

CCO Form BR11
Approved: 02/98 (BDG)
Revised: 01/11 (AR)
Modified:

**MISSOURI HIGHWAYS AND TRANSPORTATION COMMISSION
BRIDGE ENGINEERING ASSISTANCE PROGRAM (BEAP)
CONSULTANT SERVICES AGREEMENT
(HOURLY RATE FEE ARRANGEMENT)**

THIS AGREEMENT is entered into by _____
(hereinafter, "Consultant") and the Missouri Highways and Transportation Commission
(hereinafter, "Commission").

WITNESSETH:

WHEREAS, the Commission has need at various times over the next three (3) years of a consultant to perform professional services in connection with the administration of the Bridge Engineering Assistance Program (BEAP); and

WHEREAS, the Commission has selected the Consultant to provide those services for local public agency bridge owners in Missouri on an as-needed basis.

NOW, THEREFORE, in consideration of the payments to be made and the covenants set forth in this Agreement to be performed by the Commission, the Consultant hereby agrees that it shall faithfully perform the professional services called for by this Agreement in the manner and under the conditions described in this Agreement.

(1) DEFINITIONS: The following definitions apply to these terms, as used in this Agreement:

(A) "AASHTO" means the American Association of State Highway and Transportation Officials.

(B) "COMMISSION" means the Missouri Highways and Transportation Commission, an executive branch agency of state government, which acts by and through its Director, Chief Engineer and others in the Missouri Department of Transportation.

(C) "CONSULTANT" means the firm providing professional services to the Commission as a party to this Agreement.

(D) "CONSULTANT'S REPRESENTATIVE" means the person or persons designated in writing by the Consultant to represent that firm in negotiations, communications, and various other contract administration dealings with the

Commission's Engineers.

(E) "DELIVERABLES" means all data, studies, documents, designs, drawings, plans, specifications, or any other products prepared in performance of this Agreement, to be delivered to and become the property of the Commission pursuant to the terms and conditions set out in Section (12) of this Agreement.

(F) "DIRECT CHARGES" means direct non-salary costs incurred in fulfilling the terms of this Agreement, such as travel and subsistence, subcontract services, reproductions, computer charges, materials and supplies, and other related items charged at actual cost without any override or additives.

(G) "DISADVANTAGED BUSINESS ENTERPRISE (DBE)" means an entity owned and controlled by a socially and economically disadvantaged individual as defined in 49 C.F.R. Part 26, which is certified as a DBE firm in Missouri by the Commission. Appropriate businesses owned and controlled by women are included in this definition.

(H) "ENGINEER" means the Chief Engineer or any other authorized representative of the Commission. Where the specific term "Chief Engineer" is used, it shall mean the Chief Engineer exclusively.

(I) "FHWA" means the Federal Highway Administration within the USDOT, headquartered at Washington, D.C., which acts through its authorized representatives.

(J) "HOURLY RATE" means an overall hourly billing rate that is calculated by assessment of such factors as labor rates, payroll additives, general and administrative overhead, and profit.

(K) "INTELLECTUAL PROPERTY" consists of copyrights, patents, and any other form of intellectual property rights covering any data bases, software, inventions, training manuals, systems design or other proprietary information in any form or medium.

(L) "MEMORANDUM OF UNDERSTANDING" or "MOU" means a work order that is issued by the Commission for professional services, with payments for work performance made on a cost reimbursement ("hourly rate") basis.

(M) "SUBCONSULTANT" means any individual, partnership, corporation, or joint venture to which the Consultant, with the written consent of the Engineer, subcontracts any part of the professional services under this Agreement but shall not include those entities that supply only materials or supplies to the Consultant. A "subcontractor" may also be referred to as a "subconsultant."

(N) "SUSPEND" the services means that the services as contemplated

herein shall be stopped on a temporary basis. This stoppage will continue until the Commission either decides to terminate the project or reactivate the services under the conditions then existing.

(O) "TERMINATE," in the context of this Agreement, means the cessation or quitting of this Agreement based upon the action or inaction of the Consultant, or the unilateral cancellation of this Agreement by the Commission.

(P) "USDOT" means the United States Department of Transportation, headquartered at Washington, D.C., which acts through its authorized representatives.

(Q) "SERVICES" includes all professional engineering and related services and the furnishing of all equipment, supplies, and materials in conjunction with such services as are required to achieve the broad purposes and general objectives of this Agreement.

(2) SCOPE OF SERVICES:

(A) The services covered by this Agreement shall include furnishing the professional, technical, and other personnel and the equipment, material and all other things necessary to provide structural engineering and hydraulic recommendations on bridges to local public agencies in accordance with the policies and procedures of the Bridge Engineering Assistance Program (BEAP), from time to time as needed and requested by the Commission. The services generally to be provided by the consultant are set forth in Exhibit II to this agreement, titled "General Scope of Services," which is attached hereto and made a part of this agreement.

