



STATE OF CALIFORNIA  
DEPARTMENT OF TRANSPORTATION

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# PRECONSTRUCTION SERVICES CONTRACT

**[Note to Drafter: Insert Project Name]**

CONSTRUCTION MANAGER-GENERAL CONTRACTOR SERVICES

FOR DESIGN AND CONSTRUCTION ON STATE HIGHWAY IN

**[Note to Drafter: Insert Project Description/Limits]**

CONTRACT NO. **[Note to Drafter: Insert District and EA]**

PROJECT NO. **[Note to Drafter: Insert District and EA]**

**[Note to Drafter: Insert Dist-Co-Rte-PM]**

This **PRECONSTRUCTION SERVICES CONTRACT** (“Preconstruction Services Contract”) is entered into by and between the State of California through its Director (“Department”) and [to be provided with executed contract] (“Construction Manager”), effective as of the last date set forth on the signature page hereto, with reference to the definitions contained in Exhibit A hereto and the following facts:

#### RECITALS

A. WHEREAS, Pursuant to Public Contract Code §6700 et seq., the California Legislature has authorized the Department of Transportation (Department) to engage in a construction manager/general contractor (“CMGC”) project delivery method as specified for projects for the construction of highways, bridges, or tunnels.

B. WHEREAS, The Department requested Statements of Qualifications (“SOQs”) from qualified Proposers interested in entering a contract for preconstruction services, with the potential for continuing to a second contract for construction of all or part of the Scope of Work, for the [Insert Project name] (“Project”) through a Construction Contract. The Project is intended to [insert project purpose].

C. WHEREAS, Proposers interested in providing CMGC services will partner with the Department’s design team on this Project. As part of the project team, the selected Construction Manager may provide input on schedule, phasing, constructability, cost and estimates, value engineering, and plan review throughout the design process. In addition to aiding the design process, the selected Construction Manager will be asked to prepare and submit a Guaranteed Maximum Price (“GMP”) for the labor, equipment, and materials that will be required to construct the project based on the design process, plans, specifications, and estimate packages of the Project. If the GMP is accepted by the Department, a Construction Contract will be issued to the Construction Manager after the completion of the preconstruction phase so that construction of the project can begin. If the GMP is not accepted by the Department, the Department, in its sole discretion, reserves the right to end the Construction Manager’s participation in the project development process at the completion of the design phase and advertise the Project.

D. WHEREAS, The CMGC process for the Project consisted of a Request for Qualifications (“RFQ”) for preconstruction services, submittal of a Statement of Qualifications (“SOQ”), evaluation of submittals and selection of the Construction Manager, award and execution of contract for the performance of preconstruction services. Upon the completion of the design phase of the Project or any portion thereof, the Department will begin negotiation of the costs of the construction phase of the Project with the Construction Manager.

E. WHEREAS, The Construction Manager, named above, was selected by the Department to enter into a contract for the performance of preconstruction services for the Project.

NOW, THEREFORE, in consideration of the sums to be paid to Construction Manager by Department, the foregoing premises and the covenants and agreements set forth herein, the parties hereto hereby agree as follows.

#### EXHIBITS

Exhibit A – Acronyms and Definitions

Exhibit B – Scope of Work

Exhibit C – Cost Proposal [Insert Cost Proposal submitted in response to the RFQ]

Exhibit D – Prevailing Wage Determinations

**1 OBLIGATIONS OF CONSTRUCTION MANAGER****1.1 Scope of Work**

The work to be performed under this Preconstruction Services Contract is described in Exhibit B. The services shall be performed in [LIST REGION WHERE WORK IS TO BE PERFORMED]. This Preconstruction Services Contract will commence on the start date [INSERT START DATE] as presented herein or upon approval by the Department, whichever is later and no work shall begin before that time. This Preconstruction Services Contract is of no effect unless approved by the Department. The Construction Manager shall not receive payment for work performed prior to approval of the Preconstruction Services Contract and before receipt of notice to proceed by the Contract Manager. This Preconstruction Services Contract shall expire on [INSERT EXPIRATION DATE] or upon execution of the final Construction Contract, whichever is later. The services shall be provided during normal working hours Monday through Friday, except holidays. The parties may amend this agreement as permitted by law. All inquiries during the term of this Preconstruction Services Contract will be directed to the project representatives identified below:

<b>DEPARTMENT</b>	<b>CONSTRUCTION MANAGER</b>
Contract Manager:	Project Manager:
District/Division:	[insert Contractor's Name]
Address:	Address:
Phone:	Phone:
Fax:	Fax:
e-mail:	email:

**1.2 Work Guarantee**

Department does not guarantee, either expressly or by implication, that any work or services will be required under this Preconstruction Services Contract nor shall Department be required to enter into any Construction Contract as a result of this Preconstruction Services Contract.

**2 LICENSES AND PERMITS**

2.1 The Construction Manager shall be an individual or firm licensed to do business in California and shall obtain at its expense all license(s) and permit(s) required by law for accomplishing any work required in connection with this Preconstruction Services Contract.

2.2 If you are a Construction Manager located within the state of California, you must submit a business license from the city/county in which you are headquartered; however, if you are a corporation, you may submit instead a copy of your incorporation documents/letter from the Secretary of State's Office. If you are a Construction Manager outside the state of California, you must submit to the Department a copy of your business license or incorporation papers for your respective state showing that your company is in good standing in that state.

2.3 In the event any license(s) and/or permit(s) expire at any time during the term of this Preconstruction Services Contract, Construction Manager agrees to provide the Department a copy of the renewed license(s) and/or permit(s) within 30 days following the expiration date. In the event the Construction Manager fails to keep in effect at all times all required license(s) and permit(s), the Department may, in addition to any other remedies it may have, terminate this Preconstruction Services Contract upon occurrence of such event.

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### **3 CONSTRUCTION MANAGER REPORTS AND/OR MEETINGS**

3.1 The Construction Manager shall submit progress reports at least once a month. The report should be sufficiently detailed for the Contract Manager to determine if the Construction Manager is performing to expectations and is on schedule, to provide communication of interim findings and to afford occasions for airing difficulties or special problems encountered so remedies can be developed.

3.2 Progress reports shall identify the total number of hours worked by the Construction Managers' personnel by use of the Department's Work Breakdown Structure ("WBS") level element(s). The WBS is included in the Guide to Project Delivery Workplan Standards, which can be found at: <http://www.dot.ca.gov/hq/projmgmt/guidance.htm>.

3.3 The Construction Manager's Project Manager shall meet with the Department's Contract Manager as needed to discuss progress on the Preconstruction Services Contract.

### **4 FUNDING**

4.1 It is mutually understood between the parties that this Preconstruction Services Contract may have been written before ascertaining the availability of congressional or legislative appropriation of funds for the mutual benefit of both parties in order to avoid program and fiscal delays that would occur if the agreement were executed after that determination was made.

4.2 This Preconstruction Services Contract is valid and enforceable only if sufficient funds are made available to the Department by the United States Government or the California State Legislature for the purpose of this program. In addition, this Preconstruction Services Contract is subject to any additional restrictions, limitations, conditions, or any statute enacted by the Congress or the State Legislature that may affect the provisions, terms, or funding of this Preconstruction Services Contract in any manner.

4.3 It is mutually agreed that if the Congress or the State Legislature does not appropriate sufficient funds for the program, this Preconstruction Services Contract shall be amended to reflect any reduction in funds.

4.4 Pursuant to Government Code 927.13(d), no late payment penalty shall accrue during any time period for which there is no Budget Act in effect, nor on any payment or refund that is the result of a federally mandated program that is directly dependent upon the receipt of federal funds by a state agency.

4.5 The Department has the option to void the Preconstruction Services Contract under the 30-day cancellation clause.

### **5 COMPENSATION AND PAYMENT**

5.1 The Construction Manager will be reimbursed for hours worked at the hourly rates specified in the Construction Manager's Cost Proposal, (See Exhibit C). The specified hourly rates shall include direct salary costs, employee benefits, prevailing wages, employer payments, overhead, and fee. These rates are not adjustable for the performance period set forth in this agreement. In addition, the Construction Manager will be reimbursed for direct costs, other than salary costs, as shown in the Cost Proposal or as approved by the Contract Manager.

5.2 Construction Manager shall be responsible for any future adjustments to prevailing wage rates including but not limited to, base hourly rates and employer payments as determined by the Department of Industrial Relations. The Construction Manager is responsible for paying the appropriate rate, including escalations that take place during the term of the Preconstruction Services Contract.

5.3 A mistake, inadvertence, or neglect by the Construction Manager in failing to pay the correct rates of prevailing wage will be remedied solely by the Construction Manager and will not, under any circumstances, be considered as the basis of a claim against the Department on the Preconstruction Services Contract.

5.4 Transportation and subsistence costs to be reimbursed shall be the actual costs incurred, but not to exceed the rates stipulated in the Department of Transportation "Caltrans Travel Guide, Consultant/Contractors Travel Policy."

See <http://www.dot.ca.gov/hq/asc/travel/ch12.htm>

5.5 To determine allowable incurred Subcontractor costs that are eligible for reimbursement, in addition to reimbursement for actual costs that are incurred, the Department will allow Subcontractor costs that are treated by the Construction Manager as accrued due to such costs having been billed to the Construction Manager and recognized by the Construction Manager and the Department as valid, undisputed, due and payable. By submitting accrued but unpaid Subcontractor costs for reimbursement, the Construction Manager agrees that within ten (10) days of receipt of reimbursement, the full amount submitted as a reimbursable accrued Subcontractor cost shall be paid to the Subcontractor.

5.6 The Construction Manager shall not commence performance nor will payment be made for any work performed prior to approval of this Preconstruction Services Contract by State and written notification to proceed has been issued by the Department's Contract Manager, nor will any payment be made for work performed after the expiration date of this Preconstruction Services Contract. The Construction Manager will be reimbursed monthly in arrears for services satisfactorily rendered and approved by the Department's Contract Manager, as promptly as fiscal procedures will permit upon receipt by the Department's Contract Manager of itemized invoices.

5.7 Invoices shall be submitted showing the Work Breakdown Structure (WBS) level element for each billable hour increment and/or detail of work performed on each milestone, on each project as applicable. Invoicing shall include, but are not limited to, the Work Breakdown Structure (WBS) elements listed in Exhibit B for defined/related services and products. Incomplete invoices shall be returned unpaid to the Construction Manager for correction. The Department shall not pay disputed portions of invoices.

5.8 When prevailing wage rates apply, the Construction Manager must submit with each invoice a certified copy of the payroll for compliance verification. Invoice payment will not be made until the payroll has been verified and the invoice approved by the Contract Manager.

5.9 The sample invoice format can be found at <http://caltrans-opac.ca.gov/aeinfo.htm>. Invoices shall reference this Preconstruction Services Contract number, project title, and Task Order number. Invoices shall be submitted no later than 45 calendar days after completion of each billing period. Any credit, as provided under this Preconstruction Services Contract, due the Department must be reimbursed by the Construction Manager prior to the expiration or termination of this Preconstruction Services Contract. Invoices shall be mailed to the Department's Contract Manager at the following address:

CALIFORNIA DEPARTMENT OF TRANSPORTATION

[Insert name]

[Insert address]

5.10 The final project invoice shall state the final cost and all credits due the Department. The final invoice should be submitted within 60 calendar days after completion of the services.

5.11 Payment will be made in accordance with, and within the time specified in, Government Code Chapter 4.5, commencing with Section 927.

a. The total amount payable by the Department, resulting from this Preconstruction Services Contract, shall not exceed [insert amount]. It is understood and agreed that this total is an estimate, and that the actual amount of work requested by the Department may be less. There is no guarantee, either expressed or implied, as to the actual dollar amount that will be authorized under this Preconstruction Services Contract. In no event shall Scope of Work exceed this maximum.

b. Exhibit C, Cost Proposal, is subject to a post award audit. After any post award audit recommendations are received, Exhibit C shall be adjusted by the Construction Manager and approved by the Contract Manager to conform to the audit recommendations. The Construction Manager agrees that individual items of cost identified in the audit report may be incorporated into the Preconstruction Services Contract at the Department's sole discretion. Refusal by the Construction Manager to incorporate the interim audit or post award recommendations will be considered a breach of the Preconstruction Services Contract terms and cause for termination of the Preconstruction Services Contract.

c. Construction Manager, in consultation with Department, shall submit an hourly budget for each of the activities listed in Exhibit B, Scope of Work for Department approval.

## 6 STATE PREVAILING WAGE REQUIREMENTS

6.1 The Construction Manager shall comply with all of the applicable provisions of the California Labor Code requiring the payment of prevailing wages. The General Prevailing Wage Rate Determinations applicable to work under this Preconstruction Services Contract are available and on file with the Department's Regional/District Labor Compliance Officer: ([http://www.dot.ca.gov/hq/construc/LaborCompliance/LCO\\_District\\_Map.pdf](http://www.dot.ca.gov/hq/construc/LaborCompliance/LCO_District_Map.pdf)). These wage rates are made a specific part of this Preconstruction Services Contract by reference pursuant to Labor Code Section 1773.2 and will be applicable to work performed at a construction project site. Prevailing wages will be applicable to all inspection work performed at Department construction sites, at Department facilities and at off-site locations that are set up by the construction contractor or one of its subcontractors solely and specifically to serve Department projects. Prevailing wage requirements do not apply to inspection work performed at the facilities of vendors and commercial materials suppliers that provide goods and services to the general public.

6.2 General Prevailing Wage Rate Determinations applicable to this project may also be obtained from the Department of Industrial Relations Internet site at <http://www.dir.ca.gov>.

### 6.3 Payroll Records

a. Construction Manager and Subconsultants shall keep accurate certified payroll records and supporting documents as mandated by Section 1776 of the California Labor Code and as defined in Section 16000 of Title 8 of the California Code of Regulations, showing the name, address, social security number, work classification, straight time and overtime hours worked each day and week, and the actual per diem wages paid to each journeyman, apprentice, worker, or other employee employed by the Construction Manager or Subconsultant in connection with the public work. Each payroll record shall contain or be verified by a written declaration that it is made under penalty of perjury, stating both of the following:

- i. The information contained in the payroll record is true and correct.

