

PUBLICATION NO. 442

PENNSYLVANIA

DEPARTMENT OF TRANSPORTATION

SPECIFICATIONS

FOR

CONSULTANT AGREEMENTS

FOR

PROJECT DEVELOPMENT SERVICES

PUBLICATION NO. 442

PENNSYLVANIA
DEPARTMENT OF TRANSPORTATION

SPECIFICATIONS
FOR
CONSULTANT AGREEMENTS
FOR
PROJECT DEVELOPMENT SERVICES

TABLE OF CONTENTS

PREAMBLE

	Page
1.0 GENERAL	
1.1 APPLICABILITY	1.1
1.2 DEFINITIONS	1.1
1.3 CONSULTANT OFFICE	1.2
2.0 AGREEMENT ADMINISTRATION	
2.1 PROJECT MANAGER	2.1
2.2 INSPECTION AND QUALITY OF WORK AND SERVICES	2.1
2.3 CONSULTANT QUALIFICATION PACKAGE	2.2
2.4 QUALITY OF CONSULTANT PERSONNEL	2.2
2.5 RESTRICTIONS ON EMPLOYMENT	2.3
2.6 CONTACTING AGENCIES, UTILITIES OR INDIVIDUALS	2.3
2.7 RIGHT TO ENTER	2.3
2.8 AGREEMENT ASSIGNMENT	2.4
2.9 GOOD FAITH ACCEPTANCE OF CONSULTANT'S PROPOSAL	2.4
2.10 NOTICE TO PROCEED	2.5
2.11 MANAGEMENT OF PROJECT COSTS	2.5
2.12 DATE OF ACCEPTANCE	2.6
2.13 ACCEPTANCE OF FINAL PAYMENT	2.7
2.14 CONSULTANT PERFORMANCE RATING REPORT	2.7
3.0 AGREEMENT TERMS AND CONDITIONS	
3.1 CONTRACT SUSPENSION AND CANCELLATION	3.1
3.2 OWNERSHIP OF MATERIAL AND WORK	3.4
3.3 COST ELEMENTS FOR CONSULTANT AGREEMENTS	3.5
3.4 METHODS OF COMPENSATION	3.13
3.5 PROPOSED PROJECT EMPLOYEES	3.16
3.6 AGREEMENT PERFORMANCE	3.16
3.7 TRANSFER OF ELECTRONIC DATA	3.17

3.8	AUDIT REPORT	3.22
3.9	OVERPAYMENT AND NON-ELIGIBLE COSTS	3.23
3.10	WORK PROVIDED OUTSIDE THE AGREEMENT	3.24
3.11	OVERTIME	3.24
3.12	PUBLICATION 408 SPECIFICATIONS	3.25
3.13	NO THIRD-PARTY RIGHTS CREATED	3.25
3.14	FACILITY CAPITAL COST OF MONEY	3.25
4.0	INVOICES	
4.1	PARTIAL PAYMENTS	4.1
4.2	FINAL INVOICE	4.3
4.3	MAINTAINING RECORDS AND DOCUMENTATION	4.4
4.4	INVOICE TEMPLATE	4.5
4.5	MANAGEMENT DIRECTIVE 230.10	4.5
5.0	DESIGN ERRORS AND CLAIMS	
5.1	SAVE HARMLESS CLAUSE	5.1
5.2	CONSULTANT DESIGN ERROR LIABILITY	5.1
5.3	RESPONSIBILITY FOR DESIGN ERRORS	5.1
5.4	BOARD OF CLAIMS	5.2
5.5	NOTICE OF INTENT TO FILE A CLAIM AND DETERMINATION OF CLAIM	5.2
6.0	CONSULTANT RESTRICTIONS	
6.1	DISCLOSURE OF CONFIDENTIAL INFORMATION	6.1
6.2	LEGAL OR QUASI-LEGAL PROCEEDINGS	6.1

PREAMBLE

CODE OF ETHICS

The Consultant, to uphold and advance the honor and dignity of the consulting profession and in keeping with high standards of ethical conduct:

Will be honest and impartial, and will serve with devotion his employer, his clients, and the public;
Will strive to increase the competence and prestige of the consulting profession;
Will use his knowledge and skill for the advancement of human welfare.

The Consultant will be guided in all his professional relations by the highest standards of integrity, and will act in professional matters for each client or employer as a faithful agent or trustee.

The Consultant will have proper regard for the safety, health and welfare of the public in the performance of his professional duties. If his professional judgment is overruled by nontechnical authority, he will clearly point out the consequences. He will notify the proper authority of any observed conditions which endanger public safety and health.

The Consultant will not advertise its work or merit in a self-laudatory manner, and will avoid all conduct or practice likely to discredit or unfavorably reflect upon the dignity or honor of the profession.

The Consultant will endeavor to extend public knowledge and appreciation of consulting and its achievements and to protect the consulting profession from misrepresentation and misunderstanding.

The Consultant will express an opinion on a professional subject only when founded on adequate knowledge and honest conviction.

The Consultant will undertake consulting assignments for which it will be responsible only when qualified by training or experience; and it will engage, or advise engaging, experts and specialists whenever the client's or employer's interests are best served by such service.

The Consultant will not disclose confidential information concerning the business affairs or technical processes of any, present or former, clients or employers without their consent.

The Consultant will endeavor to avoid a conflict of interest with its employer or client, but when avoidable, the Consultant shall fully disclose the circumstances to its employer or client.

The Consultant will uphold the principles of appropriate and adequate compensation for those engaged in consulting work.

The Consultant will not accept compensation, financial or otherwise, from more than one interested party for the same service, or for services pertaining to the same work, unless there is full disclosure to and consent of all interested parties.

The Consultant will not compete unfairly with another Consultant by attempting to obtain employment or advancement or professional engagements by competitive bidding, by taking advantage of a salaried position, by criticizing other Consultants, or by other improper or questionable methods.

The Consultant will not attempt to injure, maliciously or falsely, directly or indirectly, the professional reputation, prospects or practice of another Consultant, nor will it indiscriminately criticize another Consultant's work in public. If it believes that another Consultant is guilty of unethical or illegal practice, it shall present such information to the proper authority for action.

The Consultant will not associate with or allow the use of its name by an enterprise of questionable character, nor will it become professionally associated with Consultants who do not conform to ethical practices, or with persons not legally qualified to render the professional services for which the association is intended.

The Consultant will give credit for consulting work to those to whom credit is due, and will recognize the proprietary interest of others.

The Consultant will cooperate in extending the effectiveness of the profession by interchanging information and experience with other Consultants, and students, and will endeavor to provide opportunity for the professional development and advancement of employees under its supervision.

1 General

1.1 Applicability

It is understood and agreed that, unless otherwise indicated in writing in an executed Consultant Agreement, the specifications hereinafter set forth apply to and become a part of all Consultant Agreements required to assist the Department in the development and construction of a transportation improvement project and any parts thereof as provided by law.

1.2 Definitions

Consultant (Prime Consultant):

As used within these specifications, the term Consultant means the contractual party (Prime Consultant) providing Consultant Work and Services pursuant to the Agreement with the Commonwealth. The Consultant may be an Individual, Partnership, Corporation, or Joint Venture.

Subconsultant/Subcontractor

The party providing work and services to the Prime Consultant pursuant to an Agreement with the Prime Consultant to which the Department is not a party.

Department

The Pennsylvania Department of Transportation acting through the Secretary of Transportation or his designee.

Responsible Charge

An individual position that requires initiative, skill and independent judgment, and implies such degree of competence and accountability gained by technical education and experience of a grade and character as is sufficient to qualify the individual to personally and independently engage in and be entrusted with the work involved.

Professional Engineer

An individual licensed and registered under the laws of the Commonwealth of Pennsylvania to engage in the practice of engineering.

Professional Land Surveyor

An individual licensed and registered under the laws of the Commonwealth of Pennsylvania to engage in the practice of land surveying.