(B) Scope and Cost of Requested Services:

1. Each individual request for services shall be covered by a standard BEAP Project Tracking Form, along with additional correspondence as needed to clarify the scope of work for an individual BEAP study, also referred to as Memorandum of Understanding (hereinafter, "MOU"), submitted by the Consultant and approved by the Engineer. The MOU will define the scope of work to be performed by the Consultant, the time limitations within which the work is to be performed, the specific deliverables required, and the location where the Consultant is to forward all deliverables.

2. The MOU shall specify a maximum price or ceiling for the work to be performed. An estimate of: (1) the hours required to complete the services multiplied by the appropriate hourly rates; and (2) the direct charges associated with those services, including subconsultant costs, shall be provided with the MOU. Only those hourly rates included in the version currently in effect of the "Schedule of Hourly Labor Billing Rates," as revised pursuant to Subsection (9)(C), shall be used as the basis for preparing any "hourly rate" MOU.

(3) TERM OF AGREEMENT: The Consultant's services are to commence upon execution of this Agreement and terminate three (3) years from the date of execution unless otherwise terminated prior to this date: (a) pursuant to the provisions of Section (11) of this Agreement, or (b) pursuant to execution of a new Consultant Services Agreement (Hourly Rate Fee Arrangement) for performance of the same professional services. Upon agreement of all parties, this Agreement may be renewed for an additional one (1) year term said term to begin on the day of termination of this Agreement.

(4) INFORMATION AND SERVICES PROVIDED BY THE COMMISSION:

(A) At no cost to the Consultant and in a timely manner, the Commission will provide available information of record which is pertinent to the requested services project to the Consultant upon request. In addition, the Commission will provide the Consultant with the specific items or services set forth in Exhibit II or in the MOU for the particular services requested by the Commission. The information provided by the Commission will generally be limited to information residing in the Commission's files pertaining to the administration of the National Bridge Inventory for Missouri, and the accuracy of this information is not guaranteed. If a project request is approved, the Consultant is expected to verify all information needed for the project by visiting the site, and obtain additional information that may be available from the local public agency responsible for the bridge. The Consultant shall be entitled to rely upon the accuracy and completeness of such information, and the Consultant may use such information in performing services under this Agreement.

(B) The Consultant shall review the information provided by the Commission along with information provided by the local public agency and information obtained at the bridge site concerning the requested services and will as expeditiously as possible advise the Engineer of any of that information which the Consultant believes is inaccurate or inadequate or would otherwise have an effect on any of its activities under this Agreement. In such case, the Commission shall provide the Consultant with new or verified data or information upon which the Consultant is entitled to rely. The Consultant shall not be liable for any errors, omissions, or deficiencies in the Consultant's services resulting from inaccurate or inadequate information furnished by the Commission which inaccuracies or inadequacies are not detected by the Consultant.

(5) RESPONSIBILITY OF THE CONSULTANT:

(A) The Consultant shall comply with applicable state and federal laws and regulations governing these services, as published and in effect on the date of this Agreement or any subsequent MOU. The Consultant shall provide the services in accordance with the criteria and requirements established and adopted by the Commission; and if none are expressly established in this Agreement, published manuals and policies of the Commission which shall be furnished by the Commission upon request; and, absent the foregoing, manuals and policies of AASHTO, as

published and in effect on the date of this Agreement or any subsequent MOU.

(B) Without limiting the foregoing, the performance of these services will be in accordance with the specific criteria and project procedures as indicated by the information set out Exhibit II and in the appropriate MOU.

(C) The Consultant shall be responsible for the professional quality, technical accuracy, and the coordination of all deliverables or any other services furnished under this Agreement. At any time during any subsequent stage of project development or phase of work performed by others based upon any deliverables or other services provided by the Consultant, the Consultant shall prepare any additional deliverables or other services needed to correct any negligent acts, errors, or omissions of the Consultant or anyone for whom it is legally responsible in failing to comply with the foregoing standard. The services necessary to correct such negligent acts, errors, or omissions shall be performed without additional compensation, even though final payment may have been received by the Consultant. The Consultant shall provide such services as expeditiously as is consistent with professional performance. Acceptance of the services will not relieve the Consultant of the responsibility to correct such negligent acts, errors, or omissions.

(D) All final deliverables produced under this agreement shall be signed, sealed, and dated by the appropriate party responsible for performance of the services and who possesses appropriate registration in the state of Missouri to perform the type of services included in this Agreement or any subsequent MOU. All requirements for professional registration and the signing and sealing of deliverables shall be in accordance with Missouri state law. All deliverables which are not the final version shall carry the words "Draft or Preliminary" or other similar language in an obvious location where it can readily be found, easily read, and is not obscured by other markings, as a disclosure to others that the deliverables are incomplete or preliminary. When the deliverables are presented in their final form, the word "Draft or Preliminary" or other similar language shall be removed and the deliverables thereupon signed, sealed, and dated as previously described in this Subsection.