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- ii. The employer has complied with the requirements of Sections 1771, 1811, and 1815 for any work performed by his or her employees on the public works project.
- b. The payroll records enumerated under subsection (a) above shall be certified as correct by the Construction Manager under penalty of perjury. The payroll records and all supporting documents shall be made available for inspection and copying by Department representatives at all reasonable hours at the principal office of the Construction Manager. The Construction Manager shall provide copies of certified payrolls or permit inspection of its records as follows:
- i. A certified copy of an employee's payroll record shall be made available for inspection or furnished to the employee or the employee's authorized representative on request.
  - ii. A certified copy of all payroll records enumerated in subsection (a) above, shall be made available for inspection or furnished upon request to a representative of Department, the Division of Labor Standards Enforcement and the Division of Apprenticeship Standards of the Department of Industrial Relations. Certified payrolls submitted to Department, the Division of Labor Standards Enforcement and the Division of Apprenticeship Standards shall not be altered or obliterated by the Construction Manager.
  - iii. The public shall not be given access to certified payroll records by the Construction Manager. The Construction Manager is required to forward any requests for certified payrolls to the Department Contract Manager by both facsimile and regular mail on the business day following receipt of the request.
- c. Construction Manager shall submit a certified copy of the records enumerated in subsection (a) above, to the entity that requested the records within ten (10) days after receipt of a written request.
- d. Any copy of records made available for inspection as copies and furnished upon request to the public or any public agency by Department shall be marked or obliterated in such a manner as to prevent disclosure of each individual's name, address and social security number. The name and address of the Construction Manager awarded the Preconstruction Services Contract or performing the Preconstruction Services Agreement shall not be marked or obliterated.
- e. The Construction Manager shall inform Department of the location of the records enumerated under subsection (a) above, including the street address, city and county, and shall, within five working days, provide a notice of a change of location and address.
- f. The Construction Manager or Subconsultant shall have ten (10) days in which to comply subsequent to receipt of written notice requesting the records enumerated in subsection (a) above. In the event the Construction Manager or Subconsultant fails to comply within the ten-day period, he or she shall, as a penalty to Department, forfeit twenty-five dollars (\$25.00) for each calendar day, or portion thereof, for each worker, until strict compliance is effectuated. Such penalties shall be withheld by Department from payments then due. A contractor is not subject to a penalty assessment pursuant to this section due to the failure of a subcontractor to comply with this section.
- 6.4 When prevailing wage rates apply, the Construction Manager must submit with each invoice a certified copy of the payroll for compliance verification. Invoice payment will not be made until the payroll has been verified and the invoice approved by the Department Contract Manager.

#### 6.5 **Penalty**

- a. The Construction Manager and any Subconsultant under the Construction Manager shall comply with Labor Code Sections 1774 and 1775. Pursuant to Section 1775, the Construction Manager and any Subconsultant shall forfeit to the State or political subdivision on whose behalf the Preconstruction Services Contract is made or awarded a penalty of not more than fifty dollars (\$50.00) for each calendar day, or portion thereof, for each worker paid less than the prevailing rates as determined by the Director of Industrial Relations for the work or craft in which the worker is employed for any public work done

under the Preconstruction Services Contract by the Construction Manager or by any Subconsultant under the Construction Manager in violation of the requirements of the Labor Code and in particular, Labor Code Sections 1770 to 1780, inclusive.

b. The amount of this forfeiture shall be determined by the Labor Commissioner and shall be based on consideration of mistake, inadvertence, or neglect of the Construction Manager or Subconsultant in failing to pay the correct rate of prevailing wages, or the previous record of the Construction Manager or Subconsultant in meeting their respective prevailing wage obligations, or the willful failure by the Construction Manager or Subconsultant to pay the correct rates of prevailing wages. A mistake, inadvertence, or neglect in failing to pay the correct rates of prevailing wages is not excusable if the Construction Manager or Subconsultant had knowledge of the obligations under the Labor Code. The Construction Manager is responsible for paying the appropriate rate, including any escalations that take place during the term of the Preconstruction Services Contract.

c. In addition to the penalty and pursuant to Labor Code Section 1775, the difference between the prevailing wage rates and the amount paid to each worker for each calendar day or portion thereof for which each worker was paid less than the prevailing wage rate shall be paid to each worker by the Construction Manager or Subconsultant.

d. If a worker employed by a Subconsultant on a public works project is not paid the general prevailing per diem wages by the Subconsultant, the Construction Manager of the project is not liable for the penalties described above unless the Construction Manager had knowledge of that failure of the Subconsultant to pay the specified prevailing rate of wages to those workers or unless the Construction Manager fails to comply with all of the following requirements:

- i. The Preconstruction Services Contract executed between the Construction Manager and the Subconsultant for the performance of work on public works projects shall include a copy of the requirements in Sections 1771, 1775, 1776, 1777.5, 1813, and 1815 of the Labor Code.
- ii. The Construction Manager shall monitor the payment of the specified general prevailing rate of per diem wages by the Subconsultant to the employees by periodic review of the certified payroll records of the Subconsultant.
- iii. Upon becoming aware of the Subconsultant's failure to pay the specified prevailing rate of wages to the Subconsultant's workers, the Construction Manager shall diligently take corrective action to halt or rectify the failure, including but not limited to, retaining sufficient funds due the Subconsultant for work performed on the public works project.
- iv. Prior to making final payment to the Subconsultant for work performed on the public works project, the Construction Manager shall obtain an affidavit signed under penalty of perjury from the Subconsultant that the Subconsultant had paid the specified general prevailing rate of per diem wages to the Subconsultant's employees on the public works project and any amounts due pursuant to Section 1813 of the Labor Code.

e. Pursuant to Section 1775 of the Labor Code, Department shall notify the Construction Manager on a public works project within 15 days of receipt of a complaint that a Subconsultant has failed to pay workers the general prevailing rate of per diem wages.

f. If Department determines that employees of a Subconsultant were not paid the general prevailing rate of per diem wages and if Department did not retain sufficient money under the contract to pay those employees the balance of wages owed under the general prevailing rate of per diem wages, the Construction Manager shall withhold an amount of moneys due the Subcontractor sufficient to pay those employees the general prevailing rate of per diem wages if requested by Department.

## 6.6 **Hours of Labor**

Eight (8) hours labor constitutes a legal day's work. The Construction Manager shall forfeit, as a penalty to the State of California, twenty-five dollars (\$25.00) for each worker employed in the execution of the Preconstruction Services Contract by the Construction Manager or any Subconsultant under the Construction Manager for each calendar day during which such worker is required or permitted to work more than eight (8) hours in any one calendar day and 40 hours in any one calendar week in violation of

the provisions of the Labor Code, and in particular Sections 1810 to 1815 thereof, inclusive, except that work performed by employees in excess of eight (8) hours per day, and forty (40) hours during any one week, shall be permitted upon compensation for all hours worked in excess of eight (8) hours per day and forty (40) hours in any week, at not less than one and one-half times the basic rate of pay, as provided in Section 1815.

#### 6.7 **Employment of Apprentices**

a. Where any contract or the subcontract exceeds \$30,000, the Construction Manager and any subcontractors under him or her shall comply with all applicable requirements of Labor Code sections 1777.5, 1777.6 and 1777.7 in the employment of apprentices.

b. Construction Manager and subcontractors are required to comply with all Labor Code requirements regarding the employment of apprentices, including mandatory ratios of journey level to apprentice workers. Prior to commencement of work, Contractors and subcontractors are advised to contact the State Division of Apprenticeship Standards, P. O. Box 420603, San Francisco, California 94142-0603, or one of its branch offices, for additional information regarding the employment of apprentices and for the specific journey-to-apprentice ratios for the contract work. The Construction Manager is responsible for all subcontractors' compliance with these requirements. Penalties are specified in Labor Code Section 1777.7.

### 7 **FEDERAL PREVAILING WAGES**

[If Preconstruction Services Contract is 100% State-funded, delete Article 7 in its entirety]

7.1 The work herein proposed will be financed in whole or in part with Federal funds; therefore, all of the statutes, rules, and regulations promulgated by the Federal government are applicable to work financed in whole or in part with Federal funds and will be applicable to work performed at a construction project site.

#### 7.2 **Federal Requirements**

a. Federal Requirements for Federal-Aid Construction Projects provisions shall apply to this Preconstruction Services Contract and are made a part of the Preconstruction Services Contract.

b. The current Federal Prevailing Wage Determinations issued under the Davis-Bacon and related Acts shall apply to this Preconstruction Services Contract and are made a part of the Preconstruction Services Contract. [Federal prevailing wage determinations and any general prevailing wage determination addenda are to be attached to the Preconstruction Services Contract as Exhibit D.]

7.3 When prevailing wage rates apply, the Construction Manager must submit, with each invoice, a certified copy of the payroll for compliance verification. Invoice payment will not be made until the payroll has been verified and the invoice approved by the Department Contract Manager.

7.4 If there is any conflict between the State prevailing wages and the Federal prevailing wages, the higher rate shall be paid.

### 8 **COST PRINCIPLES**

8.1 The Construction Manager agrees that the Contract Cost Principles and Procedures, 48 CFR, Federal Acquisition Regulations System, Chapter 1, Part 31 et seq., shall be used to determine the allowability of individual items of cost. The Construction Manager also agrees to comply with Federal procedures in accordance with 49 CFR, Part 18, Uniform Administrative Requirements for Grants and Cooperative Agreements to State and Local Governments.

8.2 Any costs for which payment has been made to the Construction Manager that are determined by subsequent audit to be unallowable under 48 CFR, Federal Acquisition Regulations System, Chapter 1,

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Part 31 et seq. or 49 CFR, Part 18, Uniform Administrative Requirements for Grants and Cooperative Agreements to State and Local Governments, are subject to repayment by the Construction Manager to the Department.

## 9 CONTINGENT FEE

The Construction Manager warrants, by execution of this Preconstruction Services Contract, that no person or selling agency has been employed or retained to solicit or secure this Preconstruction Services Contract upon an agreement or understanding for a commission, percentage, brokerage, or contingent fee, excepting bona fide employees or bona fide established commercial or selling agencies maintained by the Construction Manager for the purpose of securing business. For breach or violation of this warranty, the Department has the right to annul this Preconstruction Services Contract without liability, pay only for the value of the work actually performed, or in its discretion, to deduct from the Preconstruction Services Contract price or consideration, or otherwise recover, the full amount of such commission, percentage, brokerage, or contingent fee.

## 10 INDEMNIFICATION

With the exception that this section shall in no event be construed to require indemnification by the Construction Manager to a greater extent than permitted by law, the Construction Manager shall defend, indemnify and hold harmless the State and the Department, including its officers, directors, agents and employees, and each of them (“Indemnitees”) from any and all claims, demands, causes of action, damages, costs, expenses, actual attorneys’ fees, losses or liabilities, in law or in equity, of every kind and nature whatsoever (“Claims”), arising out of or in connection with the Construction Manager’s performance of this contract due to negligent or intentional acts, errors, or omissions of the Construction Manager. The Construction Manager will reimburse the Department for any expenditure, including reasonable attorney fees, incurred by the Department in defending against claims ultimately determined to be due to negligent or intentional acts, errors, or omissions of the Construction Manager.

## 11 CHANGES IN ORGANIZATION

11.1 There shall be no change in the Construction Manager’s Project Manager or other Key Personnel, as listed in Exhibit E and the Cost Proposal, without prior written approval by the Department’s Contract Manager. If the Construction Manager obtains approval from the Department’s Contract Manager to add or substitute personnel, the Construction Manager must provide the Personnel Request Form, a copy of the resume for the additional or substituted personnel, along with a copy of the certified payroll for that person.

## 12 DISPUTES

12.1 The Construction Manager shall continue with the responsibilities under this Preconstruction Services Contract during any work dispute. Any dispute, other than audit, concerning a question of fact arising under this Preconstruction Services Contract that is not disposed of by agreement shall be decided by a committee consisting of the Contract Manager and the Departmental Contract Officer who may consider written or verbal information submitted by the Construction Manager.

12.2 Any dispute, other than audit, not resolved by the committee consisting of the Contract Manager and Departmental Contract Officer may be reviewed by the Construction Manager Claims Review Committee (“CCRC”). The CCRC will consist of the Division Chief of Design (Chairperson), Division Chief of Construction and the Chief Counsel of Legal Services or their designees. Additional members or their designees may serve on the committee.

12.3 Not later than 30 days after completion of all deliverables necessary to complete the plans, specifications and estimate (“PS&E”) and all work under the Preconstruction Services Contract, the

Construction Manager may request review by the CCRC of unresolved claims or disputes. The request for review will be submitted in writing through the Departmental Contract Officer to the Chairperson, CCRC. A meeting by the CCRC will be scheduled after the Chairperson concurs. After the meeting, the CCRC will make recommendations to the Deputy Director of the functional program area, who will make the final decision for the Department. Neither the pendency of a dispute nor its consideration by the committee will excuse the Construction Manager from full and timely performance in accordance with the terms of this Preconstruction Services Contract.

### 13 **TERMINATION, TERMINATION FOR CONVENIENCE OR SUSPENSION**

13.1 The Department reserves the right to terminate this Preconstruction Services Contract immediately in the event of breach or failure of performance by the Construction Manager, or upon thirty (30) calendar days written notice to the Construction Manager if terminated for the convenience of the Department.

13.2 The Department may terminate this Preconstruction Services Contract and be relieved of any payments except as provided for under early termination should the Construction Manager fail to perform the requirements of this Preconstruction Services Contract at the time and in the manner herein provided. In the event of such termination, the Department may proceed with the work in any manner deemed proper by the Department. All costs to the Department shall be deducted from any sum due the Construction Manager under this Preconstruction Services Contract and the balance, if any, shall be paid to the Construction Manager upon demand.

13.3 In the event this Preconstruction Services Contract is terminated or suspended, the Construction Manager shall be paid for all billable hours and allowable direct costs accrued as of the date of termination or suspension and for termination costs. No billable costs will be considered payable under the Preconstruction Services Contract during suspension.

13.4 Within 30 days of the date the Construction Manager is notified of the early termination of this Preconstruction Services Contract for the convenience of the Department, the Construction Manager shall prepare and submit to the Contract Manager, for approval, two (2) separate supplemental cost proposals which includes a final revised cost proposal for all project-related costs for the revised termination date, and a cost proposal specifically addressing the termination settlement costs only.

#### 13.5 **Construction Manager's Deliverables**

The Construction Manager shall provide all project-related documents and correspondence required as part of the Scope of Work. Project-related documents shall be described, listed, and identified as part of the final revised cost proposal. Project-related documents shall include all documents that are in complete and final form and which have been accepted as complete by the Department, or documents in draft and/or incomplete form for those deliverables, which are in progress by the Construction Manager and have not been accepted as complete. All documents must be received and accepted before the settlement cost invoice is paid.

#### 13.6 **Invoice Submittal**

Separate final invoices for project-related costs and termination settlement costs shall be submitted no later than thirty (30) calendar days after the date the Construction Manager is notified of acceptance of the final cost proposals by the Contract Manager. The invoice for termination settlement costs shall include the following, to the extent they are applicable: lease termination costs for equipment and facilities approved under the terms of this Preconstruction Services Contract; equipment salvage costs for

equipment valued over \$500.00; rental costs for unexpired leases, less the residual value of the lease; cost of alterations and reasonable restorations required by the lease; settlement expenses, e.g., accounting, legal, clerical, storage, transportation, protection and disposition of property acquired or produced under this Preconstruction Services Contract, indirect costs, such as payroll taxes, fringe benefits, occupancy costs, and immediate supervision costs related to wages and salaries, incurred as settlement costs.