Professional Geologist

An individual licensed and registered under the laws of the Commonwealth of Pennsylvania to engage in the practice of geology.

Employee

An individual who is on a firm's payroll and for whom taxes are withheld and Social Security is withheld and matched.

Engineering Firm/Corporation

A firm or corporation, where the directing heads and employees of such firm or corporation, in responsible charge of its activities in the practice of engineering, are licensed and registered in conformity with the Commonwealth's "Engineer, Land Surveyor and Geologists Registration Law," Act of 1945, P.L. 913, No. 367, as amended, 63 P.S. Sections 148-158.2.

1.3 Consultant Office

- A. A Consultant that maintains its principal office outside the Commonwealth of Pennsylvania, or a Consultant incorporated outside the Commonwealth of Pennsylvania, shall maintain a Certificate of Authorization to Conduct Business in the Commonwealth as provided by the Pennsylvania Department of State.
- B. The Consultant shall maintain, for the life of the Agreement, a legal address within the Commonwealth of Pennsylvania through which

notices or messages can be transmitted for action in cases of emergency. The address information must also be maintained in the Department's ECMS Business Partner Registration.

- C. The Consultant shall notify the Department immediately after the receipt of the executed Agreement of any change in the location or locations where the work will be performed as well as the type and approximate percentage of the work to be accomplished at each location.
 - (1) The Consultant shall obtain prior written approval of the Department's Project Manager of any subsequent change in work location.

D. If the Consultant elects to perform any or all the work at a location outside the Commonwealth of Pennsylvania, the Consultant shall not be reimbursed for either Direct or Indirect Costs of the travel, food or lodging of the Consultant or its employees to or from the location or from locations outside the Commonwealth to any office in Pennsylvania designated for required conferences and/or inspection of the work by the Department and/or the Federal Highway Administration (FHWA).

2 Agreement Administration

2.1 Project Manager

The Consultant shall place in responsible charge of the work and services covered by the Agreement a designated representative, who is an experienced and qualified Project Manager. The Project Manager shall be the individual identified in the Consultant's statement of interest and/or technical proposal. The Project Manager shall be empowered by the Consultant to affix his name and professional seal, if applicable, as the person responsible for the preparation of plans, calculations, reports, etc. as required by the Pennsylvania Department of Transportation Policy and Procedures.

The Consultant shall not remove or reassign the Project Manager without written permission from the Department's Project Manager.

2.2 Inspection and Quality of Work and Services

All work and services rendered under the Agreement shall be of high quality, complete, accurate and in full conformance with Department requirements and shall be consistent with the highest professional standards common to the consulting/engineering profession. Such work shall be subject to the Department's and, when applicable, the Federal Highway Administration's periodic review and quality check in the field, the Consultant's office, or the Department's office. If after said periodic review and quality check the Department and/or Federal Highway Administration determine that the Consultant's work performed, services rendered, and/or material furnished does not measure up to Department requirements as specified in writing at the time of execution of the Agreement, and the quality and professional standards normally required, it shall be redone, reperformed, recomputed, and/or refurnished as directed by the Department's Deputy Secretary for Highway Administration, hereinafter called Deputy Secretary, to meet the said requirements and quality standards at the sole expense of the Engineer and at no direct or indirect cost to the Department. All

materials and records shall be furnished in accordance with the Department's standards of quality.

2.3 Consultant Qualification Package

All Consultants, both prime and subconsultants, must submit a Consultant Qualification Package (CQP) annually through ECMS. The CQP indicates the Consultant's project experience, quality plan, employee qualifications and certifications, the services that the Consultant can provide, and the Disadvantaged Business Enterprise certification, if applicable.

ECMS automates the packaging of supporting documents and provides an electronic "cover page" used to collect and store general information about the Consultant, its location, and services. The cover page is also used to attach (or package) the other documents comprising the CQP.

The following elements comprise the CQP:

- Cover Page (online)
- General Information (template provided)
- Project Experience (template provided)
- Employee Resumes (template provided)
- Quality Plan (no template provided)

2.4 Quality of Consultant Personnel

The Consultant shall employ only competent and efficient engineers, designers, draftsmen, and/or other necessary personnel required in the performance of the Agreement. Whenever, in the opinion of the Department, any employee is unfit to perform his/her task, or does his/her work contrary to instructions, or conducts himself/herself improperly, the Consultant shall discontinue the services of such employee immediately upon receipt of the Deputy Secretary's, or designee's, written request; and the Consultant shall not employ him/her again on this or any other Agreement with the Department without the Department's prior written permission.

2.5 Restrictions on Employment

The Consultant shall not engage, on a full, part-time, or other basis during the period of the Agreement, any professional or technical personnel who are employed by the FHWA or the Department, without the knowledge and consent of the employer of such person. The Consultant shall not employ a former Department employee on any Department Agreement during the first year after the employee leaves the Department, without express written opinion rendered by the State Ethics Commission.

2.6 Contacting Agencies, Utilities, or Individuals

The Consultant, when and as directed by the Department, shall contact any public or private agencies, utilities, or individuals concerned to coordinate the requirements for the project development. The provisions of the applicable Chapters and Sections of the Department Manuals, or as specifically directed by the Department, shall apply to such contacts. The Consultant in making these contacts is not authorized to and shall not make any commitment for the Department and shall so inform the contacted parties.

2.7 Right to Enter

The Consultant, when applicable, shall determine the names of the owners or the lessees and occupants of all affected properties, and shall prepare and issue the Notices of Intent to enter that are required by these specifications for any and all purposes pertaining to the Consultant's, its subconsultants and/or subcontractors, performance of the Agreement.

The Consultant shall have the right to enter upon any land or improvement which may be condemned or considered for condemnation by the Commonwealth, to make studies, surveys, tests, soundings, appraisals or for such other purposes required to fulfill the Agreement only after the owner or the party in whose name it is assessed, as well as the occupant thereof, has been notified in accordance with the requirements and procedures set forth in the Department Design

Manual (available through the PennDOT Sales Store, P.O. Box 2028, Harrisburg, PA 17105-2028).

In emergency cases, a waiver of the ten- (10-) day notice may be obtained only by utilizing the procedure set forth in the applicable Section of the Design Manual.

2.8 Agreement Assignment

The Consultant shall not assign, in whole or in part, the Agreement, or its duties, obligations, liabilities, rights or benefits, including the right to payment under the Agreement, without the prior written consent of the Department's Deputy Secretary for Highway Administration or his designee. If an assignment is anticipated and approved, the Consultant and its assignee shall enter into and execute a written agreement, in which the assignee agrees to be legally bound by all of the terms and conditions of the Agreement and to assume the duties, obligations and liabilities being assigned. In addition, the Consultant and the Department may have to enter into and execute a Supplemental Agreement signifying the Department's consent to the assignment.

2.9 Good Faith Acceptance of Consultant's Proposal

It is expressly understood that all information, statements, and material presented by the Consultant and used by the Department in the negotiations, development, and computation of the Consultant Cost Estimate, the Lump Sum for Fixed Fee and the total fee to be paid the Consultant are accepted in good faith by the Department and the burden of proof of the accuracy remains with the Consultant for the life of the Agreement. The Department may at its option elect to cancel the Agreement for cause and recover damages or elect to enter into a renegotiation to revise the amount of the fee as provided for in the Agreement when the Department determines that the said Consultant's submissions are in error, inaccurate and/or false and that the correct information and/or material when used will cause a change in the amount of fee to be paid the Consultant. It is expressly understood that such action by the Department is applicable to any Agreement regardless of the method

of payment as set forth in these specifications or as may be otherwise provided in the Agreement.

2.10 Notice to Proceed

The Consultant agrees work and services performed under this Agreement and any supplements to this agreement (regardless of the basis of payment) will be accomplished as directed by the Department through the issuance by the Department of Notices to Proceed and/or Approvals of the various elements of the design. Any work or services performed by the Consultant prior to the receipt of such Notices to Proceed or Approvals will not be reimbursable.