(E) Where the scope of services requires the preparation of completed plans, plans submitted for review by permit authorities, and plans issued for construction, the plans shall be signed, sealed, and dated by a professional engineer registered in the State of Missouri. Incomplete or preliminary plan(s), when submitted for review by others, shall not be sealed, but the name of the responsible engineer, along with the engineer's Missouri registration number, shall be indicated on the plan(s) or included in the transmittal document. In addition, the phrase "Preliminary - Not for Construction," or similar language, shall be placed on the incomplete or preliminary plan(s) in an obvious location where it can readily be found, easily read, and not obscured by other markings, as a disclosure to others that the plan(s) are incomplete or preliminary. When the plan(s) are completed, the phrase "Preliminary - Not for Construction" or similar language shall be removed and the plan(s) shall thereupon be sealed.

(F) The Consultant shall cooperate fully with the Commission and its Engineers, consultants, and contractors on adjacent projects, and with municipalities and local government officials, public utility companies and others as may be directed by the Engineer. This may include attendance at meetings, discussions, and hearings as requested by the Engineer.

(G) In the event any lawsuit or court proceeding of any kind is brought against the Commission, arising out of or relating to the Consultant's activities or services performed under this Agreement, including any MOU, or any subsequent stage of project development or phase of work or any project of construction undertaken employing the deliverables provided by the Consultant in performing this Agreement, including any MOU, the Consultant shall have the affirmative duty to assist the Commission in preparing the Commission's defense, including, but not limited to, production of documents, trials, depositions, or court testimony. Any assistance given to the Commission by the Consultant will be compensated at an amount or rate negotiated between the Commission and the Consultant as will be identified in a separate agreement between the Commission and the Consultant. To the extent the assistance given to the Commission by the Consultant was necessary for the Commission to defend claims and liability due to the Consultant's negligent acts, errors, or omissions, the compensation paid by the Commission to the Consultant will be reimbursed to the Commission.

(6) NO SOLICITATION WARRANTY: The Consultant warrants that it has not employed or retained any company or person, other than a bona fide employee working for the Consultant, to solicit or secure this Agreement, and that it has not paid or agreed to pay any company or person, other than a bona fide employee, any fee, commission, percentage, brokerage fee, gifts, or any other consideration, contingent upon or resulting from the award or making of this Agreement. For breach or violation of this warranty, the Commission will have the right to terminate this Agreement without liability, or at its discretion, to deduct from the Agreement price or consideration, or otherwise recover, the full amount of such fee, commission, percentage, brokerage fee, gifts, or contingent fee, plus costs of collection including reasonable attorney's fees.

(7) SUBCONSULTANTS:

(A) There shall be no transfer of engineering services performed under this Agreement without the proper written consent of the Commission through execution of an MOU. Subletting, assignment, or transfer of the services or any part thereof to any other corporation, partnership, or individual is expressly prohibited. Any violation of this clause will be deemed cause for termination of this Agreement.

(B) The Consultant agrees, and shall require the selected subconsultants, to maintain books, documents, papers, accounting records, and other evidence pertaining to direct charges incurred under the Agreement and to make such materials available at their offices at reasonable times at no charge to the Commission

and their designees and/or representatives during the Agreement period and for three (3) years from the date of final payment under the Agreement, for inspection by the Commission or any of its authorized representatives (or any authorized representative of the federal government), and copies thereof shall be furnished.

(C) Unless waived or modified by the Commission, the Consultant agrees to require, and shall provide evidence to the Commission, that those subconsultants shall maintain commercial general liability, automobile liability, and worker's compensation and employer's liability insurance, for not less than the period of services under such subcontract agreements, and in not less than the following amounts:

1. Commercial General Liability: \$500,000 per person up to \$3,000,000 per occurrence;
2. Automobile Liability: \$500,000 per person up to \$3,000,000 per occurrence; and
3. Worker's Compensation in accordance with the statutory limits; and Employer's Liability: \$1,000,000.

(D) The subletting of the services will in no way relieve the Consultant of its primary responsibility for the quality and performance of the services to be performed hereunder and the Consultant shall assume full liability for the services performed by its subconsultants.

(E) The payment for the services of any subconsultants will be reimbursed at cost by the Commission in accordance with the submitted invoices for such services, as set forth in Section (9), titled "Compensation."

(8) EXECUTIVE ORDER:

(A) The Consultant shall comply with all the provisions of Executive Order 07-13, issued by the Honorable Matt Blunt, Governor of Missouri, on the sixth (6th) day of March, 2007. This Executive Order, which promulgates the State of Missouri's position to not tolerate persons who contract with the state engaging in or supporting illegal activities of employing individuals who are not eligible to work in the United States, is incorporated herein by reference and made a part of this Agreement. By signing this Agreement, the Consultant hereby certifies that any employee of the Consultant assigned to perform services under this Agreement is eligible and authorized to work in the United States in compliance with federal law. In the event the Consultant fails to comply with the provisions of Executive Order 07-13, or in the event the Commission has reasonable cause to believe that the Consultant has knowingly employed individuals who are not eligible to work in the United States in violation of federal law, the Commission reserves the right to impose such contract sanctions as it

may determine to be appropriate, including but not limited to contract cancellation, termination or suspension in whole or in part or both.