### 13.7 **Termination Issues for Subcontractors, Suppliers, and Service Providers**

The Construction Manager shall notify any Subcontractor and service or supply vendor providing services under this Preconstruction Services Contract of the early termination date of this Preconstruction Services Contract. Failure to notify any Subcontractor and service or supply vendor shall result in the Construction Manager being liable for the termination costs incurred by any Subcontractor and service or supply vendor for work performed under this Preconstruction Services Contract, except those specifically agreed to in the termination notice to the Construction Manager.

### 13.8 **Cost Principles**

Termination settlement expenses will be reimbursed in accordance with 48 CFR, Federal Acquisition Regulations System, Chapter 1, Part 31. Subpart 31.205-42 (c) dealing with initial costs is not applicable to Preconstruction Services Contract terminations.

### 13.9 **Dispute Resolution**

Disputes under early termination conditions shall be resolved in accordance with Section 9 “Disputes” of this Contract.

### 13.10 **Audit Review**

Audit review procedures shall be in accordance with Article 13 (Retention of Records/Audits: Review Procedures).

### 13.11 **Construction Manager Claims**

The Construction Manager agrees to release the Department from any and all further claims for services performed arising out of this Preconstruction Services Contract or its early termination, upon acceptance by the Construction Manager of payment in the total amount agreed upon as full and final payment of its costs from performance and early termination of this Preconstruction Services Contract.

## 14 **NON-DISCRIMINATION AND STATEMENT OF COMPLIANCE**

14.1 During the performance of this agreement, the Construction Manager and its Subcontractors shall not unlawfully discriminate, harass or allow harassment against any employee or applicant for employment because of sex, race, color, ancestry, religious creed, national origin, physical disability (including HIV and AIDS), medical condition (cancer), age, marital status, denial of family and medical care leave, and denial of pregnancy disability leave. Construction Manager and Subcontractors shall insure that the evaluation and treatment of their employees and applicants for employment are free of such discrimination and harassment. The Construction Manager and Subcontractors shall comply with the provision of the Fair Employment and Housing Act (Government Code, Section 12900 et seq.) and the applicable regulations promulgated thereunder (California Code of Regulations, Title 2, Section 7285.0 et seq.). The applicable regulations of the Fair Employment and Housing Commission implementing Government Code, Section 12990 (a-f), set forth in Chapter 5 of Division 4 of Title 2 of the California

Code of Regulations are incorporated into this Preconstruction Services Contract by reference and made a part hereof as if set forth in full. The Construction Manager and its Subcontractors shall give written notice of their obligations under this clause to labor organizations with which they have a collective bargaining or other agreement.

14.2 The Construction Manager shall include the nondiscrimination and compliance provisions of this clause in all subagreements to perform work under this Preconstruction Services Contract.

14.3 The Construction Manager's signature to this Preconstruction Services Contract and dated shall constitute a certification under penalty of perjury under the laws of the State of California that the Construction Manager has, unless exempt, complied with the nondiscrimination program requirements of Government Code Section 12990 and Title 2, California Code of Regulations, Section 8103.

## 15 RETENTION OF RECORD/AUDITS; REVIEW PROCEDURES

15.1 For the purpose of determining compliance with Public Contract Code Section 10115, et seq. and Title 21, California Code of Regulations, Chapter 21, Section 2500 et seq., when applicable, and other matters connected with the performance of the Preconstruction Services Contract pursuant to Government Code Section 8546.7, the Construction Manager, Subcontractors, and the Department shall maintain all books, documents, papers, accounting records, and other evidence pertaining to the performance of the Preconstruction Services Contract, including but not limited to, the costs of administering the Preconstruction Services Contract. All parties shall make such materials available at their respective offices at all reasonable times during the Preconstruction Services Contract period and for three (3) years from the date of final payment under the Preconstruction Services Contract. The Department, the State Auditor, FHWA, or any duly authorized representative of the Federal government having jurisdiction under Federal laws or regulations (including the basis of Federal funding in whole or in part) shall have access to any books, records, and documents of the Construction Manager that are pertinent to the Preconstruction Services Contract for audits, examinations, excerpts, and transactions, and copies thereof shall be furnished if requested.

15.2 Any dispute concerning a question of fact arising under an interim or post audit of this Preconstruction Services Contract that is not disposed of by agreement shall be reviewed by the Chairperson of the Audit Review Committee (ARC). The ARC will consist of the Deputy Director of Audits & Investigation (Chairperson); Deputy Director of Project Delivery; the Director of Legal Services or their designated alternates; and two (2) representatives from private industry. The two representatives from private industry will be advisory in nature only and will not have voting rights. Additional members or their alternates may serve on the ARC.

15.3 Not later than 30 days after issuance of an interim or final audit report, the Construction Manager may request a review by the ARC of unresolved audit issues. The request for review will be submitted in writing to the Chairperson of the ARC. The request must contain detailed information of the factors involved in the dispute as well as justifications for reversal. A meeting by the ARC will be scheduled if the Chairperson concurs that further review is warranted. After the meeting, the ARC will make recommendations to the Chief Deputy Director or their designated alternate. The Chief Deputy Director will make the final decision for the Department. The final decision will be made within three (3) months of receipt of the notification of dispute.

15.4 Neither the pendency of a dispute nor its consideration by Department will excuse the Construction Manager from full and timely performance, in accordance with the terms of this Preconstruction Services Contract.

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**16 SUBCONTRACTING**

16.1 Nothing contained in this Preconstruction Services Contract or otherwise, shall create any contractual relation between the State and any subcontractors, and no subagreement shall relieve the Construction Manager of its responsibilities and obligations hereunder. The Construction Manager agrees to be as fully responsible to the State for the acts and omissions of its subcontractors and of persons either directly or indirectly employed by any of them as it is for the acts and omissions of persons directly employed by the Construction Manager. The Construction Manager's obligation to pay its subcontractors is an independent obligation from the State's obligation to make payments to the Construction Manager.

16.2 The Construction Manager shall perform the work contemplated with resources available within its own organization and no portion of the work shall be subcontracted without written authorization by the Department's Contract Manager, except that which is expressly identified in the Construction Manager's Cost Proposal.

16.3 Contractor shall pay its subcontractors within ten (10) calendar days from receipt of each payment made to the Construction Manager by the State.

16.4 Any substitution of subcontractors must be approved in writing by the Department's Contract Manager in advance of assigning work to a substitute subcontractor.

**17 EQUIPMENT PURCHASE**

17.1 Prior authorization in writing by the Contract Manager shall be required before the Construction Manager enters into any non-budgeted purchase order or subagreement exceeding \$500.00 for supplies, equipment, or Construction Manager services. The Construction Manager shall provide an evaluation of the necessity or desirability of incurring such costs.

17.2 For purchase of any item, service or consulting work not covered in the Construction Manager's Cost Proposal and exceeding \$500.00, with prior authorization by the Contract Manager, three (3) competitive quotations must be submitted with the request or the absence of bidding must be adequately justified.

17.3 The Construction Manager shall maintain an inventory record for each piece of non-expendable equipment purchased or built with funds provided under the terms of this Preconstruction Services Contract. The inventory record of each piece of such equipment shall include the date acquired, total cost, serial number, model identification (on purchased equipment), and any other information or description necessary to identify said equipment. Non-expendable equipment so inventoried are those items of equipment that have a normal life expectancy of one (1) year or more and an approximate unit price of \$5,000.00 or more. In addition, theft-sensitive items of equipment costing less than \$5,000.00 shall be inventoried. A copy of the inventory record must be submitted to the Department on request by the Department.

17.4 At the conclusion of the Preconstruction Services Contract or if the Preconstruction Services Contract is terminated, the Construction Manager may either keep the equipment and credit the Department in an amount equal to its fair market value or sell such equipment at the best price obtainable, at a public or private sale, in accordance with established State procedures, and credit the State in an amount equal to the sales price. If the Construction Manager elects to keep the equipment, fair market value shall be determined, at the Construction Manager's expense, on the basis of a competent, independent appraisal of such equipment. Appraisals shall be obtained from an appraiser mutually agreeable to the Department and the Construction Manager. If it is determined to sell the equipment, the terms and conditions of such sale must be approved in advance by the Department.

17.5 49 CFR, Part 18 requires a credit to Federal funds when participating equipment with a fair market value greater than \$5,000.00 is credited to the project.

## 18 INSPECTION OF WORK

The Construction Manager and any Subcontractors shall permit the Department and the FHWA to review and inspect the project activities at all reasonable times during the performance period of this Preconstruction Services Contract including review and inspection on a daily basis.

## 19 SAFETY

19.1 The Construction Manager shall comply with OSHA regulations applicable to the Construction Manager regarding necessary safety equipment or procedures. The Construction Manager shall comply with safety instructions issued by the District Safety Officer and other State representatives. The Construction Manager's personnel shall wear white hard hats and orange safety vests at all times while working on the construction project site.

19.2 Pursuant to the authority contained in Section 591 of the Vehicle Code, the Department has determined that within such areas as are within the limits of the project and are open to public traffic, the Construction Manager shall comply with all of the requirements set forth in Divisions 11, 12, 13, 14, and 15 of the Vehicle Code. The Construction Manager shall take all reasonably necessary precautions for safe operation of its vehicles and the protection of the traveling public from injury and damage from such vehicles.

19.3 The Construction Manager or Subcontractor(s) must have a Division of Occupational Safety and Health (CAL-OSHA) permit(s) as outlined in California Labor Code Sections 6500 and 6705, prior to the initiation of any practice, work, method, operation, or process related to the construction or excavation of trenches which are five feet or deeper.

## 20 INSURANCE

20.1 The Construction Manager shall furnish to the Department, certificates of insurance for the minimum coverage set forth below. The Construction Manager shall be fully responsible for all policy deductibles and any self-insured retention. All insurance shall be with an insurance company with an A.M. Best's Financial Strength Rating of A- or better with a Financial Size Category of VI or better. The required insurance shall be provided by carriers authorized or approved to do business in California.

### 20.2 Types and Amount of Coverage

a. Workers Compensation (statutory) and Employers Liability Insurance must meet the following requirements:

- i. \$1,000,000 for bodily injury for each accident;
- ii. \$1,000,000 policy limit for bodily injury by disease;
- iii. \$1,000,000 for each employee for bodily injury by disease.
- iv. If there is an exposure injury to the Construction Manager's employees under the U.S. Longshoremen's and Harbor Worker's Compensation Act, the Jones Act, or under laws, regulations, or statutes applicable to maritime employees, coverage shall be included for such injuries or claims.
- v. If work is performed on State owned or controlled property the policy shall contain a waiver of subrogation in favor of the State. The waiver of subrogation endorsement shall be provided in addition to the certificate of insurance.

b. Commercial General Liability insurance must meet the following requirements:

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- i. \$1,000,000 per occurrence;
  - ii. \$2,000,000 products completed operations aggregate;
- c. \$2,000,000 general aggregate which shall apply separately to the Construction Manager's work under this Preconstruction Services Contract by evidencing a per project aggregate endorsement separately attached to the certificate of insurance
- i. The policy shall include coverage for liabilities arising out of premises, operations, independent consultants, products, completed operations, personal & advertising injury, and liability assumed under an insured Agreement. This insurance shall apply separately to each insured against whom claim is made or suit is brought subject to the Consultant's limit of liability. The policy must include:
  - ii. Department, State of California, its officers, agents, employees and servants are included as additional insureds, but only with respect to work performed under this Agreement.
  - iii. This endorsement must be supplied under form acceptable to the Office of Risk and Insurance Management.
- d. Automobile liability, including owned, non-owned and hired autos, with limits not less than \$1,000,000.00 combined single limit per accident. The same additional insured designation and endorsement required for general liability is to be provided for this coverage.
- e. A \$1,000,000.00 umbrella or excess liability shall include premises/operations liability, products/completed operations liability, and auto liability coverage. The umbrella or excess policy shall contain a clause stating that it takes effect (drops down) in the event the primary limits are impaired or exhausted.

20.3 The insurance above shall be maintained in effect at all times during the term of this Preconstruction Services Contract. If the insurance expires during the term of the Preconstruction Services Contract, a new certificate must be submitted to Department Contract Manager no less than ten (10) days prior to the expiration of insurance. Failure to maintain the required coverage shall be sufficient grounds for the Department to terminate this Preconstruction Services Contract for cause, in addition to any other remedies the Department may have available. Inadequate or lack of insurance does not negate the Construction Manager's obligations under this Contract.

20.4 The Construction Manager shall provide to the Department Contract Manager within five (5) business days following receipt by Construction Manager a copy of any cancellation or non-renewal of insurance required by this Preconstruction Services Contract. In the event Construction Manager fails to keep in effect at all times the specified insurance coverage, Department may, in addition to any other remedies it may have, terminate this Preconstruction Services Contract upon the occurrence of such event, subject to the provisions of the Preconstruction Services Contract.

20.5 Any required endorsements requested by Department must be physically attached to all requested certificates of insurance and not substituted by referring to such coverage on the certificate of insurance.

20.6 Any required insurance contained in this Contract shall be primary and not in excess of or contributory to any other insurance carried by Department.

20.7 The Certificates of Insurance shall provide:

- a. That the insurer will not cancel the insured's coverage without 30 days prior written notice to the Department.
- b. That the State of California, its officers, agents, employees, and servants are included as additional insureds, but only insofar as the operations under this Preconstruction Services Contract are

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concerned and only for the General Liability and Automobile Liability coverage required in this Preconstruction Services Contract.

20.8 The Department will not be responsible for any premiums or assessments on the policy.

20.9 The Construction Manager shall require all Subconsultants to carry insurance based on the cost of the subcontract and the potential risk to Department of the subcontracted work. Notwithstanding any coverage requirements for Subconsultants, the Construction Manager shall be responsible for ensuring sufficient insurance coverage for all work performed under the Preconstruction Services Contract, including the work of Subconsultants.

## 21 OWNERSHIP OF DATA

21.1 Upon completion of all work under this Preconstruction Services Contract, all intellectual property rights, ownership and title to all reports, documents, plans, specifications, and estimates produced as part of this Preconstruction Services Contract will automatically be vested in the Department and no further agreement will be necessary to transfer ownership to the Department. The Construction Manager shall furnish the Department all necessary copies of data needed to complete the review and approval process.

21.2 It is understood and agreed that all calculations, drawings and specifications, whether in hard copy or machine readable form, are intended for one-time use in the construction of the project for which this Preconstruction Services Contract has been entered into.

21.3 The Construction Manager is not liable for claims, liabilities or losses arising out of, or connected with, the modification or misuse by the Department of the machine readable information and data provided by the Construction Manager under this agreement; further, the Construction Manager is not liable for claims, liabilities or losses arising out of, or connected with, any use by the Department of the project documentation on other projects, for additions to this project, or for the completion of this project by others, excepting only such use as may be authorized, in writing, by the Construction Manager.