2.11 Management of Project Costs

The Consultant shall exercise proper management practice pertaining to personnel and fiscal, technical, and professional surveillance to ensure that the project costs (for costs reimbursable type agreements) are kept within the man-hours and dollars in the Consultant's estimate. The Consultant shall (for cost reimbursable type Agreement) inform the Department promptly when the cost deviates from the estimate and provide the Department with justification and documentation required to cover the increase in man-hours and cost. The Department will review the justification and documentation and if acceptable will issue the necessary adjustment by a Supplemental Agreement.

- A. The Consultant shall agree and understand that the maximum cost to the Department for each Category of Compensation shall not exceed the maximum amount stipulated in the Department-approved Invoice Template without prior approval of the Department and Federal Highway Administration, where applicable, in the form of a Fund Transfer approval from the Department.
- B. The Consultant agrees that the Consultant will not request reimbursement for any costs incurred in excess of the maximum amount stipulated for each Category of Compensation in the Department-approved Invoice Template.

2.12 Date of Acceptance

The date on which the Department Project Manager notifies the Consultant of the acceptance of all work and services provided under the Agreement shall be the date of final settlement of the Agreement. If the Consultant files a claim with the Board of Claims the date of final settlement shall be the date of the final adjudication of the claims filed with the Board of Claims. File the claim in writing with the Contracting Officer within six (6) months of the date it accrues and not thereafter. If the Consultant fails to file the claim or does not file the claim within the specified time period, the Consultant will be deemed to have waived its right to assert the claim in any forum. Claims not filed within the specified time period will be disregarded by the Contracting Officer. The claim, when filed, must state all grounds upon which the claim is based and must include a copy of the previously submitted notice of intent to claim.

The Contracting Officer will attempt to settle and resolve the claim with the Consultant. The Contracting Officer, at his or her discretion, may conduct a claim review meeting to attempt to settle and resolve the claim with the Consultant. If a claim review meeting is held, it will be attended by representatives of the Consultant and such Department representatives as the Contracting Officer considers appropriate.

If the claim is not resolved by agreement between the Contracting Officer and the Consultant, the Contracting Officer will issue a determination in writing regarding the claim and will mail it to the Contractor by first class mail. The determination will be mailed within one hundred twenty (120) days of the date on which the Contracting Officer received the claim, unless the one hundred twenty- (120-) day period is extended by consent of the Contracting Officer and the Consultant. If the Contracting Officer fails to issue a final determination within the one hundred twenty (120) days, unless extended by consent of the Contracting Officer and the Consultant, the claim will be deemed denied. The determination of

the Contracting Officer will be the final order of the Department regarding the claim. The determination of the Contracting Officer will be conclusive and binding upon the Consultant unless the Consultant appeals the determination by filing a statement of claim with the Board of Claims within fifteen (15) days of the mailing date of the determination, or, if no extension is agreed to by the Contracting Officer and the Contractor, within one hundred thirty-five (135) days of the receipt by the Contracting Officer of the claim, whichever occurs first.

2.13 Acceptance of Final Payment

It is also agreed and understood that the acceptance of the final payment by the Consultant shall be considered as a release in full of all claims against the Commonwealth of Pennsylvania arising out of, or by reason of, the work, services and materials furnished under this Agreement.

2.14 Consultant Performance Rating Report

Immediately upon the completion of all the work and services required under an individual Part of an Agreement, the Department's Project Manager will rate the Consultant's performance on that particular Part.

The Performance Rating Report will be discussed with and signed by the Consultant's Project Manager and/or a Principal of the Consultant.

The Consultant's Project Manager and/or Principal should sign the report acknowledging that they have read the report and had the opportunity to discuss the report with the appropriate Department representative(s). The Consultant signature does not mean that the Consultant agrees with the rating but they did have an opportunity to discuss the rating with the Department representative(s).

The Performance Rating Report will be used for comparison purposes during the consultant selection process.

3 Agreement Terms and Conditions

3.1 Contract Suspension and Cancellation

A. Suspension of Work Notice

The Deputy Secretary, or his authorized designee, shall have the authority to suspend the work wholly or in part, under the terms of the Agreement whenever the Deputy Secretary deems such suspension is in the best interest of the Commonwealth, by issuing a Suspension Order to the Consultant. The Suspension Order may apply to the entire Agreement, or to any part(s), phase(s), or item(s) of work thereof, and upon one or multiple occasions. Upon receipt of such Suspension Order, the Consultant shall cease work immediately in accordance with the Suspension Order provisions and shall order his subconsultant and subcontractor to cease work immediately. The Consultant shall stop the suspension of work until such Suspension Order is subsequently withdrawn in writing by the Department. During the time the Suspension Order is in effect, the Consultant shall exercise due care and caution to protect and secure the completed work and work that was in process.

After receipt of the Suspension Order the Consultant may exercise one of the following options:

- 1) For Cost Plus Fixed Fee Method the Consultant may invoice for the Direct and Indirect Payroll Costs, for any applicable In-house Direct Costs, and the Direct Cost of Work and Services by Others as of the effective date specified in the Suspension Order.
- 2) For Lump Sum and Unit of Work Methods and for the Lump Sum Fee in the Cost Plus Fixed Fee Method the Consultant, with the approval of the Department, may establish an interim percentage of progress payments for accrued earnings to the effective date specified in the Suspension Order and may submit an invoice for the amount thereof.

3) For the Specific Rate of Compensation Method the Consultant may invoice for the total accrued hours of work for the employees as of the effective date specified in the Suspension Order.

The limitation of the accrual of \$1,000.00 or more in the total amount of the invoice is not applicable where the work has been suspended, and in support of such invoice the Consultant shall cite the Suspension Order as the basis for the submission of his invoice to which should be attached a copy of the Suspension Order. The Department will not recognize nor authorize standby time during the effective period of the Suspension Order.

If the Suspension Order is in effect for a period of six months or longer, the Department will consider negotiating a Supplemental Agreement on Lump Sum, Unit of Work payment, Cost Plus a Fixed Fee and Specific Rate of Compensation Agreements, when the Suspension Order is rescinded.

B. Cancellation of Contract

The Department shall have the right to cancel the Agreement at any time upon written notice signed by the Deputy Secretary, and in any such event the Consultant shall be paid as hereinafter set forth, by the method of payment indicated in the Agreement and Supplements thereto. The Consultant shall cease work as of the date the registered letter is received and shall be paid only for such work and services as have already been rendered up to and including the cease work date specified in said Notice of Cancellation.

The Consultant shall also be paid for a period of thirty (30) calendar days after the Cancellation Notice for work and services performed for the collection, assembling and transmitting to the Department the following items which were obtained, prepared or developed as part of the work required under the Agreement:
all materials; electronic files; plans; studies;
correspondence; drawings; computations; maps;

supplies; survey notes, including field books; and property records, including deeds, tax maps, title searches, etc.,

- (1) The amount due the Consultant for earnings on a Cost Plus Fixed Fee type of Agreement shall include the Consultant's direct and indirect costs defined in the Agreement as of the date of cancellation plus a payment in the amount of the Lump Sum for Fixed Fee computed on an agreed upon percentage of the Consultant's progress of completion of the Agreement as of the effective termination date specified in the Cancellation Notice. This agreed upon percentage shall be based on the actual work completed and not the percentage determined by comparing the expended payroll amount against the estimated amount for payroll included in the Agreement.
- (2) The amount due the Consultant for earnings on a Lump Sum Method of Payment contracts shall be based on an agreed upon percentage of actual work completed. This percentage shall be based on a detailed review of the work completed as applied to the amounts established in the Estimated Progress Report, approved at the start of the project or as subsequently approved by the Department.
- (3) The amount due the Consultant for earnings on a Specific Rate of Compensation type Agreement shall be the payment for the total accrued amount of Compensation due the Consultant as of the effective date specified in the Cancellation Notice.
- (4) The amount due the Consultant for earnings on a Unit of Work Method of Reimbursement shall be the payment:
 - (a) For all Units of Work completed as of the effective date specified in the Notice of Cancellation.