(B) The Consultant shall include the above-provision concerning said Executive Order within every subcontract. The Consultant shall take such action with respect to any subcontract as the Commission may direct as a means of enforcing such provisions, including sanctions for noncompliance.

(9) COMPENSATION: The following provisions apply with respect to the payment of fees to the Consultant:

(A) Payments shall be made based on the actual hours expended by personnel multiplied by the corresponding hourly rates for the appropriate employee classification indicated in Exhibit I of this Agreement that is currently in effect, and the actual direct charges associated with those services, which includes subconsultant costs, as provided in the MOU. The Exhibit I schedule is effective for the entire time that this Agreement remains in effect, but may be revised within this time period no more than once within any twelve (12) month period to reflect changes in employee classifications, salaries and overhead costs. The effective date for the first revision to Exhibit I shall occur no sooner than twelve (12) months from the Commission's execution of this Agreement. All information requested in the attached Exhibit I shall be provided by the Consultant.

1. The Consultant may submit an invoice for services rendered to the Commission not more than once every month. Upon receipt of the invoice, the Commission will, as soon as practicable, pay the Consultant for the services rendered, as specified in the MOU. The Commission reserves the right to withhold payment regarding disputed portions of any invoice, without penalty, to resolve disputes that may arise regarding the number of hours billed, the hourly rates used to develop the invoice, direct charges, or the performance of services. However, the Commission shall promptly pay undisputed portions of the invoice pursuant to section 34.055 RSMo.

2. The maximum price or ceiling for any "hourly rate" payment arrangement as expressly stated in the MOU shall not be exceeded without a change in the scope of services by execution of a supplemental MOU. No work shall be done or costs incurred outside of the existing scope of services without execution of a supplemental MOU.

(B) Hourly labor billing rates shown on Exhibit I must consist of employee pay rates, payroll additives, general and administrative overhead costs (as allowed by 48 C.F.R. Part 31, the Federal Acquisition Regulations (FAR), and 23 C.F.R. 172, Administration of Engineering and Design Related Service Contracts) and a set profit percentage of 14 percent. Payroll additives include additions to payroll cost for holidays, sick leave, vacation, group insurance, workers' compensation insurance, social security taxes (FICA), unemployment insurance, disability taxes, retirement benefits, and other payroll related items. General and administrative overhead costs

include administrative salaries (including non-productive salary of associates and employees), officer services, equipment rental and maintenance, office rent and utilities, office maintenance, office supplies, insurance, taxes, professional development expenses, legal and audit fees, professional dues and licenses, use of computerized accounting systems, and other related items.

(C) The hourly rates indicated in Exhibit I may be revised no more than once within any twelve (12) month period to reflect changes in salary and overhead costs. The effective date for the first revision to Exhibit I shall occur no sooner than twelve (12) months from the Commission's execution of this Agreement. The effective date established by the Commission for any subsequent revisions to Exhibit I shall re-establish the beginning date for measuring the aforementioned twelve (12) month period. A new "Schedule of Hourly Labor Billing Rates" must be submitted by the Consultant and approved in writing by the Commission prior to the inclusion of the revised rates in any subsequent MOU. If the Commission approves in writing the Consultant's submission of a new "Schedule of Hourly Labor Billing Rates," the parties agree that the existing Exhibit I for this Agreement shall be revised with the approved "Schedule of Hourly Labor Billing Rates." The Consultant shall submit all revisions to Exhibit I no later than forty-five (45) days prior to the desired effective date for use of the revised hourly rates. If no revisions are submitted and approved in writing by the Commission, the billing rates established in the most recently approved Exhibit I will be used as the basis for any subsequent MOU. Any revisions to the hourly rates included in Exhibit I and approved by the Commission will in no way change the hourly labor billing rates included in any previously executed MOU. Any approved revisions to the hourly billing rates will only be applicable to a MOU that is executed after the effective date of the revised Exhibit I.

(10) PERIOD OF SERVICE:

(A) The services, and if more than one then each phase thereof, shall be completed in accordance with the schedule contained in the MOU for each request for services. The Consultant and the Commission will be required to meet this schedule.

(B) The Commission will grant time extensions for delays due to unforeseeable causes beyond the control of and without fault or negligence of the Consultant. Requests for extensions of time shall be made in writing by the Consultant, before that phase of work is scheduled to be completed, stating fully the events giving rise to the request and justification for the time extension requested. Such extension of time shall be the sole allowable compensation for all such delays.

(C) The Consultant and Commission agree that time is of the essence, and the Consultant and Commission will be required to meet the schedules in the appropriate MOU. In the event of delays due to unforeseeable causes beyond the control of and without fault or negligence of the Consultant, no claim for damage shall be made by either party. An extension of time shall be the sole allowable compensation

for any such delays.