## 22 CLAIMS FILED BY DEPARTMENT'S CONSTRUCTION CONTRACTOR

22.1 The provisions of Sections 22.2 through 22.4 only apply in the event that the Department and Construction Manager do not reach agreement on a Guaranteed Maximum Price and the Department awards a construction contract for the delivery of the Project through an open bid process per Article 35 to an entity other than the Construction Manager.

22.2 If claims are filed by the Department's construction contractor relating to work performed by the Construction Manager's personnel and additional information or assistance from the Construction Manager's personnel is required in order to evaluate or defend against such claims, the Construction Manager agrees to make its personnel available for consultation with the Department's construction contract administration and legal staff and for testimony, if necessary, at depositions and at trial or arbitration proceedings.

22.3 The Construction Manager's personnel that the Department considers essential to assist in defending against construction contractor claims will be made available on reasonable notice from the Department. Consultation or testimony will be reimbursed at the same rates, including travel costs, that are being paid for the Construction Manager's personnel services under this Preconstruction Services Contract.

22.4 Services of the Construction Manager's personnel in connection with the Department's construction contract claims will be performed pursuant to a written supplement, if necessary, extending the termination date of this agreement in order to finally resolve the claims.

### 23 CONFIDENTIALITY OF DATA

23.1 All financial, statistical, personal, technical, or other data and information relative to the Department's operations, which is designated confidential by the Department and made available to the Construction Manager in order to carry out this Preconstruction Services Contract, shall be protected by the Construction Manager from unauthorized use and disclosure.

23.2 Permission to disclose information on one occasion or public hearing held by the Department relating to this Preconstruction Services Contract shall not authorize the Construction Manager to further disclose such information or disseminate the same on any other occasion.

23.3 The Construction Manager shall not comment publicly to the press or any other media regarding this Preconstruction Services Contract or the Department's actions on the same, except to the Department's staff, Construction Manager's own personnel involved in the performance of this Preconstruction Services Contract, at public hearings, or in response to questions from a Legislative committee.

23.4 The Construction Manager shall not issue any news release or public relations item of any nature whatsoever regarding work performed or to be performed under this Preconstruction Services Contract without prior review of the contents thereof by the Department and receipt of the Department's written permission.

23.5 All information related to the construction estimate is confidential and shall not be disclosed by the Construction Manager to any entity, other than the Department.

23.6 Subject to the California Records Act (California Government Code §§ 6250 et seq.), the Department has taken measures to protect the confidentiality of the negotiations related to the construction estimate. Every person involved in the process shall sign a confidentiality and nondisclosure agreement. However, under no circumstances will the Department be responsible or liable to the Construction Manager or any other party as a result of disclosing any materials, whether the disclosure is deemed required by law, by an order of court, or occurs through inadvertence, mistake, or negligence on the part of Department or its respective officers, employees, contractors, or consultants.

23.7 In the event Department is requested to disclose any of the materials identified by the Construction Manager as confidential, Department will promptly notify the Construction Manager so that Proposer may seek a protective order or other appropriate remedy. If the Construction Manager wishes to protect the materials from disclosure, the Construction Manager shall seek court protection immediately on an emergency basis. In the event that such protective order or other remedy is not sought by the Construction Manager within seven (7) days after the Construction Manager receives notice from Department, Department will be free to release the requested information. Department will consider the Construction Manager to have waived any claim of confidentiality and exemption from public disclosure for any materials not identified as confidential. Construction Managers are advised to consult with their legal counsel regarding the scope and provisions of the Public Records Act.

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**24 EVALUATION OF CONSTRUCTION MANAGER**

The Construction Manager's performance will be evaluated by the Department of Transportation. A copy of the evaluation will be sent to the Construction Manager for comments. The evaluation, together with the comments, shall be retained by the Department.

**25 DEBARMENT AND SUSPENSION CERTIFICATION**

The Construction Manager's signature to this Preconstruction Services Contract shall constitute a certification under penalty of perjury under the laws of the State of California that the Construction Manager or any person associated therewith in the capacity of owner, partner, director, officer or manager:

- a. Is not currently under suspension, debarment, voluntary exclusion, or determination of ineligibility by any federal agency;
- b. Has not been suspended, debarred, voluntarily excluded, or determined ineligible by any federal agency within the past three (3) years;
- c. Does not have a proposed debarment pending; and
- d. Has not been indicted, convicted, or had a civil judgment rendered against it by a court of competent jurisdiction in any matter involving fraud or official misconduct within the past three (3) years.

Any exceptions to this certification must be disclosed to the Department of Transportation. Exceptions will not necessarily result in denial of recommendation for award, but will be considered in determining bidder responsibility. Disclosures must indicate the party to whom the exceptions apply the initiating agency, and the dates of agency action.

**26 CONFLICT OF INTEREST**

26.1 During the term of this Preconstruction Services Contract, the Construction Manager shall disclose any financial, business, or other relationship with Department that may have an impact upon the outcome of this Preconstruction Services Contract or any ensuing Department construction project. The Construction Manager shall also list current clients who may have a financial interest in the outcome of this Preconstruction Services Contract or any ensuing Department construction project which will follow.

26.2 The Construction Manager hereby certifies that it does not now have nor shall it acquire any financial or business interest that would conflict with the performance of services under this agreement.

26.3 Except for Subcontractors whose services are limited to providing surveying or materials testing information, no Subcontractor who has provided design services in connection with this Preconstruction Services Contract shall be eligible to bid on any Contract to provide construction inspection for any construction project resulting from this Preconstruction Services Contract.

**27 REBATES, KICKBACKS OR OTHER UNLAWFUL CONSIDERATION**

The Construction Manager warrants that this Preconstruction Services Contract was not obtained or secured through rebates, kickbacks or other unlawful consideration either promised or paid to any Department agency employee. For breach or violation of this warranty, the Department shall have the right, in its discretion, to terminate this Preconstruction Services Contract without liability, to pay only for the value of the work actually performed, or to deduct from this Preconstruction Services Contract price or otherwise recover the full amount of such rebate, kickback or other unlawful consideration.

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**28 PROHIBITION OF EXPENDING STATE OR FEDERAL FUNDS FOR LOBBYING**

The Construction Manager certifies, to the best of his or her knowledge and belief, that:

28.1 No State or Federal appropriated funds have been paid or will be paid, by or on behalf of the Construction Manager, to any person for influencing or attempting to influence an officer or employee of any State or Federal agency, a Member of the State Legislature or United States Congress, an officer or employee of the Legislature or Congress, or any employee of a Member of the Legislature or Congress in connection with the awarding of any State or Federal agreement, the making of any State or Federal grant, the making of any State or Federal loan, the entering into of any cooperative agreement, and the extension, continuation, renewal, amendment, or modification of any State or Federal agreement, grant, loan, or cooperative agreement.

28.2 If any funds other than Federal appropriated funds have been paid or will be paid to any person for influencing or attempting to influence an officer or employee of any 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 Preconstruction Services Contract, grant, loan, or cooperative agreement, the Construction Manager shall complete and submit Standard Form-LLL, "Disclosure Form to Report Lobbying," in accordance with its instructions.

28.3 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, U.S. Code. Any person who fails to file the required certification shall be subject to a civil penalty of not less than \$10,000.00 and not more than \$100,000.00 for each such failure.

28.4 The Construction Manager also agrees by signing this document that he or she shall require that the language of this certification be included in all lower tier subagreements, which exceed \$100,000.00, and that all such subrecipients shall certify and disclose accordingly.

**29 COMPLIANCE WITH REGULATIONS**

The Construction Manager shall comply with regulations relative to Title VI (nondiscrimination in federally-assisted programs of the Department of Transportation – Title 49 Code of Federal Regulations Part 21 – Effectuation of Title VI of the 1964 Civil Rights Act). Title VI provides that the recipients of federal assistance will implement and maintain a policy of nondiscrimination in which no person in the state of California shall, on the basis of race, color, national origin, religion, sex, age, disability, be excluded from participation in, denied the benefits of or subject to discrimination under any program or activity by the recipients of federal assistance or their assignees and successors in interest.

**30 NON-DISCRIMINATION**

The Construction Manager, with regard to the work performed by it during the Preconstruction Services Contract shall act in accordance with Title VI. Specifically, the Construction Manager shall not discriminate on the basis of race, color, national origin, religion, sex, age, or disability in the selection and retention of Subcontractors, including procurement of materials and leases of equipment. The Construction Manager shall not participate either directly or indirectly in the discrimination prohibited by Section 21.5 of the U.S. DOT's Regulations, including employment practices when the Preconstruction Services Contract covers a program whose goal is employment.

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**31 SOLICITATIONS FOR SUBAGREEMENTS, INCLUDING PROCUREMENTS OF MATERIALS AND EQUIPMENT**

In all solicitations, either by competitive bidding or negotiation made by the Construction Manager for work to be performed under a subcontract, including procurements of materials or leases of equipment, each potential Subcontractor or supplier shall be notified by the Construction Manager of the Construction Manager's obligations under this Preconstruction Services Contract and the Regulations relative to nondiscrimination on the grounds of race, color, or national origin.

**32 INFORMATION AND REPORTS**

The Construction Manager 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 by the State Department of Transportation or any duly authorized representative of the Federal Government to be pertinent to ascertain compliance with such regulations or directives. Where any information required of a Construction Manager is in the exclusive possession of another who fails or refuses to furnish this information, the Construction Manager shall so certify to the State Department of Transportation, or any duly authorized Federal Agency as appropriate, and shall set forth what efforts it has made to obtain the information.

**33 SANCTIONS FOR NONCOMPLIANCE**

In the event of the Construction Manager's noncompliance with the nondiscrimination provisions of this Preconstruction Services Contract, the State Department of Transportation shall impose such Preconstruction Services Contract sanctions as it or any Federal funding agency may determine to be appropriate, including, but not limited to:

- a. Withholding of payments to the Construction Manager under the Preconstruction Services Contract until the Construction Manager complies, and/or
- b. Cancellation, termination or suspension of the Preconstruction Services Contract, in whole or in part.

**34 DISADVANTAGED BUSINESS ENTERPRISE PROVISIONS**

The Construction Manager shall include the provisions of paragraphs (34.1) through (34.6) in every subagreement, including procurements of materials and leases of equipment, unless exempt by the Regulations or directives issued pursuant thereto. The Construction Manager will take such action with respect to any Subcontractor or procurement as the State Department of Transportation or any Federal funding agency may direct as a means of enforcing such provisions including sanctions for noncompliance: Provided, however, that in the event a Construction Manager becomes involved in, or is threatened with, litigation with a Subcontractor or supplier as a result of such direction, the Construction Manager may request the State Department of Transportation to enter into such litigation to protect the interest of the State, and, in addition, the Construction Manager may request the United States to enter into such litigation to protect the interests of the United States.

**34.1 Disadvantaged Business Enterprise (DBE) Participation**

- a. This Preconstruction Services Contract is subject to Title 49, Part 26 of the Code of Federal Regulations entitled "Participation by Disadvantaged Business Enterprises in Department of Transportation Financial Assistance Programs." Contractors who obtain DBE participation on this Preconstruction Services Contract will assist the state in meeting its federally mandated statewide overall DBE goal.

b. DBE and other small businesses (SB), as defined in Title 49 CFR, Part 26 are encouraged to participate in the performance of agreements financed in whole or in part with Federal funds. The Construction Manager, sub recipient or subcontractor shall not discriminate on the basis of race, color, national origin, or sex in the performance of this Preconstruction Services Contract. The Construction Manager shall carry out applicable requirements of 49 CFR part 26 in the award and administration of US DOT- assisted agreements. Failure by the Construction Manager to carry out these requirements is a material breach of this Preconstruction Services Contract, which may result in the termination of this Preconstruction Services Contract or such other remedy as the recipient deems appropriate.

c. As required by federal law, the Department has established a statewide overall DBE goal. In order to ascertain whether that statewide overall DBE goal is being achieved, the Department is tracking DBE participation on all Federal-aid contracts.

d. Construction Manager shall submit ADM 0227F, Disadvantaged Business Enterprise (DBE) Participation as required by the Department (form to be provide by Department).

e. The Construction Manager should notify the Department's Contract Manager, in writing, of any changes to its anticipated DBE participation. This notice should be provided prior to the commencement of that portion of the work.

#### **34.2 Performance of DBE Contractors, and Other DBE Subcontractors/Suppliers**

a. A DBE does not perform a commercially useful function if its role is limited to that of an extra participant in a transaction, Preconstruction Services Contract, or project through which funds are passed in order to obtain the appearance of DBE participation. In determining whether a DBE is such an extra participant, examine similar transactions, particularly those in which DBEs do not participate.

b. If a DBE does not perform or exercise responsibility for at least 30 percent of the total cost of its Preconstruction Services Contract with its own work force, or the DBE subcontracts a greater portion of the work of the Preconstruction Services Contract than would be expected on the basis of normal industry practice for the type of work involved, presume that it is not performing a commercially useful function.

#### **34.3 Exclusion of Retention**

a. In conformance with 49 CFR, Part 26, Subpart B, Section 26.29 (b)(1), the retention of proceeds required by Public Contract Code ("PCC"), Section 10261 shall not apply. In conformance with PCC, Section 7200 (b), in subcontracts between the Construction Manager and a subcontractor and in subcontracts between a subcontractor and any subcontractor thereunder, retention proceeds shall not be withheld, and the exceptions provided in PCC 7200 (c), shall not apply. At the option of the Construction Manager, subcontractors may be required to furnish payment and performance bonds issued by an admitted surety insurer.

#### **34.4 DBE Records**

a. The Construction Manager shall maintain records of materials purchased and/or supplied from all subagreements entered into with certified DBEs. The records shall show the name and business address of each DBE or vendor and the total dollar amount actually paid each DBE or vendor, regardless of tier. The records shall show the date of payment and the total dollar figure paid to all firms. DBE prime Contractors shall also show the date of work performed by their own forces along with the corresponding dollar value of the work.

b. Upon completion of the Preconstruction Services Contract, a summary of these records shall be prepared and submitted on the form entitled, "Final Report- Utilization of Disadvantaged Business Enterprises (DBE)," CEM-2402F, and certified correct by the Construction Manager or the Construction Manager's authorized representative, and shall be furnished to the Department's Contract Manager. The form shall be furnished to the Department's Contract Manager with the final invoice. Failure to provide

the summary of DBE payments with the final invoice will result in twenty-five percent (25%) of the dollar value of the invoice being withheld from payment until the form is submitted. The amount will be returned to the Construction Manager when a satisfactory Final Report Utilization of Disadvantaged Business Enterprises (DBE) is submitted to the Department's Contract Manager.