- (b) For the completion of Units of Work on which the Consultant has work underway and the Department directs completion subsequent to the effective date specified in the Notice of Cancellation.
- (c) For Units of Work on which actual work has been performed prior to the effective date specified in the Notice of Cancellation an agreed percentage of completion of each unit, after negotiation with the Consultant, shall be established by the Department to determine the amount of reimbursement due the Consultant.
- (d) No allowance will be made for Units of Work on which the Consultant has performed no work as of the date of his or its receipt of the Notice of Cancellation.

C. The thirty (30) days notice shall date from the time of mailing of such letter to the Consultant. The right to cancel may be exercised by the Department as to the entire project, or as to any particular phase or phases, part of parts, thereof, and such cancellation shall not be subject to revocation.

3.2 Ownership of Material and Work

All plans, specifications, estimates, electronic files, correspondence, software developed or acquired as a part of the project, drawings, studies, computations, aerial photographic negatives and models, mosaics, maps and all other material, supplies, and designs prepared, developed, or obtained under the terms of the Agreement shall be delivered to and become the property of the Department. The original survey field books, notes, sketches, records, charts, computations, computer programs, tests results, and other data prepared, acquired, or obtained under this Agreement at Department expense shall be delivered and become the property of the Department upon request without restriction or

limitation on their further use. When an Agreement is for studies only, no commitment shall be implied therefrom that would constitute a limitation on the subsequent use of the studies, reports, and plans by the Department.

- A. The Department intends and the Consultant understands that all work, services, products, etc. under this Agreement be made for hire and that all rights to copyright shall vest in the Department.

3.3 Cost Elements for Consultant Agreements

The following seven (7) cost elements are totaled to determine the maximum not to be exceeded Agreement amount:

- Direct Labor/Direct Salary
- Overhead/Indirect Payroll
- Direct In-house Cost Other Than Payroll
- Direct Cost of Work and Services by Others
- Fixed Fee/Profit
- Escalation
- Premium Pay

- A. Direct Labor/Direct Payroll

Direct labor is the cost of salaries for those personnel such as Project Manger, engineers, technicians, drafters, CADD operators, stenographers, survey personnel, and clerks that are directly chargeable to the project.

All Consultant personnel must be on the Consultant's Department approved roster prior to working under a Department Agreement.

- 1) The Consultant's estimate of its in-house Direct Payroll Cost, presented as a breakdown of man-hour requirements into the work breakdown structures tasks and sub-tasks required to accomplish the project. Each sub-task will have the classifications of employees to be used with the average hourly rate for each classification,

extended and costed progressively to arrive at the total estimated payroll cost. The work breakdown structures tasks and sub-tasks so presented in this estimate shall be identical to those used in the Consultant's Cost Accounting Records for the work and services performed under the Agreement.

B. Overhead/Indirect Payroll

1) The overhead cost represents those allowable costs that are not directly attributable to the project. Overhead costs generally include, but not limited to, the following:

- Provisions for office, light, heat, and related items associated with the working space, depreciation allowances or rental for furniture, drafting equipment, and CADD equipment, automobile expenses, and office and drafting supplies not directly chargeable to the project;
- Taxes and insurance other than those included as salary cost, but excluding local, state and federal income taxes;
- Library and periodical expense, and other means of keeping current in the profession, such as attendance at technical and professional meetings;
- Those services and expenses essential to the conduct of the business, including preliminary arrangements for new projects, executive, administrative, accounting, legal, stenographic, and clerical salaries and expenses, other than identifiable salaries included in salary costs and expenses included in reimbursable non-salary expenses, plus salaries of partners and principals, to the extent that they perform general executive and administrative services as distinguished from technical or advisory services directly applicable to the project;
- Business development expenses, including salaries of principals and salary costs of employees so engaged; Provision for loss

of productive time of technical employees between assignments and for time of principals and employees on public-interest assignments; and

- Payroll burden and fringe benefits, which include:
 - paid sick leave
 - vacation
 - holidays
 - payroll taxes
 - unemployment contributions
 - social security taxes
 - insurance benefits
 - retirement

- 2) The determination of the eligibility of cost items making up the Consultant overhead/indirect costs shall be governed by provisions set forth in Part 31 of the Federal Acquisition Regulations (FAR).
- 3) The Consultant overhead rate expressed as a percentage is calculated as follows:

$$\text{Overhead Rate} = \frac{\text{Allowable Overhead Costs}}{\text{Direct Labor Costs}} \times 100\%$$

- 4) The Indirect Payroll Cost is calculated by multiplying the direct labor cost by the overhead rate divided by 100.
- 5) Federal Acquisition Regulation (FAR) Audit

The Consultant shall have a Federal Acquisition Regulation (FAR) Audit performed and furnished to the Department, at no direct cost to the Department, within six (6) calendar months of the end of each of his fiscal years. The maximum overhead used for negotiations will be based on an FAR Audit for latest completed fiscal year. If the latest fiscal year concluded within six (6) calendar months prior to the submission of the Consultant's price proposal the maximum overhead rate could be based on a FAR Audit for a fiscal year completed within the previous eighteen (18) months. If the

Consultant has several FAR Audits for the same fiscal year the following priority order will be established:

- a) Far Audit performed by the Comptrollers office,
- b) FAR Audit performed for the Department,
- c) FAR Audit performed for any other Pennsylvania state agency,
- d) FAR Audit performed by an agency of another state or of the federal government,
- e) FAR Audit performed by an independent certified public accountant (CPA).

If a Consultant has been in business for less than one (1) year at the time of submittal of the price proposal or if the Consultant's gross revenue for the last fiscal year was less than \$250 thousand the maximum overhead rates may be determined based on the best available fiscal information.

C. Direct Costs Other Than Payroll

These costs include, but are not limited to:

- 1) Travel, Subsistence and Lodging in accordance with the Commonwealth Management Directive 230.10 and Revisions thereto, "Travel and Subsistence Allowance".
- 2) Direct Cost of Deliverables
- 3) The Department will not reimburse consultants for the direct costs of the following items:
 - a) Design Agreements
 - * CADD Equipment
 - * Computers/Word Processors
 - * Telephone Calls
 - * Fax Machine/Copies

- * Copying Machine/Copies unless specific to an identified deliverable
- * Car and/or Van Rentals
- * Company owned vehicles
- * Disposable items (wood survey stakes, protective gear, etc.)
- * Survey equipment
- * Pagers
- * Cellular Phones
- * Postage unless specific to an identified deliverable
- * Express Mailing/Shipping
- * Cameras
- * Training
- * Office Supplies/Equipment
- * Licenses & Certification
- * Temporary Shelters
- * Computer Software

b) Construction Inspection Agreements

- * Nuclear Densimeter Gauges/Licenses
- * Paint Test Kits
- * Insurances
- * Vehicles including a vehicle for the Transportation of Nuclear Gauges
- * Subsistence
- * Travel to and from the project
- * Two-way Radios/Repeater Equipment
- * Cellular Phones
- * Cameras
- * Computers
- * Fax Machine/Copies
- * Copiers/Copies
- * Protective/Safety Gear/Equipment
- * Computer Software
- * Pagers
- * Training

- 4) The Consultant will not receive any mark-up on these in-house direct costs.
- 5) The Direct Costs Other Than Payroll Costs to be provided by the Consultant are to be identified as being directly charged to the

Agreement and not to an account which is included in the Consultant's overhead percentage. The Direct Cost Items are to be documented by estimates of quantities and costs in justification of the amounts proposed. The Consultant's and his subconsultant's (subcontractor's) out of pocket expenses for travel and subsistence (lodging and meals) shall be charged at actual cost, not to exceed those authorized by the Commonwealth's Management Directive 230.10 and revisions thereto, "Travel and Subsistence Allowance", whether charged as a direct or an indirect cost. The Consultant and his subcontractors shall be governed by the regulations as defined by this Directive.