(D) As used in this provision, the term “delays due to unforeseeable causes” includes the following:

1. War or acts of war, declared or undeclared;
2. Flooding, earthquake, or other major natural disaster preventing the Consultant from performing necessary services at the project site, or in the Consultant's offices, at the time such services must be performed;
3. The discovery on the project of differing site conditions, hazardous substances, or other conditions which, in the sole judgment of the Engineer, justifies a suspension of the services or necessitates modifications of the project design or plans by the Consultant;
4. Court proceedings;
5. Changes in services or extra services.
6. Delays caused by the local bridge owner, MoDOT District Office, or MoDOT Bridge Division.

(11) SUSPENSION OR TERMINATION OF AGREEMENT:

(A) The Commission may, without being in breach hereof, suspend or terminate the Consultant's services under this Agreement, or any services included in an active MOU, for cause or for the convenience of the Commission, upon giving to the Consultant at least fifteen (15) days' prior written notice of the effective date thereof. The Consultant shall not accelerate performance of services during the fifteen (15) day period without the express written consent of the Commission.

(B) Should the Agreement be suspended or terminated for the convenience of the Commission, the Commission will pay to the Consultant its up-to-date invoiced costs as set forth in Section (9), plus reasonable hours incurred by the Consultant in suspending or terminating the services. The payment will make no other allowances for damages or anticipated fees or profits. In the event of a suspension of the services, the Consultant's compensation and schedule for performance of services hereunder shall be equitably adjusted upon resumption of performance of the services.

(C) The Consultant shall remain liable to the Commission for any claims or damages occasioned by any failure, default, error or omission in carrying out the provisions of this Agreement during its life, including those giving rise to a termination for non-performance or breach by Consultant. This liability shall survive and shall not be waived, or estopped by final payment under this Agreement.

(D) The Consultant shall not be liable for any errors or omissions contained in deliverables which are incomplete as a result of a suspension or termination where the Consultant is deprived of the opportunity to complete the Consultant's services.

(12) OWNERSHIP OF DRAWINGS AND DOCUMENTS:

(A) All deliverables, drawings and documents prepared in performance of this Agreement shall be delivered to and become the property of the Commission and the local public agency upon suspension, abandonment, cancellation, termination, or completion of the Consultant's services hereunder; provided, however,

1. the Consultant shall have the right to their future use with written permission of the Commission;

2. the Consultant shall retain its rights in its standard drawing details, designs, specifications, CADD files, databases, computer software, and any other proprietary property; and

3. the Consultant shall retain its rights to intellectual property developed, utilized, or modified in the performance of the services subject to the following:

A. Copyrights. Commission, as the contracting agency, reserves a royalty-free, nonexclusive and irrevocable license to reproduce, publish or otherwise use, and to authorize others to use, for Governmental purposes:

I. The copyright in any works developed under this agreement, or under a subgrant or contract under this agreement; and

II. Any rights of copyright to which Commission, its consultant or subconsultant purchases ownership with payments provided by this agreement.

B. Patents. Rights to inventions made under this agreement shall be determined in accordance with 37 C.F.R. Part 401. The standard patent rights clause at 37 C.F.R. § 401.14, as modified below, is hereby incorporated by reference.

I. The terms "to be performed by a small business firm or domestic nonprofit organization" shall be deleted from Paragraph (g)(1) of the clause;

II. Paragraphs (g)(2) and (3) of the clause shall be deleted; and

III. Subsection (l) of the clause, titled “communications” shall read as follows: “(l) Communications. All notifications required by this clause shall be submitted to the Chief Engineer.”

IV. The following terms in 37 C.F.R. 401.14 shall for the purpose of this Agreement have the following meaning:

Contractor - Consultant

Government and Federal Agency - Commission

Subcontractor - Subconsultant

4. Basic survey notes, design computations, and other data prepared under this Agreement shall be made available for use by the Commission or the local public agency without further compensation and without restriction or limitation on their use.

(B) The Commission may incorporate any portion of the deliverables into a project other than that for which they were performed, without further compensation to the Consultant; provided however, that (1) such deliverables shall thereupon be deemed to be the work product of the Commission and the Commission shall use same at its sole risk and expense; and (2) the Commission shall remove the Consultant's name, seal, endorsement, and all other indices of authorship from the deliverables.

(C) If the local public agency incorporates any portion of the work into a project other than for which it was performed, it shall be deemed the work of the local public agency. The Commission shall not be liable to further compensate the Consultant for such local public agency use, or disclosure of information by a local public agency concerning the deliverables to any party outside this agreement.

(13) DECISIONS UNDER THIS AGREEMENT AND DISPUTES:

(A) The Engineer will determine the acceptability of the drawings, specifications, and estimates and all other deliverables to be furnished, and will decide the questions that may arise relative to the proper performance of this Agreement. The determination of acceptable deliverables may occur following final payment, and as late as during the construction of the project which decisions shall be conclusive, binding and incontestable, if not arbitrary, capricious or the result of fraud, and appealable only as provided in section 134 of the Commission's Engineering Policy Guide as it exists at the time the dispute arises.