#### 34.5 **DBE Certification and De-Certification Status**

a. If a DBE subcontractor is decertified during the life of the Preconstruction Services Contract, the decertified subcontractor shall notify the Construction Manager in writing with the date of decertification. If a subcontractor becomes a certified DBE during the life of the Preconstruction Services Contract, the subcontractor shall notify the Construction Manager in writing with the date of certification. Any changes should be reported to the Department's Contract Manager within 30 days.

### 35 **NEGOTIATION OF CONTRACT FOR CONSTRUCTION SERVICES**

35.1 Subject to Section 35.6 and provided that (i) this Agreement remains in effect and has not been terminated; (ii) the Construction Manager is not in default under this Agreement; (iii) no event has occurred that, with the giving of notice or expiration of a cure period, would constitute a default under this Agreement; (iv) the Construction Manager has satisfactorily performed the Services under this Agreement; and (v) the Construction Manager remains eligible to construct the Project and the Construction Manager has assumed overall responsibility for ensuring that the preconstruction of the Project is completed in a satisfactory manner, the Construction Manager shall have the right to negotiate with the Department for a contract for construction of the Project or, as directed by the Department, in its sole discretion, a portion thereof.

35.2 Subject to Section 35.1 and as more particularly described in Exhibit B – Scope of Services, the Construction Manager shall provide a Construction GMP bid to the Department when the Department determines, in its sole discretion, that design for the Project, or a portion thereof, is sufficiently finalized to enable a determination of the provable cost of the Project or portion thereof. The Construction GMP bid for the Project, or a portion thereof, shall be in the form specified in, and comply with the requirements of, Exhibit B. The Construction Manager's Construction GMP bid shall include all relevant information necessary to fully support the bid. The Construction Manager shall meet with the Department and other entities and stakeholders identified by the Department, which may include, but are not limited to, the Department's designer, the independent cost estimator and others, to review the Construction Manager's Construction GMP bid and, as directed by the Department, negotiate a contract for construction of the Project or a portion thereof (the "Construction Contract"). The Construction GMP bid and negotiation process for a Construction Contract shall be undertaken in a manner consistent with the provisions of Exhibit B – Scope of Services and this Agreement. The negotiations between the parties hereof concerning a Construction Contract shall be on an open book basis (including allowing the Department to review all underlying assumptions, documents, and data associated with pricing and financial terms). It is the express intent of the parties hereto that the Department shall be provided such information as is necessary, in the Department's sole discretion, to satisfy the Department as to the reasonableness of the amount and that the Construction Manager's pricing and other financial terms for construction are fair and reasonable.

35.3 Subject to Section 35.6, and no later than **XX** days from the post-negotiation of the Construction Contract, the Construction Manager shall:

a. Notify Department in writing of the name and address of its agent for service of legal process for this Project. The Construction Manager shall not change this authorized agent without prior written notice to Department;

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- b. Notify Department in writing of the Construction Manager's Federal Internal Revenue Service Employer Identification Number;
  - c. Provide evidence that the Construction Manager and Key Personnel hold all qualifications and licenses for the performance of the Scope of Work; and
  - d. Deliver drafts of the deliverables for final award for review and pre-approval by Department prior to delivery, as identified in Article 35.

35.4 Delivery by the Construction Manager of (i) Payment and Performance Bonds in an amount equal to one hundred percent (100%) of the accepted bid amount; (ii) evidence of insurance in the forms, coverages and amounts set forth in the Construction Contract; (iii) evidence of authority to execute the Construction Contract as a valid, binding and enforceable agreement with respect to the Construction Manager; and (iv) such other items and documents as are requested by the Department shall also be required and shall be conditions of execution and award of a Construction Contract.

35.5 The Department and the Construction Manager recognize that for federally-funded projects, project authorization must be obtained from FHWA prior to execution and delivery of a Construction Contract, that FHWA will require, as a critical prerequisite to issuance of project authorization, assurance that a price reasonableness process in accordance with 23 CFR § 636.302 was followed, and that the agreement includes appropriate terms and conditions regarding pricing, payment, change orders, and audit rights, as well as assurance regarding compliance with requirements applicable to federal-aid contracts. Completion of the price reasonableness process and authorization from FHWA are conditions precedent for the Department to enter into any Construction Contract with the Construction Manager. As a further condition precedent for the Department to enter into any Construction Contract with the Construction Manager, the Construction Manager shall have provided such additional information as the Department requests and shall have otherwise cooperated with the Department so as to allow the Department, in its sole discretion, to make a determination that the pricing and other financial terms of the Construction Contract are fair and reasonable.

35.6 If negotiations for a Construction Contract are not successful and the Construction GMP bid, scope of work or other terms and conditions of a Construction Contract are not acceptable to the Department, in its sole discretion, the Department reserves the right to terminate negotiations with the Construction Manager and place the Project, or a portion thereof, for open bid in accordance with the State Contract Act or otherwise deliver the Project, or a portion thereof, in such manner as the Department, in its sole discretion, determines. In this case, the Construction Manager will be compensated for the Services pursuant to the terms of this Agreement and the Department will have no further obligations or liabilities to the Construction Manager. If the Department utilizes the open bid process, the Construction Manager shall not be entitled to bid on the Project, or the portion thereof, through the open bid procedure.

35.7 This Agreement does not obligate the Department to enter into any subsequent agreement(s) for construction or construction services for the Project. In addition, the Department reserves the right, in its sole discretion, to not construct the Project, or any portion thereof. Any construction contract related to the Project, or a portion thereof, will be awarded in accordance with the State Contract Act.

35.8 The specific form of a Construction Contract for the Project, or a portion thereof, shall be negotiated in connection with the Construction GMP bid process as described herein. Notwithstanding the foregoing, except as otherwise agreed to or required by the Department, in its sole discretion, the provisions set forth in FHWA 1273 (Revised May 1, 2012) Required Contract Provisions Federal-Aid

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Construction Contract shall be incorporated into the Construction Contract and apply to the construction of the Project.

35.9 The Construction Manager shall not discriminate on the grounds of race, color, religion, sex, national origin, age or disability in the selection and retention of subcontractors, including procurement of materials and leases of equipment.

a. The Construction Manager shall notify all potential subcontractors and suppliers of his/her equal employment opportunity (“EEO”) obligations under each Construction Contract.

b. DBEs, as defined in 49 CFR Part 23, shall have equal opportunity to compete for and perform subcontracts which the Construction Manager enters into pursuant to a Construction Contract. The Construction Manager will use his best efforts to solicit bids from and to utilize DBE subcontractors or subcontractors with meaningful minority group and female representation among their employees. Contractors shall obtain lists of DBE construction firms from the Department.

c. The Construction Manager will use its best efforts to ensure subcontractor compliance with their EEO obligations.

35.10 The Construction Manager shall keep such records as necessary to document compliance with the EEO requirements. Such records shall be retained for a period of three years following completion of each Construction Contract work and shall be available at reasonable times and places for inspection by authorized representatives of the Department and the FHWA. The records kept by the Construction Manager shall document the following:

a. The number of minority and non-minority group members and women employed in each work classification on the Project;

b. The progress and efforts being made in cooperation with unions, when applicable, to increase employment opportunities for minorities and women;

c. The progress and efforts being made in locating, hiring, training, qualifying, and upgrading minority and female employees; and

d. The progress and efforts being made in securing the services of DBE subcontractors or subcontractors with meaningful minority and female representation among their employees.

### **36 INCLUSION OF PROVISIONS IN SUBCONTRACTS**

Each subcontract shall include terms and conditions sufficient to ensure compliance by the Subcontractor with all applicable requirements of the Preconstruction Services Contract, and shall include provisions addressing the following requirements as well as any other terms that are specifically required by the Preconstruction Services Contract to be included therein. Each Subcontract shall include terms that are substantially similar to those terms, as applicable, required by Article 6 (Cost Principles), Article 7 (State Prevailing Wages), Article 8 (Federal Prevailing Wages), Article 13 (Retention of Records/Audits; Review Procedures), Article 14 (Subcontracting), Article 15 (Equipment Purchase), Article 17 (Safety), Article 19 (Ownership of Data), Article 20 (Claims Filed by Department’s Construction Contractor), Article 21 (Confidentiality of Data), Article 24, Conflicts of Interest, and Article 34 (Disadvantaged Business Enterprise Provisions).

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**37 MISCELLANEOUS PROVISIONS****37.1 Amendments**

The Contract may be amended only by a written instrument duly executed by the parties or their respective successors or assigns.

**37.2 Time is of Essence**

Time is of the essence for this Preconstruction Services Contract.

**37.3 Waiver**

Either party's waiver of any breach or failure to enforce any of the terms, covenants, conditions or other provisions of the Preconstruction Services Contract at any time shall not in any way limit or waive that party's right thereafter to enforce or compel strict compliance with every term, covenant, condition or other provision, any course of dealing or custom of the trade notwithstanding. No waiver of any term, covenant or condition of the Preconstruction Services Contract shall be valid unless in writing and signed by the party providing the waiver.

**37.4 Independent Contractor**

Construction Manager is an independent contractor, and nothing contained in the Preconstruction Services Contract shall be construed as constituting any relationship with Department other than that of Project owner and independent contractor. In no event shall the relationship between Department and Construction Manager be construed as creating any relationship whatsoever between Department and any of Construction Manager's employees. Neither Construction Manager nor any of its employees is or shall be deemed to be an employee of Department. Except as otherwise specified in the Preconstruction Services Contract, Construction Manager has sole authority and responsibility to employ, discharge and otherwise control its employees and has complete and sole responsibility as a principal for its agents, for all Subcontractors and for all other persons that Construction Manager or any subcontractor hires or engages to perform or assist in performing the Scope of Work.

**37.5 Successors and Assigns**

The Preconstruction Services Contract shall be binding upon and inure to the benefit of Department and Construction Manager and their permitted successors, assigns and legal representatives. Construction Manager shall not otherwise sublet, transfer, assign or dispose of any portion of Preconstruction Services Contract, or delegate any of its duties hereunder, except with Department's prior Approval. Construction Manager's assignment or delegation of any of its Scope of Work under the Preconstruction Services Contract shall be ineffective to relieve Construction Manager of its responsibility for the Scope of Work assigned or delegated, unless Department, in its sole discretion, has Approved such relief from responsibility. Any assignment of money shall be subject to all proper set-offs and withholdings in favor of Department and to all deductions provided for in Preconstruction Services Contract. No partner, joint venturer, member or shareholder of Construction Manager may assign, convey, transfer, pledge, mortgage or otherwise encumber its ownership interest in Construction Manager without the prior Approval of Department, in Department's sole discretion. Department may assign all or part of its right, title and interest in and to Preconstruction Services Contract, including rights with respect to the Payment and Performance Bond, any Guaranty and any other performance security provided, to any Person with the prior written approval of Construction Manager.

**37.6 Survival**

Construction Manager's representations and warranties, the dispute resolution provisions contained in Article 12, and all other provisions which by their inherent character should survive termination of the Preconstruction Services Contract, shall survive the termination of Preconstruction Services Contract.

**37.7 Limitation on Third-Party Beneficiaries**

It is not intended by any of the provisions of the Preconstruction Services Contract to create any third-party beneficiary hereunder, or to authorize anyone not a party hereto to maintain a suit for personal injury or property damage pursuant to the terms or provisions hereof. Except as otherwise provided, the duties, obligations and responsibilities of the parties to the Preconstruction Services Contract with respect to third parties shall remain as imposed by law. The Preconstruction Services Contract shall not be construed to create a contractual relationship of any kind between Department and a Subcontractor or any other person except Construction Manager.

**37.8 No Personal Liability**

Department's authorized representatives are acting solely as agents and representatives of Department when carrying out the provisions of or exercising the power or authority granted to them under the Preconstruction Services Contract. They shall not be liable either personally or as employees of Department for actions in their ordinary course of employment. No agent, consultant, officer or employee of Department shall be personally responsible for any liability arising under Preconstruction Services Contract.

**37.9 Notices and Communications**

Notices under the Preconstruction Services Contract shall be in writing and (a) delivered personally, (b) sent by certified mail, return receipt requested, (c) sent by a recognized overnight mail or courier service, with delivery receipt requested, or (d) sent by via telephone communication followed by a hardcopy or with receipt confirmed by telephone, to the following addresses (or to such other address as may from time to time be specified in writing by such Person). All correspondence with Construction Manager shall be sent to Construction Manager's Project Manager or as otherwise directed by such Project Manager. The address for such communications shall be:

Construction Manager	Department of Transportation
Address	Address
Attn: Name	Attn: Name
Telephone:	Telephone:
Fax:	Fax:

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

Construction Manager	Department of Transportation
Address	1120 N Street, MS-57
Attn: Name	Sacramento, CA 95814
Telephone:	Attn.: Kristina Assouri
Fax:	Telephone: (916) 654-2630
	FAX: (916) 654-6128

**37.10 Further Assurances**

Construction Manager shall promptly execute and deliver to Department all such instruments and other documents and assurances as are reasonably requested by Department to further evidence the obligations of Construction Manager hereunder, including assurances regarding assignments of Subcontractors contained herein.

**37.11 Severability**

If any clause, provision, section or part of Preconstruction Services Contract is ruled invalid by a court of competent jurisdiction, then the parties shall: (a) promptly meet and negotiate a substitute for such clause, provision, section or part, which shall, to the greatest extent legally permissible, effect the original intent of the parties, including an equitable adjustment to Preconstruction Services Contract to account for any change in the Scope of Work resulting from such invalidated portion; and (b) if necessary or desirable, apply to the court or other decision maker (as applicable) which declared such invalidity for an interpretation of the invalidated portion to guide the negotiations. The invalidity or unenforceability of any such clause, provision, section or part shall not affect the validity or enforceability of the balance of Preconstruction Services Contract, which shall be construed and enforced as if Preconstruction Services Contract did not contain such invalid or unenforceable clause, provision, section or part.

**37.12 Headings**

The captions of the sections of the Preconstruction Services Contract are for convenience only and shall not be deemed part of Preconstruction Services Contract or considered in construing Preconstruction Services Contract.

**37.13 Governing Law**

The Preconstruction Services Contract shall be governed by and construed in accordance with the law of the State, without regard to conflict of law principles.

**37.14 Limit of Liability**

Notwithstanding anything to the contrary contained herein, the State's liability for payment extends only to the amount actually appropriated for the purpose of the Project.

**37.15 Entire Agreement**

The Preconstruction Services Contract contain the entire understanding of the parties with respect to the subject matter hereof and supersede all prior agreements, understandings, statements, representations and negotiations between the parties with respect to its subject matter.