D. Direct Cost of Work and Services By Others

This element encompasses the actual costs associated with Subconsultants and Non-Professional Contractual Services whether obtained by negotiations or by bidding.

The Consultant will not receive any mark-up on these direct costs.

E. Fixed Fee/Profit

The lump sum for fixed fee or profit will consider the financial and professional investments to be required of the Consultant; the record of the Consultant in performance of this type of work; the extent, scope, complexity, character, date of beginning and duration of work; the degree of responsibility to be assumed by the Consultant; the Consultant's normally expected return for such services; the conditions under which they are expected to be performed; and other factors as contemplated at the time of negotiations.

- 1) The maximum lump sum for fixed fee will be computed as follows:

- a) Final Design Services for Plans, Specifications, and Estimates (P.S.&E.) submissions (Total Direct Payroll - Escalation) x 0.235
 - b) Preliminary Engineering and Environmental Services (Total Direct Payroll - Escalation) x 0.212
 - c) Field Surveys, Mapping, and/or Photogrammetric Services (Total Direct Payroll - Escalation) x 0.212
 - d) Studies (Feasibility, traffic etc.) (Total Direct Payroll - Escalation) x 0.188
2. The maximum amount of profit for lump sum agreements will generally be as follows:
- a) Final Design (Direct Payroll - Escalation) x 0.282
 - b) Preliminary Engineering and Environmental Studies (Direct Payroll - Escalation) x 0.258
 - c) Bridge Inspection/Analysis (Direct Payroll - Escalation) x 0.282
 - d) Photogrammetric Mapping (Direct Payroll - Escalation) x 0.235
 - e) Field Surveys (Direct Payroll - Escalation) x 0.235
3. The maximum amount of profit for Cost Per Unit of Work Agreements will generally be as follows:
- a) Bridge Inspections (Direct Payroll - Escalation) x 0.282
 - b) Field Surveys (Direct Payroll - Escalation) x 0.235

- c) Repetitive Work
(Direct Payroll - Escalation) x 0.235

4. The maximum amount of profit to be included in the specific rate factor for specific rate of compensation shall be as follows:

a) Environmental Studies	0.212
b) Geotechnical Studies	0.235
c) Review Activities	0.212
d) Construction Inspection	0.200
e) Construction Management Support	0.212
f) Design Management Support	0.235
g) Consultation During Construction	0.235
h) Shop Drawing Review	0.235

F. Escalation

This element provided for the escalation of salaries over the life of the Agreement. The percentage of escalation per year should normally not exceed three percent (3%). A written justification will be required when proposed escalation exceeds 3% for any individual.

G. Premium Pay

The maximum premium pay allowed by the Department is 50% of the actual hourly payroll rate for overtime and 25% of the actual hourly payroll rate for hazardous duty. Premium pay is permitted only if the Consultant has a written company policy for the payment for such premium to its employees and charges all clients at that rate. This written policy must be included in the Consultant's proposal.

If premium pay is provided in the Agreement, the compensation for overtime and/or hazardous duty must be authorized in writing by the District Engineer. Premium pay will not be provided in the Agreement unless the premium pay can be justified. No profit is allowed on the premium portion of overtime or hazardous duty pay.

To justify premium pay the Consultant must demonstrate that he has insufficient forces to provide the required work and services in the required time frame by indicating:

- 1) the number of personnel in that classification
- 2) the total number of hours available for that classification during the required time period
- 3) the total number of hours required for that classification during the required time period
- 4) why it is not prudent to hire or assign additional personnel in that classification.

The Consultant could also justify premium pay if he can demonstrate a direct saving to the Department.

3.4 Methods of Compensation

The following four (4) methods of compensation are utilized by the Department for Consultant Agreements:

- Cost Plus Fixed Fee
- Lump Sum
- Cost Per Unit of Work
- Specific Rate of Compensation

A. Cost Plus Fixed Fee

The Cost Plus Fixed Fee method is used when the Scope of Work is fairly well-defined, but the total consulting effort required to complete the work cannot be estimated precisely. The Consultant is paid an agreed-upon amount for a fixed fee, based on actual work completed, together with the actual costs incurred in the performance of the work and services up to the maximum not to be exceeded amounts indicated on the invoice template or in the Agreement.

This is the most common method used by the Department and reimburses the Consultant for actual direct and indirect costs attributable to the project plus a predetermined lump sum amount for fixed fee (profit).

B. Lump Sum

The Lump Sum method is used when the Scope of Work and Services is well-defined and the total consulting effort can be estimated accurately.

The Consultant agrees to perform the work for a single total lump sum amount. This amount include all direct labor, overhead, profit, direct cost other than payroll, and the direct cost of work and services by others. The lump sum amount is arrived at through the development and evaluation of estimates of each cost element for the anticipated work and services.

C. Cost Per Unit of Work

The Cost Per Unit of Work method is used when the Scope of Work is well-defined, the effort per unit can be estimated accurately, and there are a repetitive number of similar units to be performed.

The Consultant is paid on the basis of a lump sum cost for each unit of work performed. The lump sum cost includes all direct labor, overhead, profit, direct costs other than payroll, and direct cost of work and services by others, if applicable. The cost per unit is arrived at through the development and evaluation of each cost element for the unit of work.

D. Specific Rate of Compensation

The Specific Rate of Compensation method is used when the Scope of Work and the required work effort cannot be determined at the time the Agreement is executed. A specific rate of compensation is established for each employee by multiplying the wage rate by the specific rate factor established in each agreement.

The specific rate of compensation includes reimbursement for direct labor, overhead, and profit.

E. The methods of compensation are normally used as follows:

1. Specific Project Engineering Agreements for preliminary and final design generally will be based on either the Cost Plus Fixed Fee or the Lump Sum methods of payment.

When part of a Specific Project Agreement, the Specific Rate of Compensation method of payment generally will be used for review of shop drawings and consultation during construction.

2. Project Specific Open-End Agreement generally will be based on the Cost Plus Fixed fee method of payment.
3. Open-End Contracts for preliminary and/or final design services and bridge inspections may be based on the Cost Plus Fixed Fee method of payment.

When shop drawing review and consultation during construction is performed under a Work Order under an Open-End Contract, the method of payment will normally be Cost Plus Fixed Fee unless another method of payment is already established.

4. Open-End Contracts and Specific Project Engineering Agreements for bridge inspections or surveying work generally will be based on the Cost Per Unit of Work method of payment.
5. Open-End Contracts for cultural resources, environmental studies, right-of-way services, review of shop drawings, and geotechnical services generally will be based on the Specific Rate of Compensation method of payment.

6. Open-End Contracts and Specific Project Engineering Agreements for construction inspection, generally will be based on the Specific Rate of Compensation method of payment.

3.5 Proposed Project Employees

The Consultant shall submit to the Department the names of the employees proposed to be used on the project. Their payroll classification, actual current payroll rate and the date the payroll rate was effective will be provided by ECMS Payroll Maintenance Function. The Consultant during the life of the contract shall notify the Department, through ECMS, of proposed wage rate increases and request approval prior to placing them into effect and submit justification for each increase. When the Department objects to the amount of such increase the Consultant will not be reimbursed therefore. Submissions for approval of payroll rate increases are to be made through ECMS indicating the proposed payroll rate with the new effective date.

The employees are to be grouped in position classification and where the Consultant has established pay scale spreads of wages within payroll classification these should also be shown together with the Consultant's calculated average pay rate for each classification.

