DEVELOPMENT AGREEMENT

IH 35E MANAGED LANES PROJECT

Between

Texas Department of Transportation

and

[*Insert name of Developer*]

Dated as of: _____, 2012

DEVELOPMENT AGREEMENT

IH 35E Managed Lanes Project

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DEVELOPMENT AGREEMENT

IH 35E Managed Lanes Project

This Development Agreement ("Agreement") is entered into by and between the Texas Department of Transportation, a public agency of the State of Texas ("TxDOT"), and _____, a _____ ("Developer"), effective as of _____, 2012.

R E C I T A L S

A. The State of Texas desires to facilitate private sector investment and participation in the development of the State's transportation system via Development agreements, and the Texas Legislature has enacted Transportation Code, Chapter 223, Subchapter E (the "Code"), and TxDOT has adopted Sections 27.1-27.9 of Title 43, Texas Administrative Code (the "Rules"), to accomplish that purpose.

B. TxDOT wishes to enter into an agreement with a private sector developer to develop, design and construct tolled managed lanes, general purpose lanes and associated facilities along all or a portion of the 28-mile section of Interstate Highway 35E from IH 635 in Dallas County to US 380 in Denton County (the "Project"). In addition, TxDOT wishes to enter into an agreement with the private sector developer to, at TxDOT's sole option, maintain the Project for specified optional terms.

C. Pursuant to the Code and the Rules, TxDOT issued a Request for Qualifications (as amended, the "RFQ") on January 12, 2011.

D. TxDOT received five qualification statements on March 23, 2012 and subsequently shortlisted four proposers.

E. On July 13, 2012, TxDOT issued to the shortlisted proposers a Request for Proposals (as subsequently amended by addenda, the "RFP") to develop, design, construct and, at TxDOT's sole option, maintain the Project.

F. On _____, TxDOT received responses to the RFP, including the response of Developer (the "Proposal").

G. An RFP evaluation committee comprised of TxDOT personnel determined that Developer was the proposer which best met the selection criteria contained in the RFP and that the Proposal was the one which provided the best value to the State of Texas.

H. On _____, the Texas Transportation Commission accepted the recommendation of the Executive Director and the RFP evaluation committee and authorized TxDOT staff to negotiate this Agreement.

I Concurrently with the execution of this Agreement, TxDOT and Developer are entering into a CMA for Developer to provide, at TxDOT's sole option, capital maintenance for the Project.

J. This Agreement, the CMA and the other Contract Documents collectively constitute a comprehensive development agreement, as contemplated under the Code and the Rules, and are entered into in accordance with the provisions of the RFP.

K. The Executive Director of TxDOT has been authorized to enter into this Agreement pursuant to the Code, the Rules and the Texas Transportation Commission Minute Order _____.

L. The Parties intend for this Agreement to be a lump sum design-build agreement obligating Developer to perform all work necessary to obtain completion of the Project by the deadlines specified herein for the Price, subject only to certain specified limited exceptions. In order to allow TxDOT to budget for and finance the Project and to reduce the risk of cost overruns, this Agreement includes restrictions affecting Developer's ability to make claims for increases to the Price or extensions of the Completion Deadlines. Developer has agreed in this Agreement to assume such responsibilities and risks and has reflected the assumption of such responsibilities and risks in the Price.

M. If Developer fails to complete the Project in accordance with the Completion Deadlines set forth in the Contract Documents, then TxDOT and the members of the public represented by TxDOT will suffer substantial losses and damages. The Contract Documents provide that Developer shall pay TxDOT substantial Liquidated Damages if such completion is delayed.

N. The Reference Information Documents include a basic preliminary design for the Project (the "Draft Interim Schematic") and a proposed final design for FM 407 ("FM 407 Design").. The Developer may use the Draft Interim Schematic and FM 407 Design as the basis for the design to be furnished by Developer, subject to the terms, conditions and limitations of the Contract Documents. Developer will assume full responsibility and liability with respect to design of the Project.

NOW, THEREFORE, in consideration of the sums to be paid to Developer by TxDOT, the Work to be performed by Developer, the foregoing premises and the covenants and agreements set forth herein, the Parties hereby agree as follows:

SECTION 1. DEFINITIONS; CONTRACT DOCUMENTS; INTERPRETATION OF CONTRACT DOCUMENTS

1.1 Definitions

Exhibit 1 hereto contains the meaning of various terms used in the Contract Documents.

1.2 Contract Documents; Order of Precedence

The term "Contract Documents" shall mean the documents listed in this Section 1.2. Each of the Contract Documents is an essential part of the agreement between the Parties, and a requirement occurring in one is as binding as though occurring in all. The Contract Documents are intended to be complementary and to describe and provide for a complete agreement.

1.2.1 Subject to Sections 1.2.2 through 1.2.5, in the event of any conflict among the Contract Documents, the order of precedence shall be as set forth below:

1. Change Orders and Agreement amendments (excluding amendments to Book 2 which are separately addressed in subparagraphs 3 and 4, below), and all exhibits and attachments thereto;
2. Book 1 (this Agreement including all exhibits and the executed originals of exhibits that are contracts, except Exhibits 2 and 19);
3. Book 2 (Technical Provisions) amendments, and all exhibits and attachments to such amendments;
4. Book 2 (Technical Provisions), and all exhibits and attachments to the Technical Provisions;
5. Developer's Proposal Commitments and ATCs (as set forth in Exhibit 2); and
6. Final Design Documents to be developed in accordance with the Contract Documents, provided that: (a) specifications contained therein shall have precedence over plans; (b) no conflict shall be deemed to exist between the Final Design Documents and the other Contract Documents with respect to requirements of the Final Design Documents that TxDOT determines are more beneficial than the requirements of the other Contract Documents; and (c) any other Deviations contained in the Final Design Documents shall have priority over conflicting requirements of other Contract Documents only to the extent that the conflicts are specifically identified to TxDOT by Developer and such Deviations are approved by TxDOT in writing.

1.2.2 Notwithstanding the order of precedence among Contract Documents set forth in Section 1.2.1, in the event and to the extent that Exhibit 2 expressly specifies that it is intended to supersede specific provisions of the Contract Documents, Exhibit 2 shall control over the specified provisions. Moreover, if the Proposal includes statements, offers, terms, concepts and designs that can reasonably be interpreted as offers to provide higher quality items than otherwise required by the Contract Documents or to perform services or meet standards in addition to or better than those otherwise required, or otherwise contains statements, offers, terms, concepts or designs which TxDOT considers to be more advantageous than the requirements of the other Contract Documents, Developer's obligations hereunder shall include compliance with all such statements, offers, terms, concepts or designs which shall have the priority of Agreement amendments and Technical Provision amendments, as applicable.

1.2.3 Portions of the Reference Information Documents listed in Exhibit 19 are referenced in the Contract Documents for the purpose of defining requirements of the Contract Documents. The Reference Information Documents shall be deemed

incorporated in the Contract Documents to the extent that they are so referenced, with the same order of priority as the Contract Document in which the reference occurs.

1.2.4 Additional details contained in a lower priority Contract Document will control except to the extent they irreconcilably conflict with the requirements of the higher level Contract Document.

1.2.5 Notwithstanding the order of precedence among Contract Documents set forth in this Section 1.2, if a Contract Document contains differing provisions on the same subject matter than another Contract Document, the provisions that establish the higher quality, manner or method of performing the Work or use more stringent standards will prevail. Further, in the event of a conflict among any standards, criteria, requirements, conditions, procedures, specifications or other provisions applicable to the Project established by reference to a described manual or publication within a Contract Document or set of Contract Documents, the standard, criterion, requirement, condition, procedure, specification or other provision offering higher quality or better performance will apply, unless TxDOT in its sole discretion, approves otherwise in writing. If either Party becomes aware of any such conflict, it shall promptly notify the other party of the conflict. TxDOT shall issue a written determination respecting which of the conflicting items is to apply promptly after it becomes aware of any such conflict.

1.2.6 In the event of any conflict, ambiguity or inconsistency between the Project Management Plan and any of the Contract Documents, the latter shall take precedence and control.

1.3 Interpretation of Contract Documents

In the Contract Documents, where appropriate: the singular includes the plural and vice versa; references to statutes or regulations include all statutory or regulatory provisions consolidating, amending or replacing the statute or regulation referred to; the words "including," "includes" and "include" shall be deemed to be followed by the words "without limitation"; unless otherwise indicated references to sections, appendices or schedules are to this Agreement; words such as "herein," "hereof" and "hereunder" shall refer to the entire document in which they are contained and not to any particular provision or section; words not otherwise defined which have well-known technical or construction industry meanings, are used in accordance with such recognized meanings; references to Persons include their respective permitted successors and assigns and, in the case of Governmental Entities, Persons succeeding to their respective functions and capacities; and words of any gender used herein shall include each other gender where appropriate. Unless otherwise specified, lists contained in the Contract Documents defining the Project or the Work shall not be deemed all-inclusive.

Developer acknowledges and agrees that it had the opportunity and obligation, prior to the Effective Date, to review the terms and conditions of the Contract Documents (including those Reference Information Documents that are referenced in the Contract Documents, and pursuant to Section 1.2.3 above, are considered Contract Documents) and to bring to the attention of TxDOT any conflicts or ambiguities contained therein. Developer further acknowledges and agrees that it has independently reviewed the Contract Documents with legal counsel, and that it has the requisite experience and sophistication to understand, interpret and agree to the particular language of the provisions of the Contract Documents. Accordingly, in the event of an ambiguity in or dispute regarding the interpretation of the Contract Documents, they shall not be interpreted or construed against the Person which prepared them, and, instead, other rules of interpretation and construction shall be used. TxDOT's interim or final answers to the questions posed

during the Proposal process for this Agreement shall in no event be deemed part of the Contract Documents and shall not be relevant in interpreting the Contract Documents except to the extent they may clarify provisions otherwise considered ambiguous. On plans, working drawings, and standard plans, calculated dimensions shall take precedence over scaled dimensions.

1.4 Referenced Standards, Policies and Specifications

1.4.1 Except as otherwise specified in the Contract Documents or otherwise directed by TxDOT, material and workmanship specified by the number, symbol or title of any standard established by reference to a described publication affecting any portion of the Project shall comply with the latest edition or revision thereof and amendments and supplements thereto in effect on the Proposal Due Date.

1.4.2 In interpreting standards, policies and specifications referenced in the Technical Provisions, the following apply:

(a) References to the project owner shall mean TxDOT.

(b) References to the Engineer in the context of provider of compliance judgment may mean the Professional Services Quality Control Manager, the Construction Quality Acceptance Firm or it may mean a TxDOT representative, depending on the context, as determined by TxDOT in its sole discretion.

(c) References to "plan(s)" shall mean the Final Design Documents.

(d) Cross-references to measurement and payment provisions contained in the referenced standards, policies and specifications shall be deemed to refer to the measurement and payment provisions contained in the Contract Documents.

1.5 Explanations; Omissions and Misdescriptions

Developer shall not take advantage of or benefit from any apparent Error in the Contract Documents. Should it appear that the Work to be done or any matter relative thereto is not sufficiently detailed or explained in the Contract Documents, Developer shall request in writing such further written explanations from TxDOT as may be necessary and shall comply with the explanation provided. Developer shall promptly notify TxDOT in writing of all Errors which it may discover in the Contract Documents (including those Reference Information Documents that are referenced in the Contract Documents and, pursuant to Section 1.2.3 above, are considered Contract Documents), and shall obtain specific instructions in writing from TxDOT regarding any such Error before proceeding with the Work affected thereby. The fact that the Contract Documents omit or misdescribe any details of any Work which are necessary to carry out the intent of the Contract Documents, or which are customarily performed, shall not relieve Developer from performing such omitted Work (no matter how extensive) or misdescribed details of the Work, and they shall be performed as if fully and correctly set forth and described in the Contract Documents, without entitlement to a Change Order hereunder except as specifically allowed under Section 13.

1.6 Computation of Periods

If the date to perform any act or give any notice specified in the Contract Documents (including the last date for performance or provision of notice "within" a specified time period) falls on a non-Business Day, such act or notice may be timely performed on the next succeeding day which is a Business Day. Notwithstanding the foregoing, requirements contained in the Contract Documents relating to actions to be taken in the event of an emergency and other requirements for which it is clear that performance is intended to occur on a non-Business Day, shall be required to be performed as specified, even though the date in question may fall on a non-Business Day.

1.7 Reference Information Documents

1.7.1 TxDOT has provided and disclosed the Reference Information Documents to Developer. Except as provided in Section 1.2.3: (a) the Reference Information Documents are not mandatory or binding on Developer, and (b) Developer is not entitled to rely on the Reference Information Documents as presenting a design, engineering, operating or maintenance solutions or other direction, means or methods for complying with the requirements of the Contract Documents, Governmental Approvals or Law.

1.7.2 TxDOT shall not be responsible or liable in any respect for any causes of action, claims or Losses whatsoever suffered by any Developer-Related Entity by reason of any use of information contained in, or any action or forbearance in reliance on, the Reference Information Documents, except any schedule or monetary relief available hereunder as set forth in Section 13 of this Agreement.

1.7.3 Except as provided in Section 1.2.3, TxDOT does not represent or warrant that the information contained in the Reference Information Documents is complete or accurate or that such information is in conformity with the requirements of the Contract Documents, Governmental Approvals or Laws. Developer shall have no right to additional compensation or time extension based on any incompleteness or inaccuracy in the Reference Information Documents.

1.8 Professional Services Licensing Requirements

TxDOT does not intend to contract for, pay for, or receive any Professional Services which are in violation of any professional licensing or registration laws, and by execution of this Agreement, Developer acknowledges that TxDOT has no such intent. It is the intent of the Parties that Developer is fully responsible for furnishing the Professional Services of the Project through itself and/or subcontracts with licensed/registered Professional Service firm(s) as provided herein. Any references in the Contract Documents to Developer's responsibilities or obligations to "perform" the Professional Services portions of the Work shall be deemed to mean that Developer shall "furnish" the Professional Services for the Project. The terms and provisions of this Section 1.8 shall control and supersede every other provision of all Contract Documents.

1.9 Federal Requirements

Developer shall comply and require its Subcontractors to comply with all federal requirements applicable to transportation projects that receive federal-aid funding or other federal funds or credit, including those requirements set forth in Exhibit 3. In the event of any conflict between any applicable Federal Requirements and the other requirements of the Contract Documents, the Federal Requirements shall prevail, take precedence and be in force over and against any such conflicting provisions.

1.10 Incorporation of ATCs

1.10.1 If the Contract Documents incorporate any approved ATCs and either: (a) Developer does not comply with one or more TxDOT conditions of pre-approval for the ATC or (b) Developer does not obtain a third party approval required for the ATC, then Developer shall comply with the Contract Document requirements that would have been applicable but for the ATC, including acquiring Developer Designated ROW necessary to comply with the Contract Documents, without any increase in the Price, extension of the Completion Deadlines or any other Change Order.

1.10.2 ATCs contained in proposals submitted by unsuccessful proposers may, in TxDOT's sole discretion, be presented to the Developer as a Request for Change Proposal in accordance with Section 13.2.1 of this Agreement.

1.11 TxDOT Monetary Obligations

All TxDOT monetary obligations under the Contract Documents are subject to appropriation by the Texas Legislature. This Section 1.11 applies to all monetary obligations of TxDOT set forth in the Contract Documents, notwithstanding any contrary provisions of the Contract Documents. The Contract Documents do not create a debt under the Texas Constitution.

SECTION 2. OBLIGATIONS OF Developer; Representations and Warranties

2.1 Performance Requirements

2.1.1 Performance of Work; Project Management Plan

2.1.1.1 The Work shall include the design and construction of the Project, conforming to the Basic Configuration as set forth in the Draft Interim Schematic and otherwise complying with the requirements of the Contract Documents, except as otherwise approved in writing by TxDOT. All materials, services and efforts necessary to achieve Substantial Completion and Final Acceptance on or before the applicable Completion Deadline shall be Developer's sole responsibility, except as otherwise specifically provided in the Contract Documents. Developer shall plan, schedule, and execute all aspects of the Work and shall coordinate its activities with all Persons who are directly impacted by the Work. Subject to the terms of Section 13, the cost of all Work, including such materials, services and efforts as are necessary for the Work, are included in the Price.

2.1.1.2 Developer is responsible for all quality assurance and quality control activities necessary to manage the Work. Developer shall undertake all aspects of quality assurance and quality control for the Project and Work in accordance with the approved Project Management Plan and Good Industry Practice.

2.1.1.3 Developer shall develop the Project Management Plan and its component parts, plans and other documentation in accordance with the requirements set forth in Section 2 of the Technical Provisions and Good Industry Practice. The Project Management Plan shall include all the parts and other documentation identified in Attachment 2-1 to the Technical Provisions.

2.1.1.4 Developer shall submit to TxDOT for approval in TxDOT's good faith discretion in accordance with the procedures described in Section 3 of this Agreement and the time line set forth in Attachment 2-1 to the Technical Provisions each component part, plan and other documentation of the Project Management Plan and any proposed changes or additions to or revisions of any such component part, plan or other documentation. TxDOT may propose any change required to comply with Good Industry Practice or to reflect a change in working practice to be implemented by Developer.

2.1.1.5 Developer shall not commence or permit the commencement of any aspect of the Work before the relevant component parts, plans and other documentation of the Project Management Plan applicable to such Work have been submitted to and approved by TxDOT in accordance with the procedures described in Section 3.1 of this Agreement and the time line set forth in Attachment 2-1 to the Technical Provisions. The schedule for submission of each component part, plan and other documentation of the Project Management Plan or any proposed changes or additions thereto is included in Section 2 and Attachment 2-1 to the Technical Provisions.

2.1.1.6 If any part, plan or other documentation of the Project Management Plan refers to, relies on or incorporates any manual, plan, procedure or like document then all such referenced or incorporated materials shall be submitted to TxDOT for approval in TxDOT's good faith discretion at the time that the relevant part, plan or other documentation of the Project Management Plan or change, addition or revision to the Project Management Plan is submitted to TxDOT.

2.1.1.7 Developer shall ensure that the Project Management Plan meets all requirements set out in ISO standards relating to quality systems, plans and audits, including BS EN ISO 9001: 2000 and BS EN ISO 14001: 2004 as appropriate.

2.1.1.8 Developer shall carry out internal audits of the Project Management Plan at the times prescribed in the Project Management Plan.

2.1.1.9 Developer shall cause each of its Subcontractors at every level to comply with the applicable requirements of the approved Project Management Plan.

2.1.1.10 The PSQCM shall, irrespective of his or her other responsibilities, have defined authority for ensuring the establishment and maintenance of the design elements of the Project Management Plan and reporting to TxDOT on the performance of the Project Management Plan with respect to those elements; and the CQAF shall, irrespective of its other responsibilities, have defined authority for ensuring the establishment and maintenance of the construction elements of the Project Management Plan and reporting to TxDOT on the performance of the Project Management Plan with respect to those elements.

(a) Developer shall contract for all CQAF services through an independent firm(s).

(b) The CQAF shall not be owned at any time during the term of the Agreement by the Developer or any subsidiary or related company affiliated with Developer or the Design Firm(s) unless agreed to in writing by TxDOT at TxDOT's sole discretion.

(c) Developer shall not terminate its agreement with the CQAF, or permit or suffer any substitution or replacement of the CQAF, except with TxDOT's prior written approval.

2.1.2 Performance Standards; Deviations

2.1.2.1 Developer shall furnish all aspects of the Work and shall construct the Project and/or Utility Adjustments included in the Work as designed, free from defects (except to the extent that such defects are inherent in prescriptive specifications required under the Contract Documents) and in accordance with: (a) Good Industry Practice, (b) the requirements, terms and conditions set forth in the Contract Documents, (c) the Project Schedule, (d) all Laws, (e) the requirements, terms and conditions set forth in all Governmental Approvals, (f) the approved Project Management Plan and all component plans prepared or to be prepared thereunder, and (g) the Construction Documents, in each case taking into account the Project ROW limits and other constraints affecting the Project.

2.1.2.2 The Project design and construction shall be subject to certification pursuant to the procedure contained in the approved Quality Management Plan.

2.1.2.3 Developer acknowledges that prior to the Effective Date it had the opportunity to identify any provisions of the Technical Provisions that are erroneous or create a potentially unsafe condition, and the opportunity and duty to notify TxDOT in writing of such fact and of the changes to the provisions that Developer believed were the minimum necessary to render the provisions correct and safe. If it is reasonable or necessary to adopt changes to the Technical Provisions after the Effective Date to make the provisions correct and safe, such changes shall not be grounds for any adjustment to the Price, Completion Deadline or other Claim, unless: (a) Developer neither

knew nor had reason to know prior to the Effective Date that the provision was erroneous or created a potentially unsafe condition or (b) Developer knew of and reported to TxDOT the erroneous or potentially unsafe provision prior to the Effective Date and TxDOT did not adopt reasonable and necessary changes. If Developer commences or continues any Work affected by such a change after the need for the change was discovered or suspected, or should have been discovered or suspected through the exercise of reasonable care, Developer shall bear any additional costs associated with redoing the Work already performed. Inconsistent or conflicting provisions of the Contract Documents shall not be treated as erroneous provisions under this Section 2.1.2.3, but instead shall be governed by Section 1.2.

2.1.2.4 Developer may apply for TxDOT approval of Deviations from applicable Technical Provisions regarding the design or construction of the Project. All applications for Deviations shall be in writing. Where Developer applies for a Deviation as part of the submittal of a component plan of the Project Management Plan, Developer shall specifically identify and label the proposed Deviation. TxDOT shall consider, in its sole discretion, but have no obligation to approve, any such application. Developer shall bear the burden of persuading TxDOT that the Deviation sought constitutes sound and safe engineering consistent with Good Industry Practice and achieves TxDOT's applicable safety standards and criteria. No Deviation shall be deemed approved or be effective unless and until stated in writing signed by TxDOT's Authorized Representative. TxDOT's affirmative written approval of a component plan of the Project Management Plan shall constitute: (a) approval of the Deviations expressly identified and labeled as Deviations therein, unless TxDOT takes exception to any such Deviation, and (b) disapproval of any Deviations not expressly identified and labeled as Deviations therein. TxDOT's lack of issuance of a written approval for any Deviation within 14 days after Developer applies therefor in writing shall be deemed a disapproval of such application. TxDOT's denial or disapproval of a requested Deviation shall be final and not subject to the dispute resolution procedures of this Agreement.

2.1.2.5 References in the Technical Provisions to manuals or other publications governing the Work shall mean the most recent editions in effect as of the Proposal Due Date, unless expressly provided otherwise. Any changes to the Technical Provisions related to the Work shall be subject to the Change Order process for a TxDOT-Directed Change in accordance with Section 13.

2.1.2.6 New or revised statutes or regulations adopted after the Proposal Due Date that change, add to or replace applicable standards, criteria, requirements, conditions, procedures, specifications and other provisions, including Safety Standards, related to the Work, as well as revisions to the Technical Provisions to conform to such new or revised statues or regulations, shall be treated as Changes in Law rather than a TxDOT change to the Technical Provisions; however, the foregoing shall not apply to new or revised statutes or regulations that also cause or constitute changes in Adjustment Standards.

2.1.3 Changes in Basic Configuration

2.1.3.1 If a VE results in a material change in the Basic Configuration of the Project, any cost savings from such VE shall be shared in accordance with Section 22.

2.1.3.2 Developer shall not make any material change in the Basic Configuration of the Project, except as approved by TxDOT and authorized by a Change

Order in accordance with Section 13, and subject to the limitations contained in Section 6.10. A Change Order is required regardless of the reason underlying the change and regardless of whether the change increases, decreases or has no effect on Developer's costs.

2.1.3.3 Developer shall be responsible for any cost increases and/or delays which affect the duration of a Critical Path resulting from changes in requirements and obligations of Developer relating to the Project due to inaccuracies in the Draft Interim Schematic. Notwithstanding the foregoing, Developer shall be entitled to a Change Order to account for any additional costs incurred as a result of additional Utility Adjustment Work on Additional Properties required due to a Necessary Basic Configuration Change. Further, any right, title or interest in real property Developer must acquire as a result of such Necessary Basic Configuration Change shall be considered Additional Properties and TxDOT shall be responsible for the purchase price therefor. Any other changes in the Basic Configuration, including Basic Configuration changes due to an Error in the Draft Interim Schematic Design that do not require the acquisition of Additional Properties, shall be the responsibility of Developer with the exception of any TxDOT-Directed Change involving more than $10,000 in additional direct costs or involving a delay to a Critical Path.

2.1.3.4 No Change Order shall be required for any non-material changes in the Basic Configuration which have been approved by TxDOT in the design approval process, unless Developer claims that it is entitled to an increase in the Price or extension of any Completion Deadline(s) in connection with a proposed change in accordance with Section 13 or unless the proposed change constitutes a VE pursuant to Section 22. Developer acknowledges and agrees that constraints set forth in the TxDOT-Provided Approvals, TxDOT Standards and other Contract Documents, as well as site conditions and the Draft Interim Schematic, will impact Developer's ability to make non-material changes in the Basic Configuration.

2.2 General Obligations of Developer

Developer, in addition to performing all other requirements of the Contract Documents, shall:

2.2.1 Furnish all design and other services, provide all materials, equipment and labor and undertake all efforts necessary or appropriate (excluding only those materials, services and efforts which the Contract Documents expressly specify will be undertaken by TxDOT or other Persons) to design, construct the Project and maintain it during construction in accordance with the requirements of the Contract Documents so as to achieve Substantial Completion and Final Acceptance by the applicable Completion Deadlines.

2.2.2 At all times provide a Project Manager approved by TxDOT who: (a) will have full responsibility for the prosecution of the Work, (b) will act as agent and be a single point of contact in all matters on behalf of Developer, (c) will be present (or its approved designee will be present) at the Site at all times that Work is performed, and (d) will be available to respond to TxDOT or TxDOT's Authorized Representatives.

2.2.3 Comply with, and require that all Subcontractors comply with, all requirements of all applicable Laws, including Environmental Laws and the Americans with Disabilities Act of 1990 (42 U.S.C. § 12101 et seq.), as amended.

2.2.4 Cooperate with TxDOT, the Program Manager, and Governmental Entities with jurisdiction in all matters relating to the Work, including their review, inspection and

oversight of the design and construction of the Project and the design and construction of the Utility Adjustments.

2.2.5 Use commercially reasonable efforts to mitigate delay to design and construction of the Project and mitigate damages due to delay in all circumstances, to the extent possible, including by re-sequencing, reallocating, or redeploying Developer's and its Subcontractors' forces to other work, as appropriate.

2.2.6 Obtain and pay the cost of obtaining all Governmental Approvals required in connection with the Project (except to the extent TxDOT has expressly agreed to be responsible therefor under Section 6.10.1).

2.3 Representations and Warranties

Developer represents and warrants that:

2.3.1 During all periods necessary for the performance of the Work, Developer and its Subcontractors will maintain all required authority, license status, professional ability, skills and capacity to perform the Work in accordance with the requirements contained in the Contract Documents.

2.3.2 As of the Effective Date, Developer has evaluated the constraints affecting design and construction of the Project, including the Draft Interim Schematic ROW limits as well as the conditions of the TxDOT-Provided Approvals, and has reasonable grounds for believing and does believe that the Project can be designed and built within such constraints.

2.3.3 Developer has evaluated the feasibility of performing the Work within the Completion Deadlines and for the Price, accounting for constraints affecting the Project, and has reasonable grounds for believing and does believe that such performance (including achievement of Substantial Completion and Final Acceptance by the applicable Completion Deadlines for the Price) is feasible and practicable.

2.3.4 Except as to parcels that TxDOT lacked title or access to prior to the Proposal Due Date, prior to the Proposal Due Date Developer, in accordance with Good Industry Practice, examined or had the opportunity to examine the Site and surrounding locations, performed or had the opportunity to perform appropriate field studies and geotechnical investigations of the Site, investigated and reviewed available public and private records, and undertook other activities sufficient to familiarize itself with surface conditions and subsurface conditions, including the presence of Utilities, Hazardous Materials, contaminated groundwater, archeological, paleontological and cultural resources, and Threatened or Endangered Species, affecting the Site or surrounding locations; and as a result of such opportunity for review, inspection, examination and other activities Developer is familiar with and accepts the physical requirements of the Work, subject to Developer's rights to seek relief under Section 13.

2.3.5 Developer has familiarized itself with the requirements of any and all applicable Laws and the conditions of any required Governmental Approvals prior to entering into this Agreement. Except as specifically permitted under Section 13, Developer shall be responsible for complying with the foregoing at its sole cost and without any additional compensation or time extension on account of such compliance, regardless of whether such compliance would require additional time for performance or additional labor, equipment and/or materials not expressly provided for in the Contract Documents. As of the Effective Date, Developer has no reason to believe that any Governmental Approval required to be obtained by Developer will not be granted in due course and

thereafter remain in effect so as to enable the Work to proceed in accordance with the Contract Documents.

2.3.6 All Work furnished by Developer shall be performed by or under the supervision of Persons who hold all necessary and valid licenses to perform the Work in the State, by personnel who are careful, skilled, experienced and competent in their respective trades or professions, who are professionally qualified to perform the Work in accordance with the Contract Documents and who shall assume professional responsibility for the accuracy and completeness of the Design Documents, Construction Documents and other documents prepared or checked by them.

2.3.7 As of the Effective Date, Developer is a [*Insert Developer entity-type.*] duly organized and validly existing under the laws of the State of Texas with all requisite power and all required licenses to carry on its present and proposed obligations under the Contract Documents. Developer is composed of [*Insert Developer's member entities.*]. Each member of Developer is duly qualified to do business, and is in good standing, in the State as of the Effective Date, and will remain in good standing throughout the Term and for as long thereafter as any obligations remain outstanding under the Contract Documents.

2.3.8 The execution, delivery and performance of the Contract Documents to which Developer is (or will be) a party have been (or will be) duly authorized by all necessary corporate action of Developer; each person executing the Contract Documents on behalf of Developer has been (or at the time of execution will be) duly authorized to execute and deliver each such document on behalf of Developer; and the Contract Documents have been (or will be) duly executed and delivered by Developer.

2.3.9 Neither the execution and delivery by Developer of the Contract Documents to which Developer is (or will be) a party, nor the consummation of the transactions contemplated hereby or thereby, is (or at the time of execution will be) in conflict with or has resulted or will result in a default under or a violation of the governing instruments of Developer.

2.3.10 Each of the Contract Documents to which Developer is (or will be) a party constitutes (or at the time of execution and delivery will constitute) the legal, valid and binding obligation of Developer, enforceable against Developer and, if applicable, each member of Developer, in accordance with its terms, subject only to applicable bankruptcy, insolvency and similar laws affecting the enforceability of the rights of creditors generally and the general principles of equity.

2.3.11 As of the Effective Date, there is no action, suit, proceeding, investigation or litigation pending and served on Developer which challenges Developer's authority to execute, deliver or perform, or the validity or enforceability of, the Contract Documents to which Developer is a party, or which challenges the authority of the Developer's official executing the Contract Documents; and Developer has disclosed to TxDOT prior to the Effective Date any pending and un-served or threatened action, suit, proceeding, investigation or litigation with respect to such matters of which Developer is aware.

2.3.12 As of the Proposal Due Date, Developer disclosed to TxDOT in writing all organizational conflicts of interest of Developer and its Contractors of which Developer was actually aware; and between the Proposal Due Date and the Effective Date, Developer has not obtained knowledge of any additional organizational conflict of interest, and there have been no organizational changes to Developer or its Subcontractors identified in its Proposal which have not been approved in writing by TxDOT. For this

purpose, organizational conflict of interest has the meaning set forth in the instructions to proposers under which Developer submitted its Proposal.

2.4 Survival of Representations and Warranties

The representations and warranties of Developer contained herein shall survive expiration or earlier termination of this Agreement.

SECTION 3. submittals; DESIGN REQUIREMENTS and DISCLAIMER; ROLEs OF PROJECT MANAGEMENT CONSULTANT AND FHWA; Governmental approvals

3.1 Submittal, Review and Approval Terms and Procedures

3.1.1 General

3.1.1.1 This Section 3.1 sets forth uniform terms and procedures that shall govern all Submittals to TxDOT pursuant to the Contract Documents or Project Management Plan and component plans thereunder. In the event of any irreconcilable conflict between the provisions of this Section 3.1 and any other provisions of the Contract Documents or Project Management Plan and component plans thereunder concerning submission, review and approval procedures, this Section 3.1 shall exclusively govern and control, except to the extent that the conflicting provision expressly states that it supersedes this Section 3.1.

3.1.1.2 Wherever in the Contract Documents Developer is obligated to make a Submittal to TxDOT, Developer shall also concurrently submit a duplicate thereof to the organization appointed by TxDOT to act on its behalf.

3.1.2 Time Periods

3.1.2.1 Whenever TxDOT is entitled to review and comment on, or to affirmatively approve, a Submittal, TxDOT shall have a period of 14 days to act after the date it receives an accurate and complete Submittal and all necessary information and documentation concerning the subject matter, except as otherwise provided below.

3.1.2.2 If any provision of the Contract Documents expressly provides a longer or shorter period for TxDOT to act, such period shall control over the foregoing time period.

3.1.2.3 If at any given time TxDOT is in receipt of more than: (a) ten concurrent Submittals in the aggregate (or other number of aggregate concurrent Submittals mutually agreed to in writing by TxDOT and Developer) that are subject to TxDOT's review and comment or approval or (b) the maximum number of concurrent Submittals of any particular type set forth in any other provision of the Contract Documents, TxDOT may extend the applicable period for it to act to that period in which TxDOT can reasonably accommodate the Submittals under the circumstances, or such other period of extension set forth in any other provision of the Contract Documents, and no such extension shall entitle Developer to an adjustment to the Price or Completion Deadline(s) or form the basis of any other Claim. However, if at any time TxDOT is in receipt of some Submittals subject to clause (a) above and some Submittals subject to clause (b) above, then the higher number of Submittals shall be used to determine whether TxDOT may extend the applicable period. Submittals are deemed to be concurrent to the extent the review time periods available to TxDOT under this Section 3.1.2 regarding such Submittals overlap. Whenever TxDOT is in receipt of excess concurrent Submittals, Developer may establish by written notice to TxDOT an order of priority for processing such Submittals; and TxDOT shall comply with such order of priority. Refer to Sections 6.5.1, 7.2.4, and 7.3.1 of the Technical Provisions for maximum concurrent Utility Adjustment Submittals, Submittals of Acquisition Packages and Submittals of Project ROW maps, and extensions of time in the case of Utility Adjustment Submittals, Acquisition Packages and Project ROW maps in excess of the maximum.

3.1.2.4 All time periods for TxDOT to act shall be extended by the period of any delay caused, in whole or in part, by the acts, omissions, negligence,

intentional misconduct, or breach of applicable Law, contract or Governmental Approval by any Developer-Related Entity.

3.1.2.5 TxDOT shall endeavor to reasonably accommodate a written request from Developer for expedited action on a specific Submittal, within the practical limitations and based on availability of TxDOT personnel appropriate for acting on the type of Submittal in question; provided however that Developer sets forth in its request specific, abnormal circumstances demonstrating the need for expedited action by TxDOT. This provision shall not apply during any time described in Section 3.1.2.4.

3.1.3 TxDOT Discretionary Approvals

If the Submittal is one where the Contract Documents indicate approval or consent or acceptance is required from TxDOT in its sole discretion, absolute discretion, unfettered discretion or good faith discretion, then TxDOT's lack of approval, determination, decision or other action within the applicable time period under Section 3.1.2 shall be deemed a disapproval. If approval is subject to the sole, absolute or unfettered discretion of TxDOT, then its decision shall be final, binding and not subject to dispute resolution, and such decision shall not entitle Developer to an adjustment to the Price or Completion Deadline(s) or form the basis of any other Claim. If the approval is subject to the good faith discretion of TxDOT, then its decision shall be binding unless it is finally determined by clear and convincing evidence under the dispute resolution procedures of this Agreement that such decision was arbitrary or capricious. For avoidance of doubt, if the approval is subject to the good faith discretion of TxDOT and the decision is determined to be arbitrary and capricious and causes delay, this delay will constitute and be treated as a TxDOT-Caused Delay, and Developer shall be entitled to submit a Claim in accordance with Section 13.

3.1.4 Other TxDOT Approvals

3.1.4.1 Whenever the Contract Documents indicate that a Submittal or other matter is subject to TxDOT's approval or consent and no particular standard therefor is stated, then the standard shall be reasonableness.

3.1.4.2 If the reasonableness standard applies to TxDOT's right of approval of or consent to a Submittal, and TxDOT delivers no approval, consent, determination, decision or other action within the applicable time period under Section 3.1.2, then Developer may deliver to TxDOT a written notice stating the date by which TxDOT was to have decided or acted and that if TxDOT does not decide or act within five Business Days after receipt of the notice, delay thereafter may constitute a TxDOT-Caused Delay for which Developer may be entitled to submit a Claim in accordance with Section 13.3.1.

3.1.5 TxDOT Review and Comment

Whenever the Contract Documents indicate that a Submittal or other matter is subject to TxDOT's review, comment, review and comment, disapproval or similar action not requiring TxDOT's prior approval before Developer may act or proceed, and TxDOT delivers no comments, exceptions, objections, rejections or disapprovals within the applicable time period under Section 3.1.2, then Developer may proceed thereafter at its election and risk, without prejudice to TxDOT's rights to later object or disapprove in accordance with Section 3.1.7.1. No such failure or delay by TxDOT in delivering comments, exceptions, objections, rejections or disapprovals within the applicable time period under Section 3.1.2 shall constitute a TxDOT-Caused Delay, entitle Developer to an adjustment to the Price or Completion Deadline(s), or form the basis of any other

Claim. When used in the Contract Documents, the phrase "completion of the review and comment process" or similar terminology means either: (a) TxDOT has reviewed, provided comments, exceptions, objections, rejections or disapprovals, and all the same have been resolved, or (b) the applicable time period has passed without TxDOT providing any comments, exceptions, objections, rejections or disapprovals.

3.1.6 Submittals Not Subject to Prior Review, Comment or Approval

Whenever the Contract Documents indicate that Developer is to deliver a Submittal to TxDOT but express no requirement for TxDOT review, comment, disapproval, prior approval or other TxDOT action, then Developer is under no obligation to provide TxDOT any period of time to review the Submittal or obtain approval of it before proceeding with further Work, and TxDOT shall have the right, but is not obligated, to at any time review, comment on, take exception to, object to, reject or disapprove the Submittal in accordance with Section 3.1.7.1. No failure or delay by TxDOT in delivering comments, exceptions, objections, rejections or disapprovals with respect to the Submittal shall constitute a TxDOT-Caused Delay, entitle Developer to an adjustment to the Price or Completion Deadline(s), or form the basis of any other Claim.

3.1.7 Resolution of TxDOT Comments and Objections

3.1.7.1 If the Submittal is one not governed by Section 3.1.3, TxDOT's exception, objection, rejection or disapproval shall be deemed reasonable, valid and binding if and only if based on any of the following grounds:

(a) The Submittal or subject provision thereof fails to comply with any applicable covenant, condition, requirement, term or provision of the Contract Documents or Project Management Plan and component plans thereunder;

(b) The Submittal or subject provision thereof is not to a standard equal to or better than the requirements of Good Industry Practice;

(c) Developer has not provided all content or information required with respect to the Submittal or subject provisions thereof, provided that TxDOT assumes no duty, obligation or liability regarding completeness or correctness of any Submittal, including a Submittal that is to be delivered to another Governmental Entity as a proposed Governmental Approval, or in order to obtain, modify, amend, supplement, renew, extend, waive or carry out a Governmental Approval;

(d) Adoption of the Submittal or subject provision thereof, or of any proposed course of action thereunder, would result in a conflict with or violation of any Law or Governmental Approval; or

(e) In the case of a Submittal that is to be delivered to another Governmental Entity as a proposed Governmental Approval, or in order to obtain, modify, amend, supplement, renew, extend, waive or carry out a Governmental Approval, it proposes commitments, requirements, actions, terms or conditions that are not usual and customary arrangements that TxDOT offers or accepts for addressing similar circumstances affecting its own projects.

3.1.7.2 Developer shall respond to all of TxDOT's comments and objections to a Submittal and make modifications to the Submittal as necessary to fully reflect and resolve all such comments and objections, in accordance with the review processes set forth in this Section 3.1. Developer acknowledges that TxDOT may provide comments and objections which reflect concerns regarding interpretation or preferences of the commenter or which otherwise do not directly relate to grounds set forth in Section 3.1.7.1. Developer agrees to undertake reasonable efforts to accommodate or otherwise

resolve any such comments or objections through the review processes described in this Section 3.1. However, if the Submittal is not governed by Section 3.1.3, the foregoing shall in no way be deemed to obligate Developer to incorporate any comments or resolve objections that are not based on any of the grounds set forth in Section 3.1.7.1 and would result in a delay to a critical path on the Project Schedule or, in an increase in Developer's costs, except pursuant to a TxDOT-Directed Change. If, however, Developer does not accommodate or otherwise resolve any comment or objection, Developer shall deliver to TxDOT within a reasonable time period, not to exceed 30 days after receipt of TxDOT's comments or objections, a written explanation why modifications based on such comment or objection are not required. The explanation shall include the facts, analyses and reasons that support the conclusion.

3.1.7.3 The foregoing shall in no way be deemed to obligate Developer to incorporate any comments or resolve objections that Developer believes would render the Submittal erroneous, defective or less than Good Industry Practice, except pursuant to a TxDOT-Directed Change.

3.1.7.4 If Developer fails to notify TxDOT within such time period, TxDOT may deliver to the Developer a written notice stating the date by which the Developer was to have addressed TxDOT's comments and that if the Developer does not address those comments within five Business Days after receipt of this notice, then that failure shall constitute Developer's agreement to make all changes necessary to accommodate and resolve the comment or objection and full acceptance of all responsibility for such changes without right to an adjustment to the Price or Completion Deadline(s) or any other Claim, including any Claim that TxDOT assumes design or other liability.

3.1.7.5 After TxDOT receives Developer's explanation as to why the modifications are not required as provided in Sections 3.1.7.2, 3.1.7.3 and 3.1.7.4, the Parties shall attempt in good faith to resolve the dispute. If they are unable to resolve the dispute, it shall be resolved according to the dispute resolution procedures of this Agreement, except: (a) as provided otherwise in Section 3.1.7, and (b) if TxDOT elects to issue a Directive Letter pursuant to Section 13.1.1.2 with respect to the disputed matter, Developer shall proceed in accordance with TxDOT's directive while retaining any Claim as to the disputed amount.

3.1.8 Limitations on Developer's Right to Rely

3.1.8.1 No review, comment on, objection, rejection, approval, disapproval, acceptance, certification (including certificates of Substantial Completion and Final Acceptance), concurrence monitoring, testing, inspection, spot checking, auditing or other oversight by or on behalf of TxDOT, and no lack thereof by TxDOT, shall constitute acceptance of materials or Work that fails to comply with the Contract Documents or waiver of any legal or equitable right under the Contract Documents, at law, or in equity, except to the extent Nonconforming Work is expressly accepted by TxDOT in its sole discretion and in accordance with Section 5.6.2. TxDOT shall be entitled to remedies for unapproved Deviations and Nonconforming Work and to identify additional Work which must be done to bring the Work and Project into compliance with requirements of the Contract Documents, regardless of whether previous review, comment on, objection, rejection, approval, disapproval, acceptance, certification, concurrence, monitoring, testing, inspection, spot checking, auditing or other oversight were conducted or given by TxDOT. Regardless of any such activity or failure to conduct any such activity by TxDOT,

Developer at all times shall have an independent duty and obligation to fulfill the requirements of the Contract Documents. Developer agrees and acknowledges that any such activity or failure to conduct any such activity by TxDOT:

(a) Is solely for the benefit and protection of TxDOT;

(b) Does not relieve Developer of its responsibility for the selection and the competent performance of all Developer-Related Entities;

(c) Does not create or impose upon TxDOT any duty or obligation toward Developer to cause it to fulfill the requirements of the Contract Documents;

(d) Shall not be deemed or construed as any kind of warranty, express or implied, by TxDOT;

(e) May not be relied upon by Developer or used as evidence in determining whether Developer has fulfilled the requirements of the Contract Documents; and

(f) May not be asserted by Developer against TxDOT as a defense, legal or equitable, to, or as a waiver of or relief from, Developer's obligation to fulfill the requirements of the Contract Documents.

3.1.8.2 Unless expressly permitted under Section 5.6.2, Developer shall not be relieved or entitled to reduction of its obligations to perform the Work in accordance with the Contract Documents, or any of its other liabilities and obligations, including its indemnity obligations, as the result of any activity identified in Section 3.1.8.1 or failure to conduct any such activity by TxDOT. Such activity by TxDOT shall not relieve Developer from liability for, and responsibility to cure and correct, any unapproved Deviations, Nonconforming Work that is not expressly accepted in accordance with Section 5.6.2 or Developer defaults.

3.1.8.3 To the maximum extent permitted by law, Developer hereby releases and discharges TxDOT from any and all duty and obligation to cause Developer's Work or the Project to satisfy the standards and requirements of the Contract Documents.

3.1.8.4 Notwithstanding the provisions of Sections 3.1.8.1, 3.1.8.2 and 3.1.8.3:

(a) Developer shall be entitled to rely on written approvals and acceptances from TxDOT: (i) for the limited purpose of establishing that the approval or acceptance occurred or (ii) that are within TxDOT's sole, absolute or unfettered discretion, but only to the extent that Developer is prejudiced by a subsequent decision of TxDOT to rescind such approval or acceptance;

(b) Developer shall be entitled to rely on specific written Deviations TxDOT approves under Section 2.1.2.4;

(c) Developer shall be entitled to rely on the certificates of Substantial Completion and Final Acceptance from TxDOT for the limited purpose of establishing that Substantial Completion and Final Acceptance, as applicable, have occurred, and the respective dates thereof;

(d) TxDOT is not relieved from any liability arising out of a knowing and intentional material misrepresentation under any written statement TxDOT delivers to Developer; and

(e) TxDOT is not relieved from performance of its express responsibilities under the Contract Documents in accordance with all standards applicable thereto.

3.2 Design Requirements

3.2.1 Design Implementation and Submittals

3.2.1.1 Developer, through the appropriately qualified and licensed design professionals identified in Developer's Project Management Plan shall prepare designs, plans and specifications in accordance with the Contract Documents. Developer shall cause the engineer of record for the Project to sign and seal all Final Design Documents.

3.2.1.2 Developer shall deliver to TxDOT accurate and complete duplicates of all interim, revised and final Design Documents (including Final Design Documents), Plans and Construction Documents within seven days after Developer completes preparation thereof. Developer shall construct the Project in accordance with the Final Design Documents and the Construction Documents. The Final Design Documents may be changed only with prior written approval of TxDOT. Developer may modify the Construction Documents without prior written approval of TxDOT, but must deliver the modifications to TxDOT in advance of performance of the Work.

3.3 Responsibility for Design

3.3.1 Developer Responsibility

Developer agrees that it has full responsibility for the design of the Project and that Developer will furnish the design of the Project, excluding only the FM 407 Design if the Developer elects not to deviate from the FM 407 Design, regardless of the fact that aspects of the Draft Interim Schematic have been provided to Developer as a preliminary basis for Developer's design. Developer specifically acknowledges and agrees that:

(a) Developer is not entitled to rely on: (i) the Draft Interim Schematic except as specified in Section 3.3.2, (ii) the Reference Information Documents, or (iii) any other documents or information provided by TxDOT, except to the extent specifically permitted in the Contract Documents.

(b) Developer is responsible for correcting any Errors in the Draft Interim Schematic through the design and/or construction process without any increase in the Price or extension of a Completion Deadline, subject only to the right to a Change Order with respect to Necessary Basic Configuration Changes to the extent permitted by Section 13.8.6.

(c) Developer has diligently reviewed and verified the FM 407 Design for Errors which may affect design or constructability.

(d) TxDOT's liability for Errors in the Draft Interim Schematic is limited to its obligations relating to Necessary Basic Configuration Changes as set forth in Section 2.1.3.3 and provision of access to parcels within the Draft Interim Schematic ROW limits, and is subject to the requirements and limitations of Section 13. TxDOT's liability to Developer for Errors in the FM 407 Design is limited to the extent set forth in Section 3.3.3.

(e) Developer's warranties and indemnities hereunder cover Errors in the Project even though they may arise from or be related to Errors in the Draft Interim Schematic.

(f) Developer is responsible for verifying all calculations and quantity takeoffs contained in the RFP Documents or otherwise provided by TxDOT.

3.3.2 Draft Interim Schematic

3.3.2.1 Developer acknowledges and agrees that if Developer wishes to deviate from the Draft Interim Schematic ROW contained in the Draft Interim

Schematic, it must specifically identify such modifications in writing to TxDOT in accordance with Section 2.1.2.4, provide justification for the modification, and obtain specific written approval from TxDOT, in its sole discretion, prior to use of such modifications. Subject to Section 2.1.2.3, Developer must obtain TxDOT's prior written approval to deviate from the Draft Interim Schematic and FM 407 Design unless the proposed modification meets all of the following: (a) is within the Draft Interim Schematic ROW and requires no additional right of way; (b) meets the requirements of the Technical Provisions; (c) requires no New Environmental Approval; (d) does not constitute a Design Exception or Design Waiver; and (e) is consistent with the design concepts included in the Proposal. Developer acknowledges and agrees that the requirements and constraints set forth in the Contract Documents and in the Governmental Approvals, as well as Site conditions, will impact Developer's ability to revise the concepts contained in the Draft Interim Schematic, in addition to the requirement to obtain approval.

3.3.2.2 Developer may rely on the Draft Interim Schematic ROW limits as shown on the Draft Interim Schematic and that it is feasible to design and develop the Project within the Draft Interim Schematic ROW limits identified in the Draft Interim Schematic provided by TxDOT, and shall have the right to obtain a Change Order for certain increased costs incurred due to Necessary Basic Configuration Changes to the extent provided in Section 13.8.6; provided however that Developer acknowledges that "feasible to design and develop the Project" is not intended to mean or be limited to Developer's design approach set forth in its Proposal or Developer's preferred design approach.

3.3.2.3 Developer acknowledges that the Draft Interim Schematic is preliminary and subject to refinement through the Final Design process and that Developer is not entitled to any time extensions in connection with any changes in the Draft Interim Schematic, and Developer's entitlement to an increase in the Price in connection with any changes in the Draft Interim Schematic is limited to certain increased costs incurred as a result of Necessary Basic Configuration Changes to the extent allowed under Section 13.8.6.

3.3.3 FM 407 Design

3.3.3.1 If Developer elects to use the FM 407 Design, and does not deviate from the FM 407 Design, then promptly following NTP2 and in no event later than 30 days before the scheduled date for commencement of construction related to the FM 407 work, Developer shall review the FM 407 Design for design and constructability and shall notify TxDOT in writing of any Errors in the FM 407 Design affecting design or constructability. If, after the start of such construction Developer becomes aware of any such Error in the FM 407 Design affecting design or constructability, Developer shall immediately notify TxDOT of the same. If Developer identifies any Error affecting the design or constructability of the FM 407 work , such Error shall be subject to a Change Order ("FM 407 Design Change") unless the Error was known or should have been known by Developer prior to the Proposal Due Date, subject to the provisions of Section 13.8.7, and if Developer believes such a change has occurred it shall provide the appropriate notice in accordance with Section 13. The traffic control plan and quantities provided in the FM 407 Design are for Developer's information only; Developer may not rely on such traffic control plan or quantities and shall not be entitled to a Change Order in relation to Errors in the traffic control plan or inaccurate quantities.

3.3.3.2 If Developer identifies an Error in the FM 407 Design, TxDOT will be responsible for providing or commissioning appropriate revisions to the design to cure the Error. TxDOT will direct its designer to expedite such revisions so as to avoid undue delay to commencement of the construction.

3.3.3.3 Except with respect to an Error in the FM 407 Design that will be subject to a Change Order as described in Section 3.3.3.1, in no event shall any change in the FM 407 Design under this Section 3.3.3 result in an increase in the Price or extension of the Completion Deadlines, except to the extent that any necessary design changes are unreasonably delayed, in which event such unreasonable delay shall be considered a TxDOT-Caused Delay.