**37.16 Counterparts**

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

**SIGNATURES TO FOLLOW**

**STATE OF CALIFORNIA**  
**DEPARTMENT OF TRANSPORTATION**

<p>DIRECTOR:</p> <p>Date: _____, 2013</p> <p>By: _____</p> <p>Authorized Signature</p>
<p>APPROVED AS TO FORM AND EXECUTION:</p> <p>Date: _____, 2013</p> <p>By: _____</p>

**CONSTRUCTION MANAGER**

By: _____	
By: _____	By: _____
Name: _____	Name: _____
Title: _____	Title: _____
Date: _____, 2013	Date: _____, 2013

Contractor License No.: \_\_\_\_\_

## **Exhibit A -- Acronyms and Definitions**

### **A.1 Acronyms**

ARC	Audit Review Committee
CCRC	Construction Manager Claims Review Committee
CFR	Code of Federal Regulations
DBE	Disadvantaged Business Enterprise
FHWA	Federal Highway Administration, U.S. Department of Transportation
GMP	Guaranteed Maximum Price
OSHA	Occupational Safety & Health Administration
WBS	Work Breakdown Structure

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**A.2 Definitions**

<b>Business Day</b>	Day on which Department is officially open for business.
<b>Calendar Day</b>	Every day shown on the calendar, beginning and ending at midnight.
<b>Caltrans</b>	The California Department of Transportation.
<b>Claim</b>	A separate demand by Construction Manager for (a) a time extension which is disputed by Department, or (b) payment of money or damages arising from work done by or on behalf of Construction Manager in connection with the Contract which is disputed by Department. A Claim will cease to be a Claim upon resolution thereof, including resolution by delivery of a Change Order or Contract amendment signed by all parties.
<b>Construction Contract</b>	The written agreement between the Department and the Construction Manager setting forth the obligations of the parties with respect to the construction of the Project, including, but not limited to, the performance of the Work, the furnishing of labor, materials, and equipment, and the basis of payment.
<b>Contract</b>	Depending on the context, (a) the Preconstruction Services Contract, or (b) the Construction Contract.
<b>Contract Documents</b>	The term “Contract Documents” shall mean this Preconstruction Services Contract including all exhibits thereto.
<b>Contract Manager</b>	Department’s representative as identified in <u>Section 1.1</u> .
<b>Cost Proposal</b>	Construction Manager’s proposed reimbursement rates as described in <u>Section 5.1</u> and attached as <u>Exhibit C</u> for performing the Work under this Preconstruction Services Contract.
<b>Day</b>	References to “days” or “Days” shall mean Calendar Days unless otherwise specified, provided that if the date to perform any act or give any notice specified in the Contract Documents (including the last date for performance or provision of notice “within” a specified time period) falls on a non-Business Day, such act or notice may be timely performed on the next succeeding day which is a Business Day.
<b>Department</b>	The Department of Transportation of the State of California, as created by law.
<b>Construction Contract</b>	The written agreement between the Department and the Construction Manager setting forth the obligations of the parties with respect to the construction of the Project or portion thereof, including, but not limited to, the performance of the Work, the furnishing of labor, equipment, and materials, and the basis of payment.
<b>Construction Manager/General Contractor Pilot Program</b>	The State’s construction manager/general contractor pilot program created under Assembly Bill No. 2498 (second extraordinary session), signed by Governor Brown on September 29, 2012, and codified in California Public Contract Code §6700 <i>et seq.</i>

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<b>Construction Manager</b>	The meaning set forth in the first page of the Preconstruction Services Contract.
<b>Construction Manager's Project Manager</b>	The person designated by Design-Builder to supervise the Project and to receive delivery of notices to Construction Manager per Section 1.1 of the Preconstruction Services Contract.
<b>Director</b>	The Director of the California Department of Transportation, or the chief executive of the department or agency constituted for administration of the Work within its jurisdiction.
<b>Disadvantaged Business Enterprise</b>	A for profit small business concern as defined in 49 CFR Part 26.
<b>Guaranteed Maximum Price</b>	Negotiated price between Department and Construction Manager for construction of the Project or portion thereof.
<b>Holidays</b>	Those days designated as State holidays in the Government Code.
<b>Key Personnel</b>	The persons listed in <u>Exhibit E</u> , subject to revision in accordance with the Contract.
<b>Person</b>	Any individual, corporation, company, voluntary association, partnership, trust, unincorporated organization or Governmental Person, including Department.
<b>Preconstruction Services Contract</b>	This written agreement between the Department and the Construction Manager setting forth the obligations of the parties with respect to the performance of certain services during the design phase including, but not limited to, scheduling, pricing, and phasing to assist the Department to design a more constructible Project.
<b>Project</b>	<b>[Insert Project name]</b> Project and all other Work product to be provided by Construction Manager in accordance with the Contract Documents.
<b>State</b>	The State of California acting through its elected officials and their authorized representative, or the State of California in the geographic sense, depending on the context.
<b>Subcontract</b>	Any subcontract to perform any part of the Work or provide any Materials, equipment or supplies for any part of the Work between Construction Manager and a Subcontractor, or between any Subcontractor and its lower tier Subcontractor, at any tier.
<b>Subcontractor or Subconsultant</b>	Any Person with whom Construction Manager has entered into any Subcontract and any other Person with whom any Subcontractor has further subcontracted any part of the Work, at any tier.

**Scope of Work, Work** All duties and services to be furnished and provided by Construction Manager as required by the Contract Documents, including the administrative, quality control, quality assurance, procurement, legal, professional, manufacturing, supply, installation, supervision, management, testing, verification, labor, materials, equipment, documentation and all other efforts necessary or appropriate to complete the Scope of Work contained in Exhibit B except for those efforts which the Contract specify will be performed by Department or other Persons. In certain cases the term is also used to mean the products of the Work.

**Work Breakdown Structure** A deliverable-oriented grouping of Project components that organizes and defines the total scope of the Project. The Department's standard WBS is included in the Guide to Project Delivery Workplan Standards, which can be found at: <http://www.dot.ca.gov/hq/projmgmt/guidance.htm> .

**Attachment 1 Scope of Work [Note to Drafter: Customize scope of services as needed]****1.0 Introduction**

As a project team member, the Construction Manager will provide input on schedule, phasing, constructability, materials availability, cost, etc. throughout the development of the project. Construction Manager tasks will include the following.

**2.0 Preconstruction Tasks**

The Construction Manager's tasks during the design phase include the following:

**2.1 Task 1: Project Team Kickoff Workshop**

The Construction Manager shall collaboratively work with the Department Project Manager to plan, attend, and actively participate as a member of the Project Team in the Project Team kickoff workshop to be led by the Department. The Project Team kickoff workshop may include discussion of the following:

1. Introduction to the Project, the CM/GC delivery method, the partnering process, and the Project stakeholders
2. Presentation of Project elements and the Project scope
  - a. Project status, goals, objectives, etc.
  - b. Project information, including relevant plans, specifications, studies, and reports
3. Project schedule and major milestones
  - a. Project Team meetings
  - b. Major Project activities
4. Identification of roles and responsibilities for the Project Team
  - a. Construction Manager/General Contractor Program Team
  - b. Project Development Team
  - c. Construction Manager
  - d. ICE
5. Process for design input
  - a. Innovation
  - b. Project Engineer's needs
6. Communications protocol and plan
7. Identification of change management process
8. Initial discussions on:
  - a. Cost/pricing development
  - b. Project risks identification

**Assumptions:** *\*\*\*Note: The Project Manager shall identify the members and personnel of the Construction Manager's team that will attend and participate in the workshop. The Project Manager will also document in this section the location, duration, and number of workshops for this task.*

**Deliverable:** Participation in meeting.

**2.2 Task 2: Initial Approach to Cost Meeting**

The Construction Manager shall participate in a meeting with the Department and Independent Cost Estimator (ICE) to establish baseline production rate assumptions and various other input standards for formulation of future cost and schedule estimates. The purpose of this meeting will be to establish like assumptions for construction means and methods as well as to establish the plan to communicate changes in scope, quantity, and phasing between the Construction Manager and the ICE in order to affirm a consistent foundation for estimation. Refer to **Section 4** for a more detailed description, definition, and delineation of the information to include as a part of the open-book cost estimates prepared for this Project.

The Construction Manager shall attend and actively participate in this meeting by:

- Directing an open discussion with the Department and the ICE regarding specific assumptions, and
- Discussing cost/pricing development and process for design input, analysis, evaluation, and resolution of the Construction Manager’s input into the design and specification development process.

**Assumptions:** *\*\*\*Note: If a specific meeting(s) is anticipated, the Project Manager shall identify the members and personnel of the Construction Manager’s team that will attend and participate in the meeting(s). The Project Manager will also document in this section the location, duration, and number of meetings for this task.*

**Deliverable:** Document the description and assumptions for the work elements that communicate the open-book estimating practices for the Project, including production rate assumptions.

**2.3 Task 3: Partnering**

The Construction Manager shall participate in a partnering process among all members of the Project Team. The partnering process shall take place during the entire length of this Preconstruction Services Contract. A facilitator shall be chosen by the Department.

**Assumptions:** *\*\*\*Note: If a specific meeting(s) is anticipated, the Project Manager shall identify the members and personnel of the Construction Manager’s team that will attend and participate in the meeting(s). The Project Manager will also document in this section the location, duration, and number of meetings for this task. <Identify the members and personnel of the Construction Manager’s team that will attend and participate> shall plan to attend two (2) partnering meetings.*

**Deliverable:** Participation in meetings. Provide partnering workshop facilitator.

**2.4 Task 4: Project Meetings and Document Review**

The Construction Manager shall advise, assist, and provide written documentation relative to the following:

<Check the services to be provided by the Construction Manager – See Section 5 for definitions>

- |  |   |
|--|---|
| <b>DESIGN RELATED</b>  | <b>SCHEDULE RELATED</b>                                 |
| <input type="checkbox"/> Validate Department/Consultant design | <input type="checkbox"/> Schedule risk analysis/control |

- Assist/input to Department/Consultant design
- Design reviews
- Design charrettes
- Constructability reviews
- Operability reviews
- Regulatory reviews
- Market surveys for design decisions
- Verify/take-off quantities
- Assistance shaping scope of work
- Feasibility studies
- Value Analysis/Engineering and innovation
- Risk identification and mitigation
- Maintenance of traffic
- Staging needs

**COST RELATED**

- Validate agency/consultant estimates
- Prepare project estimates
- Cost/Benefit engineering reviews
- Early award of critical bid packages
- Life cycle cost analysis
- Materials selection and cost forecasting
- Cost risk analysis
- Cash flow projections/Cost control
- Shape the project scope to meet the budget

- Validate agency/consultant schedules
- Prepare and manage project schedules
- Develop sequence of design work
- Construction phasing

**ADMINISTRATION RELATED**

- 3rd Party impact avoidance & reduction strategies
- Prepare Document Control
- Coordinate contract documents
- Coordinate with 3rd party stakeholders
- Subcontractor bid packaging
- Attend public meetings
- Bidability reviews
- Subcontractor bid packaging
- Prequalifying Subcontractors
- Assist in R/W acquisition/validation
- Assist in permitting actions
- Study labor availability/conditions
- Prepare sustainability certification application
- Follow environmental commitments
- Follow terms of Federal Grant
- Coordinate site visits for subcontractors
- Teamwork/Partnering meetings/sessions
- Develop Quality and Safety plans

The Construction Manager shall attend, participate in, and provide input in the form of written comments at the following milestone meetings, which may include:

- Intermediate Design Review Meeting (Design Milestone Meeting #1)
- Final Design Review Meeting (Design Milestone Meeting #2)
- Risk identification and resolution meetings: These meetings focus on identifying and documenting Project-specific risk, which includes risk definition, probability of occurrence, potential mitigation strategies (including consideration of CEQA and NEPA issues and mitigation strategies with the goal of an improved CEQA and FHWA NEPA documents), magnitude of cost and quantity impacts, and schedule impacts. These meetings shall assign risk ownership and document resolution. *<Identify the members and personnel of the Construction Manager's team that will attend and participate>* shall plan to attend two (2) formal risk analysis meetings.
- Project cost model and schedule development meetings: These meetings focus on establishing, modifying, and maintaining the production-based cost model so that assumptions, contingency, risk, and approach to the estimate are fully understood by the Project Team. The meeting will also focus on developing the construction phase schedule. The Construction Manager shall plan to develop two (2) Opinion of Probable Construction Cost (OPCC) estimates and attend two (2) of corresponding resolution meetings.
- Specifications development workshop(s): This meeting(s) focuses on clearly defining the Project-specific work items and their methods of measurement and payment so that the work

items are fully understood by the Project Team. *<Identify the members and personnel of the Construction Manager’s team that will attend and participate>* shall attend this meeting(s).

The Construction Manager shall be given assignments and tasks for follow-up during the meetings, as well as a schedule for performing and completing such assignments and tasks. The Construction Manager shall be responsible to timely meet the commitments for response in a format acceptable to the Department (e.g., comment and resolution form, redlined drawings, written report, and electronic track changes) and within the time period directed by the Department, which, in determining such schedule, shall consider a deliverable’s size and complexity. The Project Team shall establish these expectations, assignments, and commitments at the Project Team kickoff workshop and shall update and discuss the same regularly during Project meetings. Table 1 lists the review response period for the specified document types, measured from receipt by the Construction Manager of the applicable documents.

Table 1: Review Response Periods

Document	Review Response Period
Plan Sets	Not to exceed ten (10) business days
Documents 10 pages or less	Not to exceed forty-eight (48) hours
Documents 10 pages or more	Not to exceed five (5) business days
Verify meeting minutes	Not to exceed twenty-four (24) hours

**Deliverable:** Providing input and participating in each meeting and following up on assigned tasks from each meeting.

**2.5 Task 5: Risk Management**

The Construction Manager shall identify, quantify, document, and implement Project and construction risks and risk avoidance, reduction, and mitigation strategies, as well as monitor and provide written input into a Project risk register. The risk register will be maintained by the Department. The Construction Manager shall participate in the preparation, modifications, and maintenance of a risk register, and the Construction Manager shall continuously communicate its assumptions regarding impacts to risk as the design progresses.

**Assumptions:** *\*\*\*Note: If a specific meeting(s) is anticipated, the Project Manager shall identify the members and personnel of the Construction Manager’s team that will attend and participate in the meeting(s). The Project Manager will also document in this section the location, duration, and number of meetings for this task.* As noted under Task 4, *<Identify the members and personnel of the Construction Manager’s team that will attend and participate>* shall plan to attend two (2) formal risk analysis meetings.

**Deliverable:** The Construction Manager shall submit written documentation for the risk register specifying the associated value, savings, and cost of risk avoidance, reduction, and mitigation strategies during each design milestone meeting, at a minimum.

The Construction Manager shall also submit, at the time of the Construction GMP bid or fixed price bid, a report that summarizes the decisions for risk elimination or reduction and associated value of each decision in terms of cost and savings in direct relationship with its bid. Refer to **Task 12** herein for further information regarding the Construction GMP bid and the fixed price bid.

## 2.6 Task 6: Innovation Management

The Construction Manager shall develop, propose, and track challenges and quantify benefits of innovations throughout the preconstruction phase, including proposing criteria to evaluate suggestions and select improvements that will offer the most value in terms of cost, schedule, and quality. The Construction Manager shall prepare, modify, and maintain an innovation register, which identifies the person and entity that proposed the idea, the value of the idea (in terms of cost, savings, risk reduction/mitigation, and schedule impact), and which ideas were incorporated by the Project Team into the final design and construction documents.