(B) The Engineer will decide all questions which may arise as to the quality, quantity, and acceptability of services performed by the Consultant and as to the rate of progress of the services; all questions which may arise as to the interpretation of the plans and specifications or other deliverables; all questions as to the acceptable

fulfillment of the Agreement on the part of the Consultant; the proper compensation for performance or breach of the Agreement; and all claims of any character whatsoever in connection with or growing out of the services of the Consultant, whether claims under this Agreement or otherwise. The Engineer's decisions shall be conclusive, binding and incontestable, if not arbitrary, capricious or the result of fraud, and appealable only as provided in section 134 of the Commission's Engineering Policy Guide as it exists at the time the dispute arises.

(C) If the Consultant has a claim for payment against the Commission which in any way arises out of the provisions of this Agreement or the performance or non-performance hereunder, written notice of such claim must be made in triplicate within sixty (60) days of the Consultant's receipt of final payment. Notwithstanding Section (20) of this Agreement, the notice of claim shall be personally delivered or sent by certified mail to the office of the Secretary to the Commission in Jefferson City, Missouri. The notice of claim shall contain an itemized statement showing completely and fully the items and amounts forming the basis of the claim and the factual and legal basis of the claim.

(D) Any claim for payment or an item of any such claim not included in the notice of claim and itemized statement, or any such claim not filed within the time provided by this provision shall be forever waived, and shall neither constitute the basis of nor be included in any legal action, counterclaim, set-off, or arbitration against the Commission.

(E) The claims procedure in Subsections (13)(C) and (D) does not apply to any claims of the Commission against the Consultant. Further, any claims of the Commission against the Consultant under this Agreement are not waived or estopped by the claims procedure in Subsections (13)(C) and (D).

(14) SUCCESSORS AND ASSIGNS: The Commission and the Consultant agree that this Agreement and all agreements entered into under the provisions of this Agreement shall be binding upon the parties hereto and their successors and assigns.

(15) INDEMNIFICATION RESPONSIBILITY:

(A) The Consultant agrees to save harmless the Commission, the FHWA, and the local public agency from all liability, losses, damages, and judgments for bodily injury, including death, and property damage to the extent due to the Consultant's negligent acts, errors, or omissions in the services performed or to be performed under this Agreement, including those negligent acts, errors, or omissions of the Consultant's employees, agents, and subconsultants.

(B) The Consultant shall be responsible for the direct damages incurred by the Commission or the local public agency as result of the negligent acts, errors, or omissions of the Consultant or anyone for whom the Consultant is legally responsible, and for any losses or costs to repair or remedy any subsequent stage of

project development, phase of work, or project construction as a result of such negligent acts, errors or omissions; provided, however, the Consultant shall not be liable to the Commission or the local public agency for such losses, costs, repairs and/or remedies which constitute betterment of or an addition of value to the subsequent stages of project development or the construction of the project.

(C) Neither the Commission's review, approval or acceptance of, or payment for, any services required under this Agreement, nor the termination of this Agreement prior to its completion, will be construed to operate as a waiver of any right under this Agreement or any cause of action arising out of the performance of this Agreement. This indemnification responsibility survives the completion of this Agreement, as well as the completion of subsequent stages of project development or the construction of the project at some later date, and remains as long as the construction contractor may file or has pending a claim or lawsuit against the Commission or local public agency on this project arising out of the Consultant's services hereunder.

(16) INSURANCE:

(A) The Consultant shall maintain commercial general liability, automobile liability, and worker's compensation and employer's liability insurance in full force and effect to protect the Consultant from claims under Worker's Compensation Acts, claims for damages for personal injury or death, and for damages to property arising from the negligent acts, errors, or omissions of the Consultant and its employees, agents, and subconsultants in the performance of the services covered by this Agreement, including, without limitation, risks insured against in commercial general liability policies.

(B) The Consultant shall also maintain professional liability insurance to protect the Consultant against the negligent acts, errors, or omissions of the Consultant and those for whom it is legally responsible, arising out of the performance of professional services under this Agreement.

(C) The Consultant's insurance coverage shall be for not less than the following limits of liability:

1. Commercial General Liability: \$500,000 per person up to \$3,000,000 per occurrence;
2. Automobile Liability: \$500,000 per person up to \$3,000,000 per occurrence;
3. Worker's Compensation in accordance with the statutory limits; and Employer's Liability: \$1,000,000; and
4. Professional ("Errors and Omissions") Liability: \$1,000,000,

each claim and in the annual aggregate.

(D) In lieu of the minimum coverage stated in (16)(C)(1) and (C)(2), above, the Consultant may obtain insurance at all times in an amount equal to the Commission sovereign immunity caps as stated in Section 537.600 RSMo and subsequently adjusted by the Missouri Department of Insurance. If the statutory limit of liability for a type of liability specified in this section is repealed or does not exist, the Consultant shall obtain insurance with the minimum coverage stated in (16)(C)(1) and (C)(2), above.