3.6 Agreement Performance

The Consultant shall perform with its own forces all the work and services and furnish all equipment and materials required to accomplish all the provisions and requirements of the Agreement, with the exception of those services, work, equipment, and/or material specifically listed in the Agreement or approved pursuant to the provisions above, which are to be performed or furnished by other than the Consultant forces.

3.7 Transfer of Electronic Data

A. Terms and Conditions for the Release of Electronic Data Files

1. That the Department does not warrant or guarantee the information and data in these Computer Aided Design Drafting (CADD) project files as a substitute for the sound engineering judgment of the Consultant.
2. That use of the CADD project files in conjunction with engineering work and services provided by the Consultant to the Department will reduce the cost of such services and thereby benefit the public.
3. That the Consultant desires to make use of the CADD project files in conjunction with engineering work and services provided by the Consultant to the Department.
4. That the Department grants permission to the Consultant to use the CADD project files (Department's Intellectual Property) and any translated or converted form of these files subject to the terms and conditions of this Agreement, and any supplements to this Agreement. A paper copy of the Department's Intellectual Property will be provided by the Department.
5. That the Consultant has no proprietary rights in or to the Department's Intellectual Property or any subsequent version thereof. The Consultant shall maintain and protect the Department's Intellectual Property in the strictest confidence. No translated or converted form may be transferred in any form without the express written permission of the Department.
6. That the Department's Intellectual Property or any translated or converted form of this Intellectual Property shall not be used by the Consultant on any other project. The

Consultant shall be expressly prohibited from copying any portion of the files, except to the extent necessary to perform the Project.

7. That the Consultant may not copy, distribute, sell, rent, sublicense, or lease the Department's Intellectual Property to any third parties or use the files or any translated or converted form of the files to produce, market, or support the Consultant's own products.
8. That no information or data contained in the Department's Intellectual Property or any translated or converted form of same shall be transferred in any electronic form without written permission of the Department's Deputy Secretary for Highway Administration.
9. That, after payment of the final invoice for work and services provided by the Consultant as part of this Agreement, the Consultant shall remove the information and data contained in the Department's Intellectual Property or any translated or converted form of the same from all of the Consultant's electronic data processing systems. The Consultant shall not retain any electronic copies of the information and data contained in the Department's Intellectual Property or any translated or converted form of its Intellectual Property after payment of the final invoice for work and services provided under this Agreement. Within ten (10) days of the conclusion of the Project work, the Consultant shall return all copies of the Department's Intellectual Property and all related materials to the Department and shall delete all portions of the Department's Intellectual Property from computer memory.
10. That the Department may terminate this Agreement at any time, and the Consultant shall immediately remove the Department's

Intellectual Property or any translated or converted form of the same from the Consultant's electronic data processing systems upon demand of the Department.

11. That the Department reserves all rights not expressly granted. Nothing in this Agreement constitutes a waiver of the Department's rights under any federal or state law.
12. That the Department's Intellectual Property is being provided "AS IS" without any covenant, representation, or warranty of any kind or nature whatsoever, express or implied; and the Consultant assumes the entire risk as to its quality and performance. The Consultant's remedy is limited to returning the Department's Intellectual Property and accompanying documentation to the Department for replacement.
13. That the Department shall not be liable for any direct, indirect, special, incidental, or consequential damages, whether based on contract, in tort or in any other legal theory, arising out of the use of, or inability to use, the Department's Intellectual Property or any accompanying documentation.
14. That the Department shall not be liable for any direct, indirect, special, incidental, or consequential damages, whether based on contract, in tort or on any other legal theory, arising out of any defect in the Department's Intellectual Property or any accompanying documentation.
15. That the Consultant shall indemnify and hold harmless the Department, its officials and employees for any injury to the person or property of third parties arising out of the use of or any defect in the Department's Intellectual Property or any translated or

converted form of this Intellectual Property or any accompany documentation.

16. That the Consultant shall indemnify and hold harmless the Department, its officials and employees for any injury arising out of any infringement of the copyright laws of the United States of America.
17. That the warranty and remedies set forth in this Agreement are exclusive and in lieu of all others, oral or written, express or implied.
18. That nothing contained in this Agreement shall be construed to represent or warrant that the Consultant has any right to reproduce or copy any portion of the Department's Intellectual Property; and the Consultant acknowledges that it has no right to reproduce and include copyright or trade secret notices, or patent rights on any copies, in whole or in part, in any form. All copies of the Department's Intellectual Property remain the property of the Department and any rights involving the copyright law as codified in 17 U.S.C. Section 101 et seq. remain with the Department as defined by the software licensing provisions of its CADD acquisition agreements.
19. That this Agreement constitutes the entire Agreement between the Department and the Consultant. No employee of the Department is authorized to make any modification or addition to this Agreement, except through the issuance of a fully executed Supplemental Agreement.
20. That the Consultant shall provide, at no cost to the Department, the magnetic medium, acceptable to the Department, for transfer of the Department's Intellectual Property.

B. Additional terms and conditions for the release of electronic BRADD project drawing files

1. That the Consultant is solely responsible for the installation of the transferred BRADD files onto its electronic drafting system.
2. That the Consultant shall verify the integrity, correctness, and acceptability of the transferred data contained in the BRADD files as compared to the paper copy of the files provided by the Department.
3. That the Consultant shall acknowledge in writing the integrity, correctness, and acceptability of the transferred BRADD files.
4. That the Department will provide the Consultant, without modification, the BRADD files as produced by the Department's BRADD System.
5. That the Consultant is solely responsible to make all the necessary and required modifications and changes to the BRADD files as per the SHEET 0 file.
6. That the Consultant shall sign and seal all final bridge plans. This includes all transferred BRADD files used in the final bridge plans, whether or not those files were modified by the Consultant.
7. That prior to payment of the final invoice, the Consultant shall submit in writing, at no additional expense to the Department, documentation of the experience using the transferred files. This documentation shall include:
 - a) the effort required by the Consultant to accept and use the transferred files;

- b) the accuracy of the transferred files as compared to the paper copy, including any corrections required to the files; and
- c) the effect of the transferred file size and format on the subsequent use of the files by the Consultant.

3.8 Audit Report

A. Actual Audited Overhead Rate

The Consultant shall establish, within six (6) months of the end of its fiscal year ending date, a report on its actual audited overhead rate as a percentage of direct salary cost in accordance with the Federal Acquisition Regulations (FAR).

The FAR Audit Report will be accepted in the following priority order:

- a) FAR Audit performed by the Comptrollers office,
- b) FAR Audit performed for the Department,
- c) FAR Audit performed by any other Pennsylvania state agency,
- d) FAR Audit performed by an agency of another state or of the federal government,
- e) FAR Audit performed by an independent certified public accountant (CPA).

This Audit Report shall include all eligible costs incurred as defined in Federal Acquisition Regulations and shall be presented in a form understandable to all concerned.

This Audit Report shall be derived from the Consultant books of account without commingling several accounts into one description. Also, the wording of the accounts in the Audit Report shall be identical to that from which the firm derived the information.

The overhead expenses submitted shall be further defined as being the net amount of any income derived as a result of their incurrence on a direct basis. That is, accounts such as

automobile expense and depreciation expense attributable to these automobiles shall be reduced by income charged clients in this area as well as income offsets calculated in the performance of lump sum or other types of Agreements. Another example: Rental income correlated to rental expenses appearing in overhead shall be subtracted from the overhead shown to arrive at eligible overhead.

The burden of proof shall remain with the Consultant during all phases of Agreement negotiations and all reasonable requests for additional information as may be requested by the Department negotiator shall be provided by the Consultant in a timely manner.

The Audit Report plus such additional information furnished by the Consultant will be used in the preparation of the Pre-Award. Evaluation required in the negotiation of all Engineering Agreements and/or Supplements when the aggregate fee exceeds \$250,000.00. The Department will perform the Pre-Award Evaluations in conformance with the Federal Acquisition Regulations.