**Assumptions:** *\*\*\*Note: If a specific meeting(s) is anticipated, the Project Manager shall identify the members and personnel of the Construction Manager's team that will attend and participate in the meeting(s). The Project Manager will also document in this section the location, duration, and number of meetings for this task.*

**Deliverable:** The Construction Manager shall submit written documentation for the innovation register of all suggested innovations during each design milestone meeting, at a minimum.

The Construction Manager shall also submit, at the time of the Construction GMP bid or fixed price bid, a report that summarizes both the innovations considered and the innovations implemented. Refer to **Task 12** herein for further information regarding the Construction GMP bid and the fixed price bid.

## 2.7 Task 7: Project Construction Schedule Development

The Construction Manager shall create and update Project preconstruction and construction schedules. The Project Team will work together to create a baseline construction schedule, which will be updated, at a minimum, at major design milestones designated by the Department *<specify duration, e.g., and then monthly thereafter>*. The Construction Manager shall provide a finalized construction schedule with its Construction GMP bid or fixed price bid, which will be part of the Construction Contract and adhered to by the Construction Manager for the duration of the construction phase.

The schedule shall include each Project phase and identify key milestones, deliverables, and dependencies, along with durations for design, preconstruction, procurement, construction management, and construction work. The Construction Manager shall also identify roles and responsibilities for each item of work represented in the schedule.

**Assumptions:** *\*\*\*Note: If a specific meeting(s) is anticipated, the Project Manager shall identify the members and personnel of the Construction Manager's team that will attend and participate in the meeting(s). The Project Manager will also document in this section the location, duration, and number of meetings for this task.*

**Deliverable:** The Construction Manager shall provide a detailed schedule(s) in *<specify software requirements for Project schedule(s), which may be different platforms for pre-construction than construction schedule>*, which will be updated, at a minimum, at major design milestones designated by the Department as necessary. The schedule shall include a narrative report documenting key critical path elements of the schedule and the critical assumptions and/or decisions that may impact schedule adherence, including construction phasing or sequencing and long-lead items. The Construction Manager shall also include in the report any acceleration opportunities and the cost (or savings) and prerequisites thereof and the extent of the potential acceleration.

## 2.8 Task 8: Project Construction Cost Estimate Development

The Construction Manager shall develop and provide open-book, production-based cost estimates for the Project Team's examination so that assumptions, contingency, risk, and approach to the estimate are fully identified, delineated, and understood by the Project Team. Refer to [Section 4](#) for a more detailed description, definition, and delineation of the information to include as a part of the open-book cost estimates prepared for this Project.

The Construction Manager shall be responsible for verifying the quantities and methods of measurement and payment for all Project work items.

**Assumptions:** *\*\*\*Note: The Project Manager will identify, in this section, the number of times the estimate is required related to this task. If a specific meeting(s) is anticipated, the Project Manager shall identify the members and personnel of the Construction Manager's team that will attend and participate in the meeting(s). The Project Manager will also document in this section the location, duration, and number of meetings for this task.*

**Deliverable:** The Construction Manager shall provide a construction cost estimate for the Project during each design milestone meeting, at a minimum. The construction estimate shall be provided in two separate formats, one that is consistent with the production-based cost model and one that is consistent with the engineer's estimate (formatted in an Excel spreadsheet with bid item descriptions, quantities, and units). The estimate shall reflect and be consistent with the agreed upon methods and measurements of payment anticipated for each bid item and in accordance with the requirements listed in [Section 4](#). The Construction Manager shall also provide a narrative report documenting the summary of markups, escalation, overhead, profit, and contingency. The report shall document critical assumptions, clarifications, and/or decisions of costing that may impact the fluctuations in pricing adherence and a description of allowances and exclusions. Materials selection and cost forecasting and life cycle cost analysis should also be covered in the report.

The Department will review the submitted estimates and identify items not in agreement among the CM, ICE, and Department. The Construction Manager will be required to attend construction estimate review meetings as necessary to discuss assumptions and allocations associated with unit prices not in agreement. The construction schedule submitted under Task 7 shall coincide with the production and phasing assumptions used in the development of these cost estimates.

## 2.9 Task 9: Development of Subcontracting Plan

The Construction Manager shall develop its subcontracting plan in accordance with all requirements listed below as well as all applicable.

Prior to both (a) soliciting any qualifications, proposals or bids for subcontracts, and (b) submitting a bid for a Construction Contract for the Project or a portion thereof, the Construction Manager shall submit to the Department for its review and approval a reasonable procedure for the conduct of the procurement and approval processes applicable to subcontracts. Such procedures shall include times for each step of the qualification and proposal processes, with qualification determinations and selections to be made. The subcontracting plan shall be subject to the approval of the Department, in its sole discretion, and adhere to the following:

- The Construction Manager shall recommend a division of the work to facilitate the bidding and award of trade contracts.
- The Construction Manager shall provide for involvement by the Department in subcontractor solicitation, bidding, and selection.
- The Construction Manager shall identify work that the Construction Manager proposes to self-perform (which must be no less than 30 percent (30%) of the work, measured on a dollar value basis) and identify how the Construction Manager will ensure that the pricing of self-performed work will be most advantageous to the Department.

The subcontracting plan shall include provisions implementing the following requirements:

1. At the time subcontractor proposals are opened, the Construction Manager shall compile and provide to the Department or its authorized representative a list that includes, without limitation, the name and contact information of each subcontractor who submits a timely proposal and the price of the proposal submitted by the subcontractor. The list must be made available to the public upon request.
2. Prior to entering into a subcontract, the Construction Manager shall inform the Department or its authorized representative which subcontractor has been selected and provide the Department with access to the proposals, bids, and the evaluation materials.
3. The Construction Manager shall make available to the public, including, without limitation, each subcontractor who submits a proposal, the final rankings of the subcontractors and shall provide, upon request, an explanation to any subcontractor who is not selected of the reasons why the subcontractor was not selected.
4. If the Construction Manager receives a written protest from a subcontractor proposer no later than three (3) full business days following the Construction Manager's selection of a subcontractor, the Construction Manager shall not execute a contract for that subcontract package without first providing at least two (2) full business days written notice to all proposers of the Construction Manager's intent to execute a contract for the subcontract package. Construction Manager's protest procedures shall be subject to the prior written approval of the Department.
5. The Construction Manager shall enter into a subcontract with a subcontractor selected pursuant to the approved subcontracting plan and this **Attachment 1** and shall not have the right to make any substitution of any such subcontractor without written approval of the Department.
6. If, prior to award and execution of a Construction Contract, the Department objects to the use of a subcontractor for subcontracted work on such Construction Contract and such subcontractor has been properly selected by the Construction Manager in accordance with the requirements of the approved subcontracting plan and this **Attachment 1**, the Department shall issue a written request to the Construction Manager to change the subcontractor and shall pay any actual and direct increase in the Construction Manager's costs, including an adjustment to the Construction GMP or fixed price resulting from the change. The increase shall be based solely on, and be limited to, the direct cost differential between the initial subcontract cost of the original subcontractor and the initial subcontract cost of the changed subcontractor and shall exclude any additional mark-up, profit, and overhead by the Construction Manager. Other than providing such compensation, if any, the Department shall have no further responsibilities, liabilities, or obligations arising out of such objection and change of subcontractors. Replacement of subcontractors after award and execution of the Construction Contract, including, without

limitation, in connection with unsatisfactory performance, shall be governed by the terms of the Construction Contract.

**Deliverable:** The Construction Manager shall provide a subcontracting plan no later than <<enter the number of (x)> calendar days after the Notice to Proceed for pre- construction services is issued.> or <specify a milestone point, such as the intermediate design milestone.>

The Construction Manager shall update this plan as of the final design milestone and submit an approved final subcontracting plan prior to its submittal of its Construction GMP bid or fixed price bid. All documentation necessary to support adherence to the requirements of shall be included in the subcontracting plan update. If the Department elects to consider a Construction Contract for only a portion of the Project, the subcontracting plan must be submitted and approved prior to submittal of any Construction GMP or fixed price related thereto.

### 2.10 Task 10: Development of DBE Performance Plan

As part of negotiations of the Construction Contract and prior to the award and execution thereof, the Construction Manager shall work with the Department to finalize a DBE performance plan to apply during the Construction Contract and for accomplishment of all construction. The DBE performance plan shall address the manner in which the Construction Manager shall seek to meet the DBE goals and requirements, as well as address monitoring and reporting requirements. The DBE performance plan shall be subject to the approval of the Department, in its sole discretion.

**Deliverable:** The Construction Manager shall provide a DBE performance plan no later than the intermediate design milestone. The Construction Manager shall update this plan as of the final design milestone and submit the final DBE performance plan prior to submittal of its Construction GMP bid or fixed price bid. If the Department elects to consider a Construction Contract for a portion of the Project, the DBE performance plan must be submitted and approved prior to submittal of any Construction GMP or fixed price related thereto.

### 2.11 Task 11: Preconstruction Field Work (as applicable)

The preconstruction field work, if any, shall be at the direction of the Department, in its sole discretion, and may include, without limitation, design and/or Project-related activities, such as:

- Utility Relocation
- Potholing
- Preliminary soil and geotech studies
- Right of Way Demolition
- Preliminary Survey
- Installation of best management practices (BMP)
- Public outreach
- Other design-related activities

All such activities shall be consistent with the NEPA process.

### 2.12 Task 12: Construction GMP Bid(s) or Fixed Price Bid

At the time that the Department determines that the design for the Project or any portion thereof has been sufficiently finalized to a level sufficient to determine the provable cost of that portion and provided that

(i) the other conditions set forth in the Preconstruction Services Contract, including, without limitation, those set forth in **Section 47.1** of the Preconstruction Services Contract, and (ii) Tasks 1 through 10 above have been satisfied, as determined by the Department, the Construction Manager shall prepare and submit a bid as a cost of the work with a guaranteed maximum price (GMP) (Construction GMP bid) or as a fixed price. A GMP is the guarantee of the prices submitted by the Construction Manager in its Construction GMP bid. Whether these prices include some or all of lump sum items, unit-based items, quantity-based items, contingency, or allowances, the individual prices are guaranteed in accordance with the requirements of the construction documents and the Construction Contract. A fixed price includes all costs related to labor, equipment, overhead, and profit.

The Construction GMP bid or fixed price bid for a Construction Contract for the Project may be for the Project as a whole or the Construction Manager may be asked to prepare a Construction GMP bid or fixed price bid for construction of a portion of the Project, if the Department, in its sole discretion, determines significant construction time, money, risk, or potential delay can be reduced by allowing the Construction Manager to start initial work prior to the completion of the overall Project final design package. A Construction Contract for a portion of the Project may also include early procurement of long-lead items that may be in short supply or require longer than desired lead times from purchase to delivery.

In both instances, the Construction GMP bid or fixed price bid for a Construction Contract shall be developed and evaluated in accordance with the following process:

- The Department shall produce a set of plans and specifications for performance of the construction work.
- The Department will evaluate the Construction Contract bid documents for DBE participation opportunities and set a goal in accordance therewith prior to submittal of the Construction GMP bid or fixed price bid. This goal shall be incorporated into the Construction Contract bid documents, the Construction GMP bid or fixed price bid, and the Construction Manager's subcontracting plan. No Construction Contract may be entered into and no Construction GMP bid or fixed price bid may be submitted by Construction Manager until (i) the determination of any applicable DBE goal has occurred; (ii) the Department has approved the Construction Manager's subcontracting plan; and (iii) the Department has approved the Construction Manager's DBE performance plan.
- If the DBE goal is greater than zero (0) percent, the Construction Manager will be required to submit commitments from DBE participants sufficient to meet the goal or demonstrate good faith efforts to meet the DBE goal, each as required by this Preconstruction Services Contract and in substance satisfactory to the Department, in its sole discretion.
- The Construction Manager shall submit, with its Construction GMP bid or fixed price bid, a subcontracting plan that has been approved by the Department.
- Solicitations for subcontractors and award of subcontracts shall be made pursuant to Public Contract Code 6705, Caltrans Standard Specifications, and the Construction Manager's approved subcontracting plan. Concurrently with its Construction GMP bid or fixed price bid, the Construction Manager shall provide a list of all subcontractors that it has procured and intends to use.
- The Construction Manager will prepare and submit a Construction GMP bid or fixed price bid in accordance with the Department's bidding requirements under the Preconstruction Services Contract. In addition to the scope of work, risk, and quantities, the Construction GMP bid or fixed price bid shall reflect the pricing as defined in the subcontracts and include

all information required by the Department, including applicable DBE commitments as provided herein. The Construction Manager shall include with its Construction GMP bid or fixed price bid a bid bond in such form and amount as directed by the Department, along with such other documents and certifications as directed by the Department. The form of Construction GMP bid or fixed price bid shall be in such format as the Department, in its sole discretion, determines and may include quantity-based items, unit-priced based items, lump sum items, contingency, and allowances.

- The Department may have an independent cost estimate prepared. Upon opening the Construction GMP bid or fixed price bid, the Department will determine the acceptability of the Construction GMP bid or fixed price bid, in its sole discretion. In assessing the Construction GMP bid or fixed price bid, the Department may compare the Construction GMP bid or fixed price bid to some or all of the following: State averages, similar projects, an independent cost estimate, and the engineer’s estimate and use such other information that the Department determines relevant and useful. The Department is under no obligation to accept the Construction GMP or fixed price bid, even if it compares favorably to the foregoing data, averages, and estimates.
- Department personnel reviewing the Construction GMP or fixed price bid and other data, averages, and estimates may include the Department’s Project Manager, resident engineer, FHWA representatives, and other internal Department staff and outside advisors deemed necessary or desirable by the Department’s Project Manager.
- If the Construction GMP bid or fixed price bid is acceptable, the Department will prepare a Construction Contract or the work may be added to an existing Construction Contract with Construction Manager by amendment at the sole discretion of the Department, if applicable.
- If the Construction GMP bid or fixed price bid is not acceptable, the Department may enter into a process of risk identification that identifies price, quantity, assumption and other differences. Following the successful resolution of the risk issues associated with such differences, the Department, in its sole discretion, may ask the Construction Manager to re-bid the Construction GMP or fixed price bid for the Project. If this re-bid of the Construction GMP or fixed price bid does not result in a Construction GMP or a fixed price that is acceptable to the Department, the Department reserves the right, in its sole discretion, to terminate the Construction GMP or fixed price bidding process and undertake such other actions relating to the Project as the Department determines, including, without limitation, the right to procure the Construction Contract scope of work by some other delivery method. The Construction Manager is not excused from completion of the Services required under this Preconstruction Services Contract, if such Services have not been fully performed.