(E) The Consultant shall, upon request at any time, provide the Commission with certificates of insurance evidencing the Consultant's commercial general or professional liability ("Errors and Omissions") policies and evidencing that they and all other required insurance are in effect as to the services under this Agreement.

(F) Any insurance policy required as specified in Section (16) shall be written by a company which is incorporated in the United States of America or is based in the United States of America. Each insurance policy must be issued by a company authorized to issue such insurance in the State of Missouri.

(17) NONDISCRIMINATION CLAUSE: The Consultant shall comply with all state and federal statutes applicable to the Consultant relating to nondiscrimination, including, but not limited to, Chapter 213, RSMo; Title VI and Title VII of the Civil Rights Act of 1964 as amended (42 U.S.C. Sections 2000d and 2000e, *et seq.*); and with any provision of the "Americans with Disabilities Act" (42 U.S.C. Section 12101, *et seq.*).

(18) ACTIONS: No action may be brought by either party hereto concerning any matter, thing, or dispute arising out of or relating to the terms, performance, non-performance, or otherwise of this Agreement except in the Circuit Court of Cole County, Missouri. The parties agree that this Agreement is entered into at Jefferson City, Missouri, and substantial elements of its performance will take place or be delivered at Jefferson City, Missouri, by reason of which the Consultant consents to venue of any action against it in Cole County, Missouri. The Consultant shall cause this provision to be incorporated into all of its agreements with, and to be binding upon, all subconsultants of the Consultant in the performance of this Agreement.

(19) AVAILABILITY OF RECORDS:

(A) The Consultant shall maintain all those records relating to direct charges incurred under this Agreement, including but not limited to invoices, payrolls, bills, receipts, etc. These records must be available at all reasonable times to the Commission or its designees and representatives, at the Consultant's offices, at no charge, during the Agreement period and any extension thereof, and for the three (3) year period following the date of final payment made under this Agreement. If the Commission has notice of a potential claim against the Consultant and/or the

Commission based on the Consultant's services under this Agreement, the Consultant, upon written request of the Commission, shall retain and preserve its records until the Commission has advised the Consultant in writing that the disputed claim is resolved.

(B) The Commission, if it so elects, may conduct a final cost audit of the Consultant's services performed under the terms of this Agreement. If the audit reveals that the Consultant has been overpaid, then the Consultant shall immediately refund the Commission's overpayment for the services. Conversely, if the audit reveals that the Consultant has been underpaid for its services, then the Commission will promptly pay the Consultant the additional obligation, not to exceed the Commission's maximum price or ceiling.

(20) NOTICE TO THE PARTIES: All notices or communications required by this Agreement shall be made in writing, and shall be effective upon receipt by the Commission or the Consultant at their respective addresses of record. Letters or other documents which are prepared in 8.5 x 11 inch format may be delivered by telefax, provided that an original is received at the same address as that to which that telefax message was sent, within three (3) business days of the telefax transmission. Either party may change its address of record by written notice to the other party.

(A) Notice to the Commission: Notices to the Commission shall be addressed and delivered to the following Engineer, who is hereby designated by the Commission as its primary authorized Engineer for administration, interpretation, review, and enforcement of this Agreement and the services of the Consultant hereunder:

State Bridge Engineer
Missouri Department of Transportation
P.O. 270
Jefferson City, Missouri 65102
Telefax No.: (573) 526-5488
Telephone No.: (573) 526-0556

The Commission reserves the right to substitute another person for the individual named at any time, and to designate one or more other Engineers to have authority to act upon its behalf generally or in limited capacities, as the Commission may now or hereafter deem appropriate. Such substitution or designations shall be made by the Chief Engineer in a written notice to the Consultant.

(B) Notice to the Consultant: Notices to Consultant shall be addressed and delivered to Consultant's representative, as follows:

[Addressee Name]
[Addressee Title]
[Consultant Firm Name]
[Street Address and P.O. Box, if any]

[City], [State] [Zip Code]
Telefax No.: [Give Number]
Telephone No.: [Give Number]

The Consultant reserves the right to substitute another person for the individual named at any time, and to designate one or more Consultant's Representatives to have authority to act upon its behalf generally or in limited capacities, as the Consultant may now or hereafter deem appropriate. Such substitutions or designations shall be made by the Consultant's president or chief executive officer in a written notice to the Commission.

(21) LAW OF MISSOURI TO GOVERN: This Agreement shall be construed according to the laws of the State of Missouri. The Consultant shall comply with all local, state, and federal laws and regulations which govern the performance of this Agreement.