B. Pro-Forma Overhead Rate

If the Consultant is unable to generate a FAR Overhead Rate because the firm has not been in business for a complete fiscal year, the Consultant shall generate a Pro-Forma Overhead Rate based on the best available accounting information. This Pro-Forma Overhead rate will be used a provisional rate in the Consultant's price proposal.

3.9 Overpayment and Non-eligible Costs

In the event that an overpayment or noneligible charge is disclosed, as a result of a Departmental audit of the certified costs as herein provided, it is agreed by the Consultant that upon notice of such overpayment or noneligible charge the Consultant will refund the amount thereof to the Department in accordance with the terms of such notice. Upon failure of Consultant

to comply with said notice the Department is hereby authorized to deduct such overpayments from monies due the Consultant under the terms of the Agreement or any other agreement between the Department and the Consultant.

3.10 Work Provided Outside the Agreement

It is expressly understood and agreed that no claim for extra work, services, or materials, not specifically herein provided for, done or furnished by the consultant will be allowed by the Department, nor shall the Consultant do any work or furnish any materials not covered by the Specifications and the Agreement. In no event shall the Consultant incur any liability by reason of any verbal directions or instructions that may be given by the Department's Project Manager, of any other Department representatives, nor will the Department be liable for any materials furnished or used, or for any work or labor done. Directions or instructions for work, services, or materials not provided for in the Agreement issued by any Department official or employee will not be binding on nor will the Department be liable therefore to the Consultant. Any such work or materials which may be done or furnished by the Consultant shall be at said Consultant's risk, cost and expenses, and the Consultant hereby covenants and agrees that without such written order it shall make no claim for compensation for work or materials so done or furnished.

If any Department employee suggests, encourages, or directs the Consultant to perform work and services outside the scope of the Agreement, the Consultant shall immediately notify the Department's Deputy Secretary for Highway Administration so that appropriate disciplinary actions can be taken against the Department employee.

3.11 Overtime

The Consultant shall be reimbursed for such overtime paid to its employees for work and services performed hereunder, as is provided for or may be required under existing law or approved labor agreement, when such overtime has been provided for in the Agreement and

has been approved in writing by the Deputy Secretary for Highway Administration and approved where applicable by the FHWA. No employee shall receive for any overtime a sum exceeding the normal rate paid by the Consultant's overtime policy.

3.12 Publication 408 Specifications

If the engineering work to be performed by the Consultant under this Agreement is subject to Section 100 of the Department's Specifications, Publication 408 (current edition), its amendments and supplements (Publication 408), the Consultant shall comply with all applicable portions of Section 100, unless otherwise provided in this Agreement or its Special Requirements. In this connection, where the word "contractor" appears in any portion of Section 100 of Publication 408, it shall mean the Consultant; and where the word "engineer" appears, it shall mean the Deputy Secretary for Highway Administration of the Department of Transportation.

3.13 No Third-Party Rights Created

Nothing contained in the Agreement, or in these Specifications shall be deemed to create any contractual relationship with, or to create a cause of action of any kind, nature or type, whether grounded in contract, tort, equity or any other legal theory, in favor of any third party against either the Department or the Consultant, or any of their officers, agents, employees, consultants, or designees, or anyone acting on their behalf.

Nothing contained in the Agreement or in these Specifications is intended to benefit any third party. The Department and the Consultant do not intend that any other person or entity, including, but not limited to contractors, their subcontractors, their officers, agents, or employees, or anyone acting on their behalf, shall be third-party beneficiaries of the Agreement.

3.14 Facility Capital Cost of Money

The Department only accepts facility capital cost of money as a component of ownership cost when evaluating

cost of ownership in accordance with Chapter 31 of the Federal Acquisition Regulations for rent of office space between organizations under common control. The Department does not accept facility cost of money for calculating the cost of ownership on equipment, etc.

4 Invoices

4.1 Partial Payments

As the work progresses, the Consultant may, at intervals of time of one month or longer and when the value of the work and services provided exceeds one thousand (\$1,000.00) dollars, submit an invoice to the Department for reimbursement. The Consultant's invoice for progress payment will be reviewed and verified by the Department's Project Manager and when found acceptable, will be certified by the Department's Project Manager and presented to the Department's Comptroller for payment. These progress invoices are merely partial payments and are subject to correction and adjustment as provided under the Agreement at the interim or final audit of the Consultant's Agreement accounts and records. The current payments shall not bind the Department to the acceptance of any materials furnished or work done, and the Consultant shall not be entitled to demand or receive payment for any work as "additional work" or "extra work" which was not provided by the terms of the Agreement.

- A. Lump Sum Payment - As the work progresses, the Department, at its discretion, may require the Consultant, at intervals of time of one month or longer, to develop and submit an interim Progress Report as provided in these Specifications. When such interim Progress Report and the Monetary and Percentage tabulation show earnings exceeding one thousand (\$1,000.00) dollars, the Consultant may submit an invoice to the Department for payment. The Department's Project Manager will verify the Progress Report and upon acceptance will process the Consultant's invoice as provided above.
- B. Payment of Cost Per Unit of Work - The Consultant shall follow the same provisions as for the Lump Sum payment in (a) above for each Unit of Work to establish the interim progress percentage. The Consultant may, when the sum of the earnings of the interim progress percentages for any or all of the Unit of Work items on the Agreement, exceeds one thousand (\$1,000.00) dollars, submit

an invoice for partial payment. The maximum cost to the Department as set forth in the Special Requirements, shall not be exceeded without the prior approval of the Department and where applicable the FHAA, in the form of a Supplemental Agreement hereto.

- C. Consultant's Cost Plus a Fixed Fee - The Consultant may at intervals of not less than once a calendar month submit an invoice for its accrued direct and indirect costs for the invoice period, including certified invoices paid to subconsultants, subcontractors and suppliers, provided such total accrued costs are one thousand (\$1,000.00) dollars, or greater. The Lump Sum for Fixed Fee will be processed as same as that for Lump Sum Method, above, with the exception that any amount earned based on the interim Progress Report regardless of the amount will be invoiced as a part of a monthly invoice for direct and indirect costs as set forth above.

The computation of the Consultant's Monthly Partial Payment will be computed initially using the provisional Overhead Rate as provided in the Special Requirements attached to the Agreement. The Consultant shall have a FAR Audit performed by a Certified Public Accountant to determine the Consultant's actual Overhead for the Consultant's fiscal year and submit a certified copy of the Audit. The Department will review the audit of the Consultant's Overhead to determine if it is fair and reasonable. Upon notification by the Department of the acceptance of the Overhead Rate for the Consultant's Fiscal Year, the Consultant shall, by an appropriate adjustment therefore of the prior partial payment invoices, in which the provisional Overhead Rate was used, submit an invoice to the Department for the amount due the Consultant or make an appropriate refund to the Department for Overpayments. The accepted audited fiscal year Overhead shall be used as the provisional Overhead Rate for the ensuing fiscal year and at its end, the Consultant and the Department will establish the accepted audited Overhead Rate and the foregoing adjustments will again be made. The verification of the

Consultant's Overhead Rate together with the appropriate adjustment of the Consultant's billing will be accomplished for each of the Consultant's fiscal years for the term of the Agreement.

- D. Specific Rate of Compensation - The Consultant may at intervals of not less than one month and where the accumulated earnings for the period exceed one thousand (\$1,000.00) dollars, submit an invoice covering such earnings to the Department.

4.2 Final Invoice

After the work to be performed by the Consultant under the Agreement has been completed and deemed satisfactory in all respects by the Department's Project Manager and accepted by the Department and where applicable by the FHWA, the Department will notify the Consultant in writing of its acceptance of the work as fulfilling the Agreement, or part of the Agreement. The Department will pay to the Consultant upon its final invoice when accepted and approved by the Department Project Manger, all moneys due the Consultant under the terms of the Agreement. The payment of the final invoice to the Consultant for work and services under the terms of the Agreement does not waive the right of the Department to establish overpayments or adjustments disclosed by subsequent audits by the Department of the Consultant's project records and cost accounts. The Department will notify the Consultant of such amounts due the Department and request a refund for the amount of the overpayment as provided in these Specifications.