**Deliverable:** The Construction Manager shall submit the Construction GMP bid or fixed price bid in accordance with the requirements delineated herein, and utilizing the same production-based cost model as was used in development of the previous OPCCs along with a narrative report documenting critical assumptions and/or decisions of costing that may impact the fluctuations in pricing adherence (on an open-book basis).

**3.0 CO-LOCATION REQUIREMENTS [IF APPLICABLE]**

The Construction Manager shall co-locate key staff with the Department Design Team to facilitate a cooperative project development process, and the regular interaction necessary for the exchange of information during the Preconstruction Phase. It is expected that Key Personnel be co-located with the Department at a co-located office at the <XXXXXXXXXXXXXXXX> Office in <XXXXXX> during key times of the

design development process. Such times, durations, and specific personnel will be mutually agreed upon and are anticipated to include the following:

- One to two month period during conceptual design (Early 2013)
- Two to four week periods coinciding with key design deliverables ((30%), 60%, 90%, Final Submissions)
- 2 days to a week per month to attend Risk Workshops, OTS and bimonthly management meetings.

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#### 4.0 OPEN-BOOK ESTIMATING REQUIREMENTS

##### 4.1 COST MODEL AND GMP RECORD DOCUMENTATION CONFIDENTIALITY:

The Construction Manager shall designate information it considers to be confidential. The Construction Manager shall clearly mark each page of documentation that the Construction Manager wants to remain confidential prior to submitting it to the Department.

If the Department receives a request for the confidential documents under the California Public Records Act, the Department will inform the entity requesting the documents of their confidentiality and notify the Construction Manager of the request.

##### 4.2 COST MODEL AND COST ESTIMATES

1) Within 30 calendar days of the date of the Notice to Proceed, the Construction Manager shall review all available information regarding the design and scope of the project, and based upon that review shall develop a Cost Model for the entire project for review by the Department. The cost model shall be prepared in a format agreed upon in advance by the Department and the Construction Manager. It will be based on the Department's list of standard pay items. The Construction Manager will work with the Department to develop the proposed form for the Cost Model and the GMP and obtain the Department's approval of the form or make changes in the proposed form as requested by the Department

2) During the review period, the Cost Model will be compared with the estimate prepared by Design and the Department estimate and/or ICE estimate. These estimates will be used to evaluate the Cost Model. The Construction Manager shall make adjustments to the Cost Model if required. Once approved by the Department, the Cost Model will be continually updated and kept current as the design progresses throughout the Preconstruction Phase until a GMP is agreed upon by both the Construction Manager and the Department. The Cost Model shall be the best representation of what the complete functional project's construction costs will be. The cost model shall not include the Construction Manager's Preconstruction Services Fee, sums due to Design the cost of land, right of way, or other costs which are the responsibility of the Department. The Construction Manager shall communicate to the Project Team any assumptions made in preparing the Cost Model. The Cost Model may include allowances as agreed to by the Project Team, including:

a) allowances for potential additional quantities and/or additional work that the Department may require, and

b) any costs related to investigations.

3) After receipt of the Department most current documents from each design milestone, the Construction Manager shall provide a detailed written report to the Project Team regarding the impact of and changes to the Cost Model based on the Construction Manager's review of design documents made available at the design milestone. The Project Manager and the Construction Manager shall reconcile any disagreements on the estimate to arrive at an agreed upon estimate for the construction costs based on the scope of the project through that design milestone. The design milestones applicable to this paragraph are: <to be specified> design. If the Project Team requires additional updates of the Cost Model beyond that specified in this paragraph, the Construction Manager shall provide the requested information in a timely manner.

- 4) If, at any point, the Cost Model submitted to the Department exceeds estimates previously agreed upon by the Project Team, or the Department's Project Budget, the Construction Manager shall make appropriate recommendations to the Project Manager on means/methods, materials, scope and/or other design elements that it believes will reduce the estimated construction costs, (without altering the Department's overall concept) such that it is equal to or less than the established Project Team's target and/or the Project Budget.
- 5) Each Cost Model submitted shall be accompanied by backup documentation which shall include the following:
  - a) Unit prices and quantity take-offs using the Department's standard pay items, and
  - b) Details of all allowances and unit price work shown and specified in the detailed design documents, and
  - c) Material costs, equipment costs, labor costs, General Conditions costs, hourly labor rates, and total cost. Labor costs in the Cost Model shall include employee benefits, payroll taxes and other payroll burdens. The total cost for any portion of the work to be performed by subcontractors shall include subcontractor overhead and profit, and
  - d) Production rates, transportation, and other facilities and services necessary for the proper execution of the work, whether temporary or permanent, and whether or not incorporated or to be incorporated into the work, and
  - e) All fixed equipment, site improvements, utility and equipment installations, and
  - f) Copies of quotations from subcontractors and suppliers, and
  - g) Project overhead, and
  - h) Allocated general and administrative expenses, and
  - i) Bonds, taxes, insurance, and
  - j) The Construction Manager's profit, and
  - k) Memoranda, narratives, consultant's reports, and all other information included by the Construction Manager to arrive at the price shown in the Cost Model or GMP. Include a list of all assumptions and description and breakdown of all allowances

#### **4.3 OTHER REQUIREMENTS**

The followings are minimum requirements for the Construction Manager when communicating cost via the open-book estimating process.

- The Construction Manager shall clearly delineate any services to be self-performed and any services to be subcontracted.
  - For self-performed work, overhead and profit percentages are to be identified, agreed upon, and applied to the total self-performed cost “below the line.” This is opposed to allocating overhead and profit into individual direct cost items.
  - For work to be subcontracted, the subcontractor’s overhead, profit, and indirect costs are to be included within the pricing of that individual direct cost item.

- Indirect costs are to be scoped, quantified, and priced as a separate division of cost and are not to be allocated under direct costs, except as stated above for work performed by subcontractors.
- Mobilization/demobilization of temporary jobsite offices is to be a detailed item, and the Construction Manager shall include this under indirect costs.
- Mobilization/demobilization of construction equipment is to be an individually detailed item for each piece of equipment, all of which is to be included under direct costs.
- Overhead and profit is to be applied as follows.
  - Overhead is to be priced as a percentage of the total of indirect costs and direct costs.
  - Profit is to be divided and identified into two categories:
    - A percentage applied to self-performed work, and
    - A percentage applied to subcontracts.

The percentage applied to subcontracted costs is to be relatively low compared to the self-performed work.

- After all indirect, contingencies, escalation, overhead, and profit costs have been estimated and individually identified, each cost is to be allocated into pay items to establish the “all in” unit costs. Indirect costs, overhead, and profit are then to be distributed evenly into each pay item. Contingencies shall be specifically identified and allocated depending on risks associated with each pay item.

#### 4.4 DEFINITIONS

The following definitions are provided to establish expectations regarding categorization and accounting to be represented in the open-book estimating process for the Project.

- Direct costs (construction) include:
  - Self-performed work based on construction labor (e.g., craft wage rates burdened with fringe benefits only), equipment rental, equipment fuel/maintenance, and purchased materials;
  - Mobilization/demobilization of self-performed construction equipment; and
  - Subcontracted work, including each subcontractor’s direct and indirect costs, overhead, profit, and bonds.
- Indirect costs (construction) include:
  - Field supervision based on bare wages plus salary-related expenses for the project manager, superintendents, project engineer/project controls, and document control/administrator;
  - Jobsite office facilities, temporary utilities, and jobsite vehicles, including mobilization/demobilization of temporary facilities as separately-estimated items;
  - General field labor, clean-up requirements, dumpsters, dump fees, temporary toilets, etc.;
  - Temporary construction facilities or work;
  - Yard support for construction equipment; and
  - Surveys, layout, permits, testing, inspection, and insurance.
- Contingency that is applied to an estimate during the preconstruction phase is based on an assessment of risk at each design phase, and it may be divided into several categories.

- Design development to cover relatively minor changes in details, specifications, quantities, etc. from early design to 100 percent construction documents
- Estimate contingency to cover potential variances from what was estimated for materials and subcontracts compared to what was the actual cost of said materials and subcontracts
- Allowances for known items that cannot specifically be quantified and/or priced until further progress in design
- Construction phase contingency for variations related to crew productivity, schedule impacts, etc. from what was originally estimated
- Mobilization/demobilization costs are allocated as follows:
  - Mobilization/demobilization of self-performed construction equipment is considered a direct cost.
  - Mobilization/demobilization of jobsite office trailers, furniture, equipment, and personnel is considered an indirect cost. This also includes temporary utilities and elements required to begin construction, such as permits.
- Overhead is defined as home-office company overhead, including office facilities, management, subsidized insurance programs, paid vacation, etc.

Profit is defined as the operating margin or the dollars remaining after all direct and overhead costs are paid.

- Escalation shall be dealt with as follows:
  - Estimates will be based on wage rates and material costs that are current year at the time of pricing. Cost is added to cover normal expected increases for expenditures beyond the pricing baseline.
  - There are various methods for calculating escalation. The most accurate for labor increases is to manpower-load the construction schedule for all labor types and add agreed upon dollar increases for each calendar period in which each apply.
- Exclusions are defined as items that are associated with the Project but provided by others. This may include items provided by:
  - The Department
  - Utility companies
  - Work done by adjacent contractors

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## 5.0 GLOSSARY OF PRECONSTRUCTION SERVICES TERMS

### 5.1 Design-Related Preconstruction Services

- Validate agency/consultant design**—construction manager evaluates the design as it is originally intended and compares it to the scope of work with both the required budget and schedule to determine if the scope can be executed within those constraints. A validated design is one that can be constructed within the budget and schedule constraints of the project.
- Assist/input to agency/consultant design**—the construction manager will offer ideas/cost information to the designer to be evaluated during the design phase. Ultimately, the designer is still responsible for the design.
- Design reviews**—done to identify errors, omissions, ambiguities, and with an eye to improving the constructability and economy of the design submittal.
- Design charrettes**—the construction manager would participate in structured brain-storming sessions with the designer and owner to generate ideas to solve design problems associated with the project.
- Constructability reviews**—review of the capability of the industry to determine if the required level of tools, methods, techniques, and technology are available to permit a competent and qualified construction manager to build the project feature in question to the level of quality required by the contract.
- Operability reviews**—bringing in the agency’s operations and maintenance personnel and providing them with an opportunity to make suggestions that will improve the operations and maintenance of the completed projects.
- Regulatory reviews**—a check to verify that the design complies with current codes and will not have difficulty obtaining the necessary permits.
- Market surveys for design decisions**—furnish designers with alternative materials or equipment along with current pricing data and availability to assist them in making informed design decisions early in the process to reduce the need to change the design late in the process resulting from budget or schedule considerations.
- Verify/take-off quantities**—the construction manager verifies the quantities generated by the designer for the engineer’s estimate.
- Assistance shaping scope of work**—construction manager generates priced alternatives from the designer and owner to ensure that the scope of work collates to the constraints dictated by the budget and/or schedule.
- Feasibility studies**—construction manager investigates the feasibility of possible solutions to resolve design issue on the project.

### 5.2 Cost-Related Preconstruction Services

- Validate agency/consultant estimates**—constructor evaluates the estimate as it is originally intended and determines if the scope can be executed within the constraints of the budget.
- Prepare project estimates**—constructor provides real-time cost information on the project at different points in the design process to ensure that the project is staying within budget.
- Cost engineering reviews**—review that includes not only the aspects of pricing but also focuses on the aspect that “time equals money” in construction projects.

- **Early award of critical bid packages**—construction manager determines which design packages should be completed first to ensure that pricing can be locked in on the packages.
- **Life-cycle cost analysis**—construction manager provides input to design decision that impact the performance of the project over its lifespan.
- **Value analysis**—process that takes place during preconstruction where the CMGC contractor identifies aspects of the design that either do not add value or whose value may be enhanced by changing them in some form or fashion. The change does not necessarily reduce the cost; it may actually decrease the life-cycle costs.
- **Value Engineering**—systematic review by a qualified agency and/or construction manager personnel of a project, product, or process so as to improve performance, quality, safety, and life-cycle costs.
- **Material cost forecasting** – The construction manager utilizes its contacts within the industry to develop estimates of construction material escalation to assist the owner and designer make decisions regarding material selection and early construction packages.
- **Cost risk analysis**—furnishing the agency with information regarding those cost items that have the greatest probability of being exceeded.
- **Cash flow projections/Cost control** – The construction manager conducts earned value analysis to provide the owner with information on how project financing must be made available to avoid delaying project progress. This also may include an estimate of construction carrying costs to aid the owner in determining projected cash flow decisions.

### 5.3 Schedule-Related Preconstruction Services

- **Validate agency/consultant schedules**—construction manager evaluates if the current scope of work can be executed within the constraints of the schedule.
- **Prepare project schedules**—construction manager prepares schedules throughout the design phase to ensure that dates will be met, and notify the owner when issues arise.
- **Develop sequence of design work**—the construction manager sequences the design work to mirror the construction work, so that early work packages can be developed.
- **Construction phasing** – The construction manager develops a construction phasing plan to facilitate construction progress and ensure maintenance of traffic.
- **Schedule risk analysis/control**—the construction manager evaluates the risks inherent to design decisions with regard to the schedule and offers alternative materials, means and/or methods to mitigate those risks.

### 5.4 Administrative-Related Preconstruction Services

- **Coordinate contract documents** – the construction manager evaluates each component to the construction contract against all other components and identifies conflicts than can be resolved before award of the construction phase contract.
- **Coordinate with third-party stakeholders**—the construction manager communicates with third parties involved in the project including but not limited to utilities, railroads, and the general public.

- **Public information-public relations** – The construction manager implements a program to identify public relations issues and solve them to ensure the project is not delayed by public protest.
- **Attend public meetings** — the construction manager can organize and attend public meetings to answer questions from the public about the construction of the project.
- **Biddability reviews** — The construction manager reviews the design documents to ensure that subcontractor work packages can be bid out and receive competitive pricing. This action reduces the risk to the subcontractors because they are given the specific design product they need for their bids; not just told to find their work inside the full set of construction documents.
- **Subcontractor bid packaging** — The construction manager coordinates the design work packaging to directly correlate with subcontractor work packages so that early packages can be easily bid out and awarded.
- **Prequalifying subcontractors** – The construction manager develops a list of qualified subcontractors that are allowed to bid on packages as they are advertised.
- **Assist in right-of-way acquisition** – The construction manager assists the designer in identifying options for right-of-away acquisitions by providing means and methods input. The primary purpose is to minimize the amount of right-of-way actions that must be undertaken.
- **Assist in permitting actions** – The construction manager is empowered to meet with resource agencies and develop permit applications with assistance from the designer.
- **Study labor availability/conditions** – The construction manager furnishes advice during design with regard to the availability of specialty trade subcontractors and the impact of that availability on project budget and schedule constraints.
- **Prepare sustainability certification application** – When certification for sustainability is desired, the construction manager is empowered to prepare the necessary paperwork to submit for certification.