3.3.3.4 The foregoing shall not apply if the Developer elects to deviate from the FM 407 Design per Section 3.3.2.1. In such case, the FM 407 Design shall be considered part of the Interim Schematic Design for purposes of the Contract Documents.

3.4 Disclaimer

3.4.1 Developer understands and agrees that TxDOT shall not be responsible or liable in any respect for any Losses whatsoever suffered by any Developer-Related Entity by reason of any use of any information contained in the Draft Interim Schematic or Reference Information Documents, or any action or forbearance in reliance thereon, except to the extent that TxDOT has specifically agreed in Section 13 that Developer shall be entitled to an increase in the Price and/or extension of a Completion Deadline with respect to such matter. Developer further acknowledges and agrees that: (a) if and to the extent Developer or anyone on Developer's behalf uses any of said information in any way, such use is made on the basis that Developer, not TxDOT, is responsible for said information, and (b) Developer is capable of conducting and obligated hereunder to conduct any and all studies, analyses and investigations as it deems advisable to verify or supplement said information, and that any use of said information is entirely at Developer's own risk and at its own discretion.

3.4.2 TxDOT DOES NOT REPRESENT OR WARRANT THAT THE INFORMATION CONTAINED IN THE DRAFT INTERIM SCHEMATIC OR REFERENCE INFORMATION DOCUMENTS IS EITHER COMPLETE OR ACCURATE (INCLUDING WITH RESPECT TO: (i) THE EXISTENCE OR NEED FOR BRIDGES; (ii) BRIDGE LENGTHS, LOCATIONS, TYPES AND VERTICAL PROFILES DEPICTED IN THE DRAFT INTERIM SCHEMATIC, (iii) THE EXISTENCE, NEED FOR, OR LOCATIONS OF CULVERTS; (iv) THE EXISTENCE OR NEED FOR RETAINING WALLS, (v) RETAINING WALL HEIGHTS, LENGTHS OR SIZES DEPICTED IN THE DRAFT INTERIM SCHEMATIC OR (vi) ANY FAILURE OR OMISSION TO DEPICT ANY OF THE FOREGOING IN THE DRAFT INTERIM SCHEMATIC) OR THAT SUCH INFORMATION IS IN CONFORMITY WITH THE REQUIREMENTS OF TxDOT-PROVIDED APPROVALS, OTHER CONTRACT DOCUMENTS, GOVERNMENTAL APPROVALS OR LAW. TxDOT DOES NOT REPRESENT OR WARRANT THE ACCURACY OR COMPLETENESS OF ANY ITEMIZED LIST SET FORTH IN THE TECHNICAL PROVISIONS. THE FOREGOING SHALL IN NO WAY AFFECT TxDOT'S LIABILITY FOR NECESSARY BASIC CONFIGURATION CHANGES AS SPECIFIED HEREIN OR TO ISSUE CHANGE ORDERS IN ACCORDANCE WITH SECTION 13.

3.5 Role of Program Manager and TxDOT Consultants

[*Enter name of TxDOT Program Manager here*.] has been designated as TxDOT's Program Manager. The Program Manager will assist TxDOT in the management and oversight of the Project and the Contract Documents. Further, TxDOT may retain other consultants to provide services to TxDOT relating to the Project. Developer shall cooperate with the Program Manager and TxDOT's other consultants in the exercise of their respective duties and responsibilities in connection with the Project.

3.6 Role of and Cooperation with FHWA

Developer acknowledges and agrees that FHWA will have certain approval rights with respect to the Project (including rights to approve the Project design and certain Change Orders), as well as the right to provide certain oversight and technical services with respect to the Project. Developer shall cooperate with FHWA in the reasonable exercise of FHWA's duties and responsibilities in connection with the Project.

3.7 Governmental Approvals and Third Party Agreements

3.7.1 As of the Effective Date, TxDOT has obtained certain of the TxDOT-Provided Approvals based on the Draft Interim Schematic. TxDOT retains responsibility for processing all other TxDOT-Provided Approvals (based on the Draft Interim Schematic) that it has not already obtained as of the Effective Date. Developer shall obtain all other Governmental Approvals, including any modifications, renewals and extensions of the TxDOT-Provided Approvals, and, except to the extent the Contract Documents expressly provide TxDOT is responsible therefor, all third party approvals and agreements required in connection with the Project, the Project Right of Way or the Work. Prior to submitting to a Governmental Entity any application for a Governmental Approval (or any proposed modification, renewal, extension or waiver of a Governmental Approval or provision thereof), Developer shall submit the same, together with any supporting environmental studies and analyses, to TxDOT: (a) for approval or (b) for review and comment, as specified in the Technical Provisions.

3.7.2 If Developer pursues Additional Properties, or any other modification of or Deviation from any Governmental Approvals, including TxDOT-Provided Approvals, Developer shall first comply with, and obtain any consent or waiver required pursuant to, then-existing agreements between TxDOT and other Governmental Entities. These agreements include the following:

(a) **Memorandum of Understanding** between Office of the Governor, Economic Development and Tourism Division and Texas Department of Transportation, Texas Parks and Wildlife Department, Texas Commission on the Arts, and Texas Historical Commission (April 2004 – current, to promote tourism in Texas);

(b) **Memorandum of Agreement** between TxDOT and Texas Parks and Wildlife Department for Finalization of 1998 MOU, Concerning Habitat Descriptions and Mitigation (August 2, 2001);

(c) **Memorandum of Understanding** between the Texas Department of Transportation and the General Land Office (June 15, 2004);

(d) **Memorandum of Understanding** between the Texas Department of Transportation and the Texas Natural Resource Conservation Commission (applicable to its successor agency the Texas Commission on Environmental Quality) (May 2, 2002);

(e) **First Amended Programmatic Agreement** among the Federal Highway Administration, the Texas Department of Transportation, the Texas State Historic Preservation Officer, and the Advisory Council on Historic Preservation Regarding the

Implementation of Transportation Undertakings (December 28, 2005 and renewed in September, 2010);

(f) **Memorandum of Understanding** between the Texas Department of Transportation and the Texas Parks and Wildlife Department Regarding Mitigation Banking (December 7, 2005);

(g) **Program Level Agreement for Biological Evaluations (PAFBE)** for the Development of Further Endangered Species Act Programmatic Agreement among the Texas Department of Transportation, FHWA and U.S. Fish and Wildlife Service (August 26, 2005);

(h) **Memorandum of Agreement** between Texas Department of Transportation and Texas Parks and Wildlife Department for Sharing and maintaining Natural Diversity Database (NDD) Information (April 11, 2007); and

(i) **Programmatic Agreement** for the Review and Approval of NEPA Categorically Excluded Transportation Projects between the Federal Highway Administration and the Texas Department of Transportation, revised 09/30/2011.

Upon Developer's request, TxDOT will cooperate with Developer in updating the foregoing list and providing Developer with copies of the applicable agreements between TxDOT and other Governmental Entities. The Developer will periodically visit and monitor for updates to the above documents the following website: www.txdot.gov/txdot_library/consultants_contractors/publications/environmental_resources.htm .

3.7.3 At Developer's request, TxDOT shall reasonably assist and cooperate with Developer in obtaining from Governmental Entities the Governmental Approvals (including any modifications, renewals and extensions of existing Governmental Approvals from Governmental Entities) required to be obtained by Developer under the Contract Documents. TxDOT and Developer shall work jointly to establish a scope of work and budget for TxDOT's Recoverable Costs related to the assistance and cooperation TxDOT will provide. Subject to any agreed scope of work and budget and to any rights of Developer under Section 13, Developer shall fully reimburse TxDOT for all costs and expenses, including TxDOT's Recoverable Costs, TxDOT incurs in providing such cooperation and assistance, including those incurred to conduct further or supplemental environmental studies.

3.7.4 Developer shall comply with all conditions imposed by and undertake all actions required by and all actions necessary to maintain in full force and effect all Governmental Approvals, including performance of all environmental mitigation measures required by the Contract Documents or Governmental Approvals, except to the extent that responsibility for performance of such measures is expressly assigned to TxDOT in the Contract Documents.

3.7.5 In the event that any Governmental Approvals required to be obtained by Developer must formally be issued in TxDOT's name, Developer shall undertake necessary efforts to obtain such approvals subject to TxDOT's reasonable cooperation with Developer, at Developer's expense (except in connection with Governmental Approvals required due to a TxDOT-Directed Change), in accordance with Section 3.7.3, including execution and delivery of appropriate applications and other documentation in form approved by TxDOT.

3.7.6 In the event that TxDOT or FHWA must act as the lead agency and directly coordinate with a Governmental Entity in connection with obtaining Governmental Approvals which are the responsibility of Developer, Developer shall provide all necessary

support to facilitate the approval, mitigation or compliance process. Such support shall include conducting necessary field investigations, surveys, and preparation of any required reports, documents and applications.

3.7.7 Developer shall be responsible for compliance with all applicable Laws in relation to Project Specific Locations and for obtaining any Environmental Approval or other Governmental Approval required in connection with Project Specific Locations.

3.7.8 Developer shall not enter into any agreement with any Governmental Entity, Utility, railroad, property owner or other third party having regulatory jurisdiction over any aspect of the Project or Work or having any property interest affected by the Project or the Work that in any way purports to obligate TxDOT, or states or implies that TxDOT has an obligation, to the third party to carry out any installation, design, construction, maintenance, repair, operation, control, supervision, regulation or other activity after the expiration or termination of this Agreement, unless TxDOT otherwise approves in writing in its sole discretion. Developer has no power or authority to enter into any such agreement with a third party in the name or on behalf of TxDOT.

3.8 Software Compatibility

Unless otherwise specifically stated in the Contract Documents, Developer is responsible for assuring that all software it uses for any aspect of the Project is compatible with software used by TxDOT. Prior to using any software or version of software not then in use by TxDOT, Developer must obtain written approval from TxDOT. In addition, Developer shall provide to TxDOT staff, at Developer's cost, working electronic copies of the software, any necessary licenses for TxDOT's use of the software, and any training reasonably necessary to assure that TxDOT is able to implement compatible usage of all software utilized by Developer.

SECTION 4. TIME; Project SCHEDULE and progress

4.1 Time of Essence; Notices to Proceed

4.1.1 As a material consideration for entering into this Agreement, Developer hereby commits, and TxDOT is relying upon Developer's commitment, to develop the Project in accordance with the time periods set forth in this Agreement. Except where this Agreement expressly provides for an extension of time, the time limitations set forth in the Contract Documents for Developer's performance of its covenants, conditions and obligations are of the essence, and Developer waives any right at law or in equity to tender or complete performance beyond the applicable time period, or to require TxDOT to accept such performance.

4.1.2 Authorization allowing Developer to proceed with Work hereunder shall be provided through TxDOT's issuance of NTP1 and NTP2.

4.1.3 TxDOT anticipates issuing NTP1 concurrently with execution and delivery of this Agreement. Issuance of NTP1 authorizes Developer to perform (or, continue performance of) the portion of the Work necessary to obtain TxDOT's approval of the component parts, plans and documentation of the Project Management Plan that are labeled "A" in the column titled "Required By" in Attachment 2-1 to the Technical Provisions. It also authorizes Developer to enter the Project Right of Way TxDOT owns in order to conduct surveys and site investigations, including geotechnical, Hazardous Materials and Utilities investigations, and to commence negotiating Utility Agreements with Utility Owners. Developer, however, shall not execute any Project Utility Adjustment Agreement until NTP2. Refer to Sections 12.1.4 and 15.9 regarding a Price adjustment to be made in certain circumstances if the effective date of the NTP1 is later than 180 days after the Proposal Due Date, and regarding Developer's remedies for certain delays in issuance of NTP1 beyond 365 days after the Effective Date.

4.1.4 TxDOT anticipates issuing NTP2 concurrently with TxDOT's approval of all the foregoing component parts, plans and documentation of the Project Management Plan and the Project Schedule. Issuance of NTP2 authorizes Developer to perform all other Work and activities pertaining to the Project.

4.1.5 Notwithstanding Section 4.1.4, Developer may request that TxDOT issue NTP2 prior to approval of all the component parts, plans and documentation of the Project Management Plan and the Project Schedule. In such event, TxDOT may, in its sole discretion, elect to issue NTP2 prior to satisfaction by Developer of any particular condition(s) to NTP2. TxDOT may condition such early issuance of NTP2 upon payment by Developer to TxDOT the amount of $1,000 for each day that NTP2 is issued and any condition to NTP2 remains unsatisfied. Notwithstanding any early issuance of NTP2, Developer shall not be permitted to commence Construction Work on any portion of the Project until all the conditions to the commencement of Construction Work set forth in Section 4.4 have been satisfied.

4.1.6 TxDOT shall have the option, at its sole discretion, to direct Developer to proceed with any of the Option Work, as described in Section 1.2 of the Technical Provisions, by issuance of an Option Notice to Proceed for a given Option or Options. The deadline for issuance of such Option Notices to Proceed is the 180th day following the effective date of NTP1. If TxDOT issues an Option Notice to Proceed after the 90th day following the effective date of NTP1, the Option Price for the applicable Option will be subject to adjustment in accordance with Section 12.1.4.1, where for each Option exercised "Price" shall mean the Option Price of that Option and "N" shall mean the

number of days in the period starting 91 days after the effective date of NTP1 and ending on the date TxDOT provides written notice to Developer of its intent to exercise each such Option. The schedule for undertaking and completing any such Option shall be agreed upon by TxDOT and Developer and set forth in the applicable Option Notice to Proceed, provided however, that any extension of a Completion Deadline associated with Option Work shall be subject to the limitations on time extensions in Section 13.5.3, and provided further that the Developer shall not be entitled to any compensation for any delay or disruption costs arising out of an extension of time in connection with an Option Notice to Proceed.

4.2 Completion Deadlines

4.2.1 Substantial Completion Deadline

4.2.1.1 Developer shall achieve Substantial Completion of the Project within the time frame established in Exhibit 2. Said date for achieving Substantial Completion, as it may be extended hereunder, is referred to herein as the "Substantial Completion Deadline."

4.2.1.2 If the USACE Individual Permit is not obtained within 90 days after NTP1, the Substantial Completion Deadline shall be extended by the number of days between (i) the 90th day after issuance of NTP1 and (ii) the date on which TxDOT notifies Developer of the receipt of the USACE Individual Permit.

4.2.2 Final Acceptance Deadline

Developer shall achieve Final Acceptance on or before 120 days after Substantial Completion. Said deadline for achieving Final Acceptance, as it may be extended hereunder, is referred to herein as the "Final Acceptance Deadline."

4.2.3 No Time Extensions

Except as otherwise specifically provided in Section 13, TxDOT shall have no obligation to extend a Completion Deadline and Developer shall not be relieved of its obligation to comply with the Project Schedule and to achieve Substantial Completion and Final Acceptance of the Project by the applicable Completion Deadlines for any reason.

4.3 Scheduling of Design, Construction and Payment

4.3.1 Project Schedule

The Work shall be undertaken and completed in accordance with the Project Schedule prepared in conformance with Section 2.1.1 of the Technical Provisions. The Project Schedule shall be used by the Parties for planning and monitoring the progress of the Work and as the basis for determining the amount of monthly progress payments to be made to Developer.

4.3.2 Float

All Float contained in the Project Schedule, as shown in the initial Project Baseline Schedule or as generated thereafter, shall be considered a Project resource available to either Party or both Parties as needed to absorb delays caused by any event, achieve schedule milestones, interim completion dates and/or Completion Deadlines. All Float shall be shown as such in the Project Schedule on each affected schedule path. TxDOT shall have the right to examine the identification of (or failure to identify) Float on the schedule in determining whether to approve the Project Schedule. Once identified, Developer shall monitor, account for and maintain Float in accordance with critical path methodology.

4.3.3 Maximum Payment Schedule

The Project Schedule shall provide for payment to be made solely on the basis of progress by Developer, subject to a cap on payments shown on the Maximum Payment Schedule established for the Project. The Maximum Payment Schedule shall not limit payment for Change Order Work unless otherwise specified in the Change Order. In other words, at no time shall Developer's cumulative total progress payments (including mobilization payments but exclusive of payments for Change Order Work) exceed the cumulative total expenditure permitted by the Maximum Payment Schedule. The Maximum Payment Schedule shall be calculated based on the monthly expenditure rate set forth in Exhibit 5 for the Project. If Developer and TxDOT mutually agree in writing to a different expenditure rate at any time, then such revised rate shall thereafter be the Maximum Payment Schedule for the Project. The Maximum Payment Schedule shall be revised from time to time thereafter upon request by TxDOT or by Developer on its own initiative, as appropriate to account for any changes in the Price as evidenced by Change Orders and/or amendments. The aggregate amount of progress payments to Developer hereunder shall not exceed the amount allowed by the Maximum Payment Schedule at any time, exclusive of payments for Change Order Work, without the prior written approval of TxDOT and the Bond Trustee, which approval may be withheld in its sole discretion.

4.4 Conditions to Commencement of Construction

4.4.1 Construction Work Generally

Except to the extent expressly permitted in writing by TxDOT, in TxDOT's sole discretion, Developer shall not commence or permit or suffer commencement of construction of the Project or applicable portion thereof until TxDOT issues NTP2 and all of the following conditions have been satisfied:

(a) All Governmental Approvals necessary to begin Construction Work in the applicable portion of the Project have been obtained, and Developer has furnished to TxDOT fully executed copies of such Governmental Approvals.

(b) Fee simple title or other property rights acceptable to TxDOT in its sole discretion for the Project ROW necessary for commencement of construction of the applicable portion of the Project and Utility Adjustments included in the Construction Work have been identified, conveyed to and recorded in favor of TxDOT, TxDOT has obtained possession thereof through eminent domain, or all necessary parties have validly executed and delivered a possession and use agreement therefor on terms acceptable to TxDOT.

(c) Developer has satisfied for the applicable portion of the Project all applicable pre-construction requirements contained in the Environmental Approvals and other Governmental Approvals.

(d) Each Performance Bond, Payment Bond, and Retainage Bond, in form and from a surety approved by TxDOT, required under Section 8 has been obtained and is in full force and effect, and Developer has delivered to TxDOT certified and conformed copies of the originals of each such bond, with the original of each such bond delivered to Developer.

(e) The Guarantees, if any, required under Section 8.3 have been obtained and delivered to TxDOT.

(f) All insurance policies required under Section 9 have been obtained and are in full force and effect, and Developer has delivered to TxDOT written binding verifications of coverage from the relevant issuers of such insurance policies.

(g) Developer has caused to be developed and delivered to TxDOT and TxDOT has approved, in accordance with Section 2.1.1 of this Agreement and Section 2 of the Technical Provisions, the component parts, plans and documentation of the Project Management Plan that are labeled "A" and "B" in the column titled "Required By" in Attachment 2-1 to the Technical Provisions.

(h) Developer has delivered to TxDOT all Submittals relating to the Construction Work required by the Project Management Plan or Contract Documents, in the form and content required by the Project Management Plan or Contract Documents.

(i) All representations and warranties of Developer set forth in Section 2.3 shall be and remain true and correct in all material respects.

(j) Developer has adopted written policies establishing ethical standards of conduct for all Developer-Related Entities, including Developer's supervisory and management personnel in dealing with: (a) TxDOT and the Program Manager and (b) employment relations, in accordance with Section 7.8.

(k) There exists no uncured Developer Default for which Developer has received written notice from TxDOT.

(l) Developer has provided to TxDOT at least 10 days advance written notification of the date Developer determines that it will satisfy all of the conditions set forth in this Section 4.4.1.

4.4.2 Utility Adjustments

Developer shall not commence or permit or suffer commencement of construction of a Utility Adjustment included in the Construction Work until TxDOT issues NTP2, all of the conditions set forth in Section 4.4.1 that are applicable to the Utility Adjustment (reading such provisions as if they referred to the Utility Adjustment) have been satisfied, and the following additional requirements have been satisfied:

(a) If applicable, the Alternate Procedure List has been approved by FHWA, and either the affected Utility or the Utility Owner is on the approved Alternate Procedure List, as supplemented.

(b) The Utility Adjustment is covered by an executed Utility Agreement.

(c) The review and comment process has been completed and any required approvals have been obtained for the Utility Assembly covering the Utility Adjustment.

4.5 Recovery Schedule

4.5.1 If at any time, the Work on any Critical Path item is delayed for a period which exceeds the greater of either 30 days in the aggregate or that number of days in the aggregate equal to 5% of the days remaining until a Completion Deadline (including delays to which Developer may be entitled to a time extension under Section 13), then Developer, upon TxDOT's request, shall prepare and submit to TxDOT for review and approval with the next Project Status Schedule Update a Recovery Schedule demonstrating Developer's proposed plan to regain lost schedule progress and to achieve the contractual milestones as they may be extended in accordance with this Agreement, including Substantial Completion, Final Acceptance and completion of the Toll Zone Work by the applicable Completion Deadline.

4.5.2 TxDOT shall notify Developer within 14 days after receipt of each such Recovery Schedule whether the Recovery Schedule is deemed accepted or rejected. Within 7 days after any rejection by TxDOT of the Recovery Schedule, Developer will

resubmit a revised Recovery Schedule incorporating TxDOT's comments. When TxDOT accepts Developer's Recovery Schedule, Developer shall, within five days after TxDOT's acceptance, incorporate and fully include such schedule into the Project Schedule, deliver the same to TxDOT and proceed in accordance with the approved Recovery Schedule.

4.5.3 All costs incurred by Developer in preparing, implementing and achieving the Recovery Schedule shall be borne by Developer and shall not result in a change to the Price, except to the extent that the Recovery Schedule is in lieu of a time extension and a change in the Price is permitted for Acceleration Costs in accordance with Sections 13.2.1.3 or 13.3.2.5.

4.5.4 If Developer fails to provide an acceptable Recovery Schedule as required herein and in addition to any other rights and remedies in favor of TxDOT arising out of such failure, Developer shall have no right to receive progress payments until such time as Developer has prepared and TxDOT has approved such Recovery Schedule. Any failure or delay in the submittal or approval of a Recovery Schedule shall not result in any time extension under the Contract Documents.

SECTION 5. CONTROL OF WORK

5.1 Control and Coordination of Work

Developer shall be solely responsible for and have control over the construction means, methods, techniques, sequences, procedures and Site safety, and shall be solely responsible for coordinating all portions of the Work under the Contract Documents, subject, however, to all requirements contained in the Contract Documents.

5.2 Safety

Developer shall take all reasonable precautions and be solely responsible for the safety of, and shall provide protection to prevent damage, injury, or loss to, all persons on the Site or who would reasonably be expected to be affected by the Work, including individuals performing Work, employees of TxDOT and its consultants, visitors to the Site and members of the traveling public who may be affected by the Work. Developer shall at all times comply with all health and safety requirements contained in the Contract Documents and the Developer's Safety and Health Plan and all such requirements under applicable Law.

5.3 Obligations to Minimize Impacts

Developer shall ensure that all of its activities and the activities of Developer-Related Entities are undertaken in a manner that will minimize the effect on surrounding property and the traveling public to the maximum extent practicable.

5.4 Oversight, Inspection and Testing; Meetings

5.4.1 Developer Inspection and Testing

Developer shall perform the inspection, sampling, testing, quality control and quality assurance necessary for Developer to comply with its obligations under the Contract Documents. Without in any way diminishing its obligations under the Contract Documents, Developer may utilize information developed by TxDOT related to acceptance testing for offsite fabricated materials. In the event that Developer elects to utilize such information, TxDOT may recover as TxDOT Recoverable Costs its reasonable expenses related to the development of such information.

5.4.2 Oversight by TxDOT and Others

5.4.2.1 TxDOT and its Authorized Representative shall have the right at all times to monitor, inspect, sample, measure, attend, observe or conduct tests and investigations, and conduct any other oversight respecting any part or aspect of the Project or the Work, to the extent necessary or advisable to: (a) comply with FHWA, U.S. Army Corps of Engineers or other applicable federal agency requirements, and (b) verify Developer's compliance with the Contract Documents and Project Management Plan as provided in Section 21.4. TxDOT shall conduct such activity in accordance with Developer's safety procedures and manuals, and in a manner that does not unreasonably interfere with normal construction activity or normal operation and maintenance of the Project.

5.4.2.2 TxDOT shall have the right to attend and witness any tests and verifications to be conducted pursuant to the Technical Provisions and applicable Management Plans. Developer shall provide to TxDOT all test results and reports (which may be provided in electronic format in accordance with the Technical Provisions) within ten (10) days after Developer receives them.

5.4.2.3 At all points in performance of the Work at which specific inspections and/or approvals by TxDOT are required by the Contract Documents and/or the Project Management Plan, Developer shall not proceed beyond that point until TxDOT

has made such inspection or approval or waived its right in writing to inspect or approve. In addition, when any Utility Owner is to accept or pay for a portion of the cost of the Work, its respective representatives have the right to oversee, inspect and/or test the work. Such oversight, inspection and/or testing does not make such Person a party to this Agreement nor will it change the rights of the Parties. Developer hereby consents to such oversight, inspection and owner verification testing. Upon request from TxDOT, Developer shall furnish information to such Persons as are designated in such request and shall permit such Persons access to the Site and all parts of the Work.

5.4.2.4 Developer at all times shall coordinate and cooperate, and require its Subcontractors to coordinate and cooperate, with TxDOT and its Authorized Representative to facilitate TxDOT's oversight activities. Developer shall cause its representatives to be available at all reasonable times for consultation with TxDOT.

5.4.2.5 Without limiting the foregoing, Developer shall afford TxDOT and its Authorized Representative: (a) safe and unrestricted access to the Project at all times, (b) safe access during normal business hours to Developer's Project offices and operations buildings and (c) unrestricted access to data related to the Work, subject to Section 21.1. Without limiting the foregoing, Developer shall deliver to TxDOT upon request accurate and complete books, records, data and information regarding Work, the Project and the Utility Adjustment Work, in the format required by the Technical Provisions.

5.4.2.6 Nothing in the Contract Documents shall preclude, and Developer shall not interfere with, any review or oversight of Submittals or of Work that the FHWA may desire to conduct.

5.4.3 Obligation to Uncover Finished Work

Developer shall inform TxDOT in writing of any part of the Work which is about to be covered and offer a full and adequate opportunity to TxDOT to inspect and test such part of the Work before it is covered. At all times before Final Acceptance, Developer shall remove or uncover such portions of the finished Work as directed by TxDOT. After examination by TxDOT and any other Persons designated by TxDOT, Developer shall restore the Work to the standard required by the Contract Documents. If the Work exposed or examined is not in conformance with the requirements of the Contract Documents, then uncovering, removing and restoring the Work and recovery of any delay to any Critical Path occasioned thereby shall be at Developer's cost and Developer shall not be entitled to any adjustment to the Price or any Completion Deadline or any other relief. Furthermore, any Work done or materials used without adequate notice to and opportunity for prior inspection by TxDOT (if applicable) or without inspection in accordance with Contract Documents and/or Project Management Plan may be ordered uncovered, removed or restored at Developer's cost and without an adjustment to the Price or any Completion Deadline or any other relief, even if the Work proves acceptable and conforming after uncovering. Except with respect to Work done or materials used as described in the foregoing sentence, if Work exposed or examined under this Section 5.4.3 is in conformance with the requirements of the Contract Documents, then any delay in any Critical Path from uncovering, removing and restoring Work shall be considered a TxDOT-Caused Delay, and Developer shall be entitled to a Change Order for the cost of such efforts and recovery of any delay to any Critical Path occasioned thereby.

5.4.4 Meetings

Developer shall conduct regular progress meetings with TxDOT at least once a month during the course of the Work. In addition, TxDOT and Developer, through their respective Authorized Representatives, shall meet from time to time at the other Party's request to discuss and resolve matters relating to the Work or Project. Developer shall schedule all meetings with TxDOT at a date, time and place reasonably convenient to both Parties and, except in the case of urgency, shall provide TxDOT with written notice and a meeting agenda at least three Business Days in advance of each meeting.

5.5 Effect of Oversight, Spot Checks, Audits, Tests, Acceptances and Approvals

5.5.1 Oversight and Acceptance

The oversight, spot checks, inspections, verifications, audits, tests, reviews, acceptances and approvals conducted by TxDOT and other Persons do not constitute acceptance of Nonconforming Work (except in limited circumstances as expressly provided in Section 5.6.2) or waiver of any warranty or legal or equitable right with respect thereto. TxDOT may request remedies for Nonconforming Work and/or identify additional Work which must be done to bring the Work into compliance with the requirements of the Contract Documents at any time prior to Final Acceptance, whether or not previous oversight, spot checks, inspections, verifications, audits, tests, reviews, acceptances or approvals were conducted or waived by TxDOT or any such Persons.

5.5.2 No Estoppel

Developer shall not be relieved of obligations to perform the Work in accordance with the Contract Documents, or any of its Warranty or indemnity obligations, as the result of oversight, spot checks, audits, reviews, tests or inspections performed by any Persons, approvals or acceptances made by any Persons, or any failure of any Person to take such action. TxDOT shall not be precluded or estopped, by any measurement, estimate or certificate made either before or after Final Acceptance, or by making any payment, from showing that any such measurement, estimate or certificate is incorrectly made or untrue, or from showing the true amount and character of the Work performed and materials furnished by Developer, or from showing that the Work or materials do not conform in fact to the requirements of the Contract Documents. Notwithstanding any such measurement, estimate or certificate, or payment made in accordance therewith, TxDOT shall not be precluded or estopped from recovering from Developer and its Guarantor(s) or Surety(ies) such damages as TxDOT may sustain by reason of Developer's failure to comply or to have complied with the terms of the Contract Documents.

5.6 Nonconforming Work

5.6.1 Rejection, Removal and Replacement of Nonconforming Work

Nonconforming Work rejected by TxDOT shall be removed and replaced so as to conform to the requirements of the Contract Documents, at Developer's cost and without any adjustment to the Price or any Completion Deadline or any other relief; and Developer shall promptly take all action necessary to prevent similar Nonconforming Work from occurring in the future. The fact that TxDOT may not have discovered the Nonconforming Work shall not constitute an acceptance of such Nonconforming Work. If Developer fails to correct any Nonconforming Work within ten days of receipt of notice from TxDOT requesting correction, or if such Nonconforming Work cannot be corrected within ten days, and Developer fails to: (a) provide to TxDOT a schedule acceptable to TxDOT for correcting any such Nonconforming Work within such ten-day period, (b) commence such corrective Work within such ten-day period and (c) thereafter diligently prosecute such correction in accordance with such approved schedule to completion, then TxDOT may

cause the Nonconforming Work to be remedied or removed and replaced and may deduct the cost of doing so from any moneys due or to become due Developer and/or obtain reimbursement from Developer for such cost.

5.6.2 Agreement to Accept Nonconforming Work

If Developer elects not to fully correct any Nonconforming Work pursuant to Section 5.6.1 and TxDOT agrees to accept such Nonconforming Work without requiring it to be fully corrected, TxDOT shall be entitled to reimbursement of a portion of the Price in an amount equal to the greatest of: (a) the amount deemed appropriate by TxDOT to provide compensation for known impacts to all affected Persons (including TxDOT) such as future maintenance and/or other costs relating to the Nonconforming Work; (b) the amount of the Price allocated to such Work; or (c) 100% of Developer's cost savings associated with its failure to perform the Work in accordance with the requirements of the Contract Documents. Such reimbursement shall be payable to TxDOT within ten days after Developer's receipt of an invoice therefor. Alternatively, TxDOT may deduct the amount of such costs and expenses from any sums owed by TxDOT to Developer pursuant to this Agreement. Developer acknowledges and agrees that subject to Developer's right to correct Nonconforming Work in accordance with Section 5.6.1, including the timelines therein, TxDOT shall have sole discretion regarding acceptance or rejection of Nonconforming Work and shall have sole discretion with regard to the amount payable in connection therewith. Payment, reimbursement or deduction of the amounts owing to TxDOT under this Section 5.6.2 shall be a condition precedent to the acceptance of the applicable Nonconforming Work.

SECTION 6. ACCESS TO SITE; UTILITY ADJUSTMENTS; ENVIRONMENTAL COMPLIANCE

6.1 Acquisition of Project ROW

6.1.1 All Project ROW, including Additional Properties but excluding temporary interests in property for Project Specific Locations, shall be acquired in the name of the State. Developer shall undertake and complete the acquisition of all Project ROW, including Additional Properties, in accordance with Section 7 of the Technical Provisions, the approved Right of Way Acquisition Plan and all applicable Laws relating to such acquisition, including the Uniform Act.

6.1.2 TxDOT shall: (a) provide review and approval or disapproval of Acquisition Packages for Project ROW, and (b) except as provided below, undertake eminent domain proceedings, if necessary, for Project ROW in accordance with the procedures and time frames established in Section 7 of the Technical Provisions and the approved Right of Way Acquisition Plan.

6.1.3 Except as otherwise authorized by Law for temporary Project Specific Locations, (a) TxDOT shall not be obligated to exercise its power of eminent domain in connection with Developer's acquisition of any such temporary right or interest, (b) TxDOT shall have no obligations or responsibilities with respect to the acquisition, maintenance or disposition of such temporary rights or interests, and (c) Developer shall have no obligation to submit Acquisition Packages to TxDOT for, or obtain TxDOT's approval of Developer's acquisition of, any such temporary right or interest.

6.2 Costs of Acquisitions

6.2.1 TxDOT shall be responsible for the purchase price for all parcels within the Draft Interim Schematic ROW. Subject to Sections 6.2.7 Developer shall be responsible for performing and the costs (excluding the purchase price) of all right of way engineering, surveying, appraisals, administration, acquisition, environmental permitting (other than certain mitigation requirements expressly excluded under Section 6.10.1.2) and related services for all such parcels, including all costs and expenses of negotiation and, if necessary, support services for condemnation proceedings described in Section 7 of the Technical Provisions; provided however that Developer's responsibility for such support services shall terminate upon Final Acceptance of the Project. If TxDOT incurs any such costs and expenses on Developer's behalf, TxDOT may submit any invoices for such costs and expenses to Developer, in which case Developer shall pay the invoices prior to delinquency. If TxDOT pays any such costs and expenses on Developer's behalf, Developer shall reimburse TxDOT within ten days of TxDOT's submittal to Developer of an invoice for such TxDOT costs and expenses. Alternatively, TxDOT may deduct the amount of such costs and expenses from any sums owed by TxDOT to Developer pursuant to this Agreement. Notwithstanding the foregoing, TxDOT shall be responsible for the legal costs for the State Attorney General counsel or fees for private counsel retained as directed by the State Attorney General in connection with any condemnation actions, except for such legal fees and costs that arise out of the acts, omissions, negligence, intentional misconduct, or breach of applicable Law, contract or Governmental Approval of a Developer-Related Entity in the performance of its obligations under the Contract Documents.

6.2.2 TxDOT shall pay the purchase price of any real property outside the Draft Interim Schematic ROW that must be acquired due to a TxDOT-Directed Change, a Necessary Basic Configuration Change or a Force Majeure Event, subject to TxDOT's

reasonable determination that the property is necessary, as well as, for Additional Properties that must be acquired due to a TxDOT-Directed Change or Force Majeure Event, any other costs and expenses incurred by Developer to acquire such real property, subject to the limitations in Section 13. Developer shall perform all right of way engineering, surveying, appraisals, administration, acquisition, archeological surveys, environmental and other permitting and related services for such property, including any services related to re-evaluation or modification to any TxDOT-Provided Approval, if necessary. Property outside of the Draft Interim Schematic ROW that is acquired for drainage easements hereunder shall be treated as Developer-Designated ROW.

6.2.3 Developer shall be responsible for and shall pay directly all costs and expenses in connection with acquiring all Developer-Designated ROW, including: (a) the cost of acquisition services and document preparation; (b) the cost of condemnation proceedings required by the Office of the Attorney General, including private attorneys' fees and expert witness fees, and all fees and expenses for exhibits, transcripts, photos and other documents and materials production, other than the Attorney General's direct fees; (c) the purchase prices, court awards or judgments, and special commissioner's awards for all Developer-Designated ROW (to be paid by Developer at the time of closing or final special commissioner's award, as applicable); (d) the cost of permitting; (e) closing costs associated with parcel purchases, in accordance with the Uniform Act and TxDOT policies; (f) relocation assistance payments and costs, in accordance with the Uniform Act; and (g) the cost for separate property survey(s) in addition to the Draft Interim Schematic ROW survey(s) in accordance with Section 7.3.1 of the Technical Provisions. If TxDOT incurs any such costs and expenses on Developer's behalf, TxDOT may submit any invoices for such costs and expenses to Developer, in which case Developer shall pay the invoices prior to delinquency. If TxDOT pays any such costs and expenses on Developer's behalf, Developer shall reimburse TxDOT within ten days of TxDOT's submittal to Developer of an invoice for such TxDOT costs and expenses. Alternatively, TxDOT may deduct the amount of such costs and expenses from any sums owed by TxDOT to Developer pursuant to this Agreement.

6.2.4 All costs and expenses for the acquisition of any temporary right or interest in real property, including Project Specific Locations, that Developer determines necessary or desirable for its convenience in constructing the Project, such as for work space, contractor laydown areas, materials storage areas or temporary Utility Adjustment, or for any permanent interest in real property that Developer may wish to acquire for its convenience which will not be part of the Project ROW, shall be Developer's sole responsibility, to be undertaken at Developer's sole cost and expense. TxDOT shall have no obligations or responsibilities with respect to the acquisition, maintenance or disposition of such rights or interests or the condition of such rights or interests, and shall not be obligated to use its powers of eminent domain in connection therewith. Developer shall comply with all applicable Governmental Approvals and Laws in acquiring and maintaining or disposing of any such property rights or interests. Developer shall cause the documentation of any such property interest to contain the grantor's express acknowledgment that TxDOT shall have no liability with respect thereto.

6.2.5 Developer shall not be entitled to any increase in the Price or any time extension as a result of: (a) Site conditions associated with any Developer-Designated ROW (including those relating to Hazardous Materials, Differing Site Conditions or Utilities); and (b) any delay, inability or cost associated with the acquisition of any

Developer-Designated ROW, including Developer-Designated ROW required to implement any ATCs.

6.2.6 If any Developer-Related Entity holds a real property interest, including a fee, easement or option to purchase, in a parcel located in the Draft Interim Schematic ROW, a mitigation site or a parcel on which a drainage easement shall be located, TxDOT, in its sole discretion, may elect to perform some or all of the real property acquisition services required under the Contract Documents that are associated with such parcel. In such event, TxDOT shall be entitled to deduct its TxDOT's Recoverable Costs incurred in performing such services. Any risk of delay associated with the acquisition of the real property encumbered by the Developer-Related Entity's property interest, including delay caused by condemnation proceedings, shall be borne by Developer and shall not be eligible for time extension. The price paid by the Developer-Related Entity for the real property interest acquired in such parcel may, in TxDOT's discretion, be disregarded as a comparable price for purposes of appraisal and/or condemnation of such parcel.

6.2.7 If a parcel acquired by TxDOT includes: (a) property for which TxDOT is responsible for paying the price of acquisition (i.e. Draft Interim Schematic ROW) and (b) property for which Developer is responsible for paying the price of acquisition (i.e. Developer-Designated ROW), Developer shall reimburse TxDOT a pro rata share of the parcel's total purchase price and related fees and costs based on the physical area of the property referenced in clause (b) of this Section 6.2.7 as a proportion of the combined physical area of the properties referenced in clauses (a) and (b) of this Section 6.2.7 that is acquired by TxDOT.

6.3 Limiting Acquisition of Certain Additional Properties

Developer's recommendation regarding the acquisition of certain Additional Properties shall be subject to the following:

6.3.1 Developer shall use its best efforts to restrict and limit additional costs to the Project associated with acquisitions related to TxDOT-Directed Changes and Necessary Basic Configuration Changes. To the extent reasonably possible, consideration shall be given to using retaining walls or making other engineering adjustments as an alternative to such acquisition. If it would be possible to use a retaining wall or other engineering adjustment to accommodate a TxDOT-Directed Change as an alternative to such acquisition, Developer shall support its recommendation to acquire such Additional Properties in lieu of constructing a retaining wall or otherwise modifying the Draft Interim Schematic with an analysis demonstrating cost or time savings or other justification.

6.3.2 Developer shall support any requests for Change Orders for acquisitions related to Developer-Designated ROW with such information as may be reasonably required by TxDOT. Any cost savings resulting from such acquisition (including by avoiding use of retaining walls or other engineering modifications) shall be subject to the Value Engineering provisions set forth in Section 22.

6.3.3 In all cases, Developer shall exercise particular care to avoid acquisition of land owned by a public entity and used for a use inconsistent with highway use.

6.4 Representations by Developer

6.4.1 Developer's designated Right of Way Acquisition Manager ("ROW Acquisition Manager") shall be entitled to undertake the right of way acquisition services described in Section 7 of the Technical Provisions on behalf of TxDOT as its agent for

such limited purpose, subject to the conditions and limitations of Section 6.2.7 and this Section 6.4.

6.4.2 In performing such activities, ROW Acquisition Manager shall at all times follow the standard of care and conduct and be subject to all Laws applicable to a licensed real estate broker in the State, and shall at all times conform with applicable Law (including, to the extent applicable, the Uniform Act) in all communications and interactions with the owners or occupants of the Project ROW or any other real property in which Developer seeks to obtain any right or interest.

6.4.2.1 Except as provided in Section 6.4.2.2, any individual person or entity identified by Developer to represent the State of Texas ("State") and who is to contact owners of real property interests, to make offers to or negotiate the purchase of such real property interests, or otherwise to perform services as agent for the State of Texas in the acquisition of real property interests, shall be licensed as a real estate broker by the Texas Real Estate Commission ("TREC") prior to and during all times such individual person or entity represents the State of Texas. The individual person or entity so identified by Developer shall be the "Broker." Prior to any contact by the Broker with the owner of any real property interest, Developer shall submit to TxDOT a copy of the current, active license of each person or entity that will perform these tasks.

6.4.2.2 Other individual persons or entities may carry out the obligations of the Broker provided that such individual or entity meets one of the following requirements:

(a) If the individual person is licensed by TREC as a real estate broker, such person shall be either employed by the Broker, or have a written agreement with the Broker which agreement sets out the terms and obligations of such individual person to represent the State of Texas in the performance of services as agent. Prior to any contact with the owner of any real property interest, the Broker shall deliver to TxDOT a copy of the individual person's real estate broker's license and, in the event of an agreement, a copy of the agreement between the Broker and the individual person licensed as a real estate broker.

(b) If an entity is licensed by the TREC as a real estate broker, such entity shall have a written agreement with the Broker which sets out the terms and obligations of such entity to represent the State of Texas in the performance of services as agent. Prior to any contact with the owner of any real property interest, the Broker shall deliver to TxDOT a copy of the entity's real estate broker's license and a copy of the agreement between the Broker and the entity licensed as a real estate broker.

(c) If an individual person is licensed by TREC as a real estate salesman, such person shall be either sponsored and employed by the Broker, or be employed by and sponsored by a person or entity licensed as a broker by TREC, which broker has a written agreement with the Broker that sets out the terms and obligations of the broker to represent the State of Texas in the performance of services as an agent. Prior to any contact with the owner of any real property interest, the Broker shall deliver to TxDOT a copy of the individual person's real estate salesman's license.

6.4.3 Developer shall not be entitled to a Change Order or Claim as a result of the acts, omissions, negligence, intentional misconduct, or breach of applicable Law, contract or Governmental Approval by the ROW Acquisition Manager in connection with ROW Acquisition Manager's activities in carrying out the limited agency provided herein.

6.5 Negotiations and Condemnation Proceedings Relative to the Acquisition of Project ROW

6.5.1 Negotiations for any Project ROW shall be undertaken as set forth in the Contract Documents, including Section 7.4.1 of the Technical Provisions. Developer shall obtain TxDOT's written approval of any offer to be extended to an owner of any interest in Project ROW prior to making such offer, in accordance with Section 7.3.6 of the Technical Provisions. Developer shall notify TxDOT in writing, for its concurrence, of the failure of negotiations with respect to the acquisition of any parcel included in the Project ROW and shall submit to TxDOT for approval a condemnation package for the parcel as described in Section 7.4.4 of the Technical Provisions. TxDOT shall have 15 Business Days either to: (a) approve the condemnation package or (b) provide its comments and/or request for additional information to Developer if TxDOT determines that the condemnation package is incomplete or otherwise deficient. Developer shall incorporate any suggested changes and provide any additional information requested by TxDOT and shall resubmit the condemnation package to TxDOT for review and approval. TxDOT shall have 15 Business Days to approve or provide comments to Developer on any resubmittals.

6.5.2 Condemnation proceedings for any Project ROW will be brought by TxDOT within a reasonable time following approval by TxDOT of a complete condemnation package for the parcel as described in Section 7.4.4 of the Technical Provisions. TxDOT will deliver the petition for the parcel to Developer within 105 days from the date of approval of the condemnation package. TxDOT will provide the payment for the parcel within 45 days from the date the Special Commissioners' award is filed with the court. At no additional cost to TxDOT, Developer shall cooperate in all respects with TxDOT and shall cause all expert witnesses, appraisers, surveyors, land planners and other consultants utilized by Developer in connection with the acquisition of the Project ROW subject to condemnation to be available to and assist TxDOT in connection with the condemnation proceedings, including discovery, depositions, pre-hearing preparation and special commissioner's hearing. Counsel engaged for final settlement and/or condemnation proceedings shall be from the State Attorney General representing TxDOT.

6.5.3 Except as provided in Section 6.2.6, delays to the Critical Path due to failure of TxDOT to make available the portion of Draft Interim Schematic ROW, or any additional real property outside of the Draft Interim Schematic ROW that must be acquired due to a TxDOT-Directed Change, described in a condemnation packet within 345 days after approval of the condemnation package, excluding any delay caused in whole or in part by an act, omission, negligence, intentional misconduct, or breach of applicable Law, contract or Governmental Approval by any Developer-Related Entity in performing the services required under the Contract Documents, shall be considered a TxDOT-Caused Delay; provided however that the risk of delay following the expiration of such 345-day period, on an individual parcel basis, shall be borne equally by each Party for the first 100 days thereafter (i.e., for each parcel, Developer shall be entitled to one day of time extension for every two days of delay). Following the expiration of the first 100 days after the initial 345-day period, Developer shall be entitled to one day of time extension for each day of eligible delay. The term "make available", as used herein, shall mean to make available for: (a) relocation of occupants and personal property, for occupied parcels, (b) demolition, for unoccupied, improved parcels, or (c) construction, for unoccupied, unimproved parcels. The Developer through due diligence shall initiate, cooperate and be responsible for all costs and all efforts necessary for the processing of the administrative

portion of the condemnation action, up to and including the deposit of the award of Special Commissioners.

6.6 Physical Possession of Project ROW; Transfer of Title to Improvements

TxDOT shall notify Developer of the availability of Project ROW within ten Business Days after TxDOT has received access to such Project ROW. Developer shall be responsible for being informed of and complying with any access restrictions that may be set forth in any documents granting access to any Project ROW. Upon obtaining knowledge of any anticipated delay in the dates for acquisition of any Project ROW, the Party obtaining knowledge shall promptly notify the other party in writing. In such event, Developer shall immediately determine whether the delay impacts the Critical Path and, if so, to what extent it might be possible to avoid such delay through re-sequencing, reallocation or other alternative construction methods or otherwise. Developer shall promptly meet with TxDOT to determine the best course of action and prepare a written report setting forth its recommendations, which recommendations shall be subject to the written approval of TxDOT. TxDOT may, in its sole discretion, transfer, without representation or warranty, TxDOT's right, title and interest in and to any improvements within the acquired Project ROW to Developer for purposes of facilitating demolition of such improvements and construction of the Project as soon as feasible after title is acquired by TxDOT. Developer shall accept such transfer of title and shall assume all responsibility associated with such improvements upon transfer to Developer.

6.7 Access to Project ROW

To the extent that Developer has not been provided with access to portions of the Project ROW on or prior to the date set forth on the Project Schedule, Developer shall work around such Project ROW with the goals of minimizing delay to the completion of the Project. Except for delays caused by the type of event described in clause (b) of the definition of "TxDOT-Caused Delay" Developer shall not be entitled to any increase in the Price or time extension for delays caused by the failure or inability of TxDOT to provide Project ROW. Where Developer makes a written request for access or rights of entry for any Project ROW for which access has not yet been acquired, Developer may, with TxDOT's prior written consent, which may be withheld or withdrawn at any time, in TxDOT's sole discretion, and subject to the provisions of Section 6.6 above and Sections 7.4 and 7.5 of the Technical Provisions, negotiate with property owners or occupants for early access or temporary use of land, provided that any such negotiations shall comply in all respects with applicable Law, including the Uniform Act. Developer's negotiations with property owners or occupants for early rights-of-entry shall occur only under such terms and conditions as are stipulated by TxDOT, in its sole discretion. TxDOT shall not be bound by the terms and conditions agreed upon by Developer and any property owner or occupant until such time as TxDOT has expressly so indicated in writing (and, then, only to the extent expressly set forth therein).

6.8 Utility Adjustments

Developer is responsible for causing, in accordance with the Project Schedule, all Utility Adjustment Work necessary to accommodate the design and construction of the Project. All Utility Adjustment Work performed by Developer shall comply with the Contract Documents. Developer shall coordinate, monitor, and otherwise undertake the necessary efforts to cause Utility Owners performing Utility Adjustment Work to perform such work timely, in coordination with the Work, and in compliance with the standards of design and construction and other applicable requirements specified in the Contract Documents.

However, regardless of the arrangements made with the Utility Owners and except as otherwise provided in Section 13, Developer shall continue to be the responsible party to TxDOT for timely performance of all Utility Adjustment Work so that upon completion of the Work, all Utilities that might impact the Project or be impacted by it (whether located within or outside the Project ROW) are compatible with the Project. Developer agrees that: (a) the Price (as it may be modified hereunder) covers all of the Utility Adjustment Work to be furnished, performed or paid for by Developer, (b) it is feasible to obtain and/or perform all necessary Utility Adjustments within the time deadlines of the Contract Documents (as they may be modified pursuant to Section 13), and (c) the Price includes contingencies deemed adequate by Developer to account for the potential risks of additional costs and delays relating to Utility Adjustments, except to the extent that an adjustment to the Price is permitted under this Section 6.8 and in accordance with Section 13.

6.8.1 New Utilities and Unidentified Utilities

Developer's entitlement to Change Orders for additional compensation or extension of time on account of New Utilities, omissions or inaccuracies in the Utility Strip Map shall be limited as set forth in this Section 6.8.1. Developer shall use its best efforts to minimize costs for which Developer is entitled to compensation pursuant to this Section 6.8.1, and to minimize any delay for which Developer is entitled to an extension in the Completion Deadline pursuant to this Section 6.8.1, subject to Developer's obligation to comply with all applicable requirements of the Contract Documents, including the Utility Accommodation Rules (UAR) and the other requirements described in Section 6 of the Technical Provisions.

6.8.1.1 New Utilities. Developer shall be entitled to a Change Order: (a) increasing the Price to compensate Developer for any increase in Developer's costs incurred in performing the Utility Adjustment Work that is directly attributable to a New Utility (including reimbursements owed to Utility Owners but excluding delay and disruption damages), and (b) extending the applicable Completion Deadline as a result of any delay in the Critical Path directly attributable to performing the Utility Adjustment Work directly attributable to a New Utility. Subject to the foregoing, the amount of such Change Order shall be determined in accordance with Section 13.

6.8.1.2 Unidentified Utilities.

(a) Developer shall be entitled to an increase in the Price in connection with certain increases in the cost of the Work due to Unidentified Utilities within the Draft Interim Schematic ROW. Such increase shall be determined on a facility-by-facility basis, and shall apply for a particular Unidentified Utility facility only if the Basic Costs for the Utility Adjustment for that facility are greater than $50,000. The amount of the Price increase in any Change Order issued under this Section 6.8.1.2 for each such Unidentified Utility facility shall be equal to the Basic Costs for that facility, less $50,000 (which amount shall be the Developer's sole responsibility). Notwithstanding the foregoing, an aggregate cap of $1,000,000 shall apply to the total amount of such $50,000 "deductibles" that are Developer's responsibility. In determining whether the aggregate cap has been reached, Utility Adjustments of Unidentified Utilities with Basic Costs of less than $50,000 shall not be counted towards the aggregate $1,000,000 cap and such amounts shall be the Developer's sole responsibility. If the $1,000,000 aggregate cap is reached, the amount of the Price increase in any Change Order thereafter issued under this Section 6.8.1.2 for a Utility Adjustment of any Unidentified Utility for which the Basic

Costs are in excess of $50,000 shall be equal to the Basic Costs for that facility. In no event shall Developer be entitled to a Change Order for increased costs due to Utility Adjustments for Unidentified Utilities for which the Basic Costs are $50,000 or less, regardless of whether the aggregate cap is reached.

(b) All Basic Costs calculations submitted by Developer shall be supported by detailed cost proposals and supporting documentation (for all estimates used in such calculations) meeting the requirements of Section 13.6 of this Agreement. TxDOT shall have the right to require that any or all of the information submitted by Developer in the EPDs be used in evaluating the cost proposals.

6.8.1.3 No Time Extension. Except as otherwise provided in Section 6.8.1 with regard to New Utilities, no time extension will be allowed on account of: (a) any delays attributable to any inaccuracy(ies) in the Utility Strip Map; or (b) the performance of Utility Adjustments for Unidentified Utilities.

6.8.2 Utility Enhancements

Developer shall be responsible for addressing any requests by Utility Owners that Developer design and/or construct a Betterment or Utility Owner Project (collectively, "Utility Enhancements").

6.8.2.1 If a Utility Owner requests that Developer design and/or construct a Betterment, then subject to Section 6.8.3.4, Developer shall use its best efforts to negotiate in good faith an agreement with the Utility Owner providing for Developer to perform such work at the Utility Owner's expense, with payments to be made directly by the Utility Owner to Developer. Any such agreement shall be set forth in the applicable Utility Agreement. Any such Betterment shall be deemed added to the scope of the Work only upon execution by the Utility Owner and Developer and approval by TxDOT of a Utility Agreement identifying and providing for performance of such Betterment. Any change in the scope of the Work pursuant to this Section 6.8.2.1 shall not be treated as a TxDOT-Directed Change or extend the Completion Deadlines.

6.8.2.2 The Price shall not be increased on account of any Betterment added to the Work. Instead, Developer shall have the right to collect payment for such work directly from the Utility Owner, subject to the provisions of the applicable Utility Agreement. The amount of compensation payable by the Utility Owner to Developer for a Betterment shall be determined pursuant to the process set forth in the applicable Utility Agreement. Developer shall submit to TxDOT a copy of each invoice delivered to a Utility Owner pursuant to this Section 6.8.2.2, concurrently with its delivery to the Utility Owner.

6.8.2.3 If a Utility Owner requests that Developer design and/or construct a Utility Owner Project, then subject to Section 6.8.3.4, Developer shall use its best efforts to negotiate in good faith an agreement with the Utility Owner providing for Developer to perform such work at the Utility Owner's expense, with payments to be made directly by the Utility Owner to Developer. Any such agreement shall be a separate contract between Developer and the Utility Owner; and any such Utility Owner Project shall be performed outside of this Agreement and the Work, without any impact on the Price and the Completion Deadlines and shall be subject to Section 6.8.8. The compensation payable by the Utility Owner to Developer for a Utility Owner Project shall be determined in a manner acceptable to both Developer and the Utility Owner.

6.8.2.4 Developer is fully responsible for coordinating its efforts with Utility Owners and for addressing requests by Utility Owners that Developer design and/or

construct Utility Enhancements. Any Betterment performed as part of a Utility Adjustment, whether by Developer or by the Utility Owner, shall be subject to the same standards and requirements as if it were a necessary Utility Adjustment, and shall be addressed in the appropriate Utility Agreement. Under no circumstances shall Developer proceed with any Utility Enhancement which is incompatible with the Project or which cannot be performed within the other constraints of applicable Law, the Governmental Approvals and the Contract Documents, including the Completion Deadlines. Under no circumstances will Developer be entitled to any Price increase or time extension hereunder as the result of any Utility Enhancement, whether performed by Developer or by the Utility Owner. Developer may, but is not obligated to, design and construct Utility Enhancements. Developer shall promptly notify TxDOT of any requests by Utility Owners which Developer considers to be Betterments, and shall keep TxDOT informed as to the status of negotiations with Utility Owners concerning such requests. Developer shall provide TxDOT with such information, analyses, and certificates as may be requested by TxDOT in order to determine compliance with this Section 6.8.2.

6.8.3 Utility Agreements

6.8.3.1 As described in Section 6.1.3 of the Technical Provisions, Developer is responsible for preparing and entering into Utility Agreements with the Utility Owners, and TxDOT agrees to cooperate as reasonably requested by Developer in pursuing Utility Agreements, including attendance at negotiation sessions and review of Utility Agreements. TxDOT is not providing any assurances to Developer that the Utility Owners will accept, without modification, the standard Utility Agreement forms specified in Section 6.1.3 of the Technical Provisions; Developer is solely responsible for the terms and conditions of all PUAAs and UAAAs into which it enters (subject to the requirements of the Contract Documents, including Section 6.1.4 of the Technical Provisions). Utility Agreements entered into by Developer shall not be considered Contract Documents. Developer shall not be entitled to any increase in the Price or to any time extension on account of the terms of any Utility Agreement (including those related to any Betterment).

6.8.3.2 TxDOT will not be a party to the Utility Agreements; however, Developer shall cause the Utility Agreements to designate TxDOT as an intended third-party beneficiary thereof and to permit assignment of Developer's right, title and interest thereunder to TxDOT without necessity for Utility Owner consent. Developer shall not enter into any agreement with a Utility Owner that purports to bind TxDOT in any way, unless TxDOT has executed such agreement as a party thereto. However, TxDOT's signature indicating approval or review of an agreement between Developer and a Utility Owner, or its status as a third-party beneficiary, shall not bind TxDOT as a party to such agreement.

6.8.3.3 If a conflict occurs between the terms of a Utility Agreement and those of the Contract Documents, the terms that establish the higher quality, manner or method of performing Utility Adjustment Work, establish better Good Industry Practice, or use more stringent standards shall prevail between Developer and TxDOT.

6.8.3.4 Developer shall comply with and timely perform all obligations imposed on Developer by any Utility Agreement.

6.8.3.5 Each Utility Adjustment (whether performed by Developer or by the Utility Owner) shall comply with the Adjustment Standards in effect as of the Proposal Due Date, together with any subsequent amendments and additions to those standards that: (a) are necessary to conform to applicable Law, or (b) are adopted by the

Utility Owner and affect the Utility Adjustment pursuant to the applicable Utility Agreement(s). Developer is solely responsible for negotiating any terms and conditions of its Utility Agreements that might limit a Utility Owner's amendments and additions to its Adjustment Standards after the Proposal Due Date. In addition, all Utility Adjustment Work shall comply with all applicable Laws, the applicable Utility Agreement(s), and all other requirements specified in Section 6 of the Technical Provisions.

6.8.4 Failure of Utility Owners to Cooperate

6.8.4.1 Developer shall use best efforts to obtain the cooperation of each Utility Owner as necessary for the Utility Adjustment. Developer shall notify TxDOT immediately if: (a) Developer is unable (or anticipates that it will be unable), after diligent efforts, to reach agreement with a Utility Owner on a necessary Utility Agreement within a reasonable time, (b) Developer reasonably believes for any other reason that any Utility Owner would not undertake or permit a Utility Adjustment in a manner consistent with the timely completion of the Project, (c) Developer becomes aware that any Utility Owner is not cooperating in a timely manner to provide agreed-upon work or approvals, or (d) any other dispute arises between Developer and a Utility Owner with respect to the Project, despite Developer's diligent efforts to obtain such Utility Owner's cooperation or otherwise resolve such dispute. Such notice may include a request that TxDOT assist in resolving the dispute or in otherwise obtaining the Utility Owner's timely cooperation. Developer shall provide TxDOT with such information as TxDOT requests regarding the Utility Owner's failure to cooperate and the effect of any resulting delay on the Project Schedule. After delivering to TxDOT any notice or request for assistance, Developer shall continue to use diligent efforts to pursue the Utility Owner's cooperation.

6.8.4.2 If Developer requests TxDOT's assistance pursuant to Section 6.8.4.1, Developer shall provide evidence reasonably satisfactory to TxDOT that: (a) the Utility Adjustment is necessary, (b) the time for completion of the Utility Adjustment in the Project Schedule was, in its inception, a reasonable amount of time for completion of such work, (c) Developer has made diligent efforts to obtain the Utility Owner's cooperation, and (d) the Utility Owner is not cooperating (the foregoing items (a) through (d) are referred to herein as the "conditions to assistance"). Following TxDOT's receipt of satisfactory evidence, TxDOT shall take such reasonable steps as may be requested by Developer to obtain the cooperation of the Utility Owner or resolve the dispute; provided however, TxDOT shall have no obligation to prosecute eminent domain or other legal proceedings, or to exercise any other remedy available to it under applicable Law or existing contract, unless TxDOT elects to do so in its sole discretion. If TxDOT holds contractual rights that might be used to enforce the Utility Owner's obligation to cooperate and TxDOT elects in its sole discretion not to exercise those rights, then TxDOT shall assign those rights to Developer upon Developer's request; provided however, such assignment shall be without any representation or warranty as to either the assignability or the enforceability of such rights. Developer shall reimburse TxDOT for TxDOT's Recoverable Costs in connection with providing such assistance to Developer. Any assistance provided by TxDOT shall not relieve Developer of its sole and primary responsibility for the satisfactory compliance with its obligations and timely completion of all Utility Adjustment Work, except as otherwise expressly set forth in this Section 6.8.4.

6.8.4.3 If TxDOT objects in writing to a request for assistance pursuant to Section 6.8.4.1, based on Developer's failure to satisfy one or both of the conditions to assistance described in Sections 6.8.4.2(a) and (b), then Developer shall

take such action as is appropriate to satisfy the condition(s) and shall then have the right to submit another request for assistance on the same subject matter. If TxDOT objects in writing to a request for assistance pursuant to Section 6.8.4.1 based on Developer's failure to satisfy one or both of the conditions to assistance described in Sections 6.8.4.2(c) and (d), then Developer shall take such action as Developer deems advisable during the next 30 days to obtain the Utility Owner's cooperation and shall then have the right to submit another request for assistance on the same subject matter. Notwithstanding the foregoing, no resubmittal will be accepted unless all TxDOT objections have been addressed in accordance with the preceding two sentences. This process shall be followed until Developer succeeds in obtaining the Utility Owner's cooperation or in otherwise resolving the dispute or until TxDOT determines, based on evidence Developer presents, that the conditions to assistance have been satisfied. Developer shall have the right to submit the question of the reasonableness of TxDOT's determination through the dispute resolution process described in Section 19.

6.8.5 Delays by Utility Owners

6.8.5.1 Developer shall bear 100% of the risk of Critical Path delays caused by a Utility Owner's failure to timely comply with the requirements of a Utility Agreement which has been executed by Developer and such Utility Owner.

6.8.5.2 The term "Utility Owner Delay" shall mean a delay to a Critical Path that is directly attributable to a Utility Owner's failure to cooperate with Developer in performing Utility Adjustment Work within the time period reasonably scheduled by Developer for performance of such work, where Developer and Utility Owner have not yet executed a Utility Agreement addressing such Utility Adjustment Work. Developer shall bear 100% of the risk of each Utility Owner Delay prior to and during the 90-day period following TxDOT's receipt of evidence required by Section 6.8.4.2 that is reasonably satisfactory to TxDOT. The risk of any Utility Owner Delay after such 90-day period shall be borne equally by each Party (i.e. any affected Completion Deadline shall be extended by one day for every two full days of Utility Owner Delay occurring after expiration of the 90-day period). If a Utility Owner Delay is concurrent with another delay which is Developer's responsibility hereunder, Developer shall not be entitled to a time extension on account of such Utility Owner Delay. If a Utility Owner Delay is concurrent with another Utility Owner Delay by the same Utility Owner or by another Utility Owner, only one of the delays shall be counted. If a Utility Owner Delay is concurrent with any other delay for which Developer is entitled to a time extension under Section 13, the delay shall be deemed a Utility Owner Delay and the provisions of this Section 6.8.5 shall apply.

6.8.5.3 No Change Order for delay to a Critical Path shall be allowable pursuant to Section 6.8.5.2 unless all of the following criteria are met:

(a) the general requirements and conditions for Change Orders set forth in Section 13 have been met,

(b) Developer has provided evidence reasonably satisfactory to TxDOT that: (i) Developer took advantage of Float time available early in the Project Schedule for coordination activities with respect to the affected Utility, and (ii) Developer has made diligent efforts to obtain the Utility Owner's cooperation but has been unable to obtain such cooperation,

(c) if applicable, Developer has provided a reasonable Utility Adjustment plan to the Utility Owner,

(d) Developer or the Utility Owner has obtained, or is in a position to timely obtain, all applicable approvals, authorizations, certifications, consents, exemptions, filings, leases, licenses, permits, registrations, opinions and/or rulings required by or with any Person in order to design and construct such Utility Adjustment,

(e) there exists no other circumstance which would delay the affected Utility Adjustment even if the Utility Owner were cooperative, and

(f) the delay is allowable under Section 13.5.3.

6.8.5.4 Except as set forth in Section 6.8.5.2 with respect to certain Utility Owner Delays, Developer shall not be entitled to an extension of any Completion Deadline on account of any delays caused by a Utility Owner. Developer shall not be entitled to any increase of the Price or reimbursement of any additional costs which it may incur as a result of any delays caused by a Utility Owner, regardless of whether Developer is entitled to an extension of any Completion Deadlines on account of such delays pursuant to Section 6.8.5.2. Any action or inaction by TxDOT as described in Section 6.8.4.2 shall have no bearing on the restriction set forth in this Section 6.8.5.4.

6.8.6 Utility Adjustment Costs

6.8.6.1 Subject to Section 6.8.1, Developer is responsible for all costs of the Utility Adjustment Work, including costs of acquiring Replacement Utility Property Interests and costs with respect to relinquishment or acquisition of Existing Utility Property Interests, but excluding costs attributable to Betterment and any other costs for which the Utility Owner is responsible under applicable Law. Developer shall fulfill this responsibility either by performing the Utility Adjustment Work itself at its own cost (except that any assistance provided by any Developer-Related Entity to the Utility Owner in acquiring Replacement Utility Property Interests shall be provided outside of the Work, in compliance with Section 6.2.4 of the Technical Provisions), or by reimbursing the Utility Owner for its Utility Adjustment Work (however, Developer has no obligation to reimburse Utility Adjustment costs for any Service Line Utility Adjustment for which the affected property owner has been compensated pursuant to Section 6.2). Developer is solely responsible for collecting directly from the Utility Owner any reimbursement due to Developer for Betterment costs or other costs incurred by Developer for which the Utility Owner is responsible under applicable Law.

6.8.6.2 For each Utility Adjustment, the eligibility of Utility Owner costs (both indirect and direct) for reimbursement by Developer, as well as the determination of any Betterment or other costs due to Developer, shall be established in accordance with applicable Law and the applicable Utility Agreement(s), all of which shall incorporate by reference 23 CFR Part 645 Subpart A.

6.8.6.3 For each Utility Adjustment, Developer shall compensate the Utility Owner for the fair market value of each Existing Utility Property Interest relinquished pursuant to Section 6.2.4 of the Technical Provisions, to the extent TxDOT would be required to do so by applicable Law and provided that TxDOT has approved the Utility Owner's claim. Developer is advised that in some cases reimbursement of the Utility Owner's acquisition costs for a Replacement Utility Property Interest will satisfy this requirement. Developer shall pay any compensation due to the Utility Owner and all costs and expenses associated therewith (including any incurred by TxDOT on Developer's behalf for eminent domain proceedings or otherwise) in accordance with Section 6.2. Developer shall carry out the same duties for acquisition of an Existing Utility Property Interest, as are assigned to Developer in Section 6.2 of the Agreement and Section 6.2.4

of the Technical Provisions for the acquisition of any other necessary real property interests.

6.8.6.4 If for any reason Developer is unable to collect any amounts owed to Developer by any Utility Owner, then: (a) TxDOT shall have no liability for such amounts; (b) Developer shall have no right to collect such amounts from TxDOT or to offset such amounts against amounts otherwise owing to Developer from TxDOT; and (c) Developer shall have no right to stop work or to exercise any other remedies against TxDOT on account of such Utility Owner's failure to pay Developer.

6.8.6.5 If any local Governmental Entity is participating in any portion of Utility Adjustment costs, Developer shall coordinate with TxDOT and such local Governmental Entity regarding accounting for and approval of those costs.

6.8.6.6 Developer shall maintain a complete set of records for the costs of each Utility Adjustment (whether incurred by Developer or by the Utility Owner), in a format compatible with the estimate attached to the applicable Utility Agreement and in sufficient detail for analysis. For both Utility Owner costs and Developer costs, the totals for each cost category shall be shown in such manner as to permit comparison with the categories stated on the estimate. Developer also shall indicate in these records the source of funds used for each Utility Adjustment. All records with respect to Utility Adjustment Work shall comply with the record keeping and audit requirements of the Contract Documents.

6.8.7 FHWA Utility Requirements

Unless TxDOT advises Developer otherwise, the following provisions apply to Utility Adjustments.

6.8.7.1 The Project will be subject to 23 CFR Part 645 Subpart A (including its requirements as to plans, specifications, estimates, charges, tracking of costs, credits, billings, records retention, and audit) and FHWA's associated policies. Developer shall comply (and shall require the Utility Owners to comply) with 23 CFR Part 645 Subpart A as necessary for any Utility Adjustment costs to be eligible for FHWA reimbursement (or for any other federal financing or funding). Developer acknowledges, however, that without regard to whether such compliance is required, (a) it is not anticipated that Developer will be eligible for FHWA reimbursement of any Utility Adjustment outlays, and (b) Developer will not have any share in any reimbursement from FHWA or other federal financing or funding that TxDOT may receive on account of Utility Adjustments.

6.8.7.2 Developer shall prepare and deliver to TxDOT the Alternate Procedure List in appropriate format for submittal to FHWA, together with all other documentation required by FHWA for compliance with the FHWA Alternate Procedure. If applicable, TxDOT will submit the Alternate Procedure List and other documentation to FHWA.

6.8.7.3 Promptly upon determining that any Utility Owner not referenced on the Alternate Procedure List is impacted by the Project, Developer shall submit to TxDOT all documentation required by FHWA to add these Utilities to the Alternate Procedure List. If applicable, TxDOT will transmit the additional documentation to FHWA for approval.

6.8.7.4 Promptly upon receiving FHWA's approval of the initial or any amended Alternate Procedure List, TxDOT will forward the approved list to Developer.

6.8.8 Applications for Utility Permits

6.8.8.1 It is anticipated that during the Work, from time to time Utility Owners will apply for utility permits to install new Utilities that would cross or longitudinally occupy the Project ROW, or to modify, upgrade, relocate or expand existing Utilities within the Project ROW for reasons other than accommodation of the Project. The provisions of this Sections 6.8.8 shall apply to all such permit applications. TxDOT shall provide Developer with a copy of each such permit application received after the Effective Date, within 30 days after TxDOT's receipt of such application. Except as otherwise provided in Section 6.8.1, no accommodation of New Utilities or of modifications, upgrades, relocations or expansions of existing Utilities pursuant hereto shall entitle Developer to additional compensation or time extension hereunder.

6.8.8.2 For all such utility permit applications pending as of or submitted after the Effective Date, Developer shall furnish the most recent Project design information and/or as-built plans, as applicable, to the applicants, and shall assist each applicant with information regarding the location of other proposed and existing Utilities. Developer shall keep records of its costs related to New Utilities separate from other costs.

6.8.8.3 Developer shall assist TxDOT in deciding whether to approve a permit described in Section 6.8.8.1. Within a time period that will enable TxDOT to timely respond to the application, Developer shall analyze each application and provide to TxDOT a recommendation (together with supporting analysis) as to whether the permit should be approved, denied, or approved subject to conditions. As part of the recommendation process, Developer shall furnish to TxDOT Utility No-Conflict Sign-Off Forms, signed by both Developer's Utility Design Coordinator (UDC) and Developer's Utility Manager, using the standard forms included in the Technical Provisions. Developer shall limit the grounds for its recommendation to the grounds (as TxDOT communicates to Developer from time to time) on which TxDOT is legally entitled to approve or deny the application or to impose conditions on its approval. However, TxDOT shall have the right to issue utility permits in its sole discretion.

6.8.9 Security for Utility Adjustment Costs; Insurance

6.8.9.1 Upon request from a Utility Owner entitled to reimbursement of Utility Adjustment costs, Developer shall, at its sole cost, provide security for such reimbursement by way of a payment bond, letter of credit or retention account, in such amount and on such terms as are negotiated in good faith between Developer and the Utility Owner.

6.8.9.2 Developer may satisfy a Utility Owner's requirement that Developer provide liability insurance by naming such Utility Owner as an additional insured on the insurance provided by Developer or any Subcontractor pursuant to Section 9.

6.8.10 Additional Restrictions on Change Orders for Utility Adjustments

In addition to all of the other requirements and limitations contained in this Section 6.8 and in Section 13, the entitlement of Developer to any Change Order under this Section 6.8 shall be subject to the restrictions and limitations set forth in this Section 6.8.10.

6.8.10.1 Developer shall provide documentation satisfactory to TxDOT showing that the required analysis was performed and an appropriate determination made regarding the need for the Utility Adjustment, and shall also bear the burden of proving that the amount of any additional costs and/or time incurred by Developer are both necessary and reasonable.

6.8.10.2 As part of the Work, Developer is responsible for causing all Utility Adjustment Work and Incidental Utility Adjustment Work to occur, for reimbursing the Utility Owners for their costs of performing or furnishing Utility Adjustment Work and Incidental Utility Adjustment Work, and subject to Section 6.8.5.2, for scheduling all Utility Adjustment Work and Incidental Utility Adjustment Work (whether performed by Developer or the affected Utility Owner) so as to meet the Completion Deadlines herein. Accordingly, if a Utility Owner performs or furnishes Utility Adjustment Work or Incidental Utility Adjustment Work that was initially anticipated to be performed or furnished by Developer, or if Developer performs or furnishes Utility Adjustment Work or Incidental Utility Adjustment Work that was initially anticipated to be performed or furnished by the Utility Owner, there shall be no resulting time extension and no resulting change in the Price. The foregoing shall not affect TxDOT's right to any credit that may be owing under Section 13.

6.8.10.3 Developer shall not be entitled to a Change Order for any costs or delays which it may incur that are attributable to: (a) any errors, omissions, inaccuracies, inconsistencies or other defects in designs furnished by any Utility Owner, including any failure of such designs to comply with the requirements of Section 6.3 of the Technical Provisions, and/or (b) any defect in construction performed by any Utility Owner or other failure of such construction to comply with the requirements of Section 6.4 of the Technical Provisions.

6.8.10.4 Developer shall not be entitled to a Change Order for any costs or delays resulting from the performance of Incidental Utility Adjustment Work by the Developer or any Utility Owner (including with respect to New Utilities for which Developer is otherwise entitled to a Change Order under Section 6.8.1).

6.8.10.5 Any Change Order increasing the Price pursuant to this Section 6.8 shall include only the incremental costs arising from the circumstances giving rise to such Change Order.

6.8.10.6 Developer shall not be entitled to any increase in the Price for any costs of coordinating with Utility Owners (including with respect to New Utilities for which Developer is otherwise entitled to a Change Order under Section 6.8.1).

6.8.10.7 Any information with respect to Utilities provided in the Reference Information Documents is for Developer's reference only, has not been verified, and shall not be relied upon by Developer. Without limiting the generality of the foregoing, Developer acknowledges that such information does not identify most of the Service Lines that may be impacted by the Project and that there may be other facilities impacted by the Project that are not identified in such information. Developer shall verify all information with respect to Utilities included in the Reference Information Documents and shall perform its own investigations as provided in Sections 6.3.1 and 6.4.2 of the Technical Provisions. Accordingly, there shall be no changes in the Price and no time extensions on account of any inaccuracies in the Reference Information Documents with respect to any Utilities. Except as provided in Section 6.8.1 of this Agreement, Developer shall not be entitled to any increase in the Price and/or time extension as a result of any of the following.

(a) any increase in the extent or change in the character of the Utility Adjustment Work necessary to Adjust any Utility from that anticipated by Developer;

(b) any difference in the cost to Adjust a Utility from that anticipated by Developer;

(c) any inaccuracy in the information included in the Reference Information Documents as to the existence. location, ownership, type, and/or any other characteristic of any Utility;

(d) any inaccuracy in the Reference Information Documents as to whether any Utility is located within privately owned property or public right of way; and/or

(e) any inaccuracy in the Reference Information Documents as to the existence or nature of any rights or interest relating to the occupancy of any real property by any Utility.

6.8.10.8 Inasmuch as Developer is both furnishing the design of and constructing the Project, Developer may have opportunities to reduce the costs of certain portions of the Work, which may increase the costs of certain other portions of the Work. In considering each such opportunity, Developer shall consider the impact of design changes on Utility Adjustments to the extent practical. Accordingly, except as otherwise provided in Section 13 with respect to TxDOT-Directed Changes, the following provisions shall apply with respect to any increase or decrease in the cost of the Work and/or delay associated with design changes during the course of the Project which either reduce the nature or extent of or eliminate any Utility Adjustment, or result in unanticipated Utility Adjustments or an increase in the nature or extent of anticipated Utility Adjustments:

(a) Developer shall not be entitled to extension of any Completion Deadline on account of delays resulting from any such design changes.

(b) Developer shall not be entitled to any increase in the Price for any such additional costs which Developer incurs (including both additional costs of Utility Adjustment Work and the costs of any additional Work on other aspects of the Project undertaken in order to avoid or minimize Utility Adjustments).

(c) If TxDOT incurs any such additional costs, then Developer shall reimburse TxDOT for such costs within ten days after receipt of TxDOT's invoice therefor, or in TxDOT's discretion, TxDOT may deduct the amount of reimbursement due from any payment due to Developer under this Agreement.

(d) TxDOT shall not be entitled to a credit on account of reductions in the cost of the Work due to any such avoided or minimized Utility Adjustments.

6.8.10.9 If Developer elects to make payments to Utility Owners or to undertake any other efforts which are not required by the terms of the Contract Documents, Developer shall not be entitled to a Change Order in connection therewith. Developer shall promptly notify TxDOT of the terms of any such arrangements.

6.8.10.10 Except as specified in this Section 6.8 or in Section 13, Developer shall not be entitled to any Change Order with respect to any Utility Adjustments, including any act or omission of any Utility Owner which may result in a delay to the Project Schedule or in Developer's incurring costs not included in the Price.

6.9 Hazardous Materials Management

6.9.1 Procedures and Compensation for Hazardous Materials Management

6.9.1.1 Subject to Section 6.9.1.3, Developer shall manage, treat, handle, store, remediate, remove, transport (where applicable) and dispose of all Hazardous Materials and Recognized Environmental Conditions, including contaminated

groundwater, in accordance with applicable Law, Governmental Approvals, the Hazardous Materials Management Plan, and all applicable provisions of the Contract Documents. If during the course of the Work, Developer encounters Hazardous Materials or a Recognized Environmental Condition in connection with the Project, Project ROW or Work, in an amount, type, quality or location that would require reporting or notification to any Governmental Entity or other Person or taking any preventive or remedial action, in each case under applicable Law, Governmental Approvals, the Hazardous Materials Management Plan or any applicable provision of the Contract Documents, Developer shall: (a) promptly notify TxDOT in writing and advise TxDOT of any obligation to notify Governmental Entities under applicable Law; and (b) take reasonable steps, including design modifications and/or construction techniques, to avoid excavation or dewatering in areas with Hazardous Materials or Recognized Environmental Conditions. If during the performance of the Work TxDOT discovers Hazardous Materials or a Recognized Environmental Condition in connection with the Project, Project ROW or Work, TxDOT shall promptly notify Developer in writing of such fact. Where excavation or dewatering of Hazardous Materials or Recognized Environmental Conditions is unavoidable, Developer shall utilize appropriately trained personnel and shall select the most cost-effective approach to Hazardous Materials Management, unless otherwise directed by TxDOT. Wherever feasible and consistent with the Contract Documents, applicable Law and Good Industry Practice, contaminated soil and groundwater shall not be disposed off-site.

6.9.1.2 Except where Developer is required to take immediate action under the Contract Documents or applicable Law, Developer shall afford TxDOT the opportunity to inspect sites containing Hazardous Materials or Recognized Environmental Conditions before any action is taken which would inhibit TxDOT's ability to ascertain the nature and extent of the contamination.

6.9.1.3 Subject to the limitations and exceptions set forth in this Section 6.9 and Section 13, Developer shall be entitled to a Change Order as set forth in Section 13.8.4 with respect to additional costs and/or delays directly attributable to the discovery of (a) Hazardous Materials other than Developer Releases of Hazardous Materials, within the Draft Interim Schematic ROW or on any parcels added to the Site by a TxDOT-Directed Change or required due to a Force Majeure Event or a Necessary Basic Configuration Change, and (b) Hazardous Materials falling within the definition of Force Majeure Event.

6.9.2 Off-Site Disposal and Hazardous Material Generator

6.9.2.1 Off-site disposal of Hazardous Materials other than Developer Release(s) of Hazardous Materials is subject to the following provisions:

(a) As between Developer and TxDOT, TxDOT shall be considered the generator and assume generator responsibility for Hazardous Materials other than Developer Release(s) of Hazardous Materials.

(b) TxDOT has exclusive decision-making authority regarding selection of the destination facility to which Hazardous Materials other than Developer Release(s) of Hazardous Materials will be transported. With regard to Hazardous Materials other than Developer Release(s) of Hazardous Materials, TxDOT shall comply with the applicable standards for generators including those found at 40 CFR, Part 262, including the responsibility to sign manifests for the transport of hazardous wastes. The foregoing shall not preclude or limit any rights, remedies or defenses that TxDOT or Developer may have against any Governmental Entity or other third parties,

including prior owners, lessees, licensees and occupants of any parcel of land that is or becomes part of the Project ROW.

(c) To the extent permitted by applicable Law, TxDOT shall indemnify, save, protect and defend Developer from third party claims, causes of action and Losses arising out of or related to generator liability for Hazardous Material for which Developer is not considered the generator pursuant to this Section 6.9.2, specifically excluding generator liability for actual and threatened Developer Releases of Hazardous Materials.

6.9.2.2 As between Developer and TxDOT, Developer shall be considered the generator and assume generator responsibility only for Developer Releases of Hazardous Materials. For such Hazardous Materials, the following provisions shall apply:

(a) Hazardous Materials Management costs, including assessment, containment, and remediation expenses, on, arising from or related to such shall not be compensable to Developer or entitle Developer to an extension of the Completion Deadlines.

(b) To the extent permitted by applicable Law, Developer shall indemnify, save, protect and defend TxDOT from claims, causes of action and Losses arising out of or related to generator liability for such Developer Releases of Hazardous Materials.

6.10 Environmental Compliance

Developer shall be responsible for performance of all environmental mitigation measures and compliance with all other conditions and requirements of the Contract Documents and Environmental Approvals, including TxDOT-Provided Approvals and similar Governmental Approvals for the Project, other than the mitigation requirements which TxDOT has expressly agreed to perform pursuant to Section 6.10.1. The Price includes compensation for Developer's performance of all environmental requirements and conditions, including mitigation measures, except as described in Section 6.10.1.

6.10.1 TxDOT's Responsibility for Approvals and Certain Mitigation

6.10.1.1 The following TxDOT-Provided Approvals had not yet been obtained as of the Proposal Due Date: the Section 404 Permits and Section 401 Water Quality Certifications. All conditions and requirements, including mitigation requirements contained in the Project's NEPA Approvals and Section 404 Permits shall automatically be deemed included in the scope of the Work. In addition, with respect to the Section 404 Permits and Section 401 Water Quality Certifications, Developer shall utilize Best Management Practices and shall be responsible for performance of the general conditions and requirements described in Federal Register Volume 77, No. 34, published February 21, 2012 (the "General Conditions") and the Environmental Permits, Issues and Commitments ("EPIC") sheets for the Project.

6.10.1.2 If the final Section 404 Permits and Section 401 Water Quality Certifications obtained by TxDOT contain conditions or requirements that differ materially from the General Conditions and environmental commitments set forth in the NEPA Approvals, and such conditions or requirements: (a) have a material adverse impact on Developer's obligations hereunder, and (b) were not caused by modifications to the Draft Interim Schematic that were initiated by Developer, Developer may request a Force Majeure Change Order pursuant to Section 13.8.3. If the final TxDOT-Provided Approvals incorporate mitigation requirements addressing any modification in the Final Design from

the Draft Interim Schematic, such additional mitigation requirements shall be Developer's sole responsibility and shall not be considered a TxDOT-Directed Change or Force Majeure Event. TxDOT will be responsible for additional mitigation requirements resulting from TxDOT-Directed Changes, or as a result of modifications to the Section 404 Permits and Section 401 Water Quality Certifications that are outside of the General Conditions and environmental commitments set forth in the NEPA Approvals which do not arise out of modifications to the Draft Interim Schematic initiated by Developer.

6.10.1.3 To the extent required by the final Section 404 Permits or Section 401 Water Quality Certifications, and if based on the Draft Interim Schematic, Developer will be responsible for purchasing any compensatory credits through permittee-responsible mitigation from an approved mitigation bank. Developer will be responsible for the coordination and purchase of the in-lieu-fee and/or mitigation bank, and the mitigation credits required by the final Section 404 Permits based on the Draft Interim Schematic. Developer shall be responsible for any changes and/or modifications to the Section 404 Permits required by the Final Design, as well as any additional requirements (including additional payments to an approved in-lieu-fee and/or mitigation bank and the purchase of compensatory credits from an approved mitigation bank), except to the extent such changes or modifications are required due to a Force Majeure Event or TxDOT-Directed Change.

6.10.1.4 TxDOT shall be responsible for all mitigation measures associated with the Section 4(f) Evaluations except for those mitigation measures identified in Attachement 4-4 of Section 4.3.2 of the Technical Provisions, provided however, that Developer shall be responsible for any additional mitigation measures associated with the Section 4(f) Evaluations required as a result of the Final Design, except to the extent such additional measures are required due to a Force Majeure Event or TxDOT-Directed Change. Developer shall also be responsible for any additional mitigation measures associated with TxDOT-Provided Approvals, including any additional mitigation measures included in the EPIC sheets for the Project.

6.10.2 New Environmental Approvals To Be Obtained by Developer

6.10.2.1 If it is necessary to obtain a New Environmental Approval for any reason (including any New Environmental Approval associated with the drainage easements or any right of way outside of the Draft Interim Schematic ROW) other than a Force Majeure Event or a TxDOT-Directed Change, Developer shall be fully responsible, at its sole cost and expense, for obtaining the New Environmental Approval and any other environmental clearances that may be necessary, and for all requirements resulting therefrom, as well as for any litigation arising in connection therewith. If the New Environmental Approval is associated with a VE, the costs of obtaining and complying with the terms of the New Environmental Approval shall be considered in determining the Price adjustment under Section 22.

6.10.2.2 If any New Environmental Approval is necessitated by a TxDOT-Directed Change or Force Majeure Event, Developer shall be responsible for obtaining such New Environmental Approval and/or performing any additional mitigation requirements of such New Environmental Approval only if directed to do so by a Directive Letter or a Change Order. TxDOT shall cooperate with Developer and support its efforts to obtain any such New Environmental Approval. Any Change Order covering a TxDOT-Directed Change or Force Majeure Event shall include compensation to Developer for additional costs incurred by Developer to obtain the New Environmental Approval and

to implement any changes in the Work (including performance of additional mitigation measures which are Developer's responsibility) resulting from such New Environmental Approvals, as well as any time extension necessitated by the TxDOT-Directed Change or Force Majeure Event, subject to the conditions and limitations contained in Section 13. Should new, revised or modified Section 404 permits be required for any reason other than TxDOT-Directed Changes, Developer shall be solely responsible for obtaining the Section 404 permits and for compliance with all conditions and requirements, including all mitigation requirements, contained therein without entitlement to a Change Order.

SECTION 7. contracting and labor practices

7.1 DBE Requirements

7.1.1 TxDOT's Disadvantaged Business Enterprise (DBE) Special Provisions for Non-Traditional Contracts, applicable to the Project, are set forth in Exhibit 6. The purpose of the DBE Special Provisions for Non-Traditional Contracts is to ensure that DBEs shall have an equal opportunity to participate in the performance of contracts financed in whole or in part with federal funds. Developer shall comply with all applicable requirements set forth in the DBE Special Provisions for Non-Traditional Contracts and TxDOT's Disadvantaged Business Enterprise Program applicable to comprehensive development agreement projects and adopted pursuant to 49 CFR Part 26, and the provisions in Developer's approved DBE Performance Plan, set forth in Exhibit 7. The approved overall DBE participation goal for the Project is established as 6.0% of the Price.

7.1.2 Developer shall exercise good faith efforts to achieve such DBE participation goal for the Project through implementation of Developer's TxDOT-approved DBE Performance Plan. Developer shall include provisions to effectuate the requirements of Section 7.1.1 in every Subcontract (including purchase orders and in every subcontract of any Developer-Related Entity for the Work), and shall require that they be included in all Subcontracts at lower tiers, so that such provisions will be binding upon each Subcontractor.

7.1.3 Developer shall not cancel or terminate any Subcontract with a DBE firm except in accordance with all requirements and provisions applicable to cancellation or termination of Subcontracts with DBE firms set forth in the DBE Special Provisions for Non-Traditional Contracts in Exhibit 6.

7.2 Non-Discrimination; Equal Employment Opportunity

7.2.1 Developer shall not, and shall cause the Subcontractors to not, discriminate on the basis of race, color, national origin or sex in the performance of the Work under the Contract Documents. Developer shall carry out, and shall cause the Subcontractors to carry out, applicable requirements of 49 CFR Part 26. Failure by Developer to carry out these requirements is a material breach of this Agreement, which may result in the termination of this Agreement or such other remedy as TxDOT deems appropriate (subject to Developer's rights to notice and opportunity to cure set forth in this Agreement).

7.2.2 Developer shall include Section 7.2.1 in every Subcontract (including purchase orders and in every subcontract of any Developer-Related Entity for the Work), and shall require that they be included in all Subcontracts at lower tiers, so that such provisions will be binding upon each Subcontractor.

7.2.3 Developer confirms for itself and all Subcontractors that Developer and each Subcontractor has an equal employment opportunity policy ensuring equal employment opportunity without regard to race, color, national origin, sex, age, religion or handicap; and that Developer and each Subcontractor maintains no employee facilities segregated on the basis of race, color, religion or national origin. Developer shall comply with all applicable Laws relating to Equal Employment Opportunity and nondiscrimination, including those set forth in Exhibit 3, and shall require its Subcontractors to comply with such provisions.

7.3 Subcontracts

7.3.1 Developer shall retain or cause to be retained only Subcontractors that are qualified, experienced and capable in the performance of the portion of the Work

assigned. Developer shall assure that each Subcontractor has at the time of execution of the Subcontract, and maintains at all times during performance of the assigned Work, all licenses required by applicable Laws.

7.3.2 Developer shall comply with the following Subcontractor reporting requirements:

(a) Developer shall provide TxDOT a monthly report listing: (i) all Subcontracts in effect to which Developer is a party and (ii) where Developer is a party to a Subcontract with an Affiliate, all Subcontracts in effect to which such Affiliate is a party and under which all or a substantial portion of the Affiliate's responsibilities or obligations under its Subcontract with Developer are delegated to the Subcontractor. Developer also shall list in the monthly report the Subcontractors under such Subcontracts, guarantees of Subcontracts in effect and the guarantors thereunder. Subject to Section 21.1, Developer shall allow TxDOT ready access to all Subcontracts and records regarding Subcontracts, including amendments and supplements to Subcontracts and guarantees thereof.

(b) Developer shall provide TxDOT the information and certifications required pursuant to Article A, Section 6 of the DBE Special Provisions for Non-Traditional Contracts in Exhibit 6.

7.3.3 The retention of Subcontractors by Developer will not relieve Developer of its responsibility hereunder or for the quality of the Work or materials provided by it. Developer shall supervise and be fully responsible to TxDOT for the acts, omissions, negligence, intentional misconduct, or breach of applicable Law, contract or Governmental Approval by any Developer-Related Entity or by any member or employee of Developer or any Developer-Related Entity, as though Developer directly employed all such individuals. No Subcontract entered into by Developer will impose any obligation or liability upon TxDOT to any such Subcontractor or any of its employees. Nothing in this Agreement will create any contractual relationship between TxDOT and any Subcontractor of Developer.

7.3.4 The following requirements shall apply to Subcontracts:

(a) Developer shall, prior to soliciting any bids for performance of work or labor or rendering of services relating to the design or construction of the Project or for special fabrication and installation of a portion of the Work, submit to TxDOT for its review and approval a procedure for the conduct of the bidding and approval process applicable to Major Subcontracts. Developer may use procedures set forth in the TxDOT Standard Specifications or may submit alternative procedures to TxDOT for approval. Developer shall not enter into any Major Subcontracts except in accordance with the foregoing procedure; provided however that this Section 7.3.4(a) shall not apply to Major Subcontracts entered between Developer and a Subcontractor identified in Developer's Proposal.

(b) Developer shall not terminate any Major Subcontract, or permit or suffer any substitution or replacement of a Major Subcontractor, except that, (i) for Major Subcontracts that are not with Key Subcontractors, Developer may terminate the Major Subcontract in the case of material default by a Major Subcontractor, termination of this Agreement for convenience or with TxDOT's prior written approval; and (ii) for Major Subcontracts that are with Key Subcontractors, Developer may terminate the Major Contract only in accordance with Section 7.3.5.

(c) As soon as Developer identifies a potential Subcontractor for a potential Subcontract described in the first sentence of Section 7.3.2, but in no event later

than five days after Subcontract execution, Developer shall notify TxDOT in writing of the name, address, phone number and authorized representative of such Subcontractor.

7.3.5 The following additional requirements shall apply to Key Subcontractors:

(a) Developer shall not terminate any Subcontract with a Key Subcontractor, or permit or suffer any substitution or replacement of a Key Subcontractor, unless the Key Subcontractor:

(i) is no longer in business, is unable to fulfill its legal, financial, or business obligations, or can no longer meet the terms of the teaming agreement with Developer;

(ii) voluntarily removes itself from the Developer's team; or

(iii) fails to provide a sufficient number of qualified personnel to fulfill the duties identified during the Proposal stage.

(b) If Developer makes changes to a Key Subcontractor in violation of Section 7.3.5(a), Developer shall pay to TxDOT 100% of any cost savings resulting from the change.

7.3.6 Each Subcontract shall:

(a) Set forth a standard of professional responsibility or a standard for commercial practice equal to the requirements of the Contract Documents and Good Industry Practice for work of similar scope and scale and shall set forth effective procedures for claims and change orders.

(b) Require the Subcontractor to carry out its scope of work in accordance with the Contract Documents, the Governmental Approvals and applicable Law, including the applicable requirements of the DBE Performance Plan.

(c) Without cost to Developer or TxDOT, expressly permit assignment to TxDOT or its successor, assign or designee of all Developer's rights under the Subcontract, contingent only upon delivery of written request from TxDOT following termination of this Agreement, allowing TxDOT or its successor, assign or designee to assume the benefit of Developer's rights with liability only for those remaining obligations of Developer accruing after the date of assumption, such assignment to include the benefit of all Subcontractor warranties, indemnities, guarantees and professional responsibility.

(d) Expressly state that any acceptance of assignment of the Subcontract to TxDOT or its successor, assign or designee shall not operate to make the assignee responsible or liable for any breach of the Subcontract by Developer or for any amounts due and owing under the Subcontract for work or services rendered prior to assumption (but without restriction on the Subcontractor's rights to suspend work or demobilize due to Developer's breach).

(e) Expressly include a covenant to recognize and attorn to TxDOT upon receipt of written notice from TxDOT that it has exercised its rights under this Agreement, without necessity for consent or approval from Developer or to determine whether TxDOT validly exercised its rights, and Developer's covenant to waive and release any claim or cause of action against the Subcontractor arising out of or relating to its recognition and attornment in reliance on any such written notice.

(f) Not be assignable by the Subcontractor to any Person other than TxDOT (or its assignee) without Developer's prior written consent.

(g) Expressly include requirements that the Subcontractor will: (i) maintain usual and customary books and records for the type and scope of operations of business in which it is engaged (e.g., constructor, equipment Supplier, designer, service

provider); (ii) permit audit thereof with respect to the Project or Work by each of Developer and TxDOT pursuant to Section 21.4 and; (iii) provide progress reports to Developer appropriate for the type of work it is performing sufficient to enable Developer to provide the reports it is required to furnish TxDOT under this Agreement.

(h) Include the right of Developer to terminate the Subcontract in whole or in part upon any Termination for Convenience of this Agreement without liability of Developer or TxDOT for the Subcontractor's lost profits or business opportunity.

(i) Expressly require the Subcontractor to participate in meetings between Developer and TxDOT, upon TxDOT's request, concerning matters pertaining to such Subcontract or its work, provided that all direction to such Subcontractor shall be provided by Developer, and provided further that nothing in this clause (i) shall limit the authority of TxDOT to give such direction or take such action which, in its sole opinion, is necessary to remove an immediate and present threat to the safety of life or property.

(j) Include an agreement by the Subcontractor to give evidence in any dispute resolution proceeding pursuant to Section 19, if such participation is requested by either TxDOT or Developer.

(k) Expressly provide that all Liens, claims and charges of the Subcontractor and its subcontractors at any time shall not attach to any interest of TxDOT in the Project or the Project ROW.

(l) With respect to Major Subcontracts, expressly include a covenant, expressly stated to survive termination of the Major Subcontract, to promptly execute and deliver to TxDOT a new contract between the Major Subcontractor and TxDOT on the same terms and conditions as the Major Subcontract, in the event: (i) the Major Subcontract is rejected by Developer in bankruptcy or otherwise wrongfully terminated by Developer and (b) TxDOT delivers written request for such new contract following termination or expiration of this Agreement.

(m) Be consistent in all other respects with the terms and conditions of the Contract Documents to the extent such terms and conditions are applicable to the scope of work of such Subcontractors, and include all provisions required by this Agreement.

7.3.7 Developer shall not amend any Subcontract with respect to any of the foregoing matters without the prior written consent of TxDOT.

7.3.8 Developer shall not enter into any Subcontracts with any Person then debarred or suspended from submitting bids by any agency of the State.

7.4 Key Personnel; Qualifications of Employees

7.4.1 The Contract Documents identify certain job categories of Key Personnel for the Project. Except as provided in Section 7.4.4, Developer shall not change, or permit any change in, any Key Personnel. Any replacement Key Personnel during the Term shall be subject to approval by TxDOT.

7.4.2 Developer shall designate an Authorized Representative who shall have onsite field and office authority to represent and act for Developer. An Authorized Representative shall be present at the jobsite at all times while Work is actually in progress. Developer shall provide phone, e-mail addresses and mobile telephone numbers for all Key Personnel. TxDOT requires the ability to contact the following Key Personnel 24 hours per day, seven days per week: (a) Project Manager; (b) Deputy Project Manager – Design; (c) Deputy Project Manager – Construction; and (d) Environmental Compliance Manager.

7.4.3 Developer acknowledges and agrees that the award of this Agreement by TxDOT to Developer was based, in large part, on the qualifications and experience of the personnel listed in the Proposal and Developer's commitment that such individuals would be available to undertake and perform the Work. Developer represents, warrants and covenants that such individuals are available for and will fulfill the roles identified for them in the Proposal in connection with the Work. Individuals filling Key Personnel roles shall be available for the Work and shall maintain active involvement in the prosecution and performance of the Work. In addition to the foregoing, TxDOT reserves the right to require a 100% time commitment per position from any Key Personnel if TxDOT, in its sole discretion, determines that such personnel are not devoting sufficient time to the prosecution and performance of the Work.

7.4.4 If an individual filling one or more Key Personnel roles is not available for the Work and does not maintain active involvement in the prosecution and performance of the Work because such individual has been replaced, Developer acknowledges that TxDOT, the Work and the Project will suffer significant and substantial Losses due to the unavailability of the individual identified in the Proposal and that it is impracticable and extremely difficult to ascertain and determine the actual Losses which would accrue to TxDOT in such event. Therefore, if an individual filling a Key Personnel role is not available or not actively involved in the prosecution and performance of the Work, as determined by TxDOT in its sole discretion, regardless of whether such individual has been replaced by an individual approved by TxDOT, Developer agrees to pay TxDOT a liquidated amount as follows, for each position held by such individual, as deemed compensation to TxDOT for such Losses:

POSITION	**LIQUIDATED AMOUNT**
Project Manager	$378,000
Superintendant	$366,000
Lead Quality Manager	$451,000
Environmental Compliance Manager	$381,000
Design Manager	$351,000
Lead Roadway Design Engineer	$147,000
Lead Bridge Design Engineer	$148,000
~~Design~~Professional Services Quality Control Manager	$260,000
Maintenance Manager	$351,000
Maintenance QC Manager	$31,000
Public Information Coordinator	$26,000
ROW Acquisition Manager	$291,000
Utility Manager	$289,000

7.4.5 In addition, if an individual filling one or more Key Personnel roles is not available for the Work and does not maintain active involvement in the prosecution and performance of the Work and such individual has not been replaced by an individual approved by TxDOT, Developer acknowledges that TxDOT, the Work and the Project will

suffer significant and substantial additional Losses due to the unavailability of an approved individual to fill a Key Personnel role and that it is impracticable and extremely difficult to ascertain and determine the actual Losses which would accrue to TxDOT in such event. Therefore, for each day that a Key Personnel role is not filled by an approved individual, Developer agrees to pay TxDOT a liquidated amount as follows, for each position not filled, as deemed compensation to TxDOT for such Losses:

POSITION	**LIQUIDATED AMOUNT**
Project Manager	$25,200
Superintendant	$36,600
Lead Quality Manager	$45,100
Environmental Compliance Manager	$38,100
Design Manager	$35,100
Lead Roadway Design Engineer	$14,700
Lead Bridge Design Engineer	$14,800
~~Design~~Professional Services Quality Control Manager	$26,000
Maintenance Manager	$35,100
Maintenance QC Manager	$3,100
Public Information Coordinator	$2,600
ROW Acquisition Manager	$29,100
Utility Manager	$28,900

7.4.6 Developer understands and agrees that any damages payable in accordance with this Section 7.4 are in the nature of liquidated damages and not a penalty and that such sums are reasonable under the circumstances existing as of the Effective Date. TxDOT shall have the right to deduct any amount owed by Developer to TxDOT hereunder from any amounts owed by TxDOT to Developer, or to collect from any bond or Guaranty furnished under this Agreement for such liquidated damages. Notwithstanding the foregoing, Developer shall not be liable for liquidated damages under Section 7.4.4 or Section 7.4.5 if: (a) Developer removes or replaces such personnel at the direction of TxDOT; (b) such individual is unavailable due to death, retirement, injury or no longer being employed by the applicable Developer-Related Entity (provided that moving to an affiliated company shall not be considered grounds for avoiding liquidated damages), or (c) such individual is unavailable due to TxDOT's failure to issue NTP1 within 180 days of the Proposal Due Date for a reason other than the acts, omissions, negligence, intentional misconduct, or breach of applicable Law, contract or Governmental Approval of any Developer-Related Entity; provided however in each such case, Developer shall promptly propose to TxDOT a replacement for such personnel, which individual shall be subject to TxDOT's review and written consent. If NTP1 has not been issued within 180 days after the Proposal Due Date through no act, omission, negligence, intentional misconduct, or breach of applicable Law, contract or Governmental Approval of any Developer-Related Entity, Developer shall have 30 days after issuance of NTP1 to identify any change in Key Personnel without incurring any liquidated damages. Following any TxDOT-approved

substitution or replacement of a Key Personnel pursuant to the terms hereof, the new individual shall be considered a Key Personnel for all purposes under this Agreement, including the provisions of this Section 7.4.6 relative to liquidated damages.

7.4.7 Developer acknowledges and agrees that the Key Personnel positions are of critical importance to TxDOT and the Project. In addition to the approval rights of TxDOT set forth in Section 7.4.1 and the liquidated damages set forth in Section 7.4.4 and Section 7.4.5, if an individual in a Key Personnel position leaves that position for a reason other than as set forth in clauses (a)-(c) of Section 7.4.6, TxDOT shall have the right to terminate this Agreement for default under Section 16, unless Developer provides TxDOT a replacement acceptable to TxDOT within 30 days after the earlier of: (a) the date on which such individual has left his/her position; or (b) Developer or TxDOT becomes aware that such individual intends to leave his/her position.

7.4.8 Any position on the Developer's organizational chart or within the Developer's organization structure that is above that of the designated Key Personnel position for which liquidated damages may apply will be deemed to be a Key Personnel position and, for purposes of liquidated damages under Section 7.4.4 and Section 7.4.5, shall be at the level which is immediately higher than the Key Personnel immediately below that position (e.g., an individual that reports into the deputy project director level but is higher than the other Key Personnel level would be considered a deputy project director for this purpose).

7.5 Responsibility for Developer-Related Entities

Developer shall supervise and be responsible for the acts, omissions, negligence, intentional misconduct, or breach of applicable Law, contract or Governmental Approval by any Developer-Related Entity, as though Developer directly employed all such Persons.

7.6 Subcontracts with Affiliates

7.6.1 Developer shall have the right to have Work and services performed by Affiliates only under the following terms and conditions:

(a) Developer shall execute a written Subcontract with the Affiliate;

(b) The Subcontract shall comply with all applicable provisions of this Section 7, be consistent with Good Industry Practice, and be in form and substance substantially similar to Subcontracts then being used by Developer or Affiliates for similar Work or services with unaffiliated Subcontractors;

(c) The Subcontract shall set forth the scope of Work and services and all the pricing, terms and conditions respecting the scope of Work and services;

(d) The pricing, scheduling and other terms and conditions of the Subcontract shall be no less favorable to Developer than those that Developer could reasonably obtain in an arms' length, competitive transaction with an unaffiliated Subcontractor. Developer shall bear the burden of proving that the same are no less favorable to Developer; and

(e) No Affiliate shall be engaged to perform any Work or services which any Contract Documents or the Project Management Plan or any component part, plan or other documentation thereunder indicates are to be performed by an independent or unaffiliated party. No Affiliate shall be engaged to perform any Work or services which would be inconsistent with Good Industry Practice.

7.6.2 Before entering into a written Subcontract with an Affiliate or any supplement or amendment thereto, Developer shall submit a true and complete copy of

the proposed Subcontract to TxDOT for review and comment. TxDOT shall have 20 days after receipt to deliver its comments to Developer.

7.6.3 Developer shall make no payments to Affiliates for work or services in advance of provision of such work or services, except for reasonable mobilization payments or other payments consistent with arm's length, competitive transactions of similar scope.

7.7 Labor Standards

7.7.1 In the performance of its obligations under the Contract Documents, Developer at all times shall comply, and require by Subcontract that all Subcontractors and Suppliers comply, with all applicable federal and State labor, occupational safety and health standards, rules, regulations and federal and State orders.

7.7.2 All individuals performing Work shall have the skill and experience and any licenses required to perform the Work assigned to them.

7.7.3 If any individual employed by Developer or any Subcontractor is not performing the Work in a proper, safe and skillful manner, then Developer shall, or shall cause such Subcontractor to, remove such individual and such individual shall not be re-employed on the Work. If, after notice and reasonable opportunity to cure, such individual is not removed or if Developer fails to ensure that skilled and experienced personnel are furnished for the proper performance of the Work, then TxDOT may suspend the affected portion of the Work by delivery of written notice of such suspension to Developer. Such suspension shall be considered a suspension for cause and shall in no way relieve Developer of any obligation contained in the Contract Documents or entitle Developer to any additional compensation or time extension hereunder.

7.8 Ethical Standards

7.8.1 Within 90 days after the Effective Date, Developer shall adopt written policies establishing ethical standards of conduct applicable to all Developer-Related Entities, including Developer's supervisory and management personnel, in dealing with: (a) TxDOT and the Program Manager and (b) employment relations. Such policy shall be subject to review and comment by TxDOT prior to adoption. Such policy shall include standards of ethical conduct concerning the following:

(a) Restrictions on gifts and contributions to, and lobbying of, TxDOT, the Texas Transportation Commission, the Program Manager and any of their respective commissioners, directors, officers and employees;

(b) Protection of employees from unethical practices in selection, use, hiring, compensation or other terms and conditions of employment, or in firing, promotion and termination of employees;

(c) Protection of employees from retaliatory actions (including discharge, demotion, suspension, threat, harassment, pay reduction or other discrimination in the terms and conditions of employment) in response to reporting of illegal (including the making of a false claim), unethical or unsafe actions or failures to act by any Developer-Related Entity;

(d) Restrictions on directors, members, officers or supervisory or management personnel of any Developer-Related Entity engaging in any transaction or activity, including receiving or offering a financial incentive, benefit, loan or other financial interest, that is, or to a reasonable person appears to be, in conflict with or incompatible with the proper discharge of duties or independence of judgment or action in the performance of duties, or adverse to the interests of the Project or employees;

(e) Restrictions on use of office or job position for a purpose that is, or would to a reasonable person appear to be, primarily for the private benefit of a director, member, officer or supervisory or management person, rather than primarily for the benefit of Developer or the Project, or primarily to achieve a private gain or an exemption from duty or responsibility for a director, member, officer or supervisory or management person; and

(f) Restrictions on directors, members, officers or employees of any Developer-Related Entity performing any of the Work if the performance of such services would be prohibited under TxDOT's published conflict of interest rules and policies applicable to TxDOT's comprehensive development agreement program, or would be prohibited under Section 572.054, Texas Government Code.

7.8.2 Developer shall cause its directors, members, officers and supervisory and management personnel, and include contract provisions requiring those of all other Developer-Related Entities, to adhere to and enforce the adopted policy on ethical standards of conduct. Developer shall establish reasonable systems and procedures to promote and monitor compliance with the policy.

7.9 Job Training and Small Business Mentoring

7.9.1 Developer's Job Training and Small Business Mentoring Plan applicable to the Project is set forth in Exhibit 8. The purpose of the Job Training and Small Business Mentoring Plan is to ensure that inexperienced and untrained workers have a substantial opportunity to participate in the performance of the Work through apprenticeships, training and similar measures to maintain and grow a diverse, skilled work force. Developer shall perform and comply with all requirements set forth in of the Job Training and Small Business Mentoring Plan.

7.9.2 Developer shall include provisions to effectuate the Job Training and Small Business Mentoring Plan in every Subcontract to which it is a party (including purchase orders and task orders for Work), and shall require that they be included in all Subcontracts at lower tiers (including purchase orders and task orders for Work), except for Subcontracts with TxDOT or Governmental Entities, so that such provisions will be binding upon each Subcontractor. The foregoing shall not apply to Subcontracts at any tier with TxDOT or Governmental Entities.

7.10 Prevailing Wages

7.10.1 Developer shall pay or cause to be paid to all applicable workers employed by it or its Subcontractors to perform the Work not less than the prevailing rates of wages, as provided in the statutes and regulations applicable to public work contracts, including Chapter 2258 of the Texas Government Code and the Davis-Bacon Act, and as provided in Exhibit 3. Developer shall comply and cause its Subcontractors to comply with all Laws pertaining to prevailing wages. For the purpose of applying such Laws, the Project shall be treated as a public work paid for in whole or in part with public funds (regardless of whether public funds are actually used to pay for the Project). The foregoing shall not apply to Subcontracts at any tier with TxDOT or Governmental Entities.

7.10.2 It is Developer's sole responsibility to determine the wage rates required to be paid. In the event rates of wages and benefits change while this Agreement is in effect, Developer shall bear the cost of such changes and shall have no Claim against TxDOT on account of such changes. Without limiting the foregoing, no Claim will be allowed which is based upon Developer's lack of knowledge or a misunderstanding of any

such requirements or Developer's failure to include in the Price adequate increases in such wages over the duration of this Agreement.

7.10.3 Any issue between Developer or a Subcontractor, and any affected worker relating to any alleged violation of Section 2258.023 of the Texas Government Code that is not resolved before the 15th day after the date TxDOT makes its initial determination under Section 2258.052 of the Texas Government Code (as to whether good cause exists to believe that a violation occurred) shall be submitted to binding arbitration in accordance with the Texas General Arbitration Act, Chapter 171 of the Civil Practice and Remedies Code.

7.10.4 Developer shall comply and cause its Subcontractors to comply with all Laws regarding notice and posting of intent to pay prevailing wages, of prevailing wage requirements and of prevailing wage rates.

7.11 Uniforms

Any uniforms, badges, logos and other identification worn by personnel of Developer-Related Entities shall bear colors, lettering, design or other features to assure clear differentiation from those of TxDOT and its employees.

SECTION 8. PERFORMANCE, PAYMENT, retainage AND WARRANTY BONDS; GUARANTEES

8.1 Provision of Bonds

Developer shall provide payment, performance, retainage and warranty bonds to TxDOT securing Developer's obligations hereunder, and shall maintain such bonds in full force and effect as described below.

8.1.1 On or before the issuance by TxDOT of NTP1, Developer shall deliver to TxDOT a performance bond in the initial amount of $25,000,000 (the "NTP1 Performance Bond Amount") and in the form attached hereto as Exhibit 9.

8.1.2 On or before the issuance by TxDOT of NTP1, Developer shall deliver to TxDOT a payment bond in the initial amount of $25,000,000 (the "NTP1 Payment Bond Amount") and in the form attached hereto as Exhibit 10.

8.1.3 Upon the issuance by TxDOT of NTP2, the amount of the Performance Bond shall increase to [*Insert one hundred percent (100%) of the Price allocable to Construction Work (equal to the sum of the amounts set forth in rows 9-20 and 24 of ITP Form M-1.1)*.] ("NTP2 Performance Bond Amount"), in accordance with the Performance Bond rider included in Exhibit 9 effecting such increase. After Final Acceptance, TxDOT shall provide a written release of the NTP2 Performance Bond provided that (and upon such date after Final Acceptance that) all of the following have occurred: (a) Developer is not in default under this Agreement, (b) no event has occurred that with the giving of notice or passage of time would constitute a default by Developer hereunder or under the Contract Documents; and (c) TxDOT has received the Warranty Bond in accordance with Section 8.1.7.

8.1.4 Upon the issuance by TxDOT of NTP2, the amount of the Payment Bond shall increase to [*Insert one hundred percent (100%) of the Price allocable to Construction Work (equal to the sum of the amounts set forth in rows 9-20 and 24 of ITP Form M-1.1)*.] ("NTP2 Payment Bond Amount") in accordance with the Payment Bond rider included in Exhibit 10 effecting such increase. TxDOT will release the Payment Bond upon: (a) receipt of (i) evidence satisfactory to TxDOT that all Persons eligible to file a claim against the Payment Bond have been fully paid and (ii) unconditional releases of Liens and stop notices from all Subcontractors who filed preliminary notice of a claim against the Payment Bond, or (b) expiration of the statutory period for Subcontractors to file a claim against the Payment Bond if no claims have been filed.

8.1.5 On or before the issuance by TxDOT of NTP2, Developer shall deliver to TxDOT a Retainage Bond in the form attached hereto as Exhibit 11. The Retainage Bond shall be in the amount of 4% of the Price, and is to be used as a guaranty for the protection of any claimants and TxDOT for overpayments, Liquidated Damages, and other deductions or damages owed by the Developer in connection with this Agreement.

8.1.6 Developer shall not commence or permit or suffer commencement of any Design Work or Construction Work until Developer obtains from its Sureties and provides to TxDOT written confirmation that the Performance Bond and Payment Bond amounts have been increased to equal the NTP2 Performance Bond Amount and NTP2 Payment Bond Amount, respectively, in accordance with this Section 8.

8.1.7 After Final Acceptance and subject to the requirements herein, Developer may obtain a release of the Performance and Payment Bonds by providing a warranty bond which shall guarantee performance of the Development Work required to be performed during the Warranty period and which shall also constitute a payment bond

guaranteeing payment to Persons performing such Development Work ("Warranty Bond"). The Warranty Bond shall be in an amount equal to 10% of the Price and shall be in the form attached hereto as Exhibit 12. Upon Final Acceptance, the Warranty Bond shall be released upon expiration of the Warranty Term and: (a) receipt of (i) evidence satisfactory to TxDOT that all Persons eligible to file a claim against the Warranty Bond have been fully paid and (ii) unconditional releases of Liens and stop notices from all Subcontractors who filed preliminary notice of a claim against the Warranty Bond, and (b) expiration of the statutory period for Subcontractors to file a claim against the Warranty Bond if no claims have been filed.

8.1.8 Each bond required hereunder shall be issued by a Surety authorized to do business in the State with a rating of at least A minus (A-) or better and Class VIII or better by A.M. Best Company or rated in the top two categories by two nationally recognized rating agencies, or as otherwise approved by TxDOT in its sole discretion. If any bond previously provided becomes ineffective, or if the Surety that provided the bond no longer meets the requirements hereof, Developer shall provide a replacement bond in the same form issued by a surety meeting the foregoing requirements, or other assurance satisfactory to TxDOT in its sole discretion. If the Price is increased in connection with a Change Order, TxDOT may, in its sole discretion, require a corresponding proportionate increase in the amount of each bond or alternative security.

8.2 No Relief of Liability

Notwithstanding any other provision set forth in the Contract Documents, performance by a Surety or Guarantor of any of the obligations of Developer shall not relieve Developer of any of its obligations hereunder.

8.3 Guaranty

8.3.1 [_____] are the Guarantors of Developer's obligations under the Contract Documents. Such guaranty, in the form attached as Exhibit 13 to this Agreement, assures performance of Developer's obligations hereunder and shall be maintained in full force and effect throughout the duration of this Agreement.

8.3.2 Developer shall report to TxDOT, on ~~or before each anniversary of~~a quarterly basis during the ~~Effective Date~~Term, the Tangible Net Worth of Developer, its equity members, and each Guarantor. The report shall state the Tangible Net Worth and be certified by the chief financial officer of the entity reporting. The entity may mark the report "confidential."

8.3.3 If at any time during the course of this Agreement the total combined Tangible Net Worth of Developer, its equity members and any Guarantors, is less than $200,000,000, Developer shall provide one or more guarantees so that the combined Tangible Net Worth of the Developer, its equity members and any Guarantors is at least $200,000,000. Each such guaranty shall be in the form attached as Exhibit 13, together with appropriate evidence of authorization, execution, delivery and validity thereof, and shall guarantee the Guaranteed Obligations.

SECTION 9. INSURANCE

Developer shall procure and keep in effect, or cause to be procured and kept in effect, the insurance policies in accordance with the requirements in this Section 9 and Exhibit 14.

9.1 General Insurance Requirements

9.1.1 Qualified Insurers

Each of the insurance policies required hereunder shall be procured from an insurance carrier or company that, at the time coverage under the applicable policy commences is:

(a) Authorized to do business in the State and has a current policyholder's management and financial size category rating of not less that "A – VII" according to A.M. Best's Insurance Reports Key Rating Guide; or

(b) Otherwise approved in writing by TxDOT.

9.1.2 Premiums, Deductibles and Self-Insured Retentions.

Developer shall timely pay the premiums for all insurance required under this Agreement. Subject to Section 13, TxDOT shall have no liability for any deductibles, self-insured retentions and amounts in excess of the coverage provided. In the event that any required coverage is provided under a self-insured retention, the entity responsible for the self-insured retention shall have an authorized representative issue a letter to TxDOT, at the same time the insurance policy is to be procured, stating that it shall protect and defend TxDOT to the same extent as if a commercial insurer provided coverage for TxDOT.

9.1.3 Primary Coverage and Project Specific Insurance

9.1.3.1 Each insurance policy shall provide that the coverage is primary and noncontributory coverage with respect to any other insurance available to TxDOT and the other Idemnified Parties, except for coverage that by its nature cannot be written as primary. Any insurance or self-insurance beyond that specified in this Agreement that is maintained by an insured or any such additional insured shall be excess of such insurance and shall not contribute with it.

9.1.3.2 Professional Liability Insurance shall be purchased specifically and exclusively for the Project with coverage limits devoted solely to the Project.

9.1.4 Verification of Coverage

9.1.4.1 At each time Developer is required to initially obtain or cause to be obtained each insurance policy, and thereafter prior to the expiration date of each insurance policy, Developer shall deliver to TxDOT a certificate of insurance. Each required certificate must meet the requirements of Texas Insurance Code Chapter 1811 and, to the extent permitted under applicable Laws, state the identity of all carriers, named insureds and additional insureds required under the Contract Documents, state the type and limits of coverage, deductibles and termination provisions of the policy, include as attachments all additional insured endorsements required under the Contract Documents, and be signed by an authorized representative of the insurance company shown on the certificate or its agent or broker. Each required evidence must be personally and manually signed by a representative or agent of the insurance company shown on the evidence with proof that the signer is an authorized representative or agent of such insurance company and is authorized to bind it to the coverage, limits and termination provisions shown on the evidence.

9.1.4.2 In addition, within a reasonable time after availability (but not to exceed 15 days), Developer shall deliver to TxDOT: (a) a complete certified copy of each such insurance policy or modification, or renewal or replacement insurance policy and all endorsements thereto and (b) satisfactory evidence of payment of the premium therefor.

9.1.4.3 If Developer has not provided TxDOT with the foregoing proof of coverage and payment within five days after TxDOT delivers to Developer written notice of an Event of Default under Section 16.1.1 and demand for the foregoing proof of coverage, TxDOT may, in addition to any other available remedy, without obligation or liability and without further inquiry as to whether such insurance is actually in force: (a) obtain such an insurance policy; and Developer shall reimburse TxDOT for the cost thereof upon demand, and (b) suspend all or any portion of Work for cause and close the Project until TxDOT receives from Developer such proofs of coverage in compliance with this Section 9.1 (or until TxDOT obtains an insurance policy, if it elects to do so).

9.1.5 Subcontractor Insurance Requirements

9.1.5.1 Developer's obligations regarding Subcontractor's insurance are set forth in Exhibit 14. Developer shall cause each Subcontractor to provide such insurance in the manner and in the form consistent with the requirements contained in this Agreement.

9.1.5.2 If any Subcontractor fails to procure and keep in effect the insurance required of it under Exhibit 14 and TxDOT asserts the same as an Event of Default hereunder, Developer may, within the applicable cure period, cure such Event of Default by: (a) causing such Subcontractor to obtain the requisite insurance and providing to TxDOT proof of insurance; (b) procuring the requisite insurance for such Subcontractor and providing to TxDOT proof of insurance; or (c) terminating the Subcontractor and removing its personnel from the Site.

9.1.6 Policies with Insureds in Addition to Developer

All insurance policies that are required to insure Persons (whether as named or additional insureds) in addition to Developer shall comply or be endorsed to comply with the following provisions.

9.1.6.1 The insurance policy shall be written or endorsed so that no acts or omissions of an insured shall vitiate coverage of the other insureds. Without limiting the foregoing, any failure on the part of a named insured to comply with reporting provisions or other conditions of the insurance policies, any breach of warranty, any action or inaction of a named insured or others, or any change in ownership of all or any portion of the Project shall not affect coverage provided to the other named insureds or additional insureds (and their respective members, directors, officers, employees, agents and ~~Project consultants~~, if applicable, TxDOT Consultants).

9.1.6.2 The insurance shall apply separately to each named insured and additional insured against whom a claim is made or suit is brought, except with respect to the limits of the insurer's liability.

9.1.6.3 All endorsements adding additional insureds to required insurance policies shall contain no limitations, conditions, restrictions or exceptions to coverage in addition to those that apply under the insurance policy generally, and shall state that the interests and protections of each additional insured shall not be affected by any misrepresentation, act or omission of a named insured or any breach by a named insured of any provision in the policy which would otherwise result in forfeiture or reduction

of coverage. To the fullest extent of coverage allowed under Chapter 151 of the Texas Insurance Code, Developer (if applicable) and TxDOT shall be included as additional insureds under the CGL policy providing equivalent coverage, including products-completed operations. The commercial general liability and any builder's third party liability insurance policy (if furnished by Developer in lieu of commercial general liability insurance) shall include completed operations liability coverage.

9.1.7 Additional Terms and Conditions

9.1.7.1 Each insurance policy shall be endorsed to state that coverage cannot be canceled, voided, suspended, adversely modified, or reduced in coverage or in limits (including for non-payment of premium) except after 30 days' prior written notice (or ten days in the case of cancellation for non-payment of premium) by registered or certified mail, return receipt requested, has been given to TxDOT and each other insured or additional insured party; provided that Developer may obtain as comparable an endorsement as possible if it establishes unavailability of this endorsement as set forth in Section 9.1.11. Such endorsement shall not include any limitation of liability of the insurer for failure to provide such notice.

9.1.7.2 The commercial general liability insurance policy and any builder's third party liability insurance policy (if furnished by Developer in lieu of commercial general liability insurance) shall cover liability arising out of the acts or omissions of Developer's employees engaged in the Work as well as employees of Subcontractors if Subcontractors are covered by a Developer-controlled insurance program. If any Subcontractor is not covered by such Developer-controlled insurance program, then Subcontractor shall provide commercial general liability insurance and builder's third party liability insurance (if furnished by Subcontractor in lieu of commercial general liability insurance) to cover liability arising out of the acts or omissions of Subcontractor's employees engaged in the Work.

9.1.7.3 If Developer's or any Subcontractor's activities involve transportation of Hazardous Materials, the automobile liability insurance policy for Developer or such Subcontractor shall be endorsed to include for private, non-commercial vehicles Motor Carrier Act Endorsement-Hazardous Materials Clean Up (MCS-90).

9.1.7.4 Each insurance policy shall provide coverage on an "occurrence" basis and not a "claims made" basis (with the exception of any professional liability and pollution liability insurance policies).

9.1.8 Waivers of Subrogation

TxDOT waives all rights against the Developer-Related Entities, and Developer waives all rights against the Indemnified Parties, for any claims to the extent covered by insurance obtained pursuant to this Section 9, except such rights as they may have to the proceeds of such insurance. If Developer is deemed to self-insure a claim or loss under Section 9.2.3, then Developer's waiver shall apply as if it carried the required insurance. Developer shall require all Subcontractors to provide similar waivers in writing each in favor of all other Persons enumerated above. Subject to Section 9.1.11, each policy, including workers' compensation if permitted under the applicable worker's compensation insurance laws, shall include a waiver of any right of subrogation against the Indemnified Parties or the insurers consent to the insured's waiver of recovery in advance of loss. However, no waiver of subrogation rights under any policy providing professional liability coverage to the insureds shall be required of any party.

9.1.9 No Recourse

There shall be no recourse against TxDOT for payment of premiums or other amounts with respect to the insurance required to be provided by Developer hereunder, except to the extent such costs are recoverable under Section 13.

9.1.10 Support of Indemnifications

The insurance coverage provided hereunder by Developer is not intended to limit Developer's indemnification obligations under the Contract Documents.

9.1.11 Inadequacy or Unavailability of Required Coverages

9.1.11.1 TxDOT makes no representation that the limits of liability specified for any insurance policy to be carried pursuant to this Agreement or approved variances therefrom are adequate to protect Developer against its undertakings under the Contract Documents, to TxDOT, or any other Person. No such limits of liability or approved variances therefrom shall preclude TxDOT from taking any actions as are available to it under the Contract Documents or otherwise at Law.

9.1.11.2 If Developer demonstrates to TxDOT's reasonable satisfaction that it has used diligent efforts in the global insurance and reinsurance markets to maintain the insurance coverages it is required to provide hereunder, and if, despite such diligent efforts and through no fault of Developer, any of such coverages (or any of the required terms of such coverages, including insurance policy limits) become unavailable during the Term on commercially reasonable terms, TxDOT will grant Developer an interim written variance from such requirements under which Developer shall obtain and maintain or cause to be obtained and maintained alternative insurance packages and programs that provide risk coverage as comparable to that contemplated in this Section 9 as is commercially reasonable under then-existing insurance market conditions.

9.1.11.3 Developer shall not be excused from satisfying the insurance requirements of this Section 9.1 merely because premiums for such insurance are higher than anticipated. To establish that the required coverages (or required terms of such coverages, including insurance policy limits) are not commercially available, Developer shall bear the burden of proving either that: (a) the same is not available at all in the global insurance and reinsurance markets or (b) the premiums for the same have so materially increased over those previously paid for the same coverage that no reasonable and prudent risk manager for a Person seeking to insure comparable risks would conclude that such increased premiums are justified by the risk protection afforded. For the purpose of clause (b), the only increases in premiums that may be considered are those caused by changes in general market conditions in the insurance industry affecting insurance for highway facilities, and Developer shall bear the burden of proving that premium increases are the result of such changes in general market conditions. For the avoidance of doubt, no increase in insurance premiums attributable to particular conditions of the Project, or to claims or loss experience of any Developer-Related Entity or Affiliate, whether under an insurance policy required by this Section 9 or in connection with any unrelated work or activity of Developer-Related Entities or Affiliate, shall be considered in determining whether required insurance is commercially unavailable.

9.1.11.4 Developer shall not be entitled to any increase in the Price for increased costs or any time extension to the Completion Deadlines resulting from the unavailability of coverage and the requirement to provide acceptable alternatives. TxDOT shall be entitled to a reduction in the Price if it agrees to accept alternative policies providing less than equivalent coverage, with the amount to be determined by

extrapolation using the insurance quotes included in the EPDs (or based on other evidence of insurance premiums as of the Proposal Due Date if the EPDs do not provide adequate information).

9.1.12 Defense Costs

No defense costs shall be included within or erode the limits of coverage of any of the insurance policies, except that litigation and mediation defense costs may be included within the limits of coverage of professional and pollution liability policies.

9.1.13 Contesting Denial of Coverage

If any insurance carrier under an insurance policy denies coverage with respect to any claims reported to such carrier, upon Developer's request, TxDOT and, to the extent necessary, the other Indemnified Parties shall cooperate in good faith to establish whether and to what extent to contest, and how to fund the cost of contesting, the denial of coverage; provided that if the reported claim is a matter covered by an indemnity in favor of an Indemnified Party, then Developer shall bear all costs of contesting the denial of coverage.

9.1.14 Umbrella and Excess Policies

Developer shall have the right to satisfy the requisite insurance coverage amounts for liability insurance through a combination of primary policies and umbrella or excess policies. Umbrella and excess policies shall comply with all insurance requirements, terms and provisions set forth in this Agreement for the applicable type of coverage.

9.1.15 Additional Insurance Policies

If Developer carries insurance coverage in addition to that required under this Agreement, then Developer shall include TxDOT and its members, directors, officers, employees, agents and ~~Project consultants~~TxDOT Consultants as additional insureds thereunder, if and to the extent they have an insurable interest. The additional insured endorsements shall be as described in Section 9.1.6.3; and Developer shall provide to TxDOT the proofs of coverage and copy of the policy described in Section 9.1.4. If, however, Developer demonstrates to TxDOT that inclusion of such Persons as additional insureds will increase the premium, TxDOT shall elect either to pay the increase in premium or forego additional insured coverage. The provisions of Sections 9.1.4, 9.1.6, 9.1.8, 9.1.9, 9.1.13 and 9.2 shall apply to all such policies of insurance coverage.

9.2 Prosecution of Claims

9.2.1 Unless otherwise directed by TxDOT in writing with respect to TxDOT's insurance claims, Developer shall be responsible for reporting and processing all potential claims by TxDOT or Developer against the insurance policies required hereunder. Developer agrees to report timely to the insurer(s) under such insurance policies any and all matters which may give rise to an insurance claim by Developer or TxDOT or another Indemnified Party and to promptly and diligently pursue such insurance claims in accordance with the claims procedures specified in such insurance policies, whether for defense or indemnity or both. Developer shall enforce all legal rights against the insurer under the applicable insurance policies and applicable Laws in order to collect thereon, including pursuing necessary litigation and enforcement of judgments, provided that Developer shall be deemed to have satisfied this obligation if a judgment is not collectible through the exercise of lawful and diligent means.

9.2.2 TxDOT agrees to promptly notify Developer of TxDOT's incidents, potential claims against TxDOT, and matters which may give rise to an insurance claim against TxDOT, to tender to the insurer TxDOT's defense of the claim under such insurance

policies, and to cooperate with Developer as necessary for Developer to fulfill its duties hereunder.

9.2.3 If in any instance Developer has not performed its obligations respecting insurance coverage set forth in this Agreement or is unable to enforce and collect any such insurance for failure to assert claims in accordance with the terms of the insurance policies or to prosecute claims diligently, then for purposes of determining Developer's liability and the limits thereon or determining reductions in compensation due from TxDOT to Developer on account of available insurance, Developer shall be treated as if it has elected to self-insure up to the full amount of insurance coverage which would have been available had Developer performed such obligations and not committed such failure. Nothing in the Contract Documents shall be construed to treat Developer as electing to self-insure where Developer is unable to collect due to the bankruptcy or insolvency of any insurer which at the time the insurance policy is written meets the rating qualifications set forth in this Section 9.

9.2.4 If in any instance Developer has not promptly performed its obligation to report to applicable insurers and process any potential insurance claim tendered by TxDOT or another Indemnified Party, then TxDOT or the other Indemnified Party may, but is not obligated to: (a) notify Developer in writing of TxDOT's intent to report the claim directly with the insurer and thereafter process the claim; and (b) proceed with reporting and processing the claim if TxDOT or the other Indemnified Party does not receive from Developer, within ten days after so notifying Developer, written proof that Developer has reported the claim directly to the insurer. TxDOT or the other Indemnified Party may dispense with such notice to Developer if TxDOT or the other Indemnified Party has a good faith belief that more rapid reporting is needed to preserve the claim.

9.2.5 All insurance proceeds received by Developer for any insured loss under the insurance policies required by this Agreement shall be paid into a separate insurance proceeds account and shall be held in trust for the purposes of, and to be applied in accordance with, this Agreement.

9.3 Disclaimer

Developer and each Subcontractor have the responsibility to make sure that their insurance programs fit their particular needs, and it is their responsibility to arrange for and secure any insurance coverage which they deem advisable, whether or not specified herein.

SECTION 10. TITLE; Site Security; Maintenance DURING and after CONSTRUCTION

10.1 Title

Developer warrants that it owns, or will own, and has, or will have, good and marketable title to all materials, equipment, tools and supplies furnished, or to be furnished, by it and its Subcontractors that become part of the Project or are purchased for TxDOT for the operation, maintenance or repair thereof, free and clear of all Liens. Title to all of such materials, equipment, tools and supplies which are delivered to the Site shall pass to TxDOT, free and clear of all Liens, upon the sooner of: (a) incorporation into the Project, or (b) payment by TxDOT to Developer of invoiced amounts pertaining thereto. Notwithstanding any such passage of title, Developer shall retain sole care, custody and control of such materials, equipment, tools and supplies and shall exercise due care with respect thereto until Final Acceptance or until Developer is terminated from the Project pursuant to Sections 15 or 16.

10.2 Site Security

Developer shall provide appropriate security for the Site, and shall take all reasonable precautions and provide protection to prevent damage, injury, or loss to the Work and materials and equipment to be incorporated therein, as well as all other property at or on the Site, whether owned by Developer, TxDOT, or any other Person.

10.3 Risk of Loss or Damage; Maintenance During Construction Period

10.3.1 Developer shall be responsible for maintenance of the Work and the Project Site in accordance with Section 19 of the Technical Provisions. Upon Substantial Completion, TxDOT shall assume the maintenance obligations (except for landscape maintenance during the establishment period in accordance with Good Industry Practice); provided however, that, if TxDOT issues Maintenance NTP1 under the CMA, the Maintenance Contractor shall be responsible for the Maintenance Services pursuant to the terms of the CMA Documents. Developer shall be relieved from responsibility for maintenance of all other portions of the Project completed and accepted at Substantial Completion**,** except that Developer shall be responsible for: (a) maintenance of improvements owned by third parties until control of and maintenance responsibility for such improvements has been formally transferred to the third parties, and (b) maintenance of mitigation sites in accordance with the Environmental Compliance and Mitigation Plan required by Section 4.3.2 of the Technical Provisions and any other extended maintenance responsibilities set forth in the Technical Provisions, including landscape maintenance during the establishment period in accordance with Good Industry Practice. This Section 10.3.1 shall not apply to, or limit Developer's obligations, under the CMA.

10.3.2 Developer shall maintain, rebuild, repair, restore or replace all Work, including Design Documents, Construction Documents, materials, equipment, supplies and maintenance equipment which are purchased for permanent installation in, or for use during construction of the Project that is injured or damaged prior to the date that Developer's maintenance responsibility ends as set forth in Section 10.3.1, regardless of who has title thereto under the Contract Documents and regardless of the cause of the damage or injury, at no additional cost to TxDOT, except to the extent that TxDOT is responsible for such costs in accordance with the express terms of this Agreement. Developer, at its cost, shall also have sole responsibility during such periods for rebuilding, repairing and restoring all other property within the Project ROW whether owned by Developer, TxDOT or any other Person.

10.3.3 If insurance proceeds with respect to any loss or damage for which Developer is responsible for the rebuilding, repair or restoration thereof are paid to TxDOT, then TxDOT shall arrange for such proceeds to reimburse Developer as repair or replacement work is performed by Developer to the extent that TxDOT has not previously paid for such repair or replacement work; provided however that release of such proceeds to Developer shall not be a condition precedent to Developer's obligation to perform such replacement or repair work or indicate that such replacement or repair work has been approved and accepted by TxDOT.

SECTION 11. WARRANTIES

11.1 Warranties

11.1.1 Warranty

Developer warrants that: (a) all Work furnished pursuant to the Contract Documents shall conform to Good Industry Practice; (b) the Project shall be free of defects, including design Errors; (c) the Project shall be fit for use for the intended function; (d) materials and equipment furnished under the Contract Documents shall be of good quality and new; and (e) the Work shall meet all of the requirements of the Contract Documents (collectively, the "Warranty" or "Warranties"). With respect to the FM 407 Design, if Developer does not deviate from the FM 407 Design, the Warranty in clause (b) shall be limited to construction defects and the Warranty in clause (c) shall not apply.

11.1.2 Warranty Term

The Warranty Term of the Project shall commence upon Substantial Completion thereof. Subject to extension under Section 11.2, the Warranties regarding all elements of the Project that will be owned by TxDOT shall remain in effect until two years after Final Acceptance. The Warranty Term for elements of the Project that will be owned by Persons other than TxDOT (such as Utility Owners) shall commence as of the date of acceptance thereof by such Persons and shall end two years thereafter. If TxDOT determines that any of the Work has not met the standards set forth in this Section 11.1 at any time within the applicable Warranty Term, then Developer shall correct such Work as specified in this Section 11, even if the performance of such corrective Work extends beyond the applicable Warranty Term. TxDOT and Developer shall conduct a walkthrough of the Site prior to expiration of the applicable Warranty Term and shall produce a punch list of those items requiring corrective Work.

11.1.3 Remedy

Within seven days of receipt by Developer of notice from TxDOT specifying a failure of any of the Work to satisfy the Warranties, or of the failure of any Subcontractor representation, warranty, guarantee or obligation which Developer is responsible to enforce, Developer and TxDOT shall mutually agree when and how Developer shall remedy such failure; provided however that in case of an emergency requiring immediate curative action or a situation which poses a significant safety risk, Developer shall implement such action as it deems necessary and shall notify TxDOT in writing of the urgency of a decision. Developer and TxDOT shall promptly meet in order to agree on a remedy. If Developer does not use its best efforts to proceed to effectuate such remedy within the agreed time, or should Developer and TxDOT fail to reach such an agreement within such seven-day period (or immediately in the case of emergency conditions), TxDOT shall have the right, but not the obligation, to perform or have performed by third parties the necessary remedy, and the costs thereof shall be borne by Developer. Reimbursement therefor shall be payable to TxDOT within ten days after Developer's receipt of an invoice therefor. Alternatively, TxDOT may deduct the amount of such costs and expenses from any sums owed by TxDOT to Developer pursuant to this Agreement. TxDOT may agree to accept Nonconforming Work in accordance with Section 5.6.2.

11.1.4 Permits and Costs

Developer shall be responsible for obtaining any required encroachment permits and required consents from any other Persons in connection with the performance of Work addressed under this Section 11.1. Developer shall bear all costs of such Work, including additional testing and inspections, Developer shall reimburse TxDOT or pay

TxDOT's expenses made necessary thereby including any costs incurred by TxDOT for independent quality assurance and/or quality control with respect to such Work within ten days after Developer's receipt of invoices therefor (including, subject to the limitations in Section 17.5, any Liquidated Damages for Lane Closures arising from or relating to such Work). Alternatively, TxDOT may deduct the amount of such costs and expenses from any sums owed by TxDOT to Developer pursuant to this Agreement.

11.2 Applicability of Warranties to Re-Done Work

The Warranties shall apply to all Work re-done, repaired, corrected or replaced pursuant to the terms of this Agreement. Following acceptance by TxDOT of re-done, repaired, corrected or replaced Work, the Warranties as to each re-done, repaired, corrected or replaced element of the Work shall extend beyond the original Warranty Term in order that each element of the Project shall have at least a one-year warranty period (but not to exceed two years from Final Acceptance).

11.3 Subcontractor Warranties

11.3.1 Warranty Requirements

11.3.1.1 Without in any way derogating the Warranties and Developer's own representations and warranties and other obligations with respect to all of the Work, Developer shall obtain from all Subcontractors for periods at least coterminous with the Warranties, appropriate representations, warranties, guarantees and obligations with respect to design, materials, workmanship, equipment, tools and supplies furnished by such Subcontractors to effectuate the provisions in this Section 11.

11.3.1.2 Developer shall cause Subcontractor warranties to be extended to TxDOT and any third parties for whom Work is being performed or equipment, tools, supplies or software is being supplied by such Subcontractor; provided however that the foregoing requirement shall not apply to standard, pre-specified manufacturer warranties of mass-marketed materials, products (including software products), equipment or supplies where the warranty cannot be extended to TxDOT using commercially reasonable efforts. TxDOT agrees to forebear from exercising remedies under any such warranty so long as Developer is diligently pursuing remedies thereunder.

11.3.1.3 All representations, warranties, guarantees and obligations of Subcontractors shall be written so as to survive all TxDOT inspections, tests and approvals. Developer hereby assigns to TxDOT all of Developer's rights and interest in all extended warranties for periods exceeding the applicable Warranty Term which are received by Developer from any of its Subcontractors. To the extent that any Subcontractor warranty would be voided by reason of Developer's negligence or failure to comply with the Contract Documents in incorporating material or equipment into the Work, Developer shall be responsible for correcting such defect.

11.3.2 Enforcement

Upon receipt from TxDOT of notice of a failure of any of the Work to satisfy any Subcontractor warranty, representation, guarantee or obligation, Developer shall enforce or perform any such representation, warranty, guarantee or obligation, in addition to Developer's other obligations hereunder. TxDOT's rights under this Section 11.3.2 shall commence at the time such representation, warranty, guarantee or obligation is furnished and shall continue until the expiration of Developer's relevant Warranty Term (including extensions thereof under Section 11.2). Until such expiration, the cost of any equipment, material, labor (including re-engineering) or shipping shall be for the account of Developer if such cost is covered by such a representation, warranty, guarantee or obligation and Developer shall be required to replace or repair defective equipment, material or workmanship furnished by Subcontractors.

11.4 Effect of TxDOT or Maintenance Contractor Activities on Warranties

Developer acknowledges and agrees that TxDOT and the Maintenance Contractor and their respective agents may perform certain maintenance work during the period in which the Warranties are in effect and agrees that the Warranties shall apply notwithstanding such activities; provided however that Developer does not hereby waive any rights, claims or remedies to which it may be entitiled as a result of such activities.

11.5 No Limitation of Liability

Subject to Section 17.5, the Warranties and Subcontractor warranties are in addition to all rights and remedies available under the Contract Documents or applicable Law or in equity, and shall not limit Developer's liability or responsibility imposed by the Contract Documents or applicable Law or in equity with respect to the Work, including liability for design defects, latent construction defects, strict liability, breach, negligence, intentional misconduct or fraud.

11.6 Damages for Breach of Warranty

Subject to Section 17.5 and in addition to TxDOT's other rights and remedies hereunder, at law or in equity, Developer shall be liable for actual damages resulting from any breach of an express or implied warranty or any defect in the Work, including the cost of performance of such obligations by others.

SECTION 12. PAYMENT FOR SERVICES

12.1 Price

12.1.1 Amount

As full compensation for the Work and all other obligations to be performed by Developer under the Contract Documents, TxDOT shall pay to Developer the lump sum "Price." The term "Price" as used herein shall mean the lump sum amount set forth in this Section 12.1.1, subject to adjustment from time to time to account for Change Orders, Option Work, if any, and Value Engineering adjustments. The Price shall be increased or decreased only by a Change Order issued in accordance with Section 13, by the addition of any of the Option Work pursuant to Section 4.1.6, or a Value Engineering adjustment made in accordance with Section 22. The Price shall be paid in accordance with Section 12.2. The Price shall be the lump sum amount of $[*Add Development Price from Proposal*.].

12.1.2 Items Included in Price

Developer acknowledges and agrees that, subject only to Developer's rights under Section 13, the Price includes: (a) all designs, equipment, materials, labor, insurance and bond premiums, home office, jobsite and other overhead, profit and services relating to Developer's performance of its obligations under the Contract Documents (including all Work, equipment, materials, labor and services provided by Subcontractors and intellectual property rights necessary to perform the Work); (b) performance of each and every portion of the Work; (c) the cost of obtaining all Governmental Approvals (except as specified in Section 2.2.6); (d) all costs of compliance with and maintenance of the Governmental Approvals and compliance with Laws, except to the extent compliance with or maintenance of Governmental Approvals is the responsibility of Utility Owners pursuant to Section 6 of the Technical Provisions; (e) payment of any taxes, duties, permit and other fees and/or royalties imposed with respect to the Work and any equipment, materials, labor or services included therein; and (f) compensation for all risks and contingencies assigned to Developer under the Contract Documents. The Price does not include the Option Work, unless TxDOT exercises its option to add any such Option Work to the Work to be performed in accordance with the provisions of Section 4.1.6. In that event, the Price will be increased to reflect the amount of the Option Price(s) for any Option Work selected by TxDOT to be performed by Developer.

12.1.3 NTP Work Payments

Developer acknowledges and agrees that the amount of funds available to pay for Work prior to issuance of NTP2 is limited to $25,000,000. TxDOT has no obligation to make any payments to Developer in excess of $25,000,000 until such time (if any) as NTP2 is issued.

12.1.4 Delay in NTP1

12.1.4.1 TxDOT anticipates that it will issue the NTP1 concurrently with or shortly after execution and delivery of this Agreement, but shall have the right in its sole discretion to defer issuance. If the effective date of the NTP1 is more than 180 days after the Proposal Due Date and such delay in issuing the NTP1 was not caused in whole or in part by the acts, omissions, negligence, intentional misconduct, or breach of applicable Law, contract or Governmental Approval of any Developer-Related Entity, the Price will be adjusted by adding the following to the Price:

$$\Delta = N * (\text{Price}) * (([A-B]/B)/T)$$

where:

"Δ" is the adjustment amount;

"N" is the number of days in the period starting 180 days after the Proposal Due Date and ending on the effective date of NTP1;

"A" is the ENR Construction Cost Index (CCI) value published for the effective date of NTP1;

"B" is the CCI published for the month which contains the day which is N +15 days prior to the 15th day of the month which contains the effective date of the NTP1; and

"T" is the number of days between the 15th of the month for which the CCI value for "A" was taken and the 15th of the month for which the CCI value for "B" was taken.

12.1.4.2 If a Change Order is issued during the period starting 180 days after the Proposal Due Date and ending on the effective date of NTP1, the price of the Change Order, if any, shall be adjusted based on the date that the Change Order is approved to the effective date of NTP1 using the formula set forth in Section 12.1.4.1 above, with "B" being the CCI for the month in which the Change Order is approved.

12.1.4.3 If NTP1 has not been issued on or before 365 days after the Effective Date, the Parties may mutually agree to terms allowing an extension in time for issuance of NTP1 and adjustment of the Price. Developer shall provide evidence satisfactory to TxDOT, meeting the requirements of Section 13.4, justifying the amount of any Price increase. If the delay in issuance of NTP1 was not caused in whole or in part by the acts, omissions, negligence, intentional misconduct, or breach of applicable Law, contract or Governmental Approval of any Developer-Related Entity and Developer does not wish to negotiate an extension or if the Parties fail to reach agreement in accordance with this Section 12.1.4.3, then Developer's sole remedy shall be to terminate this Agreement in accordance with Section 15.9.

12.1.5 Additional Provisions Relating to Delays in NTP1

12.1.5.1 Notwithstanding anything to the contrary contained herein, Developer shall not be entitled to an increase in the Price or extension of the Completion Deadlines, nor shall Developer have a right to terminate this Agreement in accordance with Section 15.9 with respect to any delay in issuance of NTP1 due to the acts, omissions, negligence, intentional misconduct, or breach of applicable Law, contract or Governmental Approval of any Developer-Related Entity.

12.1.5.2 Any Price increase under this Section 12.1 shall be amortized proportionally over all Work at issue.

12.1.6 Price Adjustment Due to Delay in NTP2

If TxDOT does not issue NTP2 before the later of the 361st day after the Proposal Due Date or the 91st day following issuance of NTP1, and this delay is not caused in whole or in part by an act, omission, negligence, intentional misconduct, or breach of applicable Law, contract or Governmental Approval by any Developer-Related Entity (including Developer's failure to satsify any particular condition(s) to NTP2), the Price shall be subject to adjustment, as described in this Section 12.1.6.

12.1.6.1 The Price adjustment shall apply to the period beginning on the date of issuance of NTP2.

12.1.6.2 The Price for Work performed on and after the date of issuance of NTP2 will be adjusted by adding the product of the following to the Price:

$$\Delta = N * (Price - C) * (([A-B]/B)/T)$$

where:

"Δ" is the adjustment amount distributed on a *pro rata* basis over the remaining payments on Exhibit 5;

"C" is 1/3 of the amount paid or owing for Work performed prior to issuance of NTP2;

"N" is the number of days in the period starting on the later of the 360th day after the Proposal Due Date or the 91st day after issuance of NTP1 and ending on the effective date of NTP2;

"A" is the ENR Construction Cost Index (CCI) value published for the effective date of NTP2;

"B" is the CCI published for the month which contains the day which is N +15 days prior to the 15th day of the month which contains the effective date of NTP2; and

"T" is the number of days between the 15th of the month for which the CCI value for "A" was taken and the 15th of the month for which the CCI value for "B" was taken.

12.1.7 Options Work

The Option Prices for Developer's performance of each Option, provided that TxDOT exercises its option for such Option Work within the period designated in Section 4.1.6, are set forth below and correspond to the Option Work descriptions contained in Section 1.2 of the Technical Provisions.

$ [*insert Option Price from Exhibit 5-1*] for Option 1.

$ [*insert Option Price from Exhibit 5-2*] for Option 2.

* * *

$ [*insert Option Price from Exhibit 5-[X]*] for Option [X].

12.2 Invoicing and Payment

The following process shall apply to invoicing and payment:

12.2.1 Delivery of Draw Request

On or about the fifth Business Day of each month following NTP1 and continuing through the last date of the Maximum Payment Schedule shown on Exhibit 5, Developer shall deliver to TxDOT five copies of a Draw Request in the form attached hereto as Exhibit 15 and meeting all requirements specified herein except as otherwise approved in writing by TxDOT. Each Draw Request shall be executed by Developer's Authorized Representative. Developer acknowledges that TxDOT will obtain funding for portions of the Work from the federal government, local agencies and other third parties, and Developer agrees to segregate Draw Requests for all such Work in a format reasonably requested by TxDOT and with detail and information as reasonably requested by TxDOT. Each Draw Request shall be organized to account for applicable reimbursement requirements and to facilitate the reimbursement process.

12.2.2 Contents of Draw Request

Each Draw Request must contain the following items:

(a) Draw Request cover sheet;

(b) An approved Monthly Project Status Schedule Update as described in Section 2.1.1.2 of the Technical Provisions;

(c) Certification by the Developer that all Work which is the subject of the Draw Request fully complies with the requirements of the Contract Documents subject to any exceptions identified in the certification;

(d) Monthly report of personnel hours;

(e) Draw Request data sheet(s) and supporting documents, as required by TxDOT to support and substantiate the amount requested (based on quantities and unit prices for unit priced Work, based on time and materials for Time and Materials Change Orders, based on actual costs as evidenced by invoices for items to be paid from an allowance, and based on the Project Schedule for all other Work) and showing the maximum amount payable based on the Maximum Payment Schedule;

(f) DBE utilization report in a format reasonably satisfactory to TxDOT;

(g) Traffic incident reports;

(h) Cash flow curves and comparison to the Maximum Payment Schedule;

and

(i) Such other items as TxDOT reasonably requests.

In addition, no Draw Request shall be considered complete unless it: (i) describes in detail the status of completion as it relates to the Project Schedule; (ii) sets forth separately and in detail the related payments which are then due in accordance with the Project Schedule and the payments which are then due in accordance with Maximum Payment Schedule, as of the end of the prior month; (iii) in the case of amounts to be paid on a unit price basis, includes invoices, receipts or other evidence establishing the number of units delivered; (iv) in the case of amounts invoiced on a time and materials basis, includes all supporting documentation described in Section 13.7; (v) sets forth in detail the amounts paid to Subcontractors (including Suppliers and Subcontractors at lower tiers) from the payments made by TxDOT to Developer with respect to the Draw Request submitted two months prior; and (vi) includes affidavits of payment and unconditional

waivers of Liens and claims executed by Developer and each Subcontractor with respect to all amounts paid in connection with the Draw Request submitted two months prior.

12.2.3 Draw Request Cover Sheet Contents

The Draw Request cover sheet shall include the following:

(a) Project number and title;

(b) Request number (numbered consecutively starting with "1");

(c) Total amount earned to date for the Project; and

(d) Authorized signature, title of signer, and date of signature.

12.2.4 Certification by Professional Services Quality Control Manager and Construction Quality Acceptance Firm

Each Draw Request shall include a certificate signed and sealed by the Professional Services Quality Control Manager or the Construction Quality Acceptance Firm, as appropriate, in a form included in Exhibit 15 or otherwise acceptable to TxDOT, certifying that:

(a) Except as specifically noted in the certification, all Work, including that of designers, Subcontractors, and Suppliers, which is the subject of the Draw Request has been checked and/or inspected by the Professional Services Quality Control Manager with respect to Professional Services and the Construction Quality Acceptance Firm with respect to the Construction Work;

(b) Except as specifically noted in the certification, all Work which is the subject of the Draw Request conforms to the requirements of the Contract Documents;

(c) The Professional Services Quality Program and the Construction Quality Program and all of the measures and procedures provided therein are functioning properly and are being followed;

(d) The Professional Services percentages and construction percentages indicated are accurate and correct; and

(e) All quantities for which payment is requested on a unit price basis are accurate.

12.2.5 Draw Request Data Sheets

Draw Request data sheets shall be subdivided into Developer-designated Project segments and shall be attached to a Project-wide report and Draw Request data sheet. It is TxDOT's intent to base payments on a mutually agreed estimate of percentage of Work completed, not on measured quantities (except as expressly set forth in this Agreement), except that cost plus or unit price Change Order work or items to be paid from an allowance may be paid based upon measured quantities. Developer's designation of activities, phases and Project segments and their representation on the final approved Project Schedule and the corrected monthly progress reports shall facilitate this basis of determining periodic payments. Where progress is measured by percentage complete and days remaining, the percentage shall be calculated using the latest scheduling software employed by TxDOT (currently Primavera 6.2). Developer shall present the format of the Draw Request data sheets for TxDOT approval at least 20 Business Days prior to the submittal of the first Draw Request. Once the Draw Request format has been approved by TxDOT, the format shall not change without TxDOT's prior written approval.

12.2.6 Payment by TxDOT

Within ten Business Days after TxDOT's receipt of a complete Draw Request, TxDOT will review the Draw Request and all attachments and certificates thereto for conformity with the requirements of the Contract Documents, and shall notify Developer of

the amount approved for payment and the reason for disapproval of any remaining invoiced amounts or of any other information set forth in the Draw Request. Developer may include such disapproved amounts in the next month's Draw Request after correction of the deficiencies noted by TxDOT and satisfaction of the requirements of the Contract Documents related thereto. Within five Business Days after TxDOT's approval of a Draw Request, TxDOT shall pay Developer the amount of the Draw Request approved for payment less any amounts which TxDOT is entitled to withhold or deduct. In no event shall Developer be entitled to: (a) payment for any activity in excess of the value of the activity times the completion percentage of such activity (for non-unit priced Work), or (b) aggregate payments hereunder in excess of: (i) the overall completion percentage for the Project times the Price (for non-unit-priced Work) or (ii) the Maximum Payment Schedule for the month to which the Draw Request applies, plus amounts allowed by Change Orders.

12.2.7 Certification Regarding Payment

TxDOT acknowledges that Developer may satisfactorily perform Work which entitles it to payment amounts in excess of the cumulative monthly amounts allowed under the Maximum Payment Schedule prior to the final payment. Upon Developer's request, TxDOT will provide reasonable certification of such amounts. Such amounts may not be subject to deductions available to TxDOT under the Agreement or a right of offset by TxDOT, provided that Developer and TxDOT have agreed upon reasonable safeguards for issuance of the certifications; and provided further that nothing herein shall prevent TxDOT from exercising its right of offset or to deductions against sums that otherwise would be payable to Developer under the Maximum Payment Schedule or from exercising its rights under the Retainage Bond, Performance Bond, Payment Bond or Guaranty. Notwithstanding any other provision in this Agreement, Developer may assign all or any portion of its rights, title and interests in and to payment of such amounts certified by TxDOT, or to any other payment made or owed by TxDOT under this Agreement, to any Person from which Developer obtains financing to complete any portion of the Work.

12.3 Deductions, Exclusions and Limitations on Payment

12.3.1 Withholding for Maintenance Security

TxDOT shall retain from the Final Payment, and if it reasonably appears there will be insufficient funds at Final Payment, from progress payments, $10 million as security for the provision of the bonds required under Section 7.1 of the CMA. Developer shall have the option at any time to deliver an irrevocable letter of credit in the amount of $10 million in lieu of the retained sums in a form and on terms acceptable to TxDOT in its sole discretion. TxDOT shall release the $10 million or letter of credit, as applicable, to Developer upon (a) the provision of the bonds required under Section 7.1 of the CMA within 60 days after TxDOT's issuance of Maintenance NTP1 or (b) the election of TxDOT not to issue Maintenance NTP1 within 550 days after Final Acceptance. Developer shall forfeit as liquidated damages and not as a penalty such sums, or if a letter of credit is provided in lieu of retained amounts, TxDOT shall have the right to draw on the letter of credit in the event TxDOT does not receive the bonds required under Section 7.1 of the CMA by the deadline set forth therein.

12.3.2 Deductions

TxDOT may deduct from each progress payment and the Final Payment the following:

(a) Any TxDOT or third party Losses for which Developer is responsible hereunder or any Liquidated Damages which have accrued as of the date of the application for payment or which are anticipated to accrue based on the Substantial Completion and Final Acceptance dates shown in the current Project Schedule**;**

(b) If a notice to stop payment, claim or Lien is filed with TxDOT, due to Developer's failure to pay for labor or materials used in the Work, money due for such labor or materials will be withheld from payment to the Developer;

(c) Any sums expended by or owing to TxDOT as a result of Developer's failure to maintain the Record Drawings,

(d) Any sums expended by TxDOT in performing any of Developer's obligations under the Contract Documents which Developer has failed to perform, and

(e) Any other sums which TxDOT is entitled to recover from Developer under the terms of this Agreement.

The failure by TxDOT to deduct any of these sums from a progress payment shall not constitute a waiver of TxDOT's right to such sums.

12.3.3 Unincorporated Materials

TxDOT will not pay for materials not yet incorporated in the Work unless all of the following conditions are met:

12.3.3.1 Material shall be: (a) delivered to the Site; (b) delivered to Developer and promptly stored by Developer in bonded storage at a location approved by TxDOT in its sole discretion; or (c) stored at a Supplier's fabrication site, which must be a bonded commercial location approved by TxDOT, in its sole discretion. Developer shall submit certified bills for such materials with the Draw Request, as a condition to payment for such materials. TxDOT shall allow only such portion of the amount represented by these bills as, in its sole opinion, is consistent with the reasonable cost of such materials. If such materials are stored at any site not approved by TxDOT, Developer shall accept responsibility for and pay all personal and property taxes that may be levied against TxDOT by any state or subdivision thereof on account of such storage of such material.

12.3.3.2 All such materials that meet the requirements of the Contract Documents shall be and become the property of TxDOT. Developer at its own cost shall promptly execute, acknowledge and deliver to TxDOT proper bills of sale or other instruments in writing in a form acceptable to TxDOT conveying and assuring to TxDOT title to such material included in any Draw Request, free and clear of all Liens. Developer, at its own cost, shall conspicuously mark such material as the property of TxDOT, shall not permit such materials to become commingled with non-TxDOT-owned property or with materials that do not conform with the Contract Documents, and shall take such other steps, if any, as TxDOT may require or regard as necessary to vest title to such material in TxDOT free and clear of Liens.

12.3.3.3 The cost and charges for material included in a Draw Request but which is subsequently lost, damaged or unsatisfactory may be deducted from succeeding Draw Requests if TxDOT, in its sole discretion, determines that is appropriate after considering the availability of insurance coverage and Developer's actions to replace the lost, damaged or unsatisfactory items.

12.3.3.4 Payment for material furnished and delivered as indicated in this Section 12.3.3 will not exceed the amount paid by Developer as evidenced by a bill of sale supported by paid invoice.

12.3.4 Payments for Mobilization, Bond and Insurance Premiums and Record Drawings

12.3.4.1 Developer shall be entitled to payment for mobilization in installments, in an amount equal to the bid item price for mobilization, not to exceed 10% of the Price. The first payment for mobilization shall be in an amount not to exceed 5% of the bid item price for mobilization, payable as part of the first Draw Request following NTP1. The second payment for mobilization shall be in an amount not to exceed 20% of the bid item price for mobilization, payable as part of the first Draw Request following NTP2. The third payment for mobilization shall be in an amount not to exceed 50% of the bid item price for mobilization, payable when at least 10% of the Price (less mobilization) is earned. The fourth payment for mobilization shall be in the remaining amount of the bid item price for mobilization, payable when at least 25% of the Price (less mobilization) is earned. The amounts paid under this Section 12.3.4.1 shall be taken into account in assessing the maximum amount payable under a Draw Request through application of the Maximum Payment Schedule.

12.3.4.2 The portion of the Price allocable to bond and insurance premiums, as set forth in the Proposal, shall be payable to reimburse Developer for bond and insurance premiums actually paid, without markup, not to exceed the line item for such premiums in the Proposal, as part of the first Draw Request following NTP2. Any excess portion of the line item for such premiums set forth in the Proposal shall be payable following Substantial Completion of the Project. The amounts paid under this Section 12.3.4.2 shall be taken into account in assessing the maximum amount payable under a Draw Request through application of the Maximum Payment Schedule.

12.3.4.3 The amount payable for Record Drawings acceptable to TxDOT shall equal 1% of the Price, which shall be withheld from each payment of the Price. Developer shall not be entitled to payment for the last 1% of the Price until acceptable Record Drawings have been delivered to TxDOT.

12.3.5 Equipment

TxDOT shall not pay for direct costs of equipment. Costs of equipment, whether new, used or rented, and to the extent not included in the mobilization payments under Section 12.3.4, shall be allocated to and paid for as part of the activities with which the equipment is associated, in a manner which is consistent with the requirements of Section 13.7.3.

12.4 Final Payment

Final Reconciliation of amounts owing for all Work will be made as follows:

12.4.1 On or about the date of Final Acceptance, Developer shall prepare and submit a proposed Final Reconciliation to TxDOT showing the proposed total amount due Developer as of the date of Final Acceptance, including any amounts owing from Change Orders. In addition to meeting all other requirements for Draw Requests hereunder, the Final Reconciliation shall propose a schedule of monthly payments that do not exceed the amounts set forth on the Maximum Payment Schedule. The Final Reconciliation shall list all outstanding PCO Notices, stating the amount at issue associated with each such notice. The Final Reconciliation shall also be accompanied by: (a) evidence regarding the status of all existing or threatened claims, Liens and stop notices of Subcontractors,

Suppliers, laborers, Utility Owners and or other third parties against Developer, TxDOT or the Project, (b) consent of any Guarantors and Surety to the proposed monthly payment schedule, (c) such other documentation as TxDOT may reasonably require; and (d) the release described in Section 12.4.4, executed by Developer. Prior applications and payments shall be subject to correction in the Final Reconciliation. PCO Notices filed concurrently with the Final Reconciliation must be otherwise timely and meet all requirements under Sections 13 and 19.

12.4.2 If the Final Reconciliation shows no existing or threatened claims, Liens and stop notices of Subcontractors, Suppliers, laborers, Utility Owners or other third parties against Developer, TxDOT or the Project, and provided TxDOT has approved the Final Reconciliation, TxDOT, in exchange for an executed release meeting the requirements of Section 12.4.4 and otherwise satisfactory in form and content to TxDOT, will pay in accordance with the monthly payment schedule described in Section 12.4.6 the entire sum found due on the approved Final Reconciliation, less the amount of any Losses that have accrued as of the date of Final Acceptance, any other deductions permitted under Section 12.3.2 above, and any withholding permitted under Section 12.3.1 above.

12.4.3 If the Final Reconciliation lists any existing or threatened claims, Liens and stop notices of Subcontractors, Suppliers, laborers, Utility Owners or other third parties against Developer, TxDOT or the Project, or if any is thereafter filed, TxDOT may withhold from payment such amount as TxDOT deems advisable to cover any amounts owing or which may become owing to TxDOT by Developer, including costs to complete or remediate uncompleted Work or Nonconforming Work, and the amount of any existing or threatened claims, Liens and stop notices of Subcontractors, Suppliers, laborers, Utility Owners and other third parties against Developer, TxDOT or the Project.

12.4.4 The executed release from Developer shall be from any and all claims arising from the Work, and shall release and waive any claims against the Indemnified Parties, excluding only those matters identified in any PCO Notices listed as outstanding in the Final Reconciliation. The release shall be accompanied by an affidavit from Developer certifying:

(a) that all Work has been performed in strict accordance with the requirements of the Contract Documents;

(b) that Developer has resolved any claims made by Subcontractors, Suppliers, Utility Owners, laborers, or other third parties against Developer, TxDOT or the Project (except those listed by Developer in accordance with Section 12.4.3);

(c) that Developer has no reason to believe that any Person has a valid claim against Developer, TxDOT or the Project which has not been communicated in writing by Developer to TxDOT as of the date of the certificate; and

(d) that all guarantees, Warranties and the Payment Bond, the Performance Bond, Retainage Bond and Warranty Bond are in full force and effect.

12.4.5 All prior Draw Requests shall be subject to correction in the Final Reconciliation.

12.4.6 TxDOT will review Developer's proposed Final Reconciliation, and any changes or corrections, including deductions and withholding described in Section 12.4.2, will be forwarded to Developer for correction within 20 Business Days. Any changes or corrections made pursuant to this Section 12.4.6 will be reflected in an updated monthly payment schedule showing the net amount owed to Developer by month.

12.4.7 TxDOT shall fulfill its payment obligations under this Agreement by paying the amounts identified in Section 12.4.6, in accordance with the schedule described in Section 12.4.6.

12.5 Payment to Subcontractors

12.5.1 Developer shall pay each Subcontractor for Work performed within ten days after receiving payment from TxDOT for the Work performed by the Subcontractor, and shall pay any retainage on a Subcontractor's Work within ten days after satisfactory completion of all of the Subcontractor's Work. Completed Subcontractor Work includes vegetative establishment, test, maintenance, performance, and other similar periods that are the responsibility of the Subcontractor.

12.5.2 For the purpose of this Section 12.5, satisfactory completion shall have been accomplished when:

(a) the Subcontractor has fulfilled the Subcontract requirements and the requirements under the Contract Documents for the subcontracted Work, including the submission of all submittals required by the Subcontract and Contract Documents; and

(b) the Work done by the Subcontractor has been inspected and approved by Developer and the final quantities of the Subcontractor's Work have been determined and agreed upon.

12.5.3 The foregoing payment requirements apply to all tiers of Subcontractors and shall be incorporated into all Subcontracts.

12.6 Disputes

Failure by TxDOT to pay any amount in dispute shall not alleviate, diminish or modify in any respect Developer's obligation to perform under the Contract Documents, including Developer's obligation to achieve the Completion Deadlines and perform all Work in accordance with the Contract Documents, and Developer shall not cease or slow down its performance under the Contract Documents on account of any such amount in dispute. Any Claim or Dispute regarding such payment shall be resolved pursuant to Section 19. Developer shall proceed as directed by TxDOT pending resolution of the Claim or Dispute. Upon resolution of any such Claim or Dispute, each Party shall promptly pay to the other any amount owing.

12.7 Progress Payment Certificate

(a) Upon receipt of TxDOT's response under Section 12.4.6, Developer may request TxDOT to execute and deliver to Developer, within ten business days, a Progress Payment Certificate in a form substantially similar to Exhibit 21, identifying a total undisputed amount owing to Developer, acknowledging its obligation to pay that amount to Developer and committing to make payments to satisfy that obligation in accordance with the schedule described in Section 12.4.6.

(b) Notwithstanding any other provision in this Agreement, Developer may assign all or any portion of its rights, title and interests in and to the Progress Payment Certificate described in Section 12.7(a), or to any other payment made or owed by TxDOT under this Agreement, to any Person from which Developer obtains financing to complete any portion of the Work.

(c) At Developer's request, TxDOT will provide subsequent certificates to the extent appropriate to reflect additional undisputed amounts determined after issuance of the initial certificate to be owing to Developer.

SECTION 13. CHANGES IN THE WORK

This Section 13 sets forth the requirements for obtaining all Change Orders under this Agreement. Developer hereby acknowledges and agrees that the Price constitutes full compensation for performance of all of the Work, subject only to those exceptions specified in this Section 13 and Developer's right to collect certain payments from Utility Owners for Betterments as specified in Section 6.8.2, and that TxDOT is subject to constraints limiting its ability to increase the Price or extend the Completion Deadlines. Developer unconditionally and irrevocably waives the right to any Claim for a time extension or for any monetary compensation in addition to the Price and other compensation specified in this Agreement, except in accordance with this Section 13. To the extent that any other provision of this Agreement expressly provides for a Change Order to be issued, such provision is incorporated into and subject to this Section 13.

13.1 Circumstances Under Which Change Orders May Be Issued

13.1.1 Definition of and Requirements Relating to Change Orders

13.1.1.1 Definition of Change Order

The term "Change Order" shall mean a written amendment to the terms and conditions of the Contract Documents issued in accordance with this Section 13. TxDOT may issue unilateral Change Orders as specified in Section 13.2.2. Change Orders may be requested by Developer only pursuant to Section 13.3. A Change Order shall not be effective for any purpose unless executed by TxDOT. Change Orders may be issued for the following purposes (or combination thereof):

(a) to modify the scope of the Work;
(b) to revise a Completion Deadline;
(c) to revise the Price;
(d) to revise other terms and conditions of the Contract Documents.

Upon TxDOT's approval of the matters set forth in the Change Order form (whether it is initiated by TxDOT or requested by Developer), TxDOT shall sign such Change Order form indicating approval thereof. A Change Order may, at the sole discretion of TxDOT, direct Developer to proceed with the Work with the amount of any adjustment of any Completion Deadline or Price to be determined in the future. All additions, deductions or changes to the Work as directed by Change Orders shall be executed under the conditions of the original Contract Documents.

13.1.1.2 Issuance of Directive Letter

TxDOT may at any time issue a Directive Letter to Developer regarding any matter for which a Change Order can be issued or in the event of any Claim or Dispute regarding the scope of the Work or whether Developer has performed in accordance with the requirements of the Contract Documents. The Directive Letter will state that it is issued under this Section 13.1.1.2, will describe the Work in question and will state the basis for determining compensation, if any. Subject to Section 13.2.1.5, Developer shall proceed immediately as directed in the Directive Letter, pending the execution of a formal Change Order (or, if the Directive Letter states that the Work is within Developer's original scope of Work, Developer shall proceed with the Work as directed but shall have the right pursuant to Section 13.3 to request that TxDOT issue a Change Order with respect thereto).

13.1.1.3 Directive Letter as Condition Precedent to Claim that TxDOT-Directed Change Has Occurred

Developer shall not be entitled to additional compensation or time extension for any such work performed prior to receipt of a Directive Letter or Change Order, except to the extent that Section 13.3.2.2 preserves Developer's right to compensation for work performed following delivery of a Request for Partnering. Developer acknowledges that it will be at risk if it elects to proceed with any such work, since TxDOT may later decide not to provide direction with regard to such work. In addition to provision of a PCO Notice and subsequent Change Order request pursuant to Section 13.3.2, receipt of a Directive Letter from TxDOT shall be a condition precedent to Developer's right to make a Claim that a TxDOT-Directed Change has occurred.

The fact that a Directive Letter was issued by TxDOT shall not be considered evidence that in fact a TxDOT-Directed Change occurred. The determination whether a TxDOT-Directed Change in fact occurred shall be based on an analysis of the original requirements of the Contract Documents and a determination whether the Directive Letter in fact constituted a change in those requirements.

13.1.2 TxDOT Right to Issue Change Orders

TxDOT may, at any time and from time to time, without notice to any Surety, authorize and/or require, pursuant to a Change Order, changes in the Work or in terms and conditions of the Technical Provisions (including changes in the standards applicable to the Work); except TxDOT has no right to require any change that:

(a) Is not in compliance with applicable Laws;

(b) Would contravene an existing Governmental Approval and such contravention could not be corrected by the issuance of a further or revised Governmental Approval;

(c) Constitutes a fundamental change in the nature or scope of the Project;

(d) Would cause an insured risk to become uninsurable;

(e) Would materially adversely affect the health or safety of users of the Project;

(f) Is fundamentally incompatible with the Project design; or

(g) Is not technically feasible to construct.

Developer shall have no obligation to perform any work within any such exception unless on terms mutually acceptable to TxDOT and Developer.

13.2 TxDOT-Initiated Change Orders

13.2.1 Request for Change Proposal

13.2.1.1 If TxDOT desires to issue a TxDOT-Directed Change or to evaluate whether to initiate such a change, then TxDOT may, at its discretion, issue a Request for Change Proposal. The Request for Change Proposal shall set forth the nature, extent and details of the proposed TxDOT-Directed Change.

13.2.1.2 Within five Business Days after Developer receives a Request for Change Proposal, or such longer period to which the Parties mutually agree, TxDOT and Developer shall consult to define the proposed scope of the change. Within five Business Days after the initial consultation, or such longer period to which the Parties may mutually agree, TxDOT and Developer shall consult concerning the estimated cost and time impacts.

13.2.1.3 Within five Business Days after the second consultation and provision of any data described in Section 13.2.1.2, TxDOT shall notify Developer whether TxDOT: (a) wishes to issue a Change Order; (b) wishes to request Developer to provide a

Cost and Schedule Proposal as discussed at the meeting; (c) wishes to request Developer to prepare a modified work plan for the change and a Cost and Schedule Proposal based on the modified plan; or (d) no longer wishes to issue a Change Order. TxDOT may at any time, in its sole discretion, require Developer to provide two alternative Cost and Schedule Proposals, one of which shall provide for a time extension and any additional costs permitted hereunder, and the other of which shall show all Acceleration Costs associated with meeting the non-extended Completion Deadlines, as well as any additional costs permitted hereunder.

13.2.1.4 If so requested, Developer shall, within ten Business Days after receipt of the notification described in Section 13.2.1.3, or such longer period as may be mutually agreed to by TxDOT and Developer, prepare and submit to TxDOT for review and approval by TxDOT a Cost and Schedule Proposal (in the format provided by TxDOT) for the requested change, complying with all applicable requirements of Section 13.4, and incorporating and fully reflecting all requests made by TxDOT. Developer shall bear the cost of developing the Cost and Schedule Proposal, including any modifications thereto requested by TxDOT, except that costs of design and engineering work required for preparation of plans or exhibits necessary to the Cost and Schedule Proposal, as pre-authorized by TxDOT, may be included in the Change Order as reimbursable items. If the Change Order is approved, such design and engineering costs will be included within the Change Order, otherwise, they shall be separately reimbursed through a separate Change Order.

13.2.1.5 If Developer and TxDOT are unable to reach agreement on a Change Order, TxDOT may, in its sole discretion, order Developer to proceed with the performance of the Work in question notwithstanding such disagreement. Such order may, at TxDOT's option, be in the form of: (a) a Time and Materials Change Order as provided in Section 13.7 or (b) a Directive Letter under Section 13.1.1.2. Upon receipt of a Time and Materials Change Order or Directive Letter, as the case may be, pending final resolution of the relevant Change Order according to the dispute resolution procedures of this Agreement, (a) Developer shall implement and perform the Work in question as directed by TxDOT and (b) TxDOT will make interim payment(s) to Developer on a monthly basis for the reasonable documented costs of the Work in question, subject to subsequent adjustment through the dispute resolution procedures of this Agreement.

13.2.1.6 If it is not practicable, due to the nature and/or timing of the event giving rise to a proposed Change Order, for Developer to provide a complete Cost and Schedule Proposal meeting all of the requirements of Section 13.4, Developer shall provide an incomplete proposal which includes all information capable of being ascertained. Said incomplete proposal shall: (a) include a list of those Change Order requirements which are not fulfilled together with an explanation reasonably satisfactory to TxDOT stating why such requirements cannot be met, (b) provide such information regarding projected impact on a critical path as is requested by TxDOT, and (c) in all events include sufficient detail to ascertain the basis for the proposed Change Order and for any price increase associated therewith, to the extent such amount is then ascertainable. Developer shall provide monthly updates to any incomplete Cost and Schedule Proposals in the same manner as updates to incomplete Requests for Change Order under Section 13.3.2.6.

13.2.2 Unilateral Change Orders

TxDOT may issue a unilateral Time and Materials Change Order at any time, regardless of whether it has issued a Request for Change Proposal. Developer shall be entitled to compensation in accordance with Section 13.7 for additional Work which is required to be performed as the result of any such unilateral Change Order, and shall have the right to submit the issue of entitlement to an extension of the Completion Deadlines to dispute resolution in accordance with Section 19. For deductive unilateral Change Orders, the Change Order may contain a Price deduction deemed appropriate by TxDOT, and Developer shall have the right to submit the amount of such Price deduction to dispute resolution in accordance with Section 19.

13.2.3 TxDOT-Directed Changes Under $10,000

Developer shall not be entitled to an increase in the Price for any TxDOT-Directed Changes involving less than $10,000 in additional direct costs incurred by Developer.

13.3 Developer-Requested Change Orders

13.3.1 Eligible Changes

13.3.1.1 Developer may request a Change Order to extend a Completion Deadline only for delays directly attributable to one or more of the following events or circumstances which change the duration of a Critical Path:

(a) Force Majeure Events;

(b) TxDOT-Caused Delays;

(c) delays relating to Utilities, to the extent permitted by Sections 6.8.1, 6.8.5 and 13.8.2; or

(d) delays relating to Differing Site Conditions or discovery of Hazardous Materials, to the extent permitted by Section 13.8.

(e) delays relating to access to ROW, to the extent permitted by Section 13.8.5.

13.3.1.2 Developer may request a Change Order to increase the Price only for increased costs of performance of the Work as follows:

(a) subject to Section 13.2.3, additional costs directly attributable to additional Work resulting from TxDOT-Directed Changes and TxDOT-Caused Delays for which TxDOT has not submitted a Change Order or a Request for Change Proposal;

(b) additional costs relating to Differing Site Conditions, Hazardous Materials, and Force Majeure Events, to the extent provided in Section 13.8;

(c) certain additional costs relating to Utility Adjustment Work, as described in Section 6.8 and Section 13.8.2, to the extent provided therein;

(d) additional costs directly attributable to uncovering, removing and restoring Work, to the extent provided in Section 5.4.3;

(e) Price adjustments as specified in Section 12.1; or

(f) additional costs for Utility Adjustment Work directly attributable to Necessary Basic Configuration Changes, to the extent provided in Section 13.8.

13.3.1.3 Developer's entitlement to a Change Order for eligible changes is subject to the restrictions and limitations contained in this Section 13 and elsewhere in the Contract Documents, and furthermore is subject to Developer's compliance with all notification and other requirements identified herein. Developer shall initiate the Change Order process by delivery of a PCO Notice as described in Section

13.3.2, followed by submittal of a Request for Change Order and supporting documentation to TxDOT.

13.3.2 Procedures

The requirements set forth in this Section 13.3.2 constitute conditions precedent to Developer's entitlement to request and receive a Change Order except those involving: (a) a Request for Change Proposal or (b) a Price increase under Section 12.1.4. Developer understands that it shall be forever barred from recovering against TxDOT under this Section 13 if it fails to give notice of any act, or omission, by TxDOT or any of its representatives or the happening of any event, thing or occurrence pursuant to a proper PCO Notice, or fails to comply with the remaining requirements of this Section 13.3.

13.3.2.1 Delivery of Requests for Partnering and PCO Notices

Developer acknowledges the importance of providing prompt notification to TxDOT upon occurrence of any event or thing entitling Developer to a Change Order under Section 13.3.1. Among other things, such notification serves the purpose of allowing TxDOT to take action to mitigate adverse impacts. Such notification must be delivered as promptly as possible after the occurrence of such event or situation, through either: (a) a PCO Notice as described in Section 13.3.2.3; or (b) if permitted by Section 13.3.2.2, a Request for Partnering followed by a PCO Notice if appropriate.

13.3.2.2 Requests for Partnering

The term "Request for Partnering" shall mean a notice delivered by Developer requesting that TxDOT enter into partnering discussions with Developer with regard to an event or situation that has occurred within the scope of Section 13.3.1.2. The Request for Partnering shall reference this Section 13.3.2.2 and shall describe the event or situation as well as action which Developer would like to take with respect thereto. The Parties shall promptly meet and confer for the purpose of determining what action should be taken and also to determine whether the Parties are in agreement as to entitlement to a Change Order. Either Party may at any time terminate partnering discussions by delivery of written notice to the other, and partnering discussions shall automatically terminate 60 days after delivery of the Request for Partnering unless both Parties agree in writing to an extension. Within five Business Days after termination of partnering discussions, if TxDOT has not issued either a Directive Letter or Change Order, Developer must submit a PCO Notice in order to preserve its right to pursue a Change Order. The foregoing process is not available for events or situations involving a delay to the Critical Path. With regard to any such events or situations, Developer must submit a PCO Notice as provided in Section 13.3.2.3.

13.3.2.3 PCO Notices

The term "PCO Notice" shall mean a notice delivered by Developer, meeting the requirements set forth below, stating that an event or situation has occurred within the scope of Section 13.3.1 and stating which subsection thereof is applicable. The first notice shall be labeled "PCO Notice No. 1" and subsequent notices shall be numbered sequentially.

The PCO Notice shall: (a) state in detail the facts underlying the anticipated Request for Change Order, the reasons why Developer believes additional compensation or time will or may be due and the date of occurrence; (b) state the name, title, and activity of each Program Manager and TxDOT representative knowledgeable of the facts underlying the anticipated Request for Change Order; (c) identify any documents and the substance of any oral communication involved in the facts underlying the

anticipated Request for Change Order; (d) state in detail the basis for necessary accelerated schedule performance, if applicable; (e) state in detail the basis that the work is not required by this Agreement, if applicable; (f) identify particular elements of performance for which additional compensation may be sought under this Section 13.3.2; (g) identify any potential critical path impacts;and (h) provide an estimate of the time within which a response to the notice is required to minimize cost, delay or disruption of performance.

If the Request for Change Order relates to a decision which this Agreement leaves to the discretion of a Person or as to which this Agreement provides that such Person's decision is final, the PCO Notice shall set out in detail all facts supporting Developer's objection to the decision, including all facts supporting any contention that the decision was capricious or arbitrary or is not supported by substantial evidence.

Written notification provided in accordance with Section 13.8.1.3 or 13.8.4.1 may also serve as a PCO Notice provided it meets the requirements for PCO Notices.

Any adjustments made to this Agreement shall not include increased costs or time extensions for delay resulting from Developer's failure to timely provide requested additional information under this Section 13.3.2.3.

13.3.2.4 Waiver

Each PCO Notice shall be delivered as promptly as possible after the occurrence of such event or situation. If any PCO Notice is delivered later than ten days after Developer first discovered (or should have discovered in the exercise of reasonable prudence) the occurrence described therein, Developer shall be deemed to have waived: (a) the right to collect any costs incurred prior to the date of delivery of the Request for Partnering (if applicable) or PCO Notice (if no Request for Partnering was submitted or if the PCO Notice was not timely submitted following termination of partnering discussions), and (b) the right to seek an extension of any Completion Deadline with respect to any delay in a critical path which accrued prior to the date of delivery of the written notice. Furthermore, if any PCO Notice concerns any condition or material described in Section 13.8.4.1, Developer shall be deemed to have waived the right to collect any and all costs incurred in connection therewith to the extent that TxDOT is not afforded the opportunity to inspect such material or condition before it is disturbed.

In addition to the limitations set forth in Section 13.3.2.4, Developer's failure to provide a PCO Notice within 60 days after Developer first discovered (or should have discovered in the exercise of reasonable prudence) the occurrence of a given event or situation shall preclude Developer from any relief, unless Developer can show, based on a preponderance of the evidence, that: (a) TxDOT was not materially prejudiced by the lack of notice, or (b) TxDOT's Authorized Representative specified in accordance with Section 24.6.1 had actual knowledge, prior to the expiration of the 60-day period, of the event or situation and that Developer believed it was entitled to a Change Order with respect thereto. For situations involving Requests for Partnering, the 60-day period shall be extended until two Business Days following termination of the partnering period. In other words, if the requirements of clause (a) or clause (b) above are satisfied, Developer shall retain the right to receive a Change Order, but shall be deemed to have waived the right to collect any and all costs incurred prior to the date of delivery of the PCO Notice or Request for Partnering, as applicable, and shall be deemed to have waived the right to

seek a time extension with respect to any delay in any Critical Path which accrued prior to the date of delivery of the PCO Notice.

13.3.2.5 Delivery of Request for Change Order

Developer shall deliver a Request for Change Order under this Section 13.3.2.5 to TxDOT within 30 days after delivery of the PCO Notice, or such longer period of time as may be allowed in writing by TxDOT. TxDOT may require design and construction costs to be covered by separate Requests for Change Order. If Developer requests a time extension, then TxDOT, in its sole discretion, may require Developer to provide two alternative Requests for Change Order, one of which shall provide for a time extension and any additional costs permitted hereunder, and the other of which shall show all Acceleration Costs associated with meeting the non-extended Completion Deadlines, as well as any additional costs permitted hereunder. If it is not feasible to recover to the non-extended Completion Deadline or if Developer believes that the costs associated with such a recovery are prohibitive, then Developer shall recommend a date to be shown in the alternative Change Order form. If Developer fails to deliver a complete Request for Change Order or incomplete Request for Change Order meeting all of the requirements of Section 13.3.2.6 within the appropriate time period, Developer shall be required to provide a new PCO Notice before it may submit a Request for Change Order.

13.3.2.6 Incomplete Requests for Change Order

Each Request for Change Order provided under Section 13.3.2.5 shall meet all requirements set forth in Section 13.4; provided that if any such requirements cannot be met due to the nature and/or timing of the occurrence, Developer shall provide an incomplete Request for Change Order which fills in all information capable of being ascertained. Said incomplete Request shall: (a) include a list of those Change Order requirements which are not fulfilled together with an explanation reasonably satisfactory to TxDOT stating why such requirements cannot be met; (b) provide such information regarding projected impact on a critical path as is requested by TxDOT; and (c) in all events include sufficient detail to ascertain the basis for the proposed Change Order and for any price increase associated therewith, to the extent such amount is then ascertainable.

Developer shall furnish, when requested by TxDOT or its designee, such further information and details as may be required to determine the facts or contentions involved. Developer agrees that it shall give TxDOT or its designee access to any and all of Developer's books, records and other materials relating to the Work, and shall cause its Subcontractors to do the same, so that TxDOT or its designee can investigate the basis for such proposed Change Order. Developer shall provide TxDOT with a monthly update to all outstanding Requests for Change Order describing the status of all previously unfulfilled requirements and stating any changes in projections previously delivered to TxDOT, expenditures to date and time anticipated for completion of the activities for which the time extension is claimed. TxDOT may reject the Request for Change Order at any point in the process. TxDOT's failure to respond to a complete Request for Change Order within 15 Business Days of delivery of the request shall not be deemed an acceptance of such request, and the Developer shall have the burden of following up with TxDOT on the status of any such Request for Change Order.

13.3.2.7 Importance of Timely Response

Developer acknowledges and agrees that, due to limitations on funding for the Project, timely delivery of PCO Notices and Requests for Change Orders and

updates thereto are of vital importance to TxDOT. TxDOT is relying on Developer to evaluate promptly upon the occurrence of any event or situation whether the event or situation will affect the Project Schedule or Price and, if so, whether Developer believes a time extension and/or Price increase is required hereunder. If an event or situation occurs which may affect the Price or a Completion Deadline, TxDOT will evaluate the situation and determine whether it wishes to make any changes to the definition of the Project so as to bring it within TxDOT's funding and time restraints. The following matters (among others) shall be considered in determining whether TxDOT has been prejudiced by Developer's failure to provide timely notice: (a) the effect of the delay on alternatives available to TxDOT (that is, a comparison of alternatives which are available at the time notice was actually given and alternatives which would have been available had notice been given within ten days after occurrence of the event or when such occurrence should have been discovered in the exercise of reasonable prudence); and (b) the impact of the delay on TxDOT's ability to obtain and review objective information contemporaneously with the event.

13.3.2.8 Review of Subcontractor Claims

Prior to submission by Developer of any Request for Change Order which is based in whole or in part on a request by a Subcontractor to Developer for a price increase or time extension under its Subcontract, Developer shall have reviewed all claims by the Subcontractor which constitute the basis for the Request for Change Order and determined in good faith that each such claim is justified hereunder and that Developer is justified in requesting an increase in the Price and change in Completion Deadlines in the amounts specified in the Request for Change Order. Each Request for Change Order involving Subcontractor Work, and each update to an incomplete Change Order request involving such Work shall include a summary of Developer's analysis of all Subcontractor claims components and shall include a certification signed by Developer's Project Manager stating that Developer has investigated the basis for the Subcontractor's claims and has determined that all such claims are justified as to entitlement and amount of money and/or time requested, has reviewed and verified the adequacy of all back-up documentation to be placed in escrow pursuant to Section 21.1, and has no reason to believe and does not believe that the factual basis for the Subcontractor's claim is falsely represented. Any Request for Change Order involving Subcontractor Work which is not accompanied by such analysis and certification shall be considered incomplete.

13.3.3 Performance of Disputed Work

If TxDOT refuses to issue a Change Order based on Developer's request, Developer shall nevertheless perform all work as specified by Directive Letter, and shall have the right to submit the issue to dispute resolution pursuant to Section 19. Developer shall maintain and deliver to TxDOT, upon request, contemporaneous records, meeting the requirements of Section 13.9, for all work performed which Developer believes constitutes extra work (including non-construction work), until all Claims and Disputes regarding entitlement or cost of such work are resolved.

13.4 Contents of Change Orders

13.4.1 Form of Change Order

Each Cost and Schedule Proposal and Request for Change Order shall be prepared in a form acceptable to TxDOT, and shall meet all applicable requirements of this Section 13.

13.4.2 Scope of Work, Cost Estimate, Delay Analysis and Other Supporting Documentation

Developer shall prepare a scope of work, cost estimate, delay analysis and other information as required by this Section 13.4.2 for each Cost and Schedule Proposal and Request for Change Order.

13.4.2.1 Scope of Work

The scope of work shall describe in detail satisfactory to TxDOT all activities associated with the Change Order, including a description of additions, deletions and modifications to the existing requirements of the Contract Documents.

13.4.2.2 Cost Estimate

The cost estimate shall set out the estimated costs in such a way that a fair evaluation can be made. It shall include a breakdown for labor, materials, equipment and markups for overhead and profit, unless TxDOT agrees otherwise. The estimate shall include costs allowable under Section 13.5.2, if any. If the work is to be performed by Subcontractors and if the work is sufficiently defined to obtain Subcontractor quotes, Developer shall obtain quotes (with breakdowns showing cost of labor, materials, equipment and markups for overhead and profit) on the Subcontractor's stationery and shall include such quotes as back-up for Developer's estimate. No markup shall be allowed in excess of the amounts allowed under Sections 13.5.2 and 13.7. Developer shall identify all conditions with respect to prices or other aspects of the cost estimate, such as pricing contingent on firm orders being made by a certain date or the occurrence or non-occurrence of an event.

13.4.2.3 Delay Analysis

If Developer claims that such event, situation or change affects a Critical Path, it shall provide an impacted delay analysis indicating all activities represented or affected by the change, with activity numbers, durations, predecessor and successor activities, resources and cost, and with a narrative report, in form satisfactory to TxDOT, which compares the proposed new schedule to the current approved Project Schedule.

13.4.2.4 Other Supporting Documentation

Developer shall provide such other supporting documentation as may be required by TxDOT.

13.4.3 Justification

All Requests for Change Orders shall include an attachment containing a detailed narrative justification therefor, describing the circumstances underlying the proposed change, identifying the specific provision(s) of Section 13 which permit a Change Order to be issued, and describing the data and documents (including all data and reports required under Section 13.9) which establish the necessity and amount of such proposed change.

13.4.4 Developer Representation

Each Change Order shall be accompanied by a certification under penalty of perjury, in a form acceptable to TxDOT, executed by Developer and stating that: (a) the amount of time and/or compensation requested is justified as to entitlement and amount; (b) the amount of time and/or compensation requested includes all known and anticipated impacts or amounts which may be incurred as a result of the event or matter giving rise to such proposed change; and (c) the cost and pricing data forming the basis for the Change Order is complete, accurate and current. Each Change Order involving Work by a Subcontractor for which pricing data is required to be provided under Section 21.1 shall include a statement that the Subcontractor pricing data has been provided and shall

include a copy of the certification required to be provided by the Subcontractor under Section 21.1.

13.4.5 Change Order Affecting Capital Maintenance Agreement

Each Change Order shall be signed by Developer in its capacity as both the Developer under this Agreement and the Maintenance Contractor under the CMA. Each Change Order shall state whether a change order will also be required under the CMA as a result of the change in the Work, and the reasons for such change order. Developer's failure to notify TxDOT that a change order will be required under the CMA shall waive Developer's right to seek such a change order.

13.5 Certain Limitations

13.5.1 Limitation on Price Increases

Any increase in the Price allowed hereunder shall exclude: (a) costs caused by the acts, omissions, negligence, intentional misconduct, or breach of applicable Law, contract or Governmental Approval by any Developer-Related Entity; (b) costs to the extent that they are unnecessary or could reasonably be avoided by Developer, including by re-sequencing, reallocating or redeploying its forces to other portions of the Work or to other activities unrelated to the Work; and (c) costs for remediation of any Nonconforming Work. Costs incurred for the purpose of mitigating damages as described in clause (b) above, and not otherwise disallowed hereunder, would be reimbursable.

13.5.2 Limitation on Delay and Disruption Damages

13.5.2.1 Acceleration Costs; Delay and Disruption Damages

Acceleration Costs shall be compensable hereunder only with respect to Change Orders issued by TxDOT as an alternative to allowing an extension of a Completion Deadline as contemplated by Sections 13.2.1.3 and 13.3.2.5. Other delay and disruption damages shall be compensable hereunder only in the case of delays which entitle Developer to an extension of a Completion Deadline and qualify as a TxDOT-Caused Delays. Without limiting the generality of the foregoing, costs of re-sequencing or rearranging Developer's work plan to accommodate TxDOT-Directed Changes not associated with an extension of a Completion Deadline shall not be compensable hereunder.

13.5.2.2 Other Limitations

Delay and disruption damages shall be limited to direct costs directly attributable to the delays described in Section 13.5.2.1 and markups thereon in accordance with Section 13.7.7 and any additional field office and jobsite overhead costs directly attributable to such delays. In addition, before Developer may obtain any increase in the Price to compensate for additional or extended overhead, Acceleration Costs or other damages relating to delay, Developer shall have demonstrated to TxDOT's satisfaction that:

(a) its schedule which defines the affected Critical Path in fact sets forth a reasonable method for completion of the Work; and

(b) the change in the Work or other event or situation which is the subject of the requested Change Order has caused or will result in an identifiable and measurable disruption of the Work which impacted the Critical Path activity (i.e. consumed all available Float and extended the time required to achieve any Substantial Completion or Final Acceptance beyond the applicable Completion Deadline); and

(c) the delay or damage was not due to an act, omission, negligence, intentional misconduct, or breach of applicable Law, contract or Governmental Approval of

any Developer-Related Entity, and could not reasonably have been avoided by Developer, including by re-sequencing, reallocating or redeploying its forces to other portions of the Work or other activities unrelated to the Work (provided that TxDOT has agreed to reimburse Developer for additional costs reasonably incurred in connection with such re-sequencing, reallocation or redeployment); and

(d) the delay for which compensation is sought is not concurrent with any delay for which any Developer-Related Entity is responsible hereunder; and

(e) Developer has suffered or will suffer actual costs due to such delay, each of which costs shall be documented in a manner satisfactory to TxDOT.

13.5.3 Limitation on Time Extensions

Any extension of a Completion Deadline allowed hereunder shall exclude any delay to the extent that it: (a) did not impact a Critical Path; (b) was due to the fault or negligence, or act or failure to act of any Developer-Related Entity; (c) is concurrent with any other unrelated delay to a Critical Path that is Developer's responsibility hereunder; or (d) could reasonably have been avoided by Developer, including by re-sequencing, reallocating or redeploying its forces to other portions of the Work (provided however that if the request for extension involves a TxDOT-Caused Delay, Developer shall be entitled to a time extension unless TxDOT shall have agreed, if requested to do so, to reimburse Developer for its costs incurred, if any, in re-sequencing, reallocating or redeploying its forces). Developer shall be required to demonstrate to TxDOT's satisfaction that (w) the change in the Work or other event or situation which is the subject of the Request for Change Order seeking a change in a Completion Deadline has caused or will result in an identifiable and measurable disruption of the Work which has impacted the Critical Path activity (i.e., consumed all available Float and extended the time required to achieve any Substantial Completion or Final Acceptance beyond the applicable Completion Deadline); (x) the delay event affected the controlling operation on the Critical Path; (y) the total float is absorbed and the scheduled Completion Date is delayed one or more working days because of the change or impact; and (z) in the case of multiple lines of negative Float, the change or delay must cause the affected path to exceed all others before a time extension will be granted.

13.5.4 Work Performed Without Direction

To the extent that Developer undertakes any efforts outside of the scope of the Work, unless Developer has received a Directive Letter or Change Order signed by TxDOT to undertake such efforts, Developer shall be deemed to have undertaken the extra work voluntarily and shall not be entitled to a Change Order in connection therewith. In addition, TxDOT may require Developer to remove or otherwise undo any such work, at Developer's sole cost.

13.6 Change Order Pricing

The price of a Change Order under this Section 13.6 shall be a negotiated lump sum price or unit prices as provided below. Lump sum price or unit prices shall be based on the original allocations of the Price to comparable activities, whenever possible. If reference to price allocations is inappropriate and if requested by TxDOT or Developer, negotiation for lump sum or unit price Change Orders shall be on an Open Book Basis and may be based on the pricing contained in the EPDs as well as Subcontractors' bid prices.

13.6.1 Detailed Cost Proposal

Developer may be required to submit a detailed cost proposal identifying all categories of costs in accordance with the requirements of Section 13.7: (a) showing all

impacts on the Contract Documents from Work additions, deletions and modifications shown in the Change Order being priced; and (b) setting out the proposed costs in such a way that a fair evaluation can be made. When the Change Order adds Work to Developer's scope, the increase in the Price shall be negotiated based on estimates or actual costs of labor, material and equipment. When the Change Order deletes Work from Developer's scope, the amount of the reduction in the Price shall be based upon an estimate including a bill of material, a breakdown of labor and equipment costs. Markup for profit and overhead consistent with Section 13.7.7 shall apply to Work added and deleted by Change Orders.

13.6.2 Identification of Conditions

Developer shall identify all conditions with respect to prices or other aspects of the cost proposal, such as pricing contingent on firm orders being made by a certain date or the occurrence or nonoccurrence of an event.

13.6.3 Contents

A negotiated Change Order shall specify costs, scheduling requirements, time extensions and all costs of any nature arising out of the Work covered by the Change Order. Notwithstanding the foregoing, the Parties may mutually agree to use a multiple-step process involving issuance of a Change Order which includes an estimated construction cost and which provides for a revised Change Order to be issued after a certain design level has been reached, thus allowing a refinement and further definition of the estimated construction cost.

13.6.4 Added Work

When the Change Order adds Work to Developer's scope, the increase in the Price shall be negotiated based on estimated costs of labor, material and equipment, or shall be based on actual costs in accordance with Section 13.7. For negotiated Change Orders, markups for profit and overhead shall be consistent with Sections 13.5.2 and 13.7.7. Risk associated with the Work described in the Change Order shall be addressed through the assumptions contained therein regarding the scope of such Work.

13.6.5 Deleted Work

When the Change Order deletes Work from Developer's scope, the amount of the reduction in the Price shall be based upon Developer's estimated price for such work included in the Proposal, including a bill of material and a breakdown of labor and equipment costs, plus variable overhead and profit associated with the deleted Work.Estimated costs that the Developer applied to develop the original Price, as well as markup for profit and variable overhead at the rates the Developer applied to develop the Price, as reflected in the EPDs, shall apply for determining the amount of the Price reduction for deleted Work Change Orders. The amount of risk associated with such Work as of the Effective Date by Developer shall be an additional factor in determining the amount of the Price reduction for deleted Work Change Orders. When a deduction is involved, documented cancellation and restocking charges may be included in costs and subtracted from the Price deduction. In addition, the following shall be deducted from the Price reduction or reimbursed by TxDOT: (1) reasonable demobilization costs of Developer associated with the deleted Work; (2) reasonable costs associated with terminating related Subcontractors; (3) sums due and payable to Developer in accordance with approved Draw Requests for subsequently deleted Work submitted prior to the date of the Directive Letter requiring that Work be deleted; and (4) the cost of actual work performed and costs for the deleted Work after the period covered by the most recent

Draw Request and prior to the date of the Directive Letter or other notification by TxDOT eliminating the work.

13.6.6 Change Order Both Adding and Deleting Work

When the Change Order includes both added and deleted Work, Developer shall prepare a statement of the cost of labor, material and equipment for both added and deleted Work. If the cost of labor, material and equipment for the Work added and deleted results in a:

(a) Net increase in cost, the change shall be treated as Work added and the provisions of Section 13.6.4 shall be used to determine markups for overhead and profit. Markups for overhead and profit will be allowed only for the net increase in cost in order to establish the amount to be added to the Price.

(b) Net decrease in cost, the change shall be treated as Work deleted and the provisions of Section 13.6.5 shall be used on the net decrease in cost in order to establish the amount deduct from the Price.

(c) Net change of zero, there will be no change in the Price.

13.6.7 Unit Priced Change Orders

Unit prices shall be deemed to include all costs for labor, material, overhead and profit, and shall not be subject to change regardless of any change in the estimated quantities. Unit-priced Change Orders shall initially include an estimated increase in the Price based on estimated quantities. Upon final determination of the quantities, TxDOT will issue a modified Change Order setting forth the final adjustment to the Price.

13.6.8 All-Inclusive Change Orders

All Change Orders submitted by Developer shall be all-inclusive, comprehensive and complete and shall not include any conditions with respect to pricing or schedule.

13.7 Time and Materials Change Orders

TxDOT may at its discretion issue a Time and Materials Change Order whenever TxDOT determines that a Time and Materials Change Order is advisable. The Time and Materials Change Order shall instruct Developer to perform the Work, indicating expressly the intention to treat the items as changes in the Work, and setting forth the kind, character, and limits of the Work as far as they can be ascertained, the terms under which changes to the Price will be determined and the estimated total change in the Price anticipated thereunder. Upon final determination of the allowable costs, TxDOT shall issue a modified Change Order setting forth the final adjustment to the Price.

13.7.1 Labor Costs

The cost of labor for workers used in the actual and direct performance of the Change Order work, whether provided by Developer or a Subcontractor, will equal the sum of the following:

(a) For construction-related labor: (1) the actual cost for direct labor; plus (2) the actual cost of workers' compensation and liability insurance required under this Agreement, health, welfare and pension benefits and Social Security deductions or 55% of the actual direct labor cost, whichever is less; plus (3) 25% of the total of the amounts set forth in clauses (1) and (2) for profit and overhead.

(b) For non-construction-related work (professional services):(1) the actual wages (i.e. the base wage paid to the employee exclusive of any fringe benefits); plus (2) a labor surcharge in the amount of 145%, which shall constitute full compensation for all profit, overhead and all State and federal payroll, unemployment and other taxes,

insurance, fringe benefits and all other payments made to, or on behalf of, the workers, in excess of actual wages.

13.7.2 Material Costs

Material costs for Change Order work shall be the actual cost of all materials to be used in the performance of the Construction Work including normal wastage allowance as per industry standards, less salvage value, plus 15% for profit and overhead. The material prices shall be supported by valid quotes and invoices from Suppliers. The cost shall include applicable sales taxes, freight and delivery charges and any allowable discounts.

13.7.3 Equipment

13.7.3.1 Costs for Developer-owned machinery, trucks, power tools or other similar equipment that are required for Change Order work will be allowed based on the following methodology:

(a) The direct cost of fuel, lubricants, repairs, parts, and depreciation will be considered without any additional compensation percentage for overhead and profit being added; and

(b) The equipment rental rates shall be those tabulated in the most recent version of the *Rental Rate Blue Book*. The rental rates to be used shall be the published monthly rate divided by 176 to yield an hourly rate, which hourly rate shall be further adjusted by multiplying it by the *Rental Rate Blue Book* adjustment rate for the year the equipment was manufactured and by the regional factor contained in the *Rental Rate Blue Book* estimated hourly operating cost rate.

Developer shall be considered to own such items if an ownership interest therein is held by: (i) Developer; (ii) any equity participant in Developer; (iii) any Subcontractor performing the Construction Work; or (iv) any Affiliate of Developer, any equity participant in Developer or any such Subcontractor. If the publication of the *Rental Rate Blue Book* should be discontinued for any reason, TxDOT may select a different publication from which to make the described calculations.

13.7.3.2 Costs for machinery, trucks, power tools or other similar equipment that are required for Change Order work rented from any commercial enterprises routinely offering equipment and tools for rent or lease to the public will be allowed in an amount equal to the direct rental rate for the equipment plus a 5% markup for overhead and profit.

13.7.3.3 The time to be paid for use of equipment on the Site shall be the time the equipment is in operation on the Change Order work being performed. The time shall include the reasonable time required to move the equipment to the location of the Change Order work and return it to the original location or to another location requiring no more time than that required to return it to its original location. Moving time will not be paid for if the equipment is also used at the Site other than for Change Order work. Loading and transporting costs will be allowed, in lieu of moving time, when the equipment is moved by means other than its own power. Payment for loading and transporting will be made only if the equipment is used for Change Order work and cannot be used to perform other Work. Time will be computed in half and full hours. In computing the time for use of equipment, less than 30 minutes shall be considered one-half hour.

13.7.4 Subcontracted Work

To the extent that any Change Order is intended to compensate Developer for the cost of work performed by Subcontractors, the Change Order shall provide for compensation equal to: (a) the actual cost to Developer of such work (which shall be

charged by the Subcontractor on a time and materials basis in accordance with this Section 13.7, unless otherwise approved in writing by TxDOT), plus (b) 5% of such cost. The 5% markup for subcontracted work shall not apply to: (i) Subcontracts with Affiliates; or (ii) Subcontracts with Suppliers.

13.7.5 Work Performed by Utility Owners

To the extent that any Change Order is intended to compensate Developer for the cost of work performed by Utility Owners entitled to receive reimbursement for their costs from Developer, the Change Order shall provide for compensation to Developer equal to: (a) the actual and reasonable amount paid by Developer to the Utility Owner for such work (but not greater than the amount allowed pursuant to the applicable Utility Agreements), plus (b) 5% of such allowed actual amount. Back-up documentation supporting each cost item for this category shall be provided by Developer and approved by TxDOT in writing prior to any payment authorization being granted.

13.7.6 Other Direct Costs

For any justified direct cost incurred for Change Order work not covered by the categories of costs contained in Sections 13.7.1 through 13.7.5, Developer shall accept as full payment therefor an amount equal to the actual cost to Developer for such direct cost item without additional mark-up. Back-up documentation supporting each cost item for this category shall be provided by Developer and approved by TxDOT in writing prior to any payment authorization being granted.

13.7.7 Overhead Items

The mark-ups specified herein constitute full and complete compensation for all overhead, tools or equipment having an individual replacement value of $1,000 or less, consumables (items which are consumed in the performance of the Work which are not a part of the finished product) and other indirect costs of the added or changed Work, as well as for profit thereon, including any and all costs and expenses incurred due to any delay in connection with the added or changed Work. Developer's mark-up percentages shall be considered to include:

(a) Supervisory expenses of all types, including salary and expenses of executive officers, supervising officers or supervising employees, excluding only direct supervision of force account work;

(b) Clerical or stenographic employees;

(c) Any and all field, jobsite and general home office overhead and operating expenses whatsoever;

(d) Subsistence and travel expenses for all personnel, other incidental job burdens, and bonuses not otherwise covered;

(e) Quality assurance and quality control; and

(f) Bond and insurance premiums.

With respect to non-construction related labor costs, overhead is covered by the labor surcharge, and includes accessories such as computer assisted drafting and design (CADD) systems, software and computers, facsimile machines, scanners, plotters, etc.

13.7.8 Change Order Data

Developer shall contemporaneously collect, record in writing, segregate and preserve: (a) all data necessary to determine the costs described in this Section 13.7 with respect to all Work which is the subject of a Change Order or a requested Change Order (excluding negotiated Change Orders previously executed and delivered), specifically including costs associated with design work as well as Developer's costs for Utility

Adjustment Work, and (b) all data necessary to show the actual impact (if any) on the Critical Path, the Project Schedule, and Completion Deadlines with respect to all Work which is the subject of a Change Order or a proposed Change Order. Such data shall be provided to TxDOT and any authorized representative of TxDOT reviewing any Claim or Dispute regarding compensation for such Work. Developer hereby waives the right to obtain compensation for any Work for which cost data is required to be provided hereunder, if Developer fails to maintain and timely provide to TxDOT cost data meeting the requirements of this Agreement.

13.7.8.1 Developer shall maintain its records in such a manner as to provide a clear distinction between: (a) the direct cost of Work for which it is entitled (or for which it believes it is entitled) to an increase in the Price and (b) the costs of other operations. Developer shall furnish daily, on forms approved by TxDOT, reports of all costs described in the foregoing clause (a). The reports shall itemize all costs for labor, materials, and equipment rental and give total of costs through the date of the report. For workers, the reports shall include hours worked, rates of pay, names and classifications. For equipment, the reports shall include size, type, identification number, rental rate and actual working hours of operation. All such records and reports shall be made immediately available to TxDOT upon its request. The cost of furnishing such reports are deemed to be included in Developer's overhead and fee percentages.

13.7.8.2 All reports shall be signed by Developer. TxDOT will compare its records with Developer's reports, make the necessary adjustments and compile the costs of Work completed under a Time and Materials Change Order. When such reports are agreed upon and signed by both Parties, they will become the basis of payment.

13.8 Change Orders for Differing Site Conditions, Utilities, Force Majeure Events, Hazardous Materials, Access to ROW and Necessary Basic Configuration Changes

13.8.1 Differing Site Conditions

Subject to the restrictions and limitations set forth in this Section 13, Developer shall be entitled to a Change Order for certain additional costs which are directly attributable to any Differing Site Conditions to the extent permitted in this Section 13.8.1. No time extension shall be available with respect to Differing Site Conditions, and no delay or disruption damages shall be recovered. To the extent that additional costs are incurred in connection with the Project due to changes in Developer's obligations relating to the Work resulting from the existence of Differing Site Conditions and which are not reimbursed by insurance proceeds, TxDOT and Developer shall share the risk as follows:

13.8.1.1 Developer shall be fully responsible for, and thus shall not receive a Change Order with respect to, the first $150,000 in additional costs incurred directly attributable to changes in Developer's obligations hereunder resulting from each separate occurrence of Differing Site Conditions, subject to an aggregate cap of $2,100,000 for such additional costs resulting from the $150,000 "deductible" amounts borne by Developer.

13.8.1.2 TxDOT shall be fully responsible for any additional costs incurred in excess of (1) $150,000 directly attributable to changes in Developer's obligations hereunder resulting from each separate occurrence of Differing Site Conditions, and (2) the $2,100,000 cap described in Section 13.8.1.1, and a Change Order shall be issued to compensate Developer for such additional costs.

13.8.1.3 During progress of the Work, if Differing Site Conditions are encountered, Developer shall immediately notify TxDOT thereof telephonically or in person, to be followed immediately by written notification. Developer shall be responsible for determining the appropriate action to be undertaken, subject to concurrence by TxDOT. In the event that any Governmental Approvals specify a procedure to be followed, Developer shall follow the procedure set forth in the Governmental Approvals.

13.8.1.4 Developer hereby acknowledges and agrees that it has assumed all risks with respect to the need to work around locations impacted by Differing Site Conditions. Developer shall bear the burden of proving that a Differing Site Condition exists and that it could not reasonably have worked around the Differing Site Condition so as to avoid additional cost. Developer shall track the first $150,000 in costs associated with a Differing Site Condition in accordance with the requirements and limitations in Section 13.7 and shall track the costs incurred in excess of $150,000 in accordance with the requirements and limitations in Section 13.6.

13.8.1.5 Each request for a Change Order relating to a Differing Site Condition shall be accompanied by a statement signed by a qualified professional setting forth all relevant assumptions made by Developer with respect to the condition of the Site, justifying the basis for such assumptions, explaining exactly how the existing conditions differ from those assumptions, and stating the efforts undertaken by Developer to find alternative design or construction solutions to eliminate or minimize the problem and the associated costs. No time extension or costs will be allowed in connection with any work stoppage in affected areas during the investigation period described above.

13.8.2 Utilities

Developer shall be entitled to a Change Order with respect to certain additional costs and/or delays relating to Utility Adjustments, as specified in Section 6.8 and subject to the restrictions and limitations set forth in Section 6.8 and in this Section 13. In all other respects, Developer is fully responsible for, and thus shall not receive a Change Order with respect to, any additional or unanticipated costs and delays due to changes in Developer's obligations relating to the Work resulting from the existence of any Utilities on the Site.

13.8.3 Force Majeure Events

Subject to the limitations contained in, and upon Developer's fulfillment of all applicable requirements of, this Section 13, TxDOT shall issue Change Orders: (a) to compensate Developer for additional costs incurred directly attributable to Force Majeure Events; and (b) to extend the applicable Completion Deadlines as the result of any delay in a Critical Path directly caused by a Force Majeure Event, to the extent that it is not possible to work around such event. Developer's rights to recover additional costs incurred arising directly from Force Majeure Events shall not include delay and disruption damages.

13.8.4 Hazardous Materials Management

If compensation is payable to Developer pursuant to Section 6.9 with respect to Hazardous Materials Management, the amount of the Change Order shall either be a negotiated amount acceptable to the Parties, or 100% of the Reimbursable Hazardous Materials Costs for the work in question, subject to the limitations set forth in this Section 13.8.4, including the cost sharing provisions set forth in Section 13.8.4.1.

13.8.4.1 Determination of Reimbursable Amount

Developer shall be deemed to have waived the right to collect any and all costs incurred in connection with any Hazardous Materials Management and any right to obtain an extension of a Completion Deadline if TxDOT is not provided written notice of the discovery of Hazardous Materials and afforded the opportunity to inspect sites containing Hazardous Materials before any action is taken which would inhibit TxDOT's ability to ascertain, based on a site inspection, the nature and extent of the materials. In the event of an emergency involving Hazardous Materials, Developer may take such limited actions as are required by Law without advance notice to TxDOT, but shall provide such notice immediately thereafter (which in no event shall be more than 2 hours after the incident by phone and 24 hours after the incident by written notice).

In cases involving reimbursement for Hazardous Materials Management under this Section 13.8.4, allowable costs shall be limited to the incremental costs incurred in performing Hazardous Materials Management after completion of the testing process to determine whether Hazardous Materials are present (deducting any avoided costs such as the cost of disposal that would have been incurred had Hazardous Materials not been present). Investigating and characterizing, including Phase 1 Investigations and Phase 2 Investigations, are included in the Price and Developer shall not be entitled to additional compensation therefor.

Except as otherwise provided and subject to the limitations in this Section 13.8, TxDOT shall compensate Developer for (a) 50% of Developer's reasonable, out-of-pocket costs and expenses directly attributable to the handling, transport, removal and disposal of Hazardous Materials encountered by Developer after the first $4,000,000 of such total chargeable costs up until such point as $6,000,000 in such chargeable costs have been incurred and (b) 100% of the total chargeable Hazardous Materials costs that exceed $6,000,000. Developer shall be solely responsible for the first $4,000,000 of costs related to Hazardous Materials.

Except as otherwise provided and subject to the limitations in this Section 13, Developer shall be entitled to a Change Order in accordance with Section 13.8.3 to compensate Developer for Developer's reasonable, out-of-pocket costs and expenses directly attributable to the handling, transport, removal and disposal of Hazardous Materials falling within the definition for Force Majeure Event. Such events shall be handled in accordance with Section 13.8.3.

Developer shall take all reasonable steps to minimize any such costs. Compensation shall be allowed only to the extent that Developer demonstrates to TxDOT's satisfaction that: (a) the Hazardous Materials Management could not have been avoided by reasonable design modifications or construction techniques and (b) Developer's plan for the Hazardous Materials Management represents the approach which is most beneficial to the Project and the public. Developer shall provide TxDOT with such information, analyses and certificates as may be requested by TxDOT in order to enable a determination regarding eligibility for payment.

13.8.4.2 Time Extensions

Developer shall not be entitled to an extension of any Completion Deadline with regard to any need to investigate or characterize any Hazardous Materials, regardless of the total quantities. If Developer encounters Hazardous Materials for which Developer is entitled to compensation, and Hazardous Materials Management of such Hazardous Materials results in delays to the Critical Path ("Hazardous Materials Delay"), then Developer shall bear 100% of the risk of such Hazardous Materials Delay up to an

amount of 30 days per location and up to an aggregate amount of 120 days for all locations. If a Hazardous Materials Delay exceeds 30 days in any location, then the risk of such Hazardous Materials Delay in excess of 30 days for that location shall be borne by TxDOT. If aggregate Hazardous Materials Delays exceed 120 days, then the risk of Hazardous Materials Delay in excess of 120 days shall be borne by TxDOT. If a Hazardous Materials Delay is concurrent with another delay which is Developer's responsibility hereunder, then such Hazardous Materials Delay shall be borne 100% by Developer. If a Hazardous Materials Delay at one location is concurrent with another Hazardous Materials Delay at another location, the 30-day period of Developer's responsibility for the delays shall run concurrently.

The foregoing shall not preclude Developer from obtaining a time extension with respect to any Hazardous Material which qualifies as a Force Majeure Event. Notwithstanding anything to the contrary contained in this Section 13.8.4, if Developer is prohibited from working at a particular location due to the discovery of Hazardous Materials for which Developer is entitled to a Change Order during the last 12 months prior to the Completion Deadline, then Developer shall be entitled to an extension of the applicable Completion Deadline for any Critical Path delays resulting from such discovery of Hazardous Materials.

13.8.4.3 Limitations on Change Orders

Entitlement to compensation or a time extension shall be limited to work performed pursuant to Developer's Hazardous Materials Management Plan, Investigative Work Plan and Site Investigative Report for such Hazardous Materials as approved by TxDOT, in writing. No compensation or time extension shall be allowed with respect to: (a) immaterial quantities of Hazardous Materials; (b) any Hazardous Materials that could have been avoided by reasonable design modifications or construction techniques; (c) any costs that could have been avoided; (d) Hazardous Materials on any Additional Properties not expressly described in Section 6.9.1.3; (e) any Hazardous Materials encountered during or in connection with the demolition of buildings, fixtures or other improvements on any parcels within the Site; or (f) any Hazardous Materials that fall within the definition of Developer Release(s) of Hazardous Materials. Utilities (other than Service Lines) shall not be considered "buildings, fixtures or other improvements" for purposes of this Section 13.8.4.

13.8.4.4 Insurance Proceeds

If the cost of any Hazardous Materials Management is covered by the insurance described in Section 9, Developer shall be entitled to reimbursement of its costs from proceeds of insurance and self-insurance, up to the limits of the applicable policy, less any deductibles which shall be Developer's responsibility. To the extent that such proceeds are available, Developer shall not be entitled to payment hereunder on any other basis for such Hazardous Materials Management.

13.8.5 Access to ROW

Except as otherwise provided and subject to the limitations in this Section 13 and Section 6.5.3, Developer shall be entitled to a Change Order for certain additional costs which are directly attributable to delays to the Critical Path and a time extension for certain delays to the Critical Path described in Section 6.5.3 and clause (b) of the definition for TxDOT-Caused Delay. Such events shall be handled in accordance with the procedures in Section 13.3.

13.8.6 Necessary Basic Configuration Changes

13.8.6.1 Notwithstanding the fact that this Agreement generally obligates Developer to undertake all work necessary to complete the Project without an increase in the Price, this Section 13.8.6.1 provides for an increase in the Price to be made in the amount of the increased costs for additional Utility Adjustment Work required on Additional Properties acquired as a result of a Necessary Basic Configuration Change. If Developer commenced any Utility Adjustment Work affected by such modification prior to delivery of an appropriate PCO Notice, the Change Order shall allow TxDOT a credit for the cost of any unnecessary work performed and/or shall exclude any additional costs associated with redoing the work already performed.

13.8.6.2 Developer shall be responsible for any delays (including those that affect the duration of a Critical Path) and, except as set forth in Section 13.8.1, any cost increases resulting from changes in requirements and obligations of Developer relating to the Project due to Errors in the Draft Interim Schematic.

13.8.7 FM 407 Design Changes

13.8.7.1 If a Change Order is necessary due to a FM 407 Design Change as described in Section 3.3.3, and upon Developer's fulfillment of all applicable requirements of this Section 13, and subject to the limitations in this Section 13 and the other provisions of this Agreement, Developer will be entitled to payment for such change as set forth in this Section 13.8.7.

13.8.7.2 Determination of Reimbursable Amount: Except as otherwise provided and subject to the limitations in this Section 13.8 and other provisions of this Agreement, TxDOT shall be responsible for the aggregate additional construction costs incurred by Developer directly attributable to the FM 407 Design Change, such that a Change Order will be issued in the amount of 100% of such additional costs. In determining whether a Change Order is allowed under this Section 13.8.7, Developer shall bear the burden of proving that all costs incurred are reasonable and necessary and could not have been avoided by reasonable construction techniques.

13.9 Change Order Records

Developer shall maintain its records in such a manner as to provide a clear distinction between the direct costs of Work for which it is entitled (or for which it believes it is entitled) to an increase in the Price and the costs of other operations. Developer shall contemporaneously collect, record in writing, segregate and preserve: (a) all data necessary to determine the costs of all Work which is the subject of a Change Order or a requested Change Order, specifically including costs associated with design Work as well as Utility Adjustments, and (b) all data necessary to show the actual impact (if any) of the change on each Critical Path with respect to all Work which is the subject of a Change Order or a proposed Change Order, if the impact on the Project Schedule is in dispute. Such data shall be provided to any dispute resolvers, TxDOT and its authorized representatives as directed by TxDOT, on forms approved by TxDOT. The cost of furnishing such reports is included in Developer's predetermined overhead and profit markups.

13.9.1 Daily Work Reports and Data Collection

Developer shall furnish TxDOT completed daily work reports for each day's Work which is to be paid for on a time and material basis. The daily time and material Work reports shall be detailed as follows:

(a) Name, classification, date, daily hours, total hours, rate, and extension for each worker (including both construction and non-construction personnel) for whom reimbursement is requested.

(b) Designation, dates, daily hours, total hours, rental rate, and extension for each unit of machinery and equipment.

(c) Quantities of materials, prices, and extensions.

(d) Transportation of materials.

The reports shall also state the total costs to date for the Time and Materials Change Order Work.

13.9.2 Supplier's Invoices

Materials charges shall be substantiated by valid copies of Supplier's invoices. Such invoices shall be submitted with the daily time and material Work reports, or if not available, they shall be submitted with subsequent daily time and material Work reports. Should said Supplier's invoices not be submitted within 60 days after the date of delivery of the materials, TxDOT shall have the right to establish the cost of such materials at the lowest current wholesale prices at which such materials are available, in the quantities concerned, delivered to the location of Work, less any discounts available.

13.9.3 Execution of Reports

All Time and Materials Change Order reports shall be signed by Developer's Project Manager.

13.9.4 Adjustment

TxDOT will compare its records with the completed daily time and material Work reports furnished by Developer and make any necessary adjustments. When these daily time and material Work reports are agreed upon and signed by both Parties, said reports shall become the basis of payment for the Work performed, but shall not preclude subsequent adjustment based on a later audit. Developer's cost records pertaining to Work paid for on a time and material basis shall be open, during all regular business hours, to inspection or audit by representatives of TxDOT during the life of this Agreement and for a period of not less than five years after the date of Final Acceptance, and Developer shall retain such records for that period. Where payment for materials or labor is based on the cost thereof to any Person other than Developer, Developer shall make every reasonable effort to insure that the cost records of each such other Person will be open to inspection and audit by representatives of TxDOT on the same terms and conditions as the cost records of Developer. Payment for such costs may be deleted if the records of such third parties are not made available to TxDOT's representatives. If an audit is to be commenced more than 60 days after the date of Final Acceptance, Developer will be given a reasonable notice of the time when such audit is to begin.

13.10 Matters Not Eligible for Change Orders and Waiver

Developer acknowledges and agrees that no increase in the Price or extension of a Completion Deadline is available except in circumstances expressly provided for herein, that such Price increase and time extension shall be available only as provided in this Section 13 and that Developer shall bear full responsibility for the consequences of all other events and circumstances. Matters which are Developer's exclusive responsibility include the following:

(a) Errors in the Design Documents (excluding Errors in the FM 407 Design if Developer elects not to deviate from the FM 407 Design) and Construction Documents

(including Errors therein traceable to Errors in the Draft Interim Schematic), subject only to the right to a Change Order to the extent permitted by Section 13.8);

(b) any design changes requested by TxDOT as part of the process of approving the Design Documents for consistency with the requirements of the Contract Documents, the Governmental Approvals and/or applicable Laws;

(c) defective or incorrect schedules of Work or changes in the planned sequence of performance of the Work (unless arising from causes which otherwise give rise to a right to a Change Order);

(d) action or inaction of any Developer-Related Entity (unless arising from causes which otherwise give rise to a right to a Change Order);

(e) action or inaction of adjoining property owners or TxDOT's other contractors (unless arising from causes which otherwise give rise to a right to a Change Order);

(f) groundwater levels or subsurface moisture content;

(g) untimely delivery of equipment or material, or unavailability or defectiveness or increases in costs of material, equipment or products specified by the Contract Documents;

(h) any costs covered by insurance proceeds received by (or on behalf of) Developer;

(i) correction of Nonconforming Work and review and acceptance thereof by TxDOT (including rejected design submittals);

(j) failure by any Developer-Related Entity to comply with the requirements of the Contract Documents, Governmental Approvals or Laws;

(k) delays not on a Critical Path;

(l) any suspensions, terminations, interruptions, denials, non-renewals of, or delays in issuance of a Governmental Approval that is required to be obtained by Developer, any failure to obtain such Governmental Approval, and compliance with the terms and conditions of all Governmental Approvals;

(m) delays caused by untimely provision of access to Project ROW, except to the extent TxDOT has agreed in this Section 13 to be responsible for any such delays which constitute TxDOT-Caused Delays;

(n) any increased costs or delays related to any Utility Adjustment Work or failure to timely obtain any approval, work or other action from a Utility Owner, except as allowed by Section 13.8.2;

(o) any situations (other than Force Majeure Events) which, while not within one of the categories delineated above, were or should have been anticipated because such situations are referred to elsewhere in this Agreement or arise out of the nature of the Work; and

(p) all other events beyond the control of TxDOT for which TxDOT has not expressly agreed to assume liability hereunder.

Developer hereby assumes responsibility for all such matters, and acknowledges and agrees that assumption by Developer of responsibility for such risks, and the consequences and costs and delays resulting therefrom, is reasonable under the circumstances of this Agreement and that contingencies included in the Price in Developer's sole judgment, constitute sufficient consideration for its acceptance and assumption of said risks and responsibilities.

DEVELOPER HEREBY EXPRESSLY WAIVES ALL RIGHTS TO ASSERT ANY AND ALL CLAIMS BASED ON ANY CHANGE IN THE WORK, DELAY, DISRUPTION, SUSPENSION OR ACCELERATION (INCLUDING ANY CONSTRUCTIVE CHANGE, DELAY, DISRUPTION, SUSPENSION OR ACCELERATION) FOR WHICH DEVELOPER FAILED TO PROVIDE PROPER AND TIMELY NOTICE OR FAILED TO PROVIDE A TIMELY REQUEST FOR CHANGE ORDER, AND AGREES THAT IT SHALL BE ENTITLED TO NO COMPENSATION, DAMAGES OR TIME EXTENSION WHATSOEVER IN CONNECTION WITH THE WORK EXCEPT TO THE EXTENT THAT THE CONTRACT DOCUMENTS EXPRESSLY SPECIFY THAT DEVELOPER IS ENTITLED TO A CHANGE ORDER OR OTHER COMPENSATION, DAMAGES OR TIME EXTENSION.

13.11 Disputes

If TxDOT and Developer agree that a request to increase the Price and/or extend any Completion Deadline by Developer has merit, but are unable to agree as to the amount of such Price increase and/or time extension, TxDOT agrees to mark up the Request for Change Order or Cost and Schedule Proposal, as applicable, provided by Developer to reduce the amount of the Price increase or time extension as deemed appropriate by TxDOT. In such event, TxDOT will execute and deliver the marked-up Change Order to Developer within a reasonable period after receipt of a request by Developer to do so, and thereafter will make payment and/or grant a time extension based on such marked-up Change Order. The failure of TxDOT and Developer to agree to any Change Order under this Section 13 (including agreement as to the amount of compensation allowed under a Time and Materials Change Order and the disputed amount of the increase in the Price and/or extension of a Completion Deadline in connection with a Change Order as described above) shall be a Dispute to be resolved pursuant to Section 19. Except as otherwise specified in the Change Order, execution of a Change Order by both Parties shall be deemed accord and satisfaction of all claims by Developer of any nature arising from or relating to the Work covered by the Change Order. Developer's Claim and any award by the dispute resolver shall be limited to the incremental costs incurred by Developer with respect to the Dispute (crediting TxDOT for any corresponding reduction in Developer's other costs) and shall in no event exceed the amounts allowed by Section 13.7 with respect thereto.

13.12 Changes Not Requiring Change Order

Changes in the Work or requirements in the Contract Documents which have no net cost effect on the Price or impact to the Completion Deadlines may be approved in writing by TxDOT as a Deviation, and in such event shall not require a Change Order. Any other change in the requirements of the Contract Documents shall require either a Directive Letter or a Change Order.

13.13 No Release or Waiver

13.13.1 No extension of time granted hereunder shall release Developer's Surety from its obligations. Work shall continue and be carried out in accordance with all the provisions of the Contract Documents and this Agreement shall be and shall remain in full force and effect, unless formally suspended or terminated by TxDOT in accordance with the terms hereof. Permitting Developer to finish the Work or any part thereof after a Completion Deadline, or the making of payments to Developer after such date, shall not constitute a waiver on the part of TxDOT of any rights under this Agreement.

13.13.2 Neither the grant of an extension of time beyond the date fixed for the completion of any part of the Work, nor the performance and acceptance of any part of the Work or materials specified by this Agreement after a Completion Deadline, shall be deemed to be a waiver by TxDOT of its right to terminate this Agreement for abandonment or failure to complete within the time specified (as it may have been extended) or to impose and deduct damages as may be provided.

13.13.3 No course of conduct or dealings between the Parties nor express or implied acceptance of alterations or additions to the Work, and no claim that TxDOT has been unjustly enriched shall be the basis for any claim, request for additional compensation or extension of a Completion Deadline. Further, Developer shall undertake, at its risk, work included in any request, order or other authorization issued by a Person in excess of that Person's authority as provided herein, or included in any oral request. Developer shall be deemed to have performed such work as a volunteer and at its sole risk and cost. In addition, TxDOT may require Developer to remove or otherwise undo any such work, at Developer's sole risk and cost.

SECTION 14. SUSPENSION

14.1 Suspensions for Convenience

TxDOT may, at any time and for any reason, by written notice, order Developer to suspend all or any part of the Work required under the Contract Documents for the period of time that TxDOT deems appropriate for the convenience of TxDOT. Developer shall promptly comply with any such written suspension order. Developer shall promptly recommence the Work upon receipt of written notice from TxDOT directing Developer to resume work. Any such suspension for convenience shall be considered a TxDOT-Directed Change; provided that TxDOT shall have the right to direct suspensions for convenience not exceeding 48 hours each up to a total of 96 hours, which shall not be considered a TxDOT-Directed Change. Adjustments of the Price and the Completion Deadlines shall be available for any such TxDOT-Directed Change, subject to Developer's compliance with the terms and conditions set forth in Section 13.

14.2 Suspensions for Cause

14.2.1 Upon TxDOT's delivery of notice of a Developer Default for any of the following breaches or failures to perform and Developer's failure to fully cure and correct, within the applicable cure period, if any, TxDOT shall have the right and authority to suspend for cause any affected portion of the Work by written order to Developer:

(a) The existence of conditions unsafe for workers, other Project personnel or the general public;

(b) Failure to comply with any Law or Governmental Approval (including failure to handle, preserve and protect archeological, paleontological or historic resources, or failure to handle Hazardous Materials, in accordance with applicable Laws and Governmental Approvals);

(c) Performance of Nonconforming Work;

(d) Failure to carry out and comply with Directive Letters;

(e) Certain failures to remove and replace personnel as set forth in Section 7.7.3; or

(f) Failure to provide proof of required insurance coverage as set forth in Section 9.1.4.3.

14.2.2 Developer shall promptly comply with any such written suspension order, even if Developer disputes the grounds for suspension. Developer shall promptly recommence the Work upon receipt of written notice from TxDOT directing Developer to resume work. TxDOT shall have no liability to Developer, and Developer shall have no right to any adjustment in the Price or Completion Deadline(s) in connection with any suspension of Work properly founded on any of the grounds set forth in Section 14.2.1. If TxDOT orders suspension of Work on one of the foregoing grounds but it is finally determined under the dispute resolution procedures of this Agreement that such grounds did not exist, it shall be treated as a suspension for TxDOT's convenience under Section 14.1.

14.3 Responsibilities of Developer During Suspension Periods

During periods that Work is suspended, Developer shall continue to be responsible for the Work and shall prevent damage or injury to the Project, provide for drainage and shall erect necessary temporary structures, signs or other facilities required to maintain the Project. During any suspension period, Developer shall maintain in a growing condition all newly established plantings, seedings and soddings furnished under the Contract Documents and shall protect new tree growth and other vegetative growth against injury,

replacing all dead plants requiring replacement during the suspension period. Additionally, Developer shall continue other Work that has been or can be performed at the Site or offsite during the period that Work is suspended.

SECTION 15. TERMINATION FOR CONVENIENCE; TERMINATION BASED ON DELAY in NTP1

15.1 Termination for Convenience

15.1.1 TxDOT may, at any time, terminate this Agreement and the performance of the Work by Developer, in whole or in part, if TxDOT determines, in its sole discretion, that a termination is in TxDOT's best interest ("Termination for Convenience"). TxDOT shall terminate by delivering to Developer a written Notice of Termination for Convenience or Notice of Partial Termination for Convenience specifying the extent of termination and its effective date. Termination (or partial termination) of this Agreement under this Section 15 shall not relieve Developer or any Surety or Guarantor of its obligation for any claims arising prior to termination.

15.1.2 Within three days after receipt of a Notice of Termination for Convenience or Notice of Partial Termination for Convenience, Developer shall meet and confer with TxDOT for the purpose of developing an interim transition plan for the orderly transition of the terminated Work, demobilization and transfer of the Project to TxDOT. The Parties shall use diligent efforts to complete preparation of the interim transition plan within 15 days after the date Developer receives such notice of termination. The Parties shall use diligent efforts to complete a final transition plan within 30 days after such date. The transition plan shall be in form and substance acceptable to TxDOT in its good faith discretion and shall include and be consistent with the other provisions and procedures set forth in Section 15.2, all of which provisions and procedures Developer shall immediately follow, regardless of any delay in preparation or acceptance of the transition plan.

15.1.3 Developer acknowledges and agrees that TxDOT has no obligation to issue NTP1 hereunder, and further agrees that unless and until NTP1 is issued, TxDOT shall have no liability to Developer hereunder, except as provided under Section 15.9.

15.2 Developer's Responsibilities After Receipt of Notice of Termination

After receipt of a Notice of Termination for Convenience or Notice of Partial Termination for Convenience, and except as otherwise directed by TxDOT, Developer shall timely comply with the following obligations independent of, and without regard to, the timing for determining, adjusting, settling and paying any amounts due Developer under this Agreement:

15.2.1 Stop the Work as specified in the notice.

15.2.2 Notify all affected Subcontractors and Suppliers that this Agreement is being terminated and that their Subcontracts (including orders for materials, services or facilities) are not to be further performed unless otherwise authorized in writing by TxDOT.

15.2.3 Enter into no further Subcontracts (including orders for materials, services or facilities), except as necessary to complete the continued portion of the Work.

15.2.4 Unless instructed otherwise by TxDOT, terminate all Subcontracts and Utility Agreements to the extent they relate to the Work terminated.

15.2.5 To the extent directed by TxDOT, execute and deliver to TxDOT written assignments, in form and substance acceptable to TxDOT, acting reasonably, of all of Developer's right, title, and interest in and to: (a) Subcontracts and Utility Agreements that relate to the terminated Work, provided TxDOT assumes in writing all of Developer's obligations thereunder that arise after the effective date of the termination; and (b) all assignable warranties, claims and causes of action held by Developer against Subcontractors and other third parties in connection with the terminated Work, to the

extent such Work is adversely affected by any Subcontractor or other third party breach of warranty, contract or other legal obligation.

15.2.6 Subject to the prior written approval of TxDOT, settle all outstanding liabilities and claims arising from termination of Subcontracts and Utility Agreements that are required to be terminated hereunder.

15.2.7 Within 30 days after notice of termination is delivered, Developer shall provide TxDOT with a true and complete list of all materials, goods, machinery, equipment, parts, supplies and other property in inventory or storage (whether held by Developer or any person or entity on behalf of or for the account of Developer) for use in or respecting the terminated Work, or on order or previously completed but not yet delivered from Suppliers for use in or respecting such Work. In addition, if requested by TxDOT, on or about the effective date of termination, Developer shall transfer title and deliver to TxDOT or TxDOT's Authorized Representative, through bills of sale or other documents of title, as directed by TxDOT, all such materials, goods, machinery, equipment, parts, supplies and other property, provided TxDOT assumes in writing all of Developer's obligations under any contracts relating to the foregoing that arise after the effective date of termination.

15.2.8 On or about the effective date of termination, Developer shall execute and deliver to TxDOT the following, together with an executed bill of sale or other written instrument, in form and substance acceptable to TxDOT, acting reasonably, assigning and transferring to TxDOT all of Developer's right, title and interest in and to the following: (a) all completed or partially completed drawings (including plans, elevations, sections, details and diagrams), specifications, designs, design documents, Record Drawings, surveys, and other documents and information pertaining to the design or construction of the terminated Work; (b) all samples, borings, boring logs, geotechnical data and similar data and information relating to the terminated Work; (c) all books, records, reports, test reports, studies and other documents of a similar nature relating to the terminated Work; and (d) All other work product used or owned by Developer or any Affiliate relating to the terminated Work.

15.2.9 Complete performance in accordance with the Contract Documents of all Work not terminated, except to the extent performance of the remaining Work is rendered impossible due to the scope of the Partial Termination for Convenience.

15.2.10 Take all action that may be necessary, or that TxDOT may direct, for the safety, protection and preservation of: (a) the public, including public and private vehicular movement; (b) the Work; and (c) equipment, machinery, materials and property related to the Project that is in the possession of Developer and in which TxDOT has or may acquire an interest.

15.2.11 As authorized by TxDOT in writing, use its best efforts to sell, at reasonable prices, any property of the types referred to in Section 15.2.7; provided however, that Developer: (a) is not required to extend credit to any purchaser; and (b) may acquire the property under the conditions prescribed and at prices approved by TxDOT. The proceeds of any transfer or disposition will be applied to reduce any payments to be made by TxDOT under the Contract Documents or paid in any other manner directed by TxDOT.

15.2.12 Immediately safely demobilize and secure construction, staging, lay down and storage areas for the Project and Utility Adjustments included in the Work in a

manner satisfactory to TxDOT, and remove all debris and waste materials, except as otherwise approved by TxDOT in writing.

15.2.13 Assist TxDOT in such manner as TxDOT may require prior to and for a reasonable period following the effective date of termination to ensure the orderly transition of the terminated Work and its management to TxDOT, and shall, if appropriate and if requested by TxDOT, take all steps as may be necessary to enforce the provisions of Subcontracts pertaining to the surrender of the terminated Work.

15.2.14 Carry out such other directions as TxDOT may give for the termination of the Work.

15.2.15 Take such other actions as are necessary or appropriate to mitigate further cost.

15.3 Settlement Proposal

After receipt of a Notice of Termination for Convenience or Notice of Partial Termination for Convenience, Developer shall submit a final termination settlement proposal to TxDOT in the form and with the certification prescribed by TxDOT. Developer shall submit the proposal promptly, but no later than 90 days from the effective date of termination unless Developer has requested a time extension in writing within such 90-day period and TxDOT has agreed in writing to allow such an extension. Developer's termination settlement proposal shall then be reviewed by TxDOT and acted upon, returned with comments, or rejected. If Developer fails to submit the proposal within the time allowed, TxDOT may determine, on the basis of information available, the amount, if any, due Developer because of the termination, shall pay Developer the amount so determined and shall be bound by TxDOT's determination.

15.4 Amount of Negotiated Termination Settlement

Developer and TxDOT may agree, as provided in Section 15.3, upon the whole or any part of the amount or amounts to be paid to Developer by reason of the total or partial termination of the Work for convenience pursuant to Section 15.1. Such agreed amount or amounts, exclusive of settlement costs, shall not exceed the total Price as reduced by the amount of payments otherwise made and the Price of Work not terminated. Upon determination of the settlement amount, this Agreement will be amended accordingly, and Developer will be paid the agreed amount as described in this Section 15.4. Nothing in Section 15.5, prescribing the amount to be paid to Developer in the event that Developer and TxDOT fail to agree upon the whole amount to be paid to Developer by reason of the termination of Work pursuant to Section 15.1, shall be deemed to limit, restrict or otherwise determine or affect the amount or amounts which may be agreed upon to be paid to Developer pursuant to this Section 15.4. TxDOT's execution and delivery of any settlement agreement shall not affect any of its rights under the Contract Documents with respect to completed Work, relieve Developer from its obligations with respect thereto, including Warranties, or affect Developer's obligations under the Performance Bond, Payment Bond, Warranty Bond and/or Guaranty as to such completed or non-terminated Work.

15.5 No Agreement as to Amount of Termination Settlement

If Developer and TxDOT fail to agree upon either all or some portion of the amount to be paid Developer by reason of a Termination for Convenience pursuant to Section 15.1, the amount payable (exclusive of interest charges) shall be determined by TxDOT in accordance with the following, but without duplication of any items or of any amounts agreed upon in accordance with Section 15.4:

15.5.1 TxDOT will pay Developer the sum of the following amounts for Work performed prior to the effective date of the Notice of Termination for Convenience or Notice of Partial Termination for Convenience:

(a) Developer's actual reasonable out-of-pocket cost, without profit, and including equipment costs only to the extent permitted by Section 13.7.3 for all Work performed, including mobilization, demobilization, work in progress and work done to secure the applicable portion of the Project for termination, including reasonable overhead and accounting for any refunds payable with respect to insurance premiums, deposits or similar items, as established to TxDOT's satisfaction. In determining the reasonable cost, deductions will be made for the cost of materials, supplies and equipment to be retained by Developer, amounts realized by the sale of such items, and for other appropriate credits against the cost of the Work, including those deductions that would be permitted in connection with Final Payment. When, in the opinion of TxDOT's Authorized Representative, the cost of a contract item of Work is excessively high due to costs incurred to remedy or replace Nonconforming Work, the reasonable cost to be allowed will be the estimated reasonable cost of performing that Work in compliance with the requirements of the Contract Documents and the excessive actual cost shall be disallowed.

(b) A sum, as profit on clause (a) above, determined by TxDOT to be fair and reasonable; provided however, Developer establishes to TxDOT's satisfaction that it is reasonably probable that Developer would have made a profit had the Agreement been completed and provided further, that the profit allowed shall in no event exceed 4 percent of the cost owing to Developer under clause (a);

(c) The cost of settling and paying claims arising out of the termination of Work under Subcontracts as provided in Section 15.2.6, exclusive of the amounts paid or payable on account of supplies or materials delivered or services furnished by the Subcontractor prior to the effective date of the Notice of Termination for Convenience or Notice of Partial Termination for Convenience of Work under this Agreement, which amounts shall be included in the cost on account of which payment is made under clause (a) above.

(d) The reasonable out-of-pocket cost (including reasonable overhead) of the preservation and protection of property incurred pursuant to Section 15.2.10 and any other reasonable out-of-pocket cost (including overhead) incidental to termination of Work under this Agreement, including the reasonable cost to Developer of handling material returned to the Supplier, delivered to TxDOT or otherwise disposed of as directed by TxDOT, and including a reasonable allowance for Developer's administrative costs in determining the amount payable due to termination of this Agreement.

15.5.2 Developer acknowledges and agrees that it shall not be entitled to any compensation in excess of the value of the Work performed (determined as provided in Section 15.5.1) plus its settlement costs, and that items such as lost or anticipated profits, unabsorbed overhead and opportunity costs shall not be recoverable by it upon termination of this Agreement. The total amount to be paid to Developer, exclusive of costs described in Sections 15.5.1(c) and (d), may not exceed the total Price less the amount of payments previously made. Furthermore, in the event that any refund is payable with respect to insurance or bond premiums, deposits or other items which were previously passed through to TxDOT by Developer, such refund shall be paid directly to TxDOT or otherwise credited to TxDOT. Except for normal spoilage, and except to the

extent that TxDOT will have otherwise expressly assumed the risk of loss, there will be excluded from the amounts payable to Developer under Section 15.5.1, the fair value, as determined by TxDOT, of equipment, machinery, materials, supplies and property which is destroyed, lost, stolen, or damaged so as to become undeliverable to TxDOT, or sold pursuant to Section 15.2.11. Information contained in the EPDs may be a factor in determining the value of the Work terminated. Upon determination of the amount of the termination payment, this Agreement shall be amended to reflect the agreed termination payment, Developer shall be paid the agreed amount, and the Price shall be reduced to reflect the reduced scope of Work.

15.5.3 If a termination hereunder is partial, Developer may file a proposal with TxDOT for an equitable adjustment of the Price for the continued portion of this Agreement. Any proposal by Developer for an equitable adjustment under this Section 15.5.3 shall be requested within 90 days from the effective date of the partial termination unless extended in writing by the TxDOT. The amount of any such adjustment as may be agreed upon shall be set forth in an amendment to this Agreement.

15.6 Reduction in Amount of Claim

The amount otherwise due Developer under this Section 15 shall be reduced by: (a) the amount of any claim which TxDOT may have against any Developer-Related Entity in connection with this Agreement; (b) the agreed price for, or the proceeds of sale, of property, materials, supplies, equipment or other things acquired by Developer or sold, pursuant to the provisions of this Section 15, and not otherwise recovered by or credited to TxDOT; (c) all unliquidated advance or other payments made to or on behalf of Developer applicable to the terminated portion of the Work or Agreement; (d) amounts that TxDOT deems advisable, in its sole discretion, to retain to cover any existing or threatened claims, Liens and stop notices relating to the Project, including claims by Utility Owners; (e) the cost of repairing any Nonconforming Work (or, in TxDOT's sole discretion, the amount of the reimbursement to which TxDOT is entitled under Section 5.6.2); and (f) any amounts due or payable by Developer to TxDOT.

15.7 Payment

TxDOT may from time to time, under such terms and conditions as it may prescribe and in its sole discretion, make partial payments for costs incurred by Developer in connection with the terminated portion of this Agreement, whenever in the opinion of TxDOT the aggregate of such payments shall be within the amount to which Developer will be entitled hereunder. If the total of such payments is in excess of the amount finally agreed or determined to be due under this Section 15, such excess shall be payable by Developer to TxDOT upon demand.

15.8 Subcontracts

15.8.1 Provisions shall be included in each Subcontract (at all tiers) regarding terminations for convenience, allowing such termination rights and obligations to be passed through to the Subcontractors and establishing terms and conditions relating thereto, including procedures for determining the amount payable to the Subcontractor upon a termination, consistent with this Section 15.

15.8.2 Each Subcontract shall provide that, in the event of a termination for convenience by TxDOT, the Subcontractor will not be entitled to any anticipatory or unearned profit on Work terminated or partly terminated, or to any payment which constitutes consequential damages on account of the termination or partial termination.

15.9 Termination Based on Delay to Issuance of NTPs

(a) If NTP1 has not been issued within 365 days after the Effective Date due to no act, omission, negligence, intentional misconduct, or breach of applicable Law, contract or Governmental Approval of any Developer-Related Entity, Developer, as its sole remedy, shall have the right to terminate this Agreement, which right shall be exercised by delivery of notice of termination to TxDOT. In such event, TxDOT's sole liability to Developer is to pay Developer the same payment for work product as provided to unsuccessful Proposers pursuant to Section 6.3 of the ITP, provided that all other conditions for such payment are met.

(b) If NTP2 has not been issued within 365 days after the issuance of NTP1 and this delay is not caused in whole or in part by an act, omission, negligence, intentional misconduct, or breach of applicable Law, contract or Governmental Approval by any Developer-Related Entity (including Developer's failure to satisfy any particular condition(s) to NTP2), Developer, as its sole remedy, may conditionally elect to terminate this Agreement by providing TxDOT with written notice of such conditional election. If Developer delivers a written notice of its conditional election to terminate, TxDOT shall have the choice of either accepting such notice of termination or continuing this Agreement in effect by delivering to Developer written notice of TxDOT's choice not later than 30 days after receipt of Developer's notice. If TxDOT does not deliver written notice of its choice within such 30-day period, then it will be deemed to have accepted Developer's election to terminate the Agreement. In such event, the termination shall be deemed a termination for convenience and handled in accordance with this Section 15; provided however the maximum amount of liability by TxDOT shall be $25,000,000. In no event, shall Developer be entitled to payment of more than $25,000,000, including for Work performed, if NTP2 is not issued. If TxDOT delivers timely written notice choosing to continue this Agreement in effect, then the Price adjustment provisions described in Section 12.1.6 shall be extended and continue in effect for the duration of the delay in issuance of NTP2, or until earlier termination of this Agreement.

15.10 No Consequential Damages

Under no circumstances shall Developer be entitled to anticipatory or unearned profits or consequential or other damages as a result of any termination under this Section 15. The payment to Developer determined in accordance with this Section 15 constitutes Developer's exclusive remedy for a termination hereunder.

15.11 No Waiver; Release

15.11.1 Notwithstanding anything contained in this Agreement to the contrary, a termination under this Section 15 shall not waive any right or claim to damages which TxDOT may have and TxDOT may pursue any cause of action which it may have at Law, in equity or under the Contract Documents.

15.11.2 Subject to Section 15.12 below, TxDOT's payment to Developer of the amounts required under this Section 15 shall constitute full and final satisfaction of, and upon payment TxDOT shall be forever released and discharged from, any and all Claims, causes of action, suits, demands and Losses, known or unknown, suspected or unsuspected, that Developer may have against TxDOT arising out of or relating to the terminated Work. Upon such payment, Developer shall execute and deliver to TxDOT all such releases and discharges as TxDOT may reasonably require to confirm the foregoing, but no such written release and discharge shall be necessary to give effect to the foregoing satisfaction and release.

15.12 Dispute Resolution

The failure of the Parties to agree on amounts due under this Section 15 shall be a Dispute to be resolved in accordance with Section 19.

15.13 Allowability of Costs

All costs claimed by Developer under this Section 15 must be allowable, allocable and reasonable in accordance with the cost principles and procedures of 48 CFR Part 31.

SECTION 16. DEFAULT; remedies

16.1 Default of Developer

16.1.1 Events and Conditions Constituting Default

Developer shall be in breach under this Agreement upon the occurrence of any one or more of the following events or conditions (each a "Developer Default"):

(a) Developer: (i) fails to begin Work within 30 days following issuance of NTP1 or NTP2, or (ii) fails to satisfy all conditions to commencement of the Construction Work, and commence the Construction Work with diligence and continuity;

(b) Developer fails to complete the Work by the applicable Completion Deadline, as the same may be extended pursuant to this Agreement;

(c) Developer fails to perform the Work in accordance with the Contract Documents, including conforming to applicable standards set forth therein in design and construction of the Project, or refuses to correct, remove and replace Nonconforming Work;

(d) Developer suspends, ceases, stops or abandons the Work or fails to continuously and diligently prosecute the Work (exclusive of work stoppage: (i) due to termination by TxDOT, or (ii) due to and during the continuance of a Force Majeure Event or suspension by TxDOT, or (iii) due to and during the continuance of any work stoppage under Section 16.4);

(e) Developer fails to obtain, provide and maintain any insurance, bonds, guarantees, letters of credit or other performance security as and when required under this Agreement for the benefit of relevant parties, or fails to comply with any requirement of this Agreement pertaining to the amount, terms or coverage of the same;

(f) Developer makes or attempts to make or suffers a voluntary or involuntary assignment or transfer of all or any portion of this Agreement in violation of Section 24.4;

(g) Developer fails, absent a valid dispute, to make payment when due for labor, equipment or materials in accordance with its agreements with Subcontractors and Suppliers and in accordance with applicable Laws, or fails to make payment to TxDOT when due of any amounts owing to TxDOT under this Agreement;

(h) Developer materially fails to timely observe or perform or cause to be observed or performed any other material covenant, agreement, obligation, term or condition required to be observed or performed by Developer under the Contract Documents;

(i) Any representation or warranty in the Contract Documents made by Developer, or any certificate, schedule, report, instrument or other document delivered by or on behalf of Developer to TxDOT pursuant to the Contract Documents is false or materially misleading or inaccurate when made or omits material information when made;

(j) Developer commences a voluntary case seeking liquidation, reorganization or other relief with respect to itself or its debts under any U.S. or foreign bankruptcy, insolvency or other similar Law now or hereafter in effect, seeks the appointment of a trustee, receiver, liquidator, custodian or other similar official of it or any substantial part of its assets; becomes insolvent, or generally does not pay its debts as they become due; admits in writing its inability to pay its debts; makes an assignment for the benefit of creditors; or takes any action to authorize any of the foregoing;

(k) An involuntary case is commenced against Developer seeking liquidation, reorganization, dissolution, winding up, a composition or arrangement with

creditors, a readjustment of debts or other relief with respect to Developer or Developer's debts under any U.S. or foreign bankruptcy, insolvency or other similar Law now or hereafter in effect; seeking the appointment of a trustee, receiver, liquidator, custodian or other similar official of Developer or any substantial part of Developer's assets; seeking the issuance of a writ of attachment, execution, or similar process; or seeking like relief, and such involuntary case shall not be contested by Developer in good faith or shall remain undismissed and unstayed for a period of 60 days;

(l) A voluntary or involuntary case or other act or event described in clauses (j) and (k) of this Section 16.1.1 shall occur (and in the case of an involuntary case shall not be contested in good faith or shall remain undismissed and unstayed for a period of 60 days) with respect to: (i) any member of Developer with a material financial obligation owing to Developer for equity or shareholder loan contributions, or (ii) any Guarantor of Developer; or

(m) an Event of Default under the CMA.

16.1.2 Notice and Opportunity to Cure

For the purpose of TxDOT's exercise of other remedies and subject to remedies that this Section 16 expressly states may be exercised before lapse of a cure period, Developer shall have the following cure periods with respect to the following Developer Defaults:

(a) Respecting a Developer Default under clauses (a), and (c) through (g) of Section 16.1.1, a period of 15 days after TxDOT delivers to Developer written notice of the Developer Default; provided that TxDOT shall have the right, but not the obligation, to effect cure, at Developer's expense, if a Developer Default under clause (e) of Section 16.1.1 continues beyond five days after such notice is delivered.

(b) Respecting a Developer Default under clauses (h) and (i) of Section 16.1.1, a period of 30 days after TxDOT delivers to Developer written notice of the Developer Default; provided that: (i) if the Developer Default is of such a nature that the cure cannot with diligence be completed within such time period and Developer has commenced meaningful steps to cure immediately after receiving the default notice, Developer shall have such additional period of time, up to a maximum cure period of 60 days, as is reasonably necessary to diligently effect cure, and (ii) as to clause (i), cure will be regarded as complete when the adverse effects of the breach are cured.

(c) Respecting a Developer Default under clauses (b), (j) and (k) of Section 16.1.1, no cure period, and there shall be no right to notice of a Developer Default under clauses (b), (j) and (k) of Section 16.1.1.

(d) Respecting a Developer Default under clauses (l) of Section 16.1.1, a period of ten days from the date of the Developer Default to commence diligent efforts to cure, and 30 days to effect cure of such default by providing a letter of credit or payment to TxDOT for the benefit of the Project, in the amount of, as applicable: (i) the member's financial obligation for equity or shareholder loan contributions to or for the benefit of Developer or (ii) the Guarantor's specified sum or specified maximum liability under its guaranty, or if none is specified, the reasonably estimated maximum liability of the Guarantor.

16.1.3 Declaration of Event of Default

If any event or condition described in Section 16.1.1 is not subject to cure or is not cured within the period (if any) specified in Section 16.1.2, TxDOT may declare that an

"Event of Default" has occurred. The declaration of an Event of Default shall be in writing and given to Developer and the Surety.

16.2 TxDOT Remedies for Developer Default

16.2.1 Termination for Default

16.2.1.1 In the event of any Developer Default that is or becomes an Event of Default, TxDOT may terminate this Agreement or a portion thereof for default, including Developer's rights of entry upon, possession, control and operation of the Project, in which case, the procedures set forth in Section 15.2 shall apply. If this Agreement or a portion thereof is terminated for default, TxDOT shall have the following rights without further notice and without waiving or releasing Developer from any obligations and Developer shall have the following obligations (as applicable):

(a) TxDOT may deduct from any amounts (including interest thereon as permitted under this Agreement) payable by TxDOT to Developer such amounts payable by Developer to TxDOT, including reimbursements owing, Liquidated Damages, amounts TxDOT deems advisable to cover any existing or threatened claims, Liens and stop notices of Subcontractors, laborers or other Persons, amounts of any Losses that have accrued, the cost to complete or remediate uncompleted Work or Nonconforming Work or other damages or amounts that TxDOT has determined are or may be payable to TxDOT under the Contract Documents.

(b) TxDOT shall have the right, but not the obligation, to pay such amount and/or perform such act as may then be required from Developer under the Contract Documents or Subcontracts.

(c) TxDOT may appropriate any or all materials, supplies and equipment on the Site as may be suitable and acceptable and may direct the Surety to complete this Agreement or may enter into an agreement for the completion of this Agreement according to the terms and provisions hereof with another contractor or the Surety, or use such other methods as may be required for the completion of the Work and the requirements of the Contract Documents, including completion of the Work by TxDOT.

(d) If TxDOT exercises any right to perform any obligations of Developer, in the exercise of such right TxDOT may, but is not obligated to, among other things: (i) perform or attempt to perform, or cause to be performed, such Work; (ii) spend such sums as TxDOT deems necessary and reasonable to employ and pay such architects, engineers, consultants and contractors and obtain materials and equipment as may be required for the purpose of completing such Work; (iii) execute all applications, certificates and other documents as may be required for completing the Work; (iv) modify or terminate any contractual arrangements; (v) take any and all other actions which it may in its sole discretion consider necessary to complete the Work; and (vi) prosecute and defend any action or proceeding incident to the Work.

16.2.1.2 Developer and each Guarantor shall be jointly and severally liable to TxDOT for all costs reasonably incurred by TxDOT or any Person acting on TxDOT's behalf in completing the Work or having the Work completed by another Person (including any re-procurement costs, throw away costs for unused portions of the completed Work, and increased financing costs). TxDOT shall be entitled to withhold all or any portion of further payments to Developer until Final Acceptance or the date on which TxDOT otherwise accepts the Project as complete or determines that it will not proceed with completion, at which time TxDOT will determine whether and to what extent Developer is entitled to further payments. Promptly following Final Acceptance or the date

on which TxDOT otherwise accepts the Project as complete or determines that it will not proceed with completion, the total cost of all completed Work shall be determined, and TxDOT shall notify Developer and each Guarantor in writing of the amount, if any, that Developer and each Guarantor shall pay TxDOT or TxDOT shall pay Developer or its Surety with respect thereto. TxDOT's Recoverable Costs will be deducted from any moneys due or which may become due Developer or its Surety. If such expense exceeds the sum which would have been payable to Developer under this Agreement, then Developer and each Guarantor shall be liable and shall pay to TxDOT the amount of such excess.

16.2.1.3 In lieu of the provisions of this Section 16.2.1 for terminating this Agreement for default and completing the Work, TxDOT may, in its sole discretion, pay Developer for the parts already done according to the provisions of the Contract Documents and may treat the parts remaining undone as if they had never been included or contemplated by this Agreement. No Claim under this Section 16.2.1.3 will be allowed for prospective profits on, or any other compensation relating to, Work uncompleted by Developer.

16.2.1.4 If this Agreement is terminated for grounds which are later determined not to justify a termination for default, such termination shall be deemed to constitute a Termination for Convenience pursuant to Section 15.

16.2.2 Developer Defaults Related to Safety

Notwithstanding anything to the contrary in this Agreement, if in the good faith judgment of TxDOT a Developer Default results in an emergency or danger to persons or property, and if Developer is not then diligently taking all necessary steps to rectify or deal with such emergency or danger, TxDOT may, without notice and without awaiting lapse of the period to cure any breach, and in addition and without prejudice to its other remedies, (but is not obligated to): (a) immediately take such action as may be reasonably necessary to rectify the emergency or danger, in which event Developer shall pay to TxDOT on demand the cost of such action, including TxDOT's Recoverable Costs; or (b) suspend the Work and/or close or cause to be closed any and all portions of the Project affected by the emergency or danger. So long as TxDOT undertakes such action in good faith, even if under a mistaken belief in the occurrence of such failure or existence of an emergency or danger as a result thereof, such action shall not be deemed unlawful or a breach of this Agreement, shall not expose TxDOT to any liability to Developer and shall not entitle Developer to any other remedy, it being acknowledged that TxDOT has a high priority, paramount public interest in protecting public and worker safety at the Project and adjacent and connecting areas. TxDOT's good faith determination of the existence of such a failure, emergency or danger shall be deemed conclusive in the absence of clear and convincing evidence to the contrary. Immediately following rectification of such emergency or danger, as determined by TxDOT, acting reasonably, TxDOT shall allow the Work to continue or such portions of the Project to reopen, as the case may be.

16.2.3 Damages

16.2.3.1 Subject to Section 17, TxDOT shall be entitled to recover any and all damages available at Law (subject to the duty at Law to mitigate damages) on account of the occurrence of a Developer Default. Developer shall owe any such damages that accrue after the occurrence of the Developer Default and the delivery of notice thereof, if any, required by this Agreement regardless of whether the Developer Default is subsequently cured.

16.2.3.2 If TxDOT suffers damages as a result of a Developer Default due to a Developer-Related Entity's acts, omissions, negligence, intentional misconduct, or breach of applicable Law, contract or Governmental Approval, then, subject to Section 17, TxDOT shall be entitled to recovery of such damages from Developer regardless of whether such acts, omissions, negligence, intentional misconduct, or breach of applicable Law, contract or Governmental Approval ripens into an Event of Default.

16.2.3.3 Developer, the Surety and Guarantor shall not be relieved of liability for continuing Liquidated Damages on account of a Developer Default or by TxDOT's declaration of an Event of Default, or by actions taken by TxDOT under this Section 16.2.

16.2.3.4 TxDOT's remedies with respect to Nonconforming Work shall include the right to accept such Work and receive payment as provided in Section 5.6.2 in lieu of the remedies specified in this Section 16.2.

16.2.4 Performance Security

Upon the occurrence of an Event of Default and without waiving or releasing Developer from any obligations, TxDOT shall be entitled to make demand upon and enforce any bond, and make demand upon, draw on and enforce and collect any letter of credit, guaranty or other performance security available to TxDOT under this Agreement with respect to the Event of Default in question. Where access to a bond, letter of credit or other performance security is to satisfy damages owing, TxDOT shall be entitled to make demand, draw, enforce and collect, regardless of whether the Event of Default is subsequently cured. TxDOT will apply the proceeds of any such action to the satisfaction of Developer's obligations under this Agreement, including payment of amounts due TxDOT. The foregoing does not limit or affect TxDOT's right to give notice to or make demand upon and enforce any bond, and make demand upon, draw on and enforce and collect any letter of credit, guaranty or other performance security, immediately after TxDOT is entitled to do so under the bond, letter of credit, guaranty or other performance security.

16.2.5 Other Rights and Remedies; Cumulative Remedies

Subject to Sections 17.5 and 17.6, TxDOT shall also be entitled to exercise any other rights and remedies available under this Agreement, or available at law or in equity, and each right and remedy of TxDOT hereunder shall be cumulative and shall be in addition to every other right or remedy provided herein or now or hereafter existing at law or in equity or by statute or otherwise, and the exercise or beginning of the exercise by TxDOT of any one or more of any of such rights or remedies shall not preclude the simultaneous or later exercise by TxDOT of any or all other such rights or remedies.

16.3 Event of Default Due Solely to Developer's Failure to Achieve Completion Deadlines and Toll Zone Deadlines

16.3.1 If an Event of Default consists solely of Developer's failure to achieve Substantial Completion or Final Acceptance of the Project by the applicable Completion Deadline, TxDOT's sole remedy for such Event of Default shall be the right to assess Liquidated Damages, provided that: (a) such Event of Default does not delay such Substantial Completion or Final Acceptance beyond 180 days of the applicable Completion Deadline; and (b) Developer continues to diligently perform the Work despite such Event of Default. The fact that TxDOT has agreed to accept Liquidated Damages as compensation for its damages associated with any delay in meeting a Completion Deadline shall not preclude TxDOT from exercising its other rights and remedies

respecting the delay set forth in Section 16.2 other than the right to collect other damages due to the delay, except that TxDOT agrees not to exercise such other rights and remedies respecting the delay so long as: (a) the approved Project Schedule demonstrates that Developer is capable of meeting such Completion Deadline within 180 days after the Completion Deadline; and (b) the Developer diligently performs the Work in accordance with said schedule. Nothing in this Section 16.3 shall prejudice any other rights or remedies that TxDOT may have due to any other Event of Default during such 180-day period.

16.3.2 If Substantial Completion or Final Acceptance of the Project has not occurred within 180 days of the applicable Completion Deadline, TxDOT shall have the right to: (a) terminate this Agreement; (b) continue to assess Liquidated Damages subject only to the limitations set forth in Section 17.1; and/or (c) exercise any other right or remedy under this Agreement, at law or in equity.

16.3.3 If an Event of Default consists solely of Developer's failure to complete the Toll Zone-related Work within the applicable deadline set forth in Section 20.1.2, TxDOT's sole remedy for such Event of Default shall be the right to assess Liquidated Damages, provided that completion of such Work is not delayed beyond 180 days after the deadline for completion of such Work.

16.4 Right to Stop Work for Failure by TxDOT to Make Undisputed Payment

Developer shall have the right to stop Work if TxDOT fails to make an undisputed payment due hereunder within 15 Business Days after TxDOT's receipt of written notice of nonpayment from Developer. Any such work stoppage shall be considered a suspension for convenience under Section 14.1 and shall be considered a TxDOT-Directed Change. Developer shall not have the right to terminate this Agreement for default as the result of any failure by TxDOT to make an undisputed payment due hereunder. However, if such nonpayment continues for more than 180 days, upon written notice from Developer to TxDOT, the nonpayment may be deemed a Termination for Convenience pursuant to Section 15. Upon such termination, the Parties' rights and obligations shall be as set forth in Section 15.

SECTION 17. LIQUIDATED DAMAGES AND LIMITATION OF LIABILITY

17.1 Liquidated Damages Respecting Delays

17.1.1 Developer shall be liable for and pay to TxDOT liquidated damages with respect to any failure to achieve Substantial Completion and Final Acceptance of the Project by the applicable Completion Deadline, as the same may be extended pursuant to this Agreement. The amounts of such liquidated damages are as follows:

(a) $163,000.00 for each day after the Substantial Completion Deadline, not to exceed 365 days, provided however that TxDOT shall have the right to terminate this Agreement if the Substantial Completion date, per the Project Schedule, is greater than 180 days after the Substantial Completion Deadline; and

(b) $20,000.00 per day for each day after the Final Acceptance Deadline and through the date of Final Acceptance.

Liquidated damages shall commence on the applicable Completion Deadline, as the same may be extended pursuant to this Agreement, and shall continue to accrue until the date of the applicable Substantial Completion or Final Acceptance or until termination of this Agreement. Liquidated damages shall constitute TxDOT's sole right to damages for such delay.

17.1.2 Developer shall be liable for and pay to TxDOT liquidated damages with respect to any failure to complete the Toll Zone Work by the deadline therefor set forth in Section 20.1.2, as the same may be extended pursuant to this Agreement. Such liability shall apply even though: (a) a cure period remains available to Developer; or (b) cure occurs. The amount of such liquidated damages shall be $87,000.00 per day for each day after the completion deadline (180 days prior to the Substantial Completion Deadline) and through the date completion of the Toll Zone Work actually occurs or until termination of this Agreement. Liquidated damages shall constitute TxDOT's sole right to damages for such delay.

17.1.3 Developer acknowledges that the liquidated damages described in this Section 17.1 ("Liquidated Damages") are reasonable in order to compensate TxDOT for damages it will incur as a result of late completion of the Project or portions thereof as set forth in this Section 17.1. Such damages include loss of potential revenue for TxDOT due to late Substantial Completion, loss of use, enjoyment and benefit of the Project, and connecting TxDOT transportation facilities by the general public, injury to the credibility and reputation of TxDOT's transportation improvement program with policy makers and with the general public who depend on and expect availability of service by the Substantial Completion Deadline, which injury to credibility and reputation may directly result in loss of ridership on the Project and connecting TxDOT transportation facilities and further loss of TxDOT's revenue, and additional costs of administering this Agreement (including engineering, legal, accounting, overhead and other administrative costs). Developer further acknowledges that these damages are incapable of accurate measurement because of, among other things, the unique nature of the Project and the unavailability of a substitute for it.

17.2 Liquidated Damages Respecting Lane Closures

17.2.1 Developer shall be liable for and pay to TxDOT Liquidated Damages for Lane Closures assessed against Developer as described in Section 18.3.1.2 of the Technical Provisions and in the amounts set forth in Exhibit 17.

17.2.2 Developer acknowledges that such Liquidated Damages are reasonable in order to compensate TxDOT for damages it will incur by reason of the matters that result in Liquidated Damages for Lane Closures. Such damages include loss of potential revenue for TxDOT, loss of use, enjoyment and benefit of the Project and connection TxDOT transportation facilities by the general public, injury to the credibility and reputation of TxDOT's transportation improvement program with policy makers and with the general public who depend on and expect availability of service, which injury to credibility and reputation may directly result in loss of ridership on the Project and connecting TxDOT transportation facilities and loss of toll revenues, and additional costs of administering this Agreement (including engineering, legal, accounting, overhead and other administrative costs.) Developer further acknowledges that these damages are incapable of accurate measurement because of, among other things, the unique nature of the Project and the unavailability of a substitute for it.

17.3 Acknowledgements Regarding Liquidated Damages

Developer further agrees and acknowledges that:

17.3.1 In the event that Developer fails to achieve Substantial Completion or Final Acceptance of the Project by the applicable Completion Deadline, TxDOT will incur substantial damages.

17.3.2 Such damages are incapable of accurate measurement and difficult to prove for the reasons stated in Section 17.1.3.

17.3.3 As of the Effective Date, the amounts of Liquidated Damages represent good faith estimates and evaluations by the Parties as to the actual potential damages that TxDOT would incur as a result of late Substantial Completion or late Final Acceptance of the Project, and do not constitute a penalty.

17.3.4 The Parties have agreed to Liquidated Damages in order to fix and limit Developer's costs and to avoid later Disputes over what amounts of damages are properly chargeable to Developer.

17.3.5 Such sums are reasonable in light of the anticipated or actual harm caused by delayed Substantial Completion or delayed Final Acceptance of the Project, the difficulties of the proof of loss, and the inconvenience or infeasibility of otherwise obtaining an adequate remedy.

17.3.6 Liquidated Damages are not intended to, and do not, liquidate Developer's liability under the indemnification provisions of Section 18.1, even though third party claims against Indemnified Parties may arise out of the same event, breach or failure that gives rise to the Liquidated Damages.

17.4 Payment; Satisfaction; Waiver; Non-Exclusive Remedy

17.4.1 Developer shall pay any liquidated damages owing under this Section 17 within 20 days after TxDOT delivers to Developer TxDOT's invoice or demand therefor, such invoice or demand to be issued not more often than monthly.

17.4.2 TxDOT shall have the right to deduct and offset liquidated damages from any amounts owing Developer. TxDOT also shall have the right to draw on any bond, certificate of deposit, letter of credit or other security provided by Developer pursuant to this Agreement to satisfy liquidated damages not paid when due.

17.4.3 Permitting or requiring Developer to continue and finish the Work or any part thereof after a Completion Deadline as applicable, shall not act as a waiver of TxDOT's right to receive Liquidated Damages hereunder or any rights or remedies otherwise available to TxDOT.

17.4.4 Subject to Section 16.3, TxDOT's right to, and imposition of, Liquidated Damages are in addition, and without prejudice, to any other rights and remedies available to TxDOT under this Agreement, at law or in equity respecting the breach, failure to perform or Developer Default that is the basis for the Liquidated Damages or any other breach, failure to perform or Developer Default, except for recovery of the monetary damage that the Liquidated Damages are intended to compensate.

17.5 Limitation of Developer's Liability

Notwithstanding any other provision of the Conrtact Documents, to the extent permitted by applicable Law, TxDOT will not seek indemnification and defense under Section 18 or to recover damages from Developer resulting from breach of this Agreement (whether arising in contract, negligence or other tort, or any other theory of law) in excess of the sum of: (a) all those costs reasonably incurred by TxDOT or any Person acting on TxDOT's behalf in completing or correcting the Work or having the Work completed or corrected by another Person, including the cost of the work required or arising under the Warranties; (b) an amount equal to $100,000,000 (which amount shall specifically include any Liquidated Damages paid pursuant to this Section 17); (c) any amounts paid by or on behalf of Developer which are covered by insurance proceeds; and (d) all Losses incurred by any Indemnified Party relating to or arising out of any illegal activities, fraud, criminal conduct, gross negligence or intentional misconduct on the part of any Developer-Related Entity.

17.6 Limitation on Consequential Damages

17.6.1 Notwithstanding any other provision of the Contract Documents and except as set forth in this Section 17.6.1 and in Section 17.6.2, to the extent permitted by applicable Law, neither party shall be liable to the other for punitive damages or indirect, incidental or consequential damages, whether arising out of breach of this Agreement, tort (including negligence) or any other theory of liability, and each party hereby releases the other party from any such liability.

17.6.2 The foregoing limitations on Developer's liability for punitive, indirect, incidental or consequential damages shall not apply to or limit any right of recovery TxDOT may have respecting the following:

(a) Losses (including defense costs) to the extent (i) covered by the proceeds of insurance required to be carried pursuant to Section 9, and (ii) covered by the proceeds of insurance actually carried by or insuring Developer under policies solely with respect to the Project and the Work, regardless of whether required to be carried pursuant to Section 9, or (iii) Developer is deemed to have self-insured the Loss pursuant to Section 9.2.3;

(b) Losses arising out of fraud, criminal conduct, intentional misconduct (which does not include any intentional Event of Default), recklessness, bad faith or gross negligence on the part of any Developer-Related Entity;

(c) Developer's indemnities set forth in Section 18.1 or elsewhere in the Contract Documents;

(d) Developer's obligation to pay liquidated damages in accordance with Section 17.1 or any other provision of the Contract Documents and Liquidated Damages for Lane Closures; and

(e) Losses arising out of Developer Releases of Hazardous Materials.

(f) Any other consequential damages arising from a breach of this Agreement by Developer that occurs prior to Final Acceptance, subject to a cap in the amount of $1,000,000.

SECTION 18. INDEMNIFICATION

18.1 Indemnity by Developer

18.1.1 SUBJECT TO SECTION 18.1.2, DEVELOPER SHALL RELEASE, PROTECT, DEFEND, INDEMNIFY AND HOLD HARMLESS THE INDEMNIFIED PARTIES FROM AND AGAINST ANY AND ALL CLAIMS, CAUSES OF ACTION, SUITS, JUDGMENTS, INVESTIGATIONS, LEGAL OR ADMINISTRATIVE PROCEEDINGS, DEMANDS AND LOSSES, IN EACH CASE IF ASSERTED OR INCURRED BY OR AWARDED TO ANY THIRD PARTY, ARISING OUT OF, RELATING TO OR RESULTING FROM:

(a) THE BREACH OR ALLEGED BREACH OF ANY OF THE CONTRACT DOCUMENTS BY ANY DEVELOPER-RELATED ENTITY;

(b) THE FAILURE OR ALLEGED FAILURE BY ANY DEVELOPER-RELATED ENTITY TO COMPLY WITH THE GOVERNMENTAL APPROVALS, ANY APPLICABLE ENVIRONMENTAL LAWS OR OTHER LAWS (INCLUDING LAWS REGARDING HAZARDOUS MATERIALS MANAGEMENT);

(c) ANY ALLEGED PATENT OR COPYRIGHT INFRINGEMENT OR OTHER ALLEGEDLY IMPROPER APPROPRIATION OR USE OF TRADE SECRETS, PATENTS, PROPRIETARY INFORMATION, KNOW-HOW, COPYRIGHT RIGHTS OR INVENTIONS IN PERFORMANCE OF THE WORK, OR ARISING OUT OF ANY USE IN CONNECTION WITH THE PROJECT OF METHODS, PROCESSES, DESIGNS, INFORMATION, OR OTHER ITEMS FURNISHED OR COMMUNICATED TO TXDOT OR ANOTHER INDEMNIFIED PARTY PURSUANT TO THIS AGREEMENT; PROVIDED HOWEVER THAT THIS INDEMNITY SHALL NOT APPLY TO ANY INFRINGEMENT TO THE EXTENT RESULTING FROM TXDOT'S FAILURE TO COMPLY WITH SPECIFIC WRITTEN INSTRUCTIONS REGARDING USE PROVIDED TO TXDOT BY DEVELOPER;

(d) THE ACTUAL OR ALLEGED CULPABLE ACT, ERROR, OMISSION, NEGLIGENCE, BREACH OR MISCONDUCT OF ANY DEVELOPER-RELATED ENTITY IN OR ASSOCIATED WITH PERFORMANCE OF THE WORK;

(e) ANY AND ALL CLAIMS BY ANY GOVERNMENTAL OR TAXING AUTHORITY CLAIMING TAXES BASED ON GROSS RECEIPTS, PURCHASES OR SALES, THE USE OF ANY PROPERTY OR INCOME OF ANY DEVELOPER-RELATED ENTITY WITH RESPECT TO ANY PAYMENT FOR THE WORK MADE TO OR EARNED BY ANY DEVELOPER-RELATED ENTITY;

(f) ANY AND ALL STOP NOTICES AND/OR LIENS FILED IN CONNECTION WITH THE WORK, INCLUDING ALL EXPENSES AND ATTORNEYS', ACCOUNTANTS' AND EXPERT WITNESS FEES AND COSTS INCURRED IN DISCHARGING ANY STOP NOTICE OR LIEN, AND ANY OTHER LIABILITY TO SUBCONTRACTORS FOR FAILURE TO PAY SUMS DUE FOR THEIR WORK OR SERVICES, PROVIDED THAT TXDOT HAS PAID ALL UNDISPUTED AMOUNTS OWING TO DEVELOPER WITH RESPECT TO SUCH WORK;

(g) ANY ACTUAL OR THREATENED DEVELOPER RELEASE OF HAZARDOUS MATERIALS;

(h) THE CLAIM OR ASSERTION BY ANY OTHER TXDOT CONTRACTOR OR DEVELOPER: (i) THAT ANY DEVELOPER-RELATED ENTITY INTERFERED WITH OR HINDERED THE PROGRESS OR COMPLETION OF WORK

BEING PERFORMED BY SUCH OTHER TXDOT CONTRACTOR OR DEVELOPER, OR FAILED TO COOPERATE REASONABLY WITH SUCH OTHER TXDOT CONTRACTOR OR DEVELOPER, SO AS TO CAUSE INCONVENIENCE, DISRUPTION, DELAY OR LOSS, EXCEPT WHERE THE DEVELOPER-RELATED ENTITY WAS NOT IN ANY MANNER ENGAGED IN PERFORMANCE OF THE WORK OR (ii) THAT ANY DEVELOPER-RELATED ENTITY INTERFERED WITH OR HINDERED THE PROGRESS OR COMPLETION OF WORK BEING PERFORMED BY SUCH OTHER TXDOT CONTRACTOR OR DEVELOPER, SO AS TO CAUSE INCONVENIENCE, DISRUPTION, DELAY OR LOSS, TO THE EXTENT SUCH CLAIM ARISES OUT OF THE ACTUAL OR ALLEGED CULPABLE ACT, ERROR, OMISSION, NEGLIGENCE, BREACH OR MISCONDUCT OF ANY DEVELOPER-RELATED ENTITY;

(i) DEVELOPER'S PERFORMANCE OF, OR FAILURE TO PERFORM, THE OBLIGATIONS UNDER ANY UTILITY AGREEMENT, OR ANY DISPUTE BETWEEN DEVELOPER AND A UTILITY OWNER AS TO WHETHER WORK RELATING TO A UTILITY ADJUSTMENT CONSTITUTES A BETTERMENT;

(j) (i) ANY DEVELOPER-RELATED ENTITY'S BREACH OF OR FAILURE TO PERFORM AN OBLIGATION THAT TXDOT OWES TO A THIRD PERSON, INCLUDING GOVERNMENTAL ENTITIES, UNDER LAW OR UNDER ANY AGREEMENT BETWEEN TXDOT AND A THIRD PERSON, WHERE TXDOT HAS DELEGATED PERFORMANCE OF THE OBLIGATION TO DEVELOPER UNDER THE CONTRACT DOCUMENTS OR (ii) THE ACTS OR OMISSIONS OF ANY DEVELOPER-RELATED ENTITY WHICH RENDER TXDOT UNABLE TO PERFORM OR ABIDE BY AN OBLIGATION THAT TXDOT OWES TO A THIRD PERSON, INCLUDING GOVERNMENTAL ENTITIES, UNDER ANY AGREEMENT BETWEEN TXDOT AND A THIRD PERSON, WHERE THE AGREEMENT WAS EXPRESSLY DISCLOSED TO DEVELOPER;

(k) THE FRAUD, BAD FAITH, ARBITRARY OR CAPRICIOUS ACTS, OR VIOLATION OF LAW BY ANY DEVELOPER-RELATED ENTITY IN OR ASSOCIATED WITH THE PERFORMANCE OF THE WORK;

(l) INVERSE CONDEMNATION, TRESPASS, NUISANCE OR SIMILAR TAKING OF OR HARM TO REAL PROPERTY BY REASON OF: (i) THE FAILURE OF ANY DEVELOPER-RELATED ENTITY TO COMPLY WITH GOOD INDUSTRY PRACTICES, REQUIREMENTS OF THE CONTRACT DOCUMENTS, PROJECT MANAGEMENT PLAN OR GOVERNMENTAL APPROVALS RESPECTING CONTROL AND MITIGATION OF CONSTRUCTION ACTIVITIES AND CONSTRUCTION IMPACTS, (ii) THE INTENTIONAL MISCONDUCT OR NEGLIGENCE OF ANY DEVELOPER-RELATED ENTITY, OR (iii) THE ACTUAL PHYSICAL ENTRY ONTO OR ENCROACHMENT UPON ANOTHER'S PROPERTY BY ANY DEVELOPER-RELATED ENTITY; AND

(m) ERRORS, INCONSISTENCIES OR OTHER DEFECTS IN THE DESIGN OR CONSTRUCTION OF THE PROJECT AND/OR OF UTILITY ADJUSTMENTS INCLUDED IN THE WORK.

18.1.2 Subject to the releases and disclaimers herein, including all the provisions set forth in Section 3.1.8 of this Agreement, Developer's indemnity obligation shall not extend to any third party Loss to the extent caused by:

(a) the negligence, reckless or intentional misconduct, bad faith or fraud of such Indemnified Party,

(b) TxDOT's material breach of any of its obligations under the Contract Documents;

(c) An Indemnified Party's material violation of any Laws or Governmental Approvals; or

(d) An unsafe requirement inherent in prescriptive design or prescriptive construction specifications of the Technical Provisions, but only where prior to occurrence of the third party Loss: (i) Developer complied with such specifications and did not actually know, or would not have known, while exercising reasonable diligence, that the requirement created a potentially unsafe condition or (ii) Developer knew of and reported to TxDOT the potentially unsafe requirement.

18.1.3 In claims by an employee of Developer, a Subcontractor, anyone directly or indirectly employed by them or anyone for whose acts they may be liable, the indemnification obligation under this Section 18.1 shall not be limited by a limitation on the amount or type of damages, compensation or benefits payable by or for Developer or a Subcontractor under workers' compensation, disability benefit or other employee benefits laws.

18.1.4 For purposes of this Section 18.1, "third party" means any person or entity other than an Indemnified Party and Developer, except that a "third party" includes any Indemnified Party's employee, agent or contractor who asserts a claim against an Indemnified Party which is within the scope of the indemnities and which is not covered by the Indemnified Party's worker's compensation program.

18.2 Defense and Indemnification Procedures

18.2.1 If any of the Indemnified Parties receives notice of a claim or otherwise has actual knowledge of a claim that it believes is within the scope of the indemnities under Section 18.1, TxDOT shall by writing as soon as practicable after receipt of the claim: (a) inform Developer of the claim; (b) send to Developer a copy of all written materials TXDOT has received asserting such claim; and (c) notify Developer that should no insurer accept defense of the claim, the Indemnified Party will conduct its own defense unless Developer accepts the tender of the claim in accordance with Section 18.2.3. As soon as practicable after Developer receives notice of a claim or otherwise has actual knowledge of a claim, it shall tender the claim in writing to the insurers under all potentially applicable insurance policies. TxDOT and other Indemnified Parties also shall have the right to tender such claims to such insurers.

18.2.2 If the insurer under any applicable insurance policy accepts the tender of defense, TXDOT and Developer shall cooperate in the defense as required by the insurance policy. If no insurer under potentially applicable insurance policies provides defense, then Section 18.2.3 shall apply.

18.2.3 If the defense is tendered to Developer, then within 30 days after receipt of the tender it shall notify the Indemnified Party whether it has tendered the matter to an insurer and (if not tendered to an insurer or if the insurer has rejected the tender) shall deliver a written notice stating that Developer:

(a) Accepts the tender of defense and confirms that the claim is subject to full indemnification hereunder without any "reservation of rights" to deny or disclaim full indemnification thereafter;

(b) Accepts the tender of defense but with a "reservation of rights" in whole or in part; or

(c) Rejects the tender of defense based on a determination that it is not required to indemnify against the claim under the terms of this Agreement.

18.2.4 If Developer accepts the tender of defense under Section 18.2.3(a), Developer shall have the right to select legal counsel for the Indemnified Party, subject to reasonable approval by the Indemnified Party, and Developer shall otherwise control the defense of such claim, including settlement, and bear the fees and costs of defending and settling such claim. During such defense:

(a) Developer shall fully and regularly inform the Indemnified Party of the progress of the defense and of any settlement discussions; and

(b) The Indemnified Party shall fully cooperate in said defense, provide to Developer all materials and access to personnel it requests as necessary for defense, preparation and trial and which or who are under the control of or reasonably available to the Indemnified Party, and maintain the confidentiality of all communications between it and Developer concerning such defense.

18.2.5 If Developer responds to the tender of defense as specified in Section 18.2.3(b) or 18.2.3(c), the Indemnified Party shall be entitled to select its own legal counsel and otherwise control the defense of such claim, including settlement.

18.2.6 The Indemnified Party may assume its own defense by delivering to Developer written notice of such election and the reasons therefor, if the Indemnified Party, at the time it gives notice of the claim or at any time thereafter, reasonably determines that:

(a) A conflict exists between it and Developer which prevents or potentially prevents Developer from presenting a full and effective defense;

(b) Developer is otherwise not providing an effective defense in connection with the claim; or

(c) Developer lacks the financial capacity to satisfy potential liability or to provide an effective defense.

18.2.7 If the Indemnified Party is entitled and elects to conduct its own defense pursuant hereto of a claim for which it is entitled to indemnification, Developer shall reimburse on a current basis all reasonable costs and expenses the Indemnified Party incurs in investigating and defending, except to the extent the Indemnified Party conducts its own defense as a result of Developer's denial of such defense pursuant Section 18.2.3(c). In the event the Indemnified Party is entitled to and elects to conduct its own defense, then:

(a) In the case of a defense conducted under Section 18.2.3(a), it shall have the right to settle or compromise the claim with Developer's prior written consent, which shall not be unreasonably withheld or delayed;

(b) In the case of a defense conducted under Section 18.2.3(b), it shall have the right to settle or compromise the claim with Developer's prior written consent, which shall not be unreasonably withheld or delayed, or with approval of the court or arbitrator following reasonable notice to Developer and opportunity to be heard and without prejudice to the Indemnified Party's rights to be indemnified by Developer; and

(c) In the case of a defense conducted under Section 18.2.3(c), it shall have the right to settle or compromise the claim without Developer's prior written consent and without prejudice to its rights to be indemnified by Developer. If a dispute resolver determines that Developer wrongfully denied the defense of the Indemnified Party, the Indemnified Party shall be entitled to reimbursement of the costs of defense,

including reimbursement of reasonable attorneys' fees and other litigation and defense costs, and indemnification of costs to settle or compromise the claim, in addition to interest at the rate calculated in accordance with Section 24.13 payable on such defense and settlement amounts from the date such costs and expenses are incurred by the Indemnified Party.

18.2.8 The Parties acknowledge that while Section 18.1 contemplates that Developer will have responsibility for certain claims and liabilities arising out of its obligations to indemnify, circumstances may arise in which there may be shared liability of the Parties with respect to such claims and liabilities. In such case, where either Party believes a claim or liability may entail shared responsibility and that principles of comparative negligence and indemnity are applicable, it shall confer with the other Party on management of the claim or liability in question. If the Parties cannot agree on an approach to representation in the matter in question, each shall arrange to represent itself and to bear its own costs in connection therewith pending the outcome of such matter. Within 30 days subsequent to the final, non-appealable resolution of the matter in question, whether by arbitration or by judicial proceedings, the Parties shall adjust the costs of defense, including reimbursement of reasonable attorneys' fees and other litigation and defense costs, in accordance with the indemnification arrangements of Section 18.2, and consistent with the outcome of such proceedings concerning the respective liabilities of the Parties on the third party claim.

18.2.9 In determining responsibilities and obligations for defending suits pursuant to this Section 18.2, specific consideration shall be given to the following factors: (a) the party performing the activity in question; (b) the location of the activity and incident; (c) contractual arrangements then governing the performance of the activity; and (d) allegations of respective fault contained in the claim.

SECTION 19. PARTNERING AND DISPUTE RESOLUTION

19.1 General Dispute Resolution Provisions

Partnering will be encouraged in preference to formal dispute resolution mechanisms. Partnering in this context is intended to be a voluntary, non-binding procedure available for use by the Parties to resolve any issues that may arise during performance of the Work.

19.2 Partnering

19.2.1 Schedule; Participation

As soon as possible after execution of this Agreement, TxDOT and Developer shall jointly select a third-party facilitator to conduct the partnering meetings. The cost of the facilitator shall be shared equally by TxDOT and Developer. Partnering meetings shall be conducted at the office of TxDOT or at such location as otherwise agreed upon by the Parties. Persons who should attend the partnering meetings include Key Personnel and executives of the Parties.

19.2.2 Confidentiality

Subject to the requirements of the Public Information Act, any statements made or materials prepared during or relating to partnering meetings, including any statements made or documents prepared by the facilitator, shall not be admissible or discoverable in any judicial or other dispute resolution proceeding, unless such statements or materials are admissible or discoverable under applicable Law.

19.3 Dispute Resolution Procedures

19.3.1 Disputes Governed by These Procedures

(a) The Parties agree, in accordance with 43 TEX. ADMIN. CODE. Section 9.6, to be bound by and subject to the procedures established in this Section 19.3 as an agreement regarding dispute resolution procedures that shall survive expiration or earlier termination of the Term and thereafter for so long as either Party has any obligation originating under the Contract Documents.

(b) The provisions of this Section 19.3 are intended to accord with Section 201.112 of the Code and the DRP Rules promulgated thereunder.

(c) As used in this Section 19.3, the phrase "the procedures established in this Section 19.3" includes the procedures established in this Section 19.3, the Disputes Board Agreement, the DRP Rules, the Code, and the Texas Government Code.

(d) All Disputes arising under the Contract Documents shall be resolved pursuant to the Informal Resolution Procedures and, if not resolved thereby, the Dispute Resolution Procedures, except the following:

(i) Any equitable relief sought in Travis County, Texas District Court that TxDOT is permitted to bring against Developer under Section 19.3.1.1; and

(ii) Ineligible Matters.

(e) Any disagreement between the Parties as to whether the Informal Resolution Procedures and/or the Dispute Resolution Procedures apply to a particular Dispute shall be treated as a Dispute for resolution in accordance with this Section 19.3.

(f) With respect to any Dispute for resolution in accordance with the procedures established in this Section 19.3, the Parties agree that: (i) such Dispute must be asserted in writing to the other Party prior to the running of the applicable statute of limitations; and (ii) provided that this is done, the applicable statute of limitations shall be tolled until the 30th day after conclusion of the last such procedure applicable to such Dispute.

19.3.1.1 **Jurisdiction of Travis County, Texas District Courts**

TxDOT may invoke the jurisdiction of the district courts of Travis County, Texas to petition for equitable relief against Developer, including temporary restraining orders, injunctions, other interim or final declaratory relief or the appointment of a receiver, to the extent allowed by Law

19.3.1.2 Matters Ineligible for Dispute Resolution Procedures

The Dispute Resolution Procedures shall not apply to the following (collectively, "Ineligible Matters"):

(a) Any matters that the Contract Documents expressly state are final, binding or not subject to dispute resolution;

(b) Any claim or dispute that does not arise under the Contract Documents;

(c) Any claim that is not actionable against TxDOT by Developer on its own behalf or on behalf of its Subcontractors in accordance with Section 19.4;

(d) Any claim for indemnity under Section 18;

(e) Any claim for injunctive relief;

(f) Any claim against an insurance company, including any Subcontractor Dispute that is covered by insurance;

(g) Any claim arising solely in tort or that is covered by the Texas Tort Claims Act;

(h) Any claim arising out of or relating to any Utility Adjustment where the Utility Owner is a necessary party (unless, and only to the extent that, the applicable Utility Agreement provides for resolution of claims as set forth in this Section 19);

(i) Any claim or dispute that is the subject of litigation in a lawsuit filed in court to which the procedures established in this Section 19.3 do not apply, including any effort to interplead a Party into such a lawsuit in order to make the procedures established in this Section 19.3 applicable;

(j) Any claim for, or dispute based on, remedies expressly created by statute; and

(k) Any Dispute that is actionable only against a Surety.

19.3.2 Informal Resolution As Condition Precedent

As a condition precedent to the right to have any Dispute resolved pursuant to the Dispute Resolution Procedures or by a district court, the claiming Party must first attempt to resolve the Dispute directly with the responding Party through the informal resolution procedures described in Section 19.3.3 other than Section 19.3.3.3 (collectively, the "Informal Resolution Procedures"). Time limitations set forth for the Informal Resolution Procedures may be changed by mutual written agreement of the Parties. Changes to the time limitations for the Informal Resolution Procedures agreed upon by the Parties shall pertain to the particular Dispute only and shall not affect the time limitations for the Informal Resolution Procedures applicable to any subsequently arising Disputes.

19.3.3 Informal Resolution Procedures

19.3.3.1 Notice of Dispute to Designated Agent

(a) A Party desiring to pursue a Dispute against the other Party shall initiate the Informal Resolution Procedures by serving a written notice on the responding Party's designated agent. Unless otherwise indicated by written notice from

one Party to the other Party, each Party's designated agent shall be its Authorized Representative. The notice shall contain a concise statement describing:

(i) If the Parties have mutually agreed that the Dispute is a Fast-Track Dispute;

(ii) The date of the act, inaction or omission giving rise to the Dispute;

(iii) An explanation of the Dispute, including a description of its nature, circumstances and cause;

(iv) A reference to any pertinent provision(s) from the Contract Documents;

(v) If applicable and then known, the estimated dollar amount of the Dispute, and how that estimate was determined (including any cost and revenue element that has been or may be affected);

(vi) If applicable, an analysis of the Project Schedule and Completion Deadlines showing any changes or disruptions (including an impacted delay analysis reflecting the disruption in the manner and sequence of performance that has been or will be caused, delivery schedules, staging, and adjusted Completion Deadlines);

(vii) If applicable, the claiming Party's plan for mitigating the amount claimed and the delay claimed;

(viii) The claiming Party's desired resolution of the Dispute; and

(ix) Any other information the claiming Party considers relevant.

(b) The notice shall be signed by the designated representative of the Party asserting the Dispute, and shall constitute a certification by the Party asserting the Dispute that:

(i) The notice of Dispute is served in good faith; and

(ii) To the then current knowledge of such Party, except as to matters stated in the notice of Dispute as being unknown or subject to discovery, (1) all supporting information is reasonably believed by the Party asserting the Dispute to be accurate and complete and (2) the Dispute accurately reflects the amount of money or other right, remedy or relief to which the Party asserting the Dispute reasonably believes it is entitled; and

(iii) The designated representative is duly authorized to execute and deliver the notice and such certification on behalf of the claiming Party.

(c) If the responding Party agrees with the claiming Party's position and desired resolution of the Dispute, it shall so state in a written response. The notice of the Dispute and such response shall suffice to evidence the Parties' resolution of the subject Dispute unless either Party requests further documentation. Upon either Party's request, within five Business Days after the claiming Party's receipt of the responding Party's response in agreement, the Parties' designated representatives shall state the resolution of the Dispute in writing as appropriate, including execution of Change Orders or other documentation as needed, and thereafter each Party shall then promptly perform its respective obligations in accordance with the agreed resolution of the Dispute.

(d) The Party asserting the Dispute shall not be prejudiced by its initial statement of the Dispute and shall have the ability at any time during the

Informal Resolution Procedures and Dispute Resolution Procedures to modify its statement of the Dispute and/or the amount of money or other right, remedy or relief sought.

19.3.3.2 Fast-Track Disputes

With respect to any Dispute that the Parties mutually designate as a Fast-Track Dispute, the Informal Resolution Procedures shall be abbreviated in that the procedure contemplated in Section 19.3.3.3 shall not be required.

19.3.3.3 CEO / Executive Director Meetings

Commencing within 10 Business Days after the notice of Dispute is served and concluding 10 Business Days thereafter, the Chief Executive Officer of Developer and the Executive Director or the assistant Executive Director, shall meet and confer, in good faith, to seek to resolve the Dispute raised in the claiming Party's notice of Dispute. If they succeed in resolving the Dispute, Developer and TxDOT shall memorialize the resolution in writing, including execution of Change Orders or other documentation as appropriate, and thereafter each Party shall then promptly perform its respective obligations in accordance with the agreed resolution of the Dispute.

19.3.3.4 Failure to Resolve Dispute With Informal Resolution Procedures

If a Dispute is not timely resolved under the Informal Resolution Procedures, then within 15 days (seven days for Fast-Track Disputes) after the conclusion of the time periods for Informal Resolution Procedures, if such Dispute was not resolved to the Parties' satisfaction:

(i) The Parties may mutually agree to initiate mediation or other alternative dispute resolution process in accordance with Section 19.3.7; or

(ii) Either Party may refer the Dispute to the Disputes Board for resolution pursuant to Section 19.3.4.2.

19.3.4 Disputes Board; Finality of Disputes Board Decision

19.3.4.1 Disputes Board Agreement

(a) The Parties executed the Disputes Board Agreement on even date herewith. The Disputes Board Agreement governs all aspects of the Disputes Board, as well as all rights and responsibilities of the Parties with respect to the Disputes Board, that are not otherwise addressed in this Section 19.3, the DRP Rules and the Code.

(b) If the composition of either Party's Disputes Board Member Candidates' List has not been finalized prior to the Effective Date, that Party shall promptly appoint the members in accordance with the requirements and procedures of the Disputes Board Agreement.

(c) The Disputes Board shall conduct proceedings and, upon completion of its proceedings, issue written findings of fact, written conclusions of law, and a written decision to TxDOT and Developer.

(d) The Disputes Board shall have the authority to resolve any Dispute other than Ineligible Matters and any actions for equitable relief in district court that TxDOT is permitted to bring against Developer under Section 19.3.1.1.

(e) The Disputes Board shall not have the authority to order that one Party compensate the other Party for attorneys' fees and expenses.

(f) If a Disputes Board Decision awards an amount payable by one Party to the other, such amount became or shall become due and payable on the

date required for payment in accordance with the applicable DRP governed agreement. If the date of payment is not specified in a DRP governed agreement, the payment shall be due ten days after the date the Final Order Implementing Decision for such decision becomes final under Section 19.3.6 (or, if the tenth day is not a Business Day, the next Business Day).

(g) Except for those matters subject to Section 19.8, interest at LIBOR on an amount payable by one Party to the other shall accrue beginning on the date such amount was due and continuing until the date such amount is paid.

(h) If the notice of Dispute fails to meet the certification requirements under Section 19.3.3.1(b), on motion of the responding Party the Disputes Board shall suspend proceedings on the Dispute until a correct and complete written certification is delivered, and shall have the discretionary authority to dismiss the Dispute for lack of a correct certification if it is not delivered within a reasonable time as set by the Disputes Board. Prior to the entry by the Disputes Board of a final decision on a Dispute, the Disputes Board shall require a defective certification to be corrected.

19.3.4.2 Submission of Dispute to Disputes Board

(a) Within 15 days (seven days for Fast-Track Disputes) after the end of the last time period under the Informal Resolution Proceedings, either Party may refer a Dispute to the Disputes Board for resolution by serving written notice on the other Party. The notice shall include the same information as a notice of Dispute issued under Section 19.3.3.1(a). Within 15 days (seven days for Fast-Track Disputes) after a Party refers a Dispute to the Disputes Board, the responding Party shall serve a written response upon the claiming Party's designated agent. The response shall include the same information as the notice of Dispute issued under Section 19.3.3.1(a), to the extent applicable; shall be signed by the designated representative of the responding Party; and shall constitute a certification by the responding Party that:

(i) The response to the claiming Party's notice of Dispute is served in good faith;

(ii) All supporting information is reasonably believed by the responding Party to be accurate and, except as otherwise reasonably explained in the response, complete; and

(iii) The responding Party disputes the amount of money or other right, remedy or relief to which the claiming Party believes it is entitled.

(b) Neither Party may attempt to seek resolution of a Dispute by the Disputes Board or litigate the merits of any Dispute in court if such Dispute is not timely referred to the Disputes Board within the 15 day time period under Section 19.3.4.2(a) above, except for Ineligible Matters and Disputes for which TxDOT is entitled to seek relief in court.

(c) The responding Party shall also assert in its response any challenge it may then have to the Dispute Board's authority to resolve the Dispute if the responding Party then believes in good faith that the Dispute is an Ineligible Matter.

19.3.4.3 Finality of Disputes Board Decision

Upon completion of the remainder of the procedures required under the Code and the DRP Rules, each Disputes Board Decision shall be final, conclusive, binding upon and enforceable against the Parties.

19.3.5 SOAH Administrative Hearings and Final Orders

19.3.5.1 Appeal of Disputes Board Decision

(a) If, within 20 days after the Disputes Board's issuance of the Disputes Board Decision to TxDOT and Developer (the "Appeal Period"), either Party is dissatisfied with the Disputes Board Decision due to a good faith belief that Disputes Board Error occurred, (i) Developer may request the Executive Director to seek and/or (ii) TxDOT may seek a formal administrative hearing before SOAH pursuant to Texas Government Code, Chapter 2001, and Section 201.112 of the Code, solely on the grounds that Disputes Board Error occurred. Upon receipt of Developer's request for a formal administrative hearing before SOAH, the Executive Director shall, as a purely ministerial act, refer the matter to SOAH within ten Business Days after receipt of Developer's request.

(b) If Developer does not request, and TxDOT does not seek for itself, a formal administrative hearing before SOAH under Section 19.3.5.1(a) within the Appeal Period, then within ten Business Days after the expiration of the Appeal Period, the Executive Director shall issue the Final Order Implementing Decision as a purely ministerial act. If the Executive Director fails to issue the Final Order Implementing Decision within this ten Business Day time period, the Disputes Board Decision shall become effective as the Final Order Implementing Decision for all purposes on the next Business Day.

(c) Neither Party may attempt to:

(i) Seek an administrative hearing before SOAH on any Dispute after the Appeal Period has expired without either Party seeking an administrative hearing before SOAH;

(ii) Seek rehearing in any forum of a Dispute that is the subject of a Disputes Board Decision after the Appeal Period has expired without either Party seeking an administrative hearing before SOAH; or

(iii) Resubmit to the Disputes Board or litigate in court any Dispute that was the subject of and resolved by a prior final Disputes Board Decision.

19.3.5.2 Appeal of Disputes Board Error to SOAH

"Disputes Board Error" means one or more of the following:

(a) The Disputes Board failed, in any material respect, to properly follow or apply the procedures for handling, hearing and deciding on the Dispute established under this Section 19.3 and such failure prejudiced the rights of a Party; or

(b) The Disputes Board Decision was procured by, or there was evident partiality among the Disputes Board Members due to, a Conflict of Interest, Misconduct, corruption or fraud.

19.3.5.3 SOAH Proceeding and ALJ Proposal For Decision

(a) Upon referral to SOAH of the question of whether Disputes Board Error occurred, the ALJ shall conduct a hearing solely on the question of whether Disputes Board Error occurred. The Disputes Board's written findings of fact, conclusions of law and Disputes Board Decision; any written dissenting findings, recommendations or opinions of a minority Disputes Board Member; and all submissions to the Disputes Board by the Parties shall be admissible in the SOAH proceeding, along with all other evidence the ALJ determines to be relevant. After timely closing of the record of the SOAH proceeding, the ALJ shall timely issue to the Executive Director and Developer the ALJ's written proposal for decision as to whether Disputes Board Error occurred.

(b) Each Party may file exceptions to the proposal for decision with the ALJ no later than seven days after issuance of the ALJ's proposal for decision and, in response to a Party's exceptions, the other Party may file a reply to the excepting Party's exceptions with the ALJ no later than 14 days after issuance of the proposal for decision. The ALJ shall review all exceptions and replies and notify TxDOT and Developer no later than 21 days after issuance of the proposal for decision whether the ALJ recommends any changes to the proposal for decision, amends the proposal for decision in response to exceptions and replies to exceptions, and/or corrects any clerical errors in the proposal for decision. The ALJ shall reissue its written proposal for decision to the Executive Director and TxDOT, together with written findings of fact and conclusions of law, if revised from those previously furnished to the Parties.

(c) Unless a Party in good faith challenges the Disputes Board's authority to resolve the Dispute because the Dispute is an Ineligible Matter (1) in the proceedings before the Disputes Board, (2) as a Disputes Board Error during the Appeal Period, (3) in the SOAH proceeding or (4) in exceptions to the ALJ's proposal for decision timely filed under Section 19.3.5.3(b) above, any objection to the Disputes Board's authority to resolve the applicable Dispute shall be deemed waived by such Party.

19.3.5.4 Final Orders of Executive Director

(a) Within 28 days after receipt of the ALJ's proposal for decision:

(i) If, upon review of the ALJ's proposal for decision, the Executive Director concludes that Disputes Board Error occurred, the Executive Director shall issue a Final Order Vacating Decision. A "Final Order Vacating Decision" means an order of the Executive Director either adopting or rejecting the ALJ's proposal for decision, as applicable (and if the Executive Director rejects the ALJ's proposal for decision, accompanied by the written explanatory statement required under Section 201.112(c) of the Code); ruling that the Disputes Board Decision is invalid, void and of no force and effect; and remanding the Dispute to the Disputes Board for reconsideration. If the nature of the Disputes Board Error was a Conflict of Interest, Misconduct fraud or corruption of a Disputes Board Member, the remanded Dispute will be reconsidered by a reconstituted Disputes Board after removal of such Disputes Board Member; or

(ii) If, upon review of the ALJ's proposal for decision, the Executive Director concludes that no Disputes Board Error occurred, the Executive Director shall issue a Final Order Implementing Decision. A "Final Order Implementing Decision" means an order of the Executive Director either adopting or rejecting the ALJ's proposal for decision, as applicable (and if the Executive Director rejects the ALJ's proposal for decision, accompanied by the written explanatory statement required under Section 201.112(c) of the Code), and approving and fully implementing the Disputes Board Decision.

(b) The Parties agree and acknowledge that the Executive Director's issuance of either type of Final Order is a purely ministerial function of the Executive Director. If the Executive Director fails to issue one or the other type of Final Order within the foregoing 28 Day time period, then on the next Business Day:

(i) If the ALJ determined that Disputes Board Error occurred, a Final Order Vacating Decision shall be deemed to have been issued for all purposes by the Executive Director which (1) adopted the ALJ's proposal for decision; (2) ruled that the Disputes Board Decision is invalid, void and of no force and effect; and (3)

remanded the Dispute to the Disputes Board for reconsideration (or, if the nature of the Disputes Board Error was a Conflict of Interest or Misconduct of a Disputes Board Member, a reconstituted Disputes Board after removal of such Disputes Board Member) without Disputes Board Error; or

(ii) If the ALJ determined that no Disputes Board Error occurred, a Final Order Implementing Decision shall be deemed to have been issued for all purposes by the Executive Director which adopted the ALJ's proposal for decision and fully implemented the Disputes Board Decision.

19.3.6 Judicial Appeal of Final Orders Under Substantial Evidence Rule

Each issued or deemed issued Final Order Implementing Decision and Final Order Vacating Decision shall be considered a final order for purposes of Developer's ability to seek judicial appeal thereof under Section 201.112(d) of the Code under the substantial evidence rule. TxDOT and Developer hereby agree that: (a) pursuant to Section 2001.144(a)(4) of the Texas Government Code, each Final Order Implementing Decision and Final Order Vacating Decision shall be final (and therefore eligible for appeal under Section 201.112(d) of the Code) on the date such final order is issued or deemed issued by the Executed Director; and (b) pursuant to Section 2001.145 of the Texas Government Code, TxDOT and Developer hereby agree that the filing of a motion for rehearing shall not be a prerequisite for appeal of such final orders under Section 201.112(d) of the Code.

19.3.7 Mediation or Other Alternative Dispute Resolution

Developer and TxDOT, by mutual agreement, may refer a Dispute (as well as any dispute with a Utility Owner relating to any Utility Adjustment) to mediation or other alternative dispute resolution process for resolution. The Parties shall use diligent efforts to convene and conclude mediation proceedings within 30 days after they agree to refer the Dispute to mediation or other alternative dispute resolution process. Developer and TxDOT shall share equally the expenses of the mediation or other alternative dispute resolution process. If any Dispute has been referred to mediation or other alternative dispute resolution process for resolution by mutual agreement of the Parties, but the Dispute is not resolved within the foregoing 30 day period, then either Party can, on or after the 31st day, cease participating in such mediation or other alternative dispute resolution process. A Party shall give written notice to the other Party that it will no longer participate. The deadlines in this Section 19.3 for processing a Dispute are tolled, day for day, during mediation or other alternative dispute resolution.

19.3.8 Confidential Information

19.3.8.1 All discussions, negotiations, and Informal Resolution Procedures between the Parties to resolve a Dispute, and all documents and other written materials furnished to a Party or exchanged between the Parties during any such discussions, negotiations, or Informal Resolution Procedures, shall be considered confidential and not subject to disclosure by either Party.

19.3.8.2 With respect to all discussions, negotiations, testimony and evidence between the Parties and/or in a proceeding before the Disputes Board, an administrative hearing before an ALJ or a judicial proceeding in court:

(a) All information that has been deposited into Escrow pursuant to Section 5.12.4 of the ITP shall be treated as confidential by the Parties and the Disputes Board, the ALJ and the court, as applicable, and, further, shall be subject to

a protective order issued by the Disputes Board, the ALJ or the court, as applicable, to protect such information from disclosure to third Persons.

(b) Either or both Parties may also request a protective order in any Disputes Board proceeding, SOAH administrative hearing or judicial proceeding to prohibit disclosure to third Persons of any other information that such Party or Parties believe(s) is confidential. Whether such a protective order will be issued by the Disputes Board, the ALJ or the court, as applicable, shall be determined under the standards set forth in the Texas Rules of Evidence, the Texas Rules of Civil Procedure, Section 223.204 of the Code and the Public Information Act.

19.4 Dispute Resolution: Additional Requirements for Subcontractor Disputes

For purposes of this Section 19, a "Subcontractor Dispute" shall include any Dispute by a Subcontractor, including also any pass-through claims by a lower tier Subcontractor, against Developer that is actionable by Developer against TxDOT and arises from Work, materials or other services provided or to be provided under the Contract Documents. If Developer determines to pursue a Dispute against TxDOT that includes a Subcontractor Dispute, the following additional conditions shall apply:

(a) Developer shall identify clearly in all submissions pursuant to this Section 19, that portion of the Dispute that involves a Subcontractor Dispute.

(b) Failure of Developer to assert a Subcontractor Dispute on behalf of any Subcontractor at the time of submission of a related demand by Developer, as provided hereunder, shall constitute a release and discharge of TxDOT by Developer on account of, and with respect to, such Subcontractor Dispute.

(c) Developer shall require in all Subcontracts that all Subcontractors of any tier: (i) agree to submit Subcontractor Disputes to Developer in a proper form and in sufficient time to allow processing by Developer in accordance with this Section 19; (ii) agree to be bound by the terms of this Section 19 to the extent applicable to Subcontractor Disputes; (iii) agree that, to the extent a Subcontractor Dispute is involved, completion of all steps required under this Section 19 shall be a condition precedent to pursuit by the Subcontractor of any other remedies permitted by Law, including institution of a lawsuit against Developer; (iv) agree that any Subcontractor Dispute brought against a Surety, that also is actionable against TxDOT through Developer, shall be stayed until completion of all steps required under this clause (c); and (v) agree that the existence of a dispute resolution process for Disputes involving Subcontractor Disputes shall not be deemed to create any claim, right or cause of action by any Subcontractor against TxDOT. Subcontractors shall, at all times, have rights and remedies only against Developer.

19.5 Subsequent Proceedings

19.5.1 Exclusive Jurisdiction and Venue

The Parties agree that the exclusive jurisdiction and venue for any legal action or proceeding, at law or in equity, that is permitted to be brought by a Party in court arising out of the Contract Documents shall be the district courts of Travis County, Texas.

19.5.2 Admissibility of Disputes Resolution Proceedings

The admissibility, in any administrative or judicial proceeding subsequent to this dispute resolution process, of the Parties' submittals and any TxDOT determinations shall be in the discretion of the appropriate administrative officer or the court in accordance with applicable Law.

19.6 Continuation of Disputed Work

At all times during the dispute resolution procedures set forth in this Agreement, Developer and all Subcontractors shall continue with the performance of the Work and their obligations, including any disputed Work or obligations, diligently and without delay, in accordance with this Agreement, except to the extent enjoined by order of a court or otherwise approved by TxDOT in its sole discretion. Developer acknowledges that it shall be solely responsible for the results of any delaying actions or inactions taken during the pendency of resolution of a Dispute relating to the Work even if Developer's position in connection with the Dispute ultimately prevails. In addition, during the pendency of resolution of a Dispute relating to the Work, the Parties shall continue to comply with all provisions of the Contract Documents, the Project Management Plan, the Governmental Approvals and applicable Law.

19.7 Records Related to Claims and Disputes

Throughout the course of any Work that is the subject of any Dispute that is the subject of dispute resolution procedures of this Agreement, Developer shall keep separate and complete records of any extra costs, expenses, and/or other monetary effects relating to the disputed Work, and shall permit TxDOT access to these and any other records needed for evaluating the Dispute. These records shall be retained for a period of not less than one year after the date of resolution of the Dispute pertaining to such disputed Work (or for any longer period required under any other applicable provision of the Contract Documents).

19.8 Interest

This Section 19.8 applies only to claims that are subject to the Texas Prompt Payment Act, Government Code, Chapter 2251.

In the event a Developer elects to pursue a formal Dispute with TxDOT under this Section 19, TxDOT shall notify Developer whether it will dispute the claim not later than the 21st day after the date TxDOT receives the claim. Except as provided in this paragraph, a payment becomes overdue and begins to accrue interest on the 31st day after the later of: (1) the date TxDOT provides notice of Final Acceptance of the Project under Section 20.3.5; or (2) the date TxDOT receives a contract claim pursuant to Texas Transportation Code, Section 201.112 and the dispute resolution procedures established thereunder. If the resolution of a disputed claim results in the award of an amount which is less than the amount requested in the original claim, then the Developer shall submit a corrected invoice. The unpaid balance of the corrected invoice becomes overdue and begins to accrue interest on the 31st day after TxDOT receives the corrected invoice.

19.9 Attorney Fees

This Section 19.9 applies only to claims that are subject to the Texas Prompt Payment Act, Government Code, Chapter 2251.

A party shall pay the attorneys fees of the other party for Disputes brought pursuant to this Section 19 only if such payment is required pursuant to the Texas Prompt Payment Act and the payment of attorney's fees is ordered in a TxDOT administrative order or in a judicial order.

SECTION 20. COMPLETION AND ACCEPTANCE; Early opening

20.1 Substantial Completion

20.1.1 Requirements

20.1.1.1 TxDOT will issue a written Certificate of Substantial Completion at such time as Substantial Completion occurs for the Project.

20.1.1.2 In determining whether Substantial Completion of the Project has occurred, TxDOT may consider and require satisfaction of the following criteria:

(a) Whether all major safety features are installed and functional, such major safety features to include shoulders, guard rails, striping and delineations, concrete traffic barriers, bridge railings, cable safety systems, metal beam guard fences, safety end treatments, terminal anchor sections and crash attenuators;

(b) Whether required illumination is installed and functional;

(c) Whether required signs and signals are installed and functional;

(d) Whether the need for temporary traffic controls or for lane closures at any time has ceased (except for any then required for routine maintenance, and except for temporary lane closures during hours of low traffic volume in accordance with and as permitted by the Traffic Management Plan solely in order to complete Punch List items);

(e) Whether all lanes of traffic (including ramps, interchanges, overpasses, underpasses, other crossings and frontage roads) set forth in the Design Documents are in their final configuration and available for public use;

(f) Whether required ITS systems (excluding elements to be installed by the Systems Integrator) are installed and functional; and

(g) Whether Developer has otherwise completed the Work, including all Work required under Section 20.1.2, in accordance with the Contract Documents and Design Documents, including the construction of noise/sound walls, such that the Project (excluding elements of the Project that are to be installed by the Systems Integrator) is in a condition that it can be used for normal and safe vehicular travel in all lanes and at all points of entry and exit, subject only to Punch List items and other items of work that do not affect the ability to safely open for such normal use by the traveling public and for normal tolling operation.

20.1.1.3 The Parties shall disregard the status of the vegetative ground cover landscaping and aesthetic features, except noise/sound walls, included in the Design Documents in determining whether Substantial Completion has occurred, except to the extent that its later completion will affect public safety or satisfaction of the criterion in Section 20.1.1.2(d).

20.1.2 Notification and Completion of Toll Zone Work

Developer shall complete all Work necessary (excluding work to be performed by the Systems Integrator as detailed in Chapter 21 of the Technical Provisions) to allow TxDOT to open the Project for revenue operations by the applicable Substantial Completion Deadline. Further, Developer acknowledges and agrees that it is responsible for coordinating the performance of the Work with the work to be performed by the Systems Integrator and allowing such contractor(s) sufficient time in advance of the Substantial Completion Deadline to install such facilities. Developer shall provide written notice to TxDOT no later than 270 days prior to the scheduled date of Substantial Completion based on and consistent with the most current Project Status Schedule

Update so that the Systems Integrator can coordinate its work. Developer shall complete the Toll Zone Work no later than 180 days prior to the Substantial Completion Deadline, and shall provide written notice to TxDOT upon completion of such Toll Zone Work.

20.1.3 Notification of Substantial Completion

20.1.3.1 For purposes of TxDOT's right to issue Maintenance NTP1, Developer shall provide written notice to TxDOT when the Project is within 365 days of achieving Substantial Completion based on and consistent with the most current Project Status Schedule Update.

20.1.3.2 In addition to the notice required under Section 20.1.3.1, Developer shall provide TxDOT with not less than 20 days' prior written notification of the date Developer determines it will achieve Substantial Completion. During such 20-day period, Developer and TxDOT shall meet and confer and exchange information on a regular cooperative basis with the goal being TxDOT's orderly, timely inspection and review of the Project and the applicable Final Design Documents and Construction Documents, and TxDOT's issuance of a Certificate of Substantial Completion.

20.1.3.3 During such 20-day period, TxDOT shall conduct an inspection of the Project and its components, a review of the applicable Final Design Documents and Construction Documents and such other investigation as may be necessary to evaluate whether Substantial Completion is achieved.

20.1.3.4 Developer shall provide TxDOT a second written notification when Developer determines it has achieved Substantial Completion. Within five days after expiration of the 20-day period and TxDOT's receipt of the second notification, TxDOT shall either: (a) issue the Certificate of Substantial Completion;or (b) notify Developer in writing setting forth, as applicable, why the Project has not reached Substantial Completion. If TxDOT and Developer cannot agree as to the date of Substantial Completion, such Dispute shall be resolved according to the dispute resolution procedures set forth in this Agreement.

20.2 Punch List

20.2.1 The Project Management Plan shall establish procedures and schedules for preparing a Punch List and completing Punch List work. Such procedures and schedules shall conform to the following provisions.

20.2.2 The schedule for preparation of the Punch List either shall be consistent and coordinated with the inspections regarding Substantial Completion, or shall follow such inspections.

20.2.3 Developer shall prepare and maintain the Punch List. Developer shall deliver to TxDOT not less than five days' prior written notice stating the date when Developer will commence Punch List field inspections and Punch List preparation. TxDOT may, but is not obligated to, participate in the development of the Punch List. Each participant shall have the right to add items to the Punch List and none shall remove any item added by any other without such other's express permission. If Developer objects to the addition of an item by TxDOT, the item shall be noted as included under protest, and if the Parties thereafter are unable to reconcile the protest, the Dispute shall be resolved according to the dispute resolution procedures set forth in this Agreement. Developer shall deliver to TxDOT a true and complete copy of the Punch List, and each modification thereto, as soon as it is prepared.

20.2.4 Developer shall immediately commence work on the Punch List items and diligently prosecute such work to completion, consistent with the Contract Documents,

within the time period to be set forth in the Project Management Plan and in any case by the Final Acceptance Deadline.

20.3 Final Acceptance

20.3.1 Promptly after achieving Substantial Completion, Developer shall perform all remaining Work, including completion of all Punch List items, all landscaping other than vegetative ground cover, and aesthetic features other than noise/sound walls. Developer shall prepare and adhere to a timetable for planting and establishing the vegetative ground cover landscaping for the Project, taking into account weather conditions necessary for successful planting and growth, which timetable shall in any event provide for vegetative ground cover landscaping to be planted and established by 12 months after Substantial Completion.

20.3.2 TxDOT will issue a Certificate of Final Acceptance for the Project at such time as all of the following conditions have been satisfied:

(a) TxDOT has issued a Certificate of Substantial Completion for of the Project;

(b) All Punch List items shall have been completed and delivered to the reasonable satisfaction of TxDOT;

(c) All aesthetic and landscaping features (other than vegetative ground cover landscaping) for the Project have been completed in accordance with Section 15 of the Technical Provisions, Attachment 15-1 to the Technical Provisions and the plans and designs prepared in accordance therewith;

(d) TxDOT has received the "as-built schedule" required by Section 2.1.1.2.5 of the Technical Provisions;

(e) TxDOT has received a complete set of the Record Drawings in form and content required by Section 2.2.7.2 of the Technical Provisions;

(f) All Utility Adjustment Work and other work that Developer is obligated to perform for or on behalf of third parties with respect to the Project has been accepted by such third parties, and Developer has paid for all work by third parties that Developer is obligated to pay for, other than disputed amounts;

(g) All component parts, plans and documentation of the Project Management Plan required to be prepared, submitted and approved prior to Final Acceptance have been so prepared, submitted and approved;

(h) All Submittals required by the Project Management Plan or Contract Documents to be submitted to and approved by TxDOT prior to Final Acceptance have been submitted to and approved by TxDOT, in the form and content required by the Project Management Plan or Contract Documents;

(i) All personnel, supplies, equipment, waste materials, rubbish and temporary facilities of each Developer-Related Entity shall have been removed from the Project ROW, Developer shall restore and repair all damage or injury arising from such removal to the satisfaction of TxDOT, and the Site shall be in good working order and condition;

(j) Developer shall have delivered to TxDOT a certification representing that there are no outstanding claims of Developer or claims, Liens or stop notices of any Subcontractor, Supplier, laborer, Utility Owner or other Persons with respect to the Work, other than any previously submitted unresolved claims of Developer and any claims, Liens or stop notices of a Subcontractor, Supplier, laborer, Utility Owner or other Persons being contested by Developer (in which event the certification shall include a list

of all such matters with such detail as is requested by TxDOT and, with respect to all claims, Liens or stop notices of a Subcontractor, Supplier, laborer, Utility Owner and other Person, shall include a representation by Developer that it is diligently and in good faith contesting such matters by appropriate legal proceedings which shall operate to prevent the enforcement or collection of the same). For purposes of such certificate, the term "claim" shall include all matters or facts which may give rise to a claim;

(k) Developer has paid in full all Liquidated Damages that are owing to TxDOT pursuant to this Agreement and are not in Dispute, and has provided to TxDOT reasonable security for the full amount of liquidated damages that may then be the subject of an unresolved Dispute.

(l) There exists no uncured Developer Defaults; and

(m) All of Developer's other obligations under the Contract Documents (other than obligations which by their nature are required to be performed after Final Acceptance) shall have been satisfied in full or waived.

20.3.3 Developer shall provide TxDOT with written notification when Developer determines it has achieved Final Acceptance. During the 15-day period following receipt of such notification, Developer and TxDOT shall meet and confer and exchange information on a regular cooperative basis with the goal being TxDOT's and the orderly, timely inspection and review of the Project and the Record Drawings, and TxDOT's issuance of a Certificate of Final Acceptance for the Project.

20.3.4 During such 15-day period, TxDOT shall conduct an inspection of the Punch List items, a review of the Record Drawings and such other investigation as may be necessary to evaluate whether the conditions to Final Acceptance are satisfied.

20.3.5 Within five days after expiration of such 15-day period, TxDOT shall either: (a) issue a Certificate of Final Acceptance for the Project; or (b) notify Developer in writing setting forth, as applicable, why Final Acceptance has not been achieved. If TxDOT and Developer cannot agree as to the date of Final Acceptance, such Dispute shall be resolved according to the dispute resolution procedures set forth in this Agreement.

20.4 Early Opening

Prior to Substantial Completion, TxDOT shall have the right to open to traffic portions of the Project to the extent such portions are safe and necessary or advisable, in TxDOT's sole determination, for traffic circulation. No early openings shall constitute Substantial Completion or Final Acceptance or waive the requirements thereof.

20.5 Clayton Act Assignment

Developer shall assign to TxDOT all right, title and interest in and to all claims and causes of action it may have under Section 4 of the Clayton Act (15 U.S.C. Sec. 15), arising from purchases of goods, services or materials pursuant to the Contract Documents or any Subcontract. This assignment shall be made and become effective at the time TxDOT tenders Final Payment to Developer, without further acknowledgment by the Parties.

SECTION 21. RECORDS AND AUDITS; OWNERSHIP OF DOCUMENTS AND INTELLECTUAL PROPERTY

21.1 Escrowed Proposal Documents

Prior to execution of this Agreement, Developer delivered to TxDOT one copy of all cost, unit pricing, price quote and other documentary information used in preparation of the Price (the "EPDs"). Upon execution of this Agreement, the EPDs shall be held in locked fireproof cabinet(s) supplied by Developer and located in TxDOT's project office with the key held only by Developer. Concurrently with approval of each Change Order or amendment to any Contract Document, one copy of all documentary information used in preparation of the Change Order or amendment shall be added to the cabinet to be held with the other EPDs. The EPDs will be held in such cabinet or otherwise maintained until all of the following have occurred: (a) 180 days have elapsed from the later of Final Acceptance or termination of this Agreement, as applicable; (b) all Claims or Disputes regarding the Work have been settled; and (c) Final Payment has been made and accepted.

21.1.1 Availability for Review

The EPDs shall be available during business hours for joint review by Developer, TxDOT and any dispute resolver in accordance with Section 19, in connection with approval of the Project Schedule, negotiation of Change Orders and resolution of Claims or Disputes under the Contract Documents, and also as described in Section 21.1.6. TxDOT shall be entitled to review all or any part of the EPDs in order to satisfy itself regarding the applicability of the individual documents to the matter at issue.

21.1.2 Proprietary Information

The EPDs are, and shall always remain, the property of Developer and shall be considered to be in Developer's possession, subject to TxDOT's right to review the EPDs as provided in this Section 21.1. Developer will have and control the keys to the filing cabinet containing the EPDs. TxDOT acknowledges that Developer may consider that the EPDs constitute trade secrets or proprietary information. TxDOT shall have the right to copy the EPDs for the purposes set forth in this Section 21.1, provided however that the Parties execute a mutually agreeable confidentiality agreement with respect to EPDs that constitute trade secrets or proprietary information.

21.1.3 Representation

Developer represents and warrants that the EPDs constitute all documentary information used in the preparation of its Price. Developer agrees that no other price proposal preparation information will be considered in resolving Disputes or Claims. Developer further agrees that the EPDs are not part of the Contract Documents and that nothing in the EPDs shall change or modify any Contract Document.

21.1.4 Contents of EPDs

The EPDs shall, inter alia, clearly detail how each cost or price included in the Proposal has been determined and shall show cost or price elements in sufficient detail as is adequate to enable TxDOT to understand how Developer calculated the Price. The EPDs provided in connection with quotations and Change Orders shall, inter alia, clearly detail how the total cost or price and individual components of that cost or price were determined. The EPDs shall itemize the estimated costs or price of performing the required work separated into usual and customary items and cost or price categories to present a detailed estimate of costs and price, such as direct labor, repair labor, equipment ownership and operation, expendable materials, permanent materials,

supplies, Subcontract costs, plant and equipment, indirect costs, contingencies, mark-up, overhead and profit. The EPDs shall itemize the estimated annual costs of insurance premiums for each coverage required to be provided by Developer under Section 9. The EPDs shall include all assumptions, detailed quantity takeoffs, price reductions and discounts, rates of production and progress calculations, and quotes from Subcontractors used by Developer to arrive at the Price, and any adjustments to the Price under this Agreement.

21.1.5 Form of EPDs

Except as otherwise provided in the RFP, Developer shall submit the EPDs in such format as is used by Developer in connection with its Proposal. Developer represents and warrants that the EPDs provided with the Proposal were personally examined by an authorized officer of Developer prior to delivery, and that the EPDs meet the requirements of Section 21.1.4. Developer further represents and warrants that all EPDs provided were or will be personally examined prior to delivery by an authorized officer of Developer, and that they shall meet the requirements of Section 21.1.4.

21.1.6 Review by TxDOT to Confirm Completeness

TxDOT may at any time conduct a review of the EPDs to determine whether they are complete. If TxDOT determines that any data is missing from an EPD, Developer shall provide such data within three Business Days after delivery of TxDOT's request for such data. At that time of its submission to TxDOT, such data will be date stamped, labeled to identify it as supplementary EPD information and added to the EPD. Developer shall have no right to add documents to the EPDs except upon TxDOT's request. The EPDs associated with any Change Order or Price adjustment under this Agreement shall be reviewed, organized and indexed in the same manner described in Section 5.12.4 of the ITP.

21.2 Financial Reporting Requirements

21.2.1 Developer shall deliver to TxDOT financial and narrative reports, statements, certifications, budgets and information as and when required under the Contract Documents.

21.2.2 Developer shall furnish, or cause to be furnished, to TxDOT such information and statements as TxDOT may reasonably request from time to time for any purpose related to the Project, the Work or the Contract Documents. In addition, Developer shall deliver to TxDOT the following financial statements for each Guarantor, at the times specified below:

21.2.2.1 Within 60 days after the end of each fiscal quarter, duplicate copies of the balance sheet and a consolidated statement of earnings of the Guarantor and its consolidated subsidiaries for such quarter and for the period from the beginning of the then current fiscal year to the end of such quarter, setting forth in comparative form the figures for the corresponding periods during the previous fiscal year, all in reasonable detail and certified as complete and correct, subject to changes resulting from year-end adjustments, by the chief financial officer of the Guarantor;

21.2.2.2 Within 120 days after the end of each fiscal year, duplicate copies of the financial statements (which shall include a balance sheet and a consolidated statement of financial condition of the Guarantor and its consolidated subsidiaries at the end of such year, and statements of earnings, changes in financial position of the Guarantor and its consolidated subsidiaries for such year, and all related notes to the financial statements, setting forth in each case in comparative form the figures for the

previous fiscal year), all in reasonable detail and accompanied by an opinion thereon of an independent public accountant of recognized national standing selected by the Guarantor, which opinion shall state that such financial statements have been prepared in accordance with Generally Accepted Accounting Principles consistently applied, and that the examination of such accountants in connection with such financial statements has been made in accordance with generally accepted auditing standards, and accordingly, included such tests of the accounting records and such other auditing procedures as were considered necessary in the circumstances. If financial statements are prepared in accordance with principles other than U.S. GAAP, a letter from the certified public accountant of the applicable entity, discussing the areas of the financial statements that would be affected by a conversion to U.S. GAAP is required; and

21.2.2.3 Upon request of TxDOT for particular fiscal quarters, copies of all other financial statements and information reported by the Guarantor to its shareholders generally and of all reports filed by the Guarantor with the Securities Exchange Commission under Sections 13, 14 or 15(d) of the Exchange Act, to be provided to TxDOT as soon as practicable after furnishing such information to the Guarantor's shareholders or filing such reports with the Securities and Exchange Commission, as the case may be.

21.2.3 Developer shall cooperate and provide, and shall cause the Subcontractors to cooperate and provide, such information as determined necessary or desirable by TxDOT in connection with any Project financing. Without limiting the generality of the foregoing, Developer shall provide such information deemed necessary or desirable by TxDOT for inclusion in TxDOT's securities disclosure documents and in order to comply with Securities and Exchange Commission Rule 15c2-12 regarding certain periodic information and notice of material events. Developer shall provide customary representations and warranties to TxDOT and the capital markets as to the correctness, completeness and accuracy of any information furnished.

21.2.4 Developer shall cooperate and provide, and shall cause the Subcontractors to cooperate and provide, such information as is necessary or requested by TxDOT to assist or facilitate the submission by TxDOT of any documentation, reports or analysis required by the State, FHWA and/or any other Governmental Entity with jurisdiction over the Project.

21.2.5 All reports and information delivered by Developer under Sections 21.2.3 and 21.2.4 shall also be delivered electronically, to the extent electronic files exist, and be suitable for posting on the web.

21.3 Maintenance and Inspection of Records

21.3.1 Except for EPDs (which shall be maintained as set forth in Section 21.1), Developer shall keep and maintain in Dallas County, Texas, or in another location TxDOT approves in writing in its sole discretion, all books, records and documents relating to the Project, Project Right of Way, Utility Adjustments or Work, including copies of all original documents delivered to TxDOT. Developer shall keep and maintain such books, records and documents in accordance with applicable provisions of the Contract Documents, and of the Project Management Plan, and in accordance with Good Industry Practice. Developer shall notify TxDOT where such records and documents are kept.

21.3.2 Developer shall make all its books, records and documents available for inspection by TxDOT and TxDOT's authorized representatives and legal counsel at Developer's principal offices in Texas, or at TxDOT's project office for EPDs, at all times

during normal business hours, without charge. Developer shall provide copies thereof to TxDOT, or make available for review to TxDOT: (a) as and when expressly required by the Contract Documents; or (b) for those not expressly required, upon request and at no expense to TxDOT. TxDOT may conduct any such inspection upon 48 hours' prior written notice, or unannounced and without prior notice where there is good faith suspicion of fraud. The right of inspection includes the right to make extracts and take notes. The provisions of this Section 21.3.2 are subject to the following:

21.3.2.1 Developer reserves the right to assert exemptions from disclosure for information that would be exempt under applicable State Law from discovery or introduction into evidence in legal actions, provided that in no event shall Developer be entitled to assert any such exemption to withhold traffic and revenue data; and

21.3.2.2 Developer shall retain records and documents for the respective time periods set forth in Texas State Records Retention Schedule or, if not addressed therein , for a minimum of five years after the date the record or document is generated; provided however that if the Contract Documents specify any different time period for retention of particular records, such time period shall control. Notwithstanding the foregoing, all records which relate to Claims and Disputes being processed or actions brought under the Dispute Resolution Procedures shall be retained and made available until any later date that such Claims, Disputes and actions are finally resolved.

21.4 Audits

21.4.1 TxDOT shall have such rights to review and audit Developer, its Subcontractors and their respective books and records as and when TxDOT deems necessary for purposes of verifying compliance with the Contract Documents and applicable Law. Without limiting the foregoing, TxDOT shall have the right to audit Developer's Project Management Plan and compliance therewith, including the right to inspect Work and/or activities and to verify the accuracy and adequacy of the Project Management Plan and its component parts, plans and other documentation. TxDOT may conduct any such audit of books and records upon 48 hours' prior written notice, or unannounced and without prior notice where there is good faith suspicion of fraud.

21.4.2 All Claims or Disputes filed against TxDOT shall be subject to audit at any time following the filing of the Claim or Dispute. The audit may be performed by employees of TxDOT or by an auditor under contract with TxDOT. No notice is required before commencing any audit within 60 days after Final Acceptance. Thereafter, TxDOT shall provide 20 days notice to Developer, any Subcontractors or their respective agents before commencing an audit. Developer, Subcontractors or their agents shall provide adequate facilities, acceptable to TxDOT, for the audit during normal business hours. Developer, Subcontractors or their agents shall cooperate with the auditors. Failure of Developer, Subcontractors or their agents to maintain and retain sufficient records to allow the auditors to verify all or a portion of the Claim or Dispute or to permit the auditor access to the books and records of Developer, Subcontractors or their agents shall constitute a waiver of the Claim or Dispute and shall bar any recovery thereunder. At a minimum, the auditors shall have available to them the following documents:

(a) Daily time sheets and supervisor's daily reports;
(b) Union agreements;
(c) Insurance, welfare, and benefits records;
(d) Payroll registers;

(e) Earnings records;
(f) Payroll tax forms;
(g) Material invoices and requisitions;
(h) Material cost distribution work sheet;
(i) Equipment records (list of company equipment, rates, etc.);
(j) Subcontractors' (including Suppliers) invoices;
(k) Subcontractors' and agents' payment certificates;
(l) Canceled checks (payroll and Suppliers);
(m) Job cost report;
(n) Job payroll ledger;
(o) General ledger;
(p) Cash disbursements journal;
(q) Project Schedules;
(r) All documents that relate to each and every Claim or Dispute, together with all documents that support the amount of damages as to each Claim or Dispute; and
(s) Work sheets used to prepare the Claim or Dispute establishing the cost components for items of the Claim or Dispute, including labor, benefits and insurance, materials, equipment, subcontractors, all documents that establish the time periods, individuals involved, the hours for the individuals, and the rates for the individuals.

21.4.3 Full compliance by Developer with the provisions of this Section 21.4 is a contractual condition precedent to Developer's right to seek relief under Section 19.

21.4.4 Any rights of the FHWA to review and audit Developer, its Subcontractors and their respective books and records are set forth in Exhibit 3.

21.4.5 Developer represents and warrants the completeness and accuracy of all information it or its agents provides in connection with TxDOT audits, and shall cause all Subcontractors other than TxDOT and Governmental Entities acting as Subcontractors to warrant the completeness and accuracy of all information such Subcontractors or their agents provides in connection with TxDOT audits.

21.4.6 Developer's internal and third party quality and compliance auditing responsibilities shall be set forth in the Project Management Plan, consistent with the audit requirements referred to in Section 2 of the Technical Provisions.

21.4.7 Nothing in the Contract Documents shall in any way limit the constitutional and statutory powers, duties and rights of elected State officials, including the independent rights of the State auditor, in carrying out his or her legal authority. Developer understands and acknowledges that:: (a) the State auditor may conduct an audit or investigation of any Person receiving funds from the State directly under this Agreement or indirectly through a Subcontract; (b) acceptance of funds directly under this Agreement or indirectly through a Subcontract acts as acceptance of the authority of the State auditor, under the direction of the legislative audit committee, to conduct an audit or investigation in connection with those funds; and (c) a Person that is the subject of an audit or investigation must provide the State auditor with access to any information the State Auditor considers relevant to the investigation or audit.

21.5 Public Information Act

21.5.1 Developer acknowledges and agrees that, except as provided by Section 223.204 of the Texas Transportation Code, all records, documents, drawings, plans, specifications and other materials in TxDOT's possession, including materials submitted

by Developer, are subject to the provisions of the Public Information Act. If Developer believes information or materials submitted to TxDOT constitute trade secrets, proprietary information or other information that is not subject to the Public Information Act pursuant to Section 223.204 of the Texas Transportation Code or excepted from disclosure under the Public Information Act, Developer shall be solely responsible for specifically and conspicuously designating that information by placing "CONFIDENTIAL" in the center header of each such page affected, as it determines to be appropriate. Any specific proprietary information, trade secrets or confidential commercial and financial information shall be clearly identified as such, and shall be accompanied by a concise statement of reasons supporting the claim. Nothing contained in this Section 21.5 shall modify or amend requirements and obligations imposed on TxDOT by the Public Information Act or other applicable Law, and the provisions of the Public Information Act or other Laws shall control in the event of a conflict between the procedures described above and the applicable Law. Developer is advised to contact legal counsel concerning such Law and its application to Developer.

21.5.2 If TxDOT receives a request for public disclosure of materials marked "CONFIDENTIAL," TxDOT will use reasonable efforts to notify Developer of the request and give Developer an opportunity to assert, in writing and at its sole expense, a claimed exception under the Public Information Act or other applicable Law within the time period specified in the notice issued by TxDOT and allowed under the Public Information Act. Under no circumstances, however, will TxDOT be responsible or liable to Developer or any other Person for the disclosure of any such labeled materials, whether the disclosure is required by Law, or court order, or occurs through inadvertence, mistake or negligence on the part of TxDOT or its officers, employees, contractors or consultants.

21.5.3 In the event of any proceeding or litigation concerning the disclosure of any material submitted by Developer to TxDOT, TxDOT's sole involvement will be as a stakeholder retaining the material until otherwise ordered by a court or such other authority having jurisdiction with respect thereto, and Developer shall be fully responsible for otherwise prosecuting or defending any action concerning the materials at its sole cost and risk; provided however that TxDOT reserves the right, in its sole discretion, to intervene or participate in the litigation in such manner as it deems necessary or desirable. Except in the case of TxDOT's voluntary intervention or participation in litigation, Developer shall pay and reimburse TxDOT within 30 days after receipt of written demand and reasonable supporting documentation for all costs and fees, including attorneys' fees and costs, TxDOT incurs in connection with any litigation, proceeding or request for disclosure.

21.6 Ownership of Documents

Subject to Section 21.7, all data, sketches, charts, calculations, plans, specifications, electronic files, correspondence and other documents created or collected under the terms of the Contract Documents shall be considered "works made for hire" for which TxDOT owns the copyright. Design Documents shall become TxDOT's property upon preparation; Construction Documents shall become TxDOT's property upon delivery to TxDOT; and other documents prepared or obtained by Developer in connection with the performance of its obligations under the Contract Documents, including studies, manuals, Record Drawings, technical and other reports and the like, shall become the property of TxDOT upon Developer's preparation or receipt thereof. Copies of all Design Documents and Construction Documents shall be furnished to TxDOT upon preparation or receipt

thereof by Developer. Developer shall maintain all other documents described in this Section 21.6 in accordance with the requirements of Section 21.3 and shall deliver copies to TxDOT as required by the Contract Documents or upon request if not otherwise required to be delivered, with an indexed set delivered to TxDOT as a condition to Final Acceptance.

21.7 Intellectual Property

21.7.1 All Proprietary Intellectual Property, including with respect to Source Code and Source Code Documentation, shall remain exclusively the property of Developer or its Affiliates or Subcontractors that supply the same, notwithstanding any delivery of copies thereof to TxDOT.

21.7.2 TxDOT shall have and is hereby granted a nonexclusive, transferable, irrevocable, fully paid up right and license to use, reproduce, modify, adapt and disclose, and sublicense others to use, reproduce, modify, adapt and disclose, the Proprietary Intellectual Property of Developer, including with respect to Source Code and Source Code Documentation, solely in connection with the Project and any State Highway, tolled or not tolled, owned and operated by TxDOT or a State or regional Governmental Entity; provided that TxDOT shall have the right to exercise such license only at the following times:

(a) From and after the expiration or earlier termination of this Agreement for any reason whatsoever; and

(b) During any time that a receiver is appointed for Developer, or during any time that there is pending a voluntarily or involuntary proceeding in bankruptcy in which Developer is the debtor, in which case TxDOT may exercise such license only in connection with the Project.

21.7.3 Subject to the license and rights granted to TxDOT pursuant to Section 21.7.2, TxDOT shall not at any time sell any Proprietary Intellectual Property of Developer or use, reproduce, modify, adapt and disclose, or allow any party to use, reproduce, modify, adapt and disclose, any such Proprietary Intellectual Property for any other purpose.

21.7.4 The right to transfer the license is limited to any Governmental Entity that succeeds to the power and authority of TxDOT generally or with respect to the Project.

21.7.5 The right to sublicense is limited to State or regional Governmental Entities that own or operate a State Highway or other road, tolled or not tolled, and to the concessionaires, contractors, subcontractors, employees, attorneys, consultants and agents that are retained by or on behalf of TxDOT or any such State or regional Governmental Entity in connection with the Project or another State Highway or other road, tolled or untolled. All such sublicenses shall be subject to Section 21.7.6.

21.7.6 Subject to Section 21.5, TxDOT shall:

(a) Not disclose any Proprietary Intellectual Property of Developer to any Person other than authorized transferees and sublicensees who agree to be bound by any confidentiality obligations of TxDOT relating thereto;

(b) Enter into a commercially reasonable confidentiality agreement if requested by Developer with respect to the licensed Proprietary Intellectual Property; and

(c) Include, or where applicable require such State or regional Governmental Entity to include, in the contract with the sublicensee its covenant to employ sound business practices no less diligent than those used for its own confidential information, and no less diligent than required by commercially reasonable standards of

confidentiality, to protect all Proprietary Intellectual Property of Developer and other materials provided under the sublicense against disclosure to third parties not in receipt of a sublicense, and to use the sublicense only for the permitted purposes.

21.7.7 Notwithstanding any contrary provision of this Agreement, in no event shall TxDOT or any of its directors, officers, employees, consultants or agents be liable to Developer, any Affiliate or any Subcontractor for any damages, including loss of profit, arising out of breach of the duty of confidentiality set forth in Section 21.7.6 if such breach is not the result of gross negligence or intentional misconduct. Developer hereby irrevocably waives all claims to any such damages.

21.7.8 Developer shall continue to have a full and complete right to use any and all duplicates or other originals of its Proprietary Intellectual Property in any manner it chooses.

21.7.9 With respect to any Proprietary Intellectual Property, including with respect to Source Code and Source Code Documentation, owned by a Person other than Developer, including any Affiliate, and other than TxDOT or a Governmental Entity acting as a Subcontractor, Developer shall obtain from such owner, concurrently with execution of any contract, subcontract or purchase order with such owner or with the first use or adaptation of the Proprietary Intellectual Property in connection with the Project, both for Developer and TxDOT, nonexclusive, transferable, irrevocable, fully paid up licenses to use, reproduce, modify, adapt and disclose such Proprietary Intellectual Property solely in connection with the Project and any State Highway, tolled or not tolled, owned and operated by TxDOT or a State or regional Governmental Entity, of at least identical scope, purpose, duration and applicability as the license granted under Section 21.7.2. The foregoing requirement shall not apply, however, to mass-marketed software products (sometimes referred to as "shrink wrap software") owned by such a Person where such a license cannot be extended to TxDOT using commercially reasonable efforts. The limitations on sale, transfer, sublicensing and disclosure by TxDOT set forth in Sections 21.7.3 through 21.7.6 shall also apply to TxDOT's licenses in such Proprietary Intellectual Property.

SECTION 22. VALUE ENGINEERING

22.1 General

This Section 22 sets forth the requirements applicable to preparation, review and approval of Value Engineering recommendations ("VEs") for the purpose of enabling Developer and TxDOT to take advantage of potential cost savings or provide potential improvements to the Work through changes in the requirements relating to the Work. Developer is encouraged to submit VEs whenever it identifies potential savings or improvements ("Developer-Initiated VE") for the Project. TxDOT may also request Developer to develop and submit a specific VE ("TxDOT-Initiated VE"). Developer shall have the right to refuse to consider such TxDOT-Initiated VE, provided however that nothing herein is intended to alter TxDOT's right to issue TxDOT-Directed Changes in accordance with Section 13.

22.2 Value Engineering Recommendation

A VE is a proposal developed and documented by Developer which: (a) would modify or require a change in any of the requirements of or constraints set forth in the Contract Documents in order to be implemented; and (b) changes the Price without impairing essential functions or characteristics of the Project, including service life, economy of operation, ease of maintenance, desirability and safety, as determined by TxDOT in its sole discretion, and provided that it is not based solely upon a change in quantities, performance or reliability or a relaxation of the requirements contained in the Contract Documents.

22.3 Required Information

At a minimum, the following information shall be submitted by Developer to TxDOT with each VE:

(a) A statement that the submission is a VE, and a narrative description of the proposed change;

(b) Description of the existing requirements in the Contract Documents which are involved in the proposed change;

(c) Discussion of differences between existing requirements and the proposed change, together with advantages and disadvantages of each changed item;

(d) Itemization of the requirements of the Contract Documents which must be changed if the VE is approved;

(e) A complete cost analysis including: (i) Developer's cost estimate for performing the subject Work in accordance with the Contract Documents compared to Developer's cost estimate for performing the subject Work in accordance with the proposed changes, (ii) an estimate of additional costs that will be incurred by TxDOT, including estimated impact on future maintenance costs; and (iii) costs of development and implementation of the VE by Developer. The cost of any additional Governmental Approvals, rights of way or easements and other costs or impacts to the Project, shall be included in the cost analysis;

(f) Justification for changes in function or characteristics of each item, and effect of the change on the performance of the end item, as well as on the meeting of requirements contained in the Contract Documents, including environmental compliance requirements;

(g) If available, a description of any previous use or tests of the VE and the conditions and results. If the VE was previously submitted on another TxDOT project, indicate the date, contract number and the action taken by TxDOT; and

(h) Date or time by which a Change Order adopting the VE must be issued in order to obtain the maximum cost reduction, noting any effect on the current Project Schedule and most recent approved Draw Request.

Any additional information requested by TxDOT shall be provided in a timely manner. Additional information could include results of field investigations and surveys, design computations and field change sheets.

22.4 TxDOT Review and Approval

22.4.1 TxDOT will determine whether a VE qualifies for consideration and evaluation. VEs that require excessive time or costs for review, evaluation or investigations, or that are not consistent with TxDOT's design policies and basic design criteria may be rejected without evaluation. Developer shall have no Claim for any additional costs or delays resulting from the rejection of a Developer-Initiated VE, including VE development costs, loss of anticipated profits or increased material or labor costs. TxDOT will consider only proven features that have been employed under similar conditions or projects acceptable to TxDOT. Within five Business Days after receipt of the VEs, TxDOT and Developer will meet and confer to determine whether to proceed with further evaluation. If requested by TxDOT, Developer shall conduct an analysis of each such concept and shall provide data to TxDOT within 15 Business Days after receipt of such request so as to enable TxDOT to determine whether to accept the VE.

22.4.2 Upon receipt of a VE, TxDOT will process it, but shall not be liable for any delay in acting upon any VE submitted pursuant to this Section 22. Developer may withdraw all or part of any VE at any time prior to approval. In the event Developer withdraws a VE, Developer shall be liable for costs incurred by TxDOT in reviewing the withdrawn VE. Each Party shall bear its own costs in connection with the preparation and review of rejected VEs.

22.4.3 TxDOT may approve, in its sole discretion, in whole or in part, by Change Order, any VE submitted. Designs for approved VEs shall be prepared by Developer for incorporation into the Design Documents. Until a Change Order is issued on a VE, Developer shall remain obligated to perform in accordance with the Contract Documents. The decision of TxDOT as to rejection or approval of any VE shall be at the sole discretion of TxDOT and shall be final and not subject to partnering, dispute resolution or appeal.

22.5 Price Adjustment

If TxDOT accepts a VE, the Price shall be adjusted in accordance with the following:

22.5.1 For VEs which reduce the Developer's costs, the Price shall be reduced by an amount equal to the sum of: (a) 100% of any additional costs incurred by TxDOT, including the costs incurred in reviewing the VE and any impact the VE may have on project revenue, but excluding the amounts due to the Developer, resulting from the VE (excluding any impact on the Price itself) plus (b) 50% of estimated net savings. For VEs that result in a reduction of the Developer's costs, the term "estimated net savings" shall mean: (i) the difference between the cost of performing the Work according to the Contract Documents and the actual cost to perform the Work, as modified by the VE, less (ii) the actual costs of studying and preparing the VE as substantiated by Developer and approved by TxDOT in writing in accordance with the Change Order procedures set forth herein, less (iii) the costs in (a) above. Developer's profit shall not be considered part of the cost.

22.5.2 For VEs that result in an increase in the Developer's costs, the Price shall be increased by an amount equal to the sum of: (a) 100% of any additional costs incurred

by Developer and approved by TxDOT in accordance with the Change Order procedures in Section 13 resulting from the VE plus (b) 50% of estimated net savings. For VEs that result in an increase of the Developer's costs, the term "estimated net savings" shall mean (i) the amount of any savings in TxDOT's costs resulting from the VE (taking into consideration the costs incurred in reviewing the VE and any impact the VE may have on project revenue), less (ii) the actual costs of studying and preparing the VE as substantiated by Developer and approved by TxDOT in writing in accordance with the Change Order procedures set forth herein, less (iii) the costs in (a) above. Developer's profit shall not be considered part of the cost.

22.5.3 Developer is not entitled to share in either collateral or future contract savings. The term "collateral savings" means those measurable net reductions in TxDOT's costs of operation resulting from the VE, including costs of maintenance by TxDOT or any third party, logistics, TxDOT-furnished property and future costs associated with the Project. The term "future contract savings" shall mean reductions in the cost of performance of future construction contracts for essentially the same item resulting from a VE submitted by Developer.

22.5.4 In a case where a VE involves acquisition of Additional Property and/or reduces TxDOT's cost of property acquisition, the analysis of the VE shall consider the additional costs or savings associated with the adjustment in the real property requirements for the Project, including Developer's costs for property acquisition support services, the costs involved in adjusting the Governmental Approvals, TxDOT's additional costs, including costs of personnel, Developer's out-of-pocket costs such as the price of the Additional Property, and the incremental reduction in TxDOT's costs (if any) for property acquisition. The estimated net savings shall be shared between TxDOT and Developer as described above.

22.5.5 In the event that Developer proceeds with a Developer-requested Change Order that TxDOT believes should be characterized as a VE, and it is later determined through the dispute resolution process that the change meets the technical qualifications for a VE, the Price shall be reduced by an amount equal to the sum of: (a) 100% of any additional costs incurred by TxDOT resulting from the VE plus (b) 75% of estimated net savings.

22.6 Implementation of VEs

22.6.1 Designs for approved VEs shall be prepared by Developer for incorporation into the Design Documents and shall be subject to the same design procedures as other aspects of the Project's design.

22.6.2 Developer's share of any VE cost savings shall be payable at such time as payments would have been made for the Work which is the subject of the VE had the VE not been implemented. If a VE results in a Price increase, payment for the additional Construction Work will be made in the ordinary course of progress of the Project.

22.7 Use of VEs By TxDOT

All approved or disapproved VEs will become the property of TxDOT, and shall contain no restrictions imposed by Developer on their use or disclosure. TxDOT retains the right to use, duplicate and disclose in whole or in part any data necessary for the utilization of the VE on any other or subsequent projects without any obligation or liability to Developer.

SECTION 23. COOPERATION AND COORDINATION WITH OTHER CONTRACTORS AND ADJACENT PROPERTY OWNERS

23.1 Cooperation with Other Contractors

Developer acknowledges that TxDOT has awarded and/or plans to award contracts for construction and other work at or near the Site, and that other projects at or near the Site may be in various stages of design and construction. Developer and any Developer-Related Entity shall fully cooperate and be solely responsible for coordinating with such other contractors and projects, and shall schedule and sequence the Work as reasonably necessary to accommodate the work of such other contractors and projects. Further, Developer shall conduct its Work and perform its obligations under the Contract Documents without interfering with or hindering the progress or completion of the work being performed by other contractors or of the work relating to such other projects.

23.2 Interference by Other Contractors

If Developer asserts that any of TxDOT's other contractors have caused damage to the Work, or have hindered or interfered with the progress or completion of the Work, then, subject only to the right to a Change Order for TxDOT-Caused Delays, Developer's sole remedy shall be to seek recourse against such other contractors.

23.3 Coordination with Utility Owners and Adjacent Property Owners

Developer shall coordinate with Utility Owners and owners of property adjoining the Project, and with their respective contractors, as more particularly described in the Contract Documents.

23.4 Coordination with Toll Related Project Participants; Delays

Developer shall coordinate with all Persons engaged in work on any elements relating to tolling of the Project. Developer shall also maintain on-going communication regarding requirements applicable to and progress with respect to the tolling elements of the Project, including coordination with TxDOT and the Systems Integrator. Developer shall provide access to the Project and coordinate construction activities for the System Integrator to construct civil Elements for the Toll Zones concurrent with Developer's Work.

SECTION 24. MISCELLANEOUS PROVISIONS

24.1 Amendments

The Contract Documents may be amended only by a written instrument duly executed by the Parties or their respective successors or assigns, except to the extent expressly provided otherwise in this Agreement.

24.2 Waiver

24.2.1 No waiver of any term, covenant or condition of the Contract Documents shall be valid unless in writing and signed by the obligee Party.

24.2.2 The exercise by a Party of any right or remedy provided under the Documents shall not waive or preclude any other or further exercise thereof or the exercise of any other right or remedy. No waiver by any Party of any right or remedy under the Contract Documents shall be deemed to be a waiver of any other or subsequent right or remedy under the Contract Documents. The consent by one Party to any act by the other Party requiring such consent shall not be deemed to render unnecessary the obtaining of consent to any subsequent act for which consent is required, regardless of whether similar to the act for which consent is given.

24.2.3 Except as provided otherwise in the Contract Documents, no act, delay or omission done, suffered or permitted by one Party or its agents shall be deemed to waive, exhaust or impair any right, remedy or power of such Party hereunder, or to relieve the other Party from the full performance of its obligations under the Contract Documents.

24.2.4 Either Party's waiver of any breach or failure to enforce any of the terms, covenants, conditions or other provisions of the Contract Documents at any time shall not in any way limit or waive that Party's right thereafter to enforce or compel strict compliance with every term, covenant, condition or other provision, any course of dealing or custom of the trade notwithstanding. Furthermore, if the Parties make and implement any interpretation of the Contract Documents without documenting such interpretation by an instrument in writing signed by both Parties, such interpretation and implementation thereof will not be binding in the event of any future Claims or Disputes.

24.3 Independent Contractor

24.3.1 Developer is an independent contractor, and nothing contained in the Contract Documents shall be construed as constituting any relationship with TxDOT other than that of Project developer and independent contractor.

24.3.2 Nothing in the Contract Documents is intended or shall be construed to create any partnership, joint venture or similar relationship between TxDOT and Developer; and in no event shall either Party take a position in any tax return or other writing of any kind that a partnership, joint venture or similar relationship exists. While the term "Design-Build" may be used on occasion to refer to contractual relationships of the type hereby created, the Parties do not thereby express any intention to form or hold themselves out as a *de jure* or *de facto* partnership, joint venture or similar relationship, to share net profits or net losses, or to give TxDOT control or joint control over Developer's financial decisions or discretionary actions concerning the Project and the Work.

24.3.3 In no event shall the relationship between TxDOT and Developer be construed as creating any relationship whatsoever between TxDOT and Developer's employees. Neither Developer nor any of its employees is or shall be deemed to be an employee of TxDOT. Except as otherwise specified in the Contract Documents, Developer has sole authority and responsibility to employ, discharge and otherwise control its employees and has complete and sole responsibility as a principal for its agents, for all

Subcontractors and for all other Persons that Developer or any Subcontractor hires to perform or assist in performing the Work.

24.4 Successors and Assigns; Change of Control

24.4.1 The Contract Documents shall be binding upon and inure to the benefit of TxDOT and Developer and their