(22) MISCONDUCT CERTIFICATIONS: Under penalty of perjury, false declaration, and any other applicable consequences pursuant to state and federal law, the Consultant by signing this Agreement hereby certifies, unless expressly noted by submission of written exceptions, that the Consultant and its principals (any person associated with the Consultant in the capacity of owner, partner, director, officer, principal investor, project director, manager, auditor, or any other administrative position): (1) are not presently debarred, suspended, proposed for debarment, declared ineligible, or voluntarily excluded by any federal, state or local governmental entity; (2) have not been indicted, convicted, or had a civil judgment rendered against them in any matter involving fraud or official misconduct within the past three years; and (3) have not had any public transactions terminated for cause or default in the last three years. If there are any exceptions to this certification, the Consultant shall submit those exceptions in writing, and these exceptions will be considered in determining whether to procure professional services from the Consultant. The Consultant shall not execute a subcontract for services under this Agreement with any business or person the Consultant knows to be debarred, suspended, proposed for debarment, declared ineligible, or voluntarily excluded by a federal agency unless authorized by the Commission.

(23) CONFIDENTIALITY: The Consultant agrees that the Consultant's services under this Agreement is a confidential matter between the Consultant, the local public agency, and the Commission. The Consultant shall not disclose any aspect of the Consultant's services under this Agreement to any other person, corporation, governmental entity, or news media, excepting only to such employees, subconsultants, and agents as may be necessary to allow them to perform services for the Consultant in the furtherance of this Agreement, without the prior approval of the Commission's Engineer; provided, however, that any confidentiality and non-disclosure requirements set out herein shall not apply to any of the Consultant's services or to any information which (1) is already in the public domain or is already in the Consultant's possession at the time the Consultant performs the services or comes into possession of the

information, (2) is received from a third party without any confidentiality obligations, or (3) is required to be disclosed by governmental or judicial order. Any disclosure pursuant to a request to the Commission under Chapter 610, RSMo, shall not constitute a breach of this Agreement. The content and extent of any authorized disclosure shall be coordinated fully with and under the direction of the Commission's Engineer, in advance.

(24) SOLE BENEFICIARY: This Agreement is made for the sole benefit of the parties hereto and nothing in this Agreement shall be construed to give any rights or benefits to anyone other than the Commission and the Consultant.

(25) SEVERABILITY AND SURVIVAL:

(A) Any provision or part of this Agreement held to be void or unenforceable under any law or regulation shall be deemed stricken, and all remaining provisions shall continue to be valid and binding upon the Commission and the Consultant.

(B) All express representations, indemnifications, or limitations of liability made or given in this Agreement will survive the completion of all services by the Consultant under this Agreement or the termination of this Agreement for any reason.

(26) PAYMENT BOND: In the event that any subconsultants are used to supply at least twenty five thousand dollars (\$25,000) worth of materials and/or labor not within the scope of environmental assessment services or licensed professional services as defined by chapter 327, RSMo, the Consultant shall require any such subconsultants to provide laborers and materialmen with adequate bond security. Payment bonds shall be executed by any such subconsultants with the subconsultant as principal and a surety company authorized to do business in the State of Missouri as surety, and any agent executing the same on behalf of a subconsultant or surety company must attach a current Power of Attorney setting forth sufficient execution authority. Said payment bonds must be acceptable to the Commission to cover all materials used, all labor performed, and all insurance premiums necessary to comply with Section 107.170, RSMo, and must be provided to the Commission prior to the performance of any subconsultant services under this Agreement.

(27) ENTIRE AGREEMENT: This Agreement represents the entire understanding between the parties regarding the performance of these professional services and supersedes prior hourly rate fee arrangements and written or oral communications between the parties regarding these services.

(28) PROGRAM FUNDING: The BEAP program is currently funded utilizing highway safety funds and local technology assistance program funds available to MoDOT. The Consultant recognizes that funding for services contemplated in this Agreement are dependent upon congressional actions as well as actions by the Commission and that the continued funding of this program and the level of funding

available for this program are not guaranteed.

(29) SELECTION FOR WORK: The Consultant recognizes that the Commission has identical agreements with other consultants to provide these same services to local public agencies and that execution of this agreement by the Commission only places the Consultant on a list of preapproved consultants available to provide services on the BEAP program. Selection of the Consultant to provide services under this agreement is dependent upon the local public agencies selecting the Consultant from the list of preapproved consultants for these services. The Commission makes no guarantees that the Consultant will be selected to provide any of these services during the term of this Agreement.

(30) ATTACHMENTS: The following Exhibits are attached to and made a part of this Agreement: Exhibit I – “Schedule of Hourly Labor Billing Rates”; Exhibit II – “General Scope of Services.”

[remainder of page intentionally left blank]

IN WITNESS WHEREOF, the parties have entered into this Agreement on the date last written below.

Executed by the Consultant this ____ day of _____, 20__.

Executed by the Commission this ____ day of _____, 20__.

**MISSOURI HIGHWAYS AND
TRANSPORTATION COMMISSION**

[INSERT CONSULTANT NAME HERE]

By: _____

By: _____

Title: _____

Title: _____

ATTEST: (Commission seal)

ATTEST: (Consultant seal, if existing)

Secretary to the Commission

By: _____

Title: _____

APPROVED AS TO FORM:

APPROVED AS TO FORM:

Commission Counsel

By: _____

Title: _____