- A. Lump Sum Method of Payment - The Consultant shall be paid the Lump Sum amount as provided in the Agreement for the project as a whole or such parts thereof on which a Lump Sum is provided. The amount of the final invoice shall be the remaining amount due the Engineer after all prior partial and/or interim payments by the Department have been deducted from the Lump Sum amount as set forth in the Agreement.

- B. Cost Per Unit of Work Method - The Consultant will be paid a total fee in the amount of the number of the Department accepted Units of Work times the Unit Price or Prices set forth in the Agreement. The final invoice shall be the amount of total accepted fee less the aggregate amount of the prior partial payments made to the Consultant by the Department.

- C. Cost Plus a Fixed Fee Amount Method - The Consultant shall be paid the amount of the fee computed in accordance with the procedure set forth for partial payments in these Specifications above, subject to a final audit of the Agreement and the determination of the Consultant's total amount due. The final settlement will be the submission by the Consultant of a Final Invoice in the amount of the audited amount due less the aggregate sum of the prior partial payments by the Department to the Consultant where the total aggregate sum of the prior partial payments exceeds the amount of the final audited amount of fee, the Consultant shall refund the overpayment amount to the Department.

- D. Specific Rate of Compensation - The Consultant shall be paid the accumulated earnings of the Consultant's employee's authorized by the Department to perform work less the amount of the aggregate total of partial payments by the Department to the Consultant.

4.3 Maintaining Records and Documentation

The Consultant and its subconsultants/subcontractors shall maintain all books, documents, papers, records supporting cost proposals, accounting records, employees time cards, payroll records, and other evidence pertaining to costs incurred on the project and shall make such materials available at a site designated by the Department at all reasonable times during the Agreement period and for three (3) years from the date of final payment under the Agreement for inspection and/or audit by the Department, FHWA, or any other authorized representative of the state or

federal government, and copies thereof shall be furnished, if requested.

4.4 Invoice Template

The Consultant shall use the Invoice Template provided by the Department for the Agreement when requesting reimbursement from the Department.

4.5 MANAGEMENT DIRECTIVE 230.10

The Department shall not accept any charges for subsistence or travel with rates in excess of the maximum State rates set forth in appropriate directives promulgated by the Governor's Office, Commonwealth of Pennsylvania (Currently Management Directive 230.10).

5 Design Errors and Claims

5.1 Save Harmless Clause

The Consultant agrees to save harmless the Commonwealth or other agencies of the Commonwealth and Federal Government from all claims and liability due to the negligence of the Consultant, or its subconsultants/subcontractors, agents and/or employees.

5.2 Consultant Design Error Liability

The Department will attempt to recover all Department costs incurred above what the Department's cost would have been without design errors that are determined to be the responsibility of a consultant

5.3 Responsibility for Design Errors

The Consultant shall, notwithstanding the acceptance and approval by the Department of any work performed or completed under the terms of the Consultant Agreement, continue to be responsible and liable on the Agreement for any expense or damages incurred by the Department in remedying errors, omissions, faulty design and latent defects in any part of the work performed on the Agreement project due to the negligence of the Consultant. In this connection, it is understood and agreed that the Department shall promptly notify the Consultant of any error, omission, faulty design, and latent defect discovered by the Department in the Consultant's performance of the Agreement work and services so that the Consultant might have the opportunity to remedy or correct the same.

The Department will determine the actual additional cost to the Department as a result of any error, omission, faulty design, and latent defects and notify the Consultant of its liability for the additional cost.

5.4 Board of Claims

All questions or disputes, respecting any matter pertaining to the Agreement or any part thereof or any breach of said Agreement, shall be referred to the Board of Claims created by the Pennsylvania Act of December 3, 2002, P.L. 1147, codified in Sections 1721-1726 of the Commonwealth Procurement Code, 62 Pa. C.S. §§ 1721-1726, in the manner and under the terms and conditions as provided therein.

5.5 Notice of Intent to File a Claim and Determination of Claim

- (a) As a condition precedent to filing a claim for additional compensation, submit notice of intent to claim to the Chief of the Consultant Agreement Division, in writing, within ten (10) days' time of when the consultant knew of or should have known of the circumstances leading to the claim. This notice of intent will give the Department the opportunity to investigate the claim and to maintain and document information for future resolution or litigation of the claim.

File the claim in writing with the Chief of the Consultant Agreement Division within six (6) months of the date it accrues and not thereafter. If the Consultant fails to file the claim or does not file the claim within the specified time period, the Consultant will be deemed to have waived its right to assert the claim in any forum. Claims not filed within the specified time period will be disregarded by the Chief of the Consultant Agreement Division. The claim, when filed, must state all grounds upon which the claim is based and must include a copy of the previously submitted notice of intent to claim.

- (b) The Chief of the Consultant Review Section will attempt to settle and resolve the claim with the Consultant. The Chief of the Consultant Review Section, at his or her discretion, may conduct a claim review meeting to attempt to settle and resolve the claim with the Consultant. If a claim review meeting is held, it will be attended by representatives of the Consultant and such

Department representatives as the Chief of the Consultant Review Section considers appropriate.

If the claim is not resolved by agreement between the Chief of the Consultant Review Section and the Consultant, the Chief of the Consultant Review Section will issue a determination in writing regarding the claim and will mail it to the Consultant by first class mail. The determination will be mailed within one hundred twenty (120) days of the date on which the Chief of the Consultant Review Section received the claim, unless the one hundred twenty- (120-) day period is extended by consent of the Chief of the Consultant Review Section and the Consultant. If the Chief of the Consultant Review Section fails to issue a final determination within the one hundred twenty (120) days, unless extended by consent of the Chief of the Consultant Review Section and the Consultant, the claim will be deemed denied. The determination of the Chief of the Consultant Review Section will be the final order of the Department regarding the claim. The determination of the Chief of the Consultant Review Section will be conclusive and binding upon the Consultant unless the Consultant appeals the determination by filing a statement of claim with the Board of Claims within fifteen (15) days of the mailing date of the determination, or, if no extension is agreed to by the Chief of the Consultant Review Section and the Consultant, within one hundred thirty-five (135) days of the receipt by the Chief of the Consultant Review Section of the claim, whichever occurs first.

6 Consultant Restrictions

6.1 Disclosure of Confidential Information

The Consultant agrees to guard the confidentiality of any Commonwealth matter with the same diligence with which it guards its own proprietary information. In order for information to be deemed confidential, the Department will designate the information as "confidential" in such a manner as to give notice to the Consultant. If the Consultant needs to disclose all or part of project materials to third parties to perform the work or services covered under this Agreement, it may do so only if such third parties sign agreements containing substantially the same provisions as those set forth in this Paragraph. Upon termination of this Agreement, the Consultant shall return all copies of confidential information to the Department, except for one copy, which may be maintained for archival purposes only.

The Consultant agrees that it will not purchase, lease, take options upon, or in any manner financially benefit from any transaction involving real estate, affected by or located contiguous to future improvements planned by the Department of Transportation, in the planning for which the Consultant has gained knowledge through its contractual or other activity relationships with the Department.

All restrictions imposed upon the Consultant by the preceding paragraphs of this section shall be compulsory and applicable not only to the Consultant, but to its employees, agents, and members of its family. The Consultant agrees that it will advise all of its employees, agents, and members of its family of the requirements of this section, and that it will constantly supervise the activities of its employees, agents, and members of its family to guarantee that the requirements of this section are not violated.

6.2 Legal or Quasi-Legal Proceedings

The Consultant shall not testify in any legal or quasi- legal proceeding concerning any matter under

this Agreement or under a task force or committee without written consent of the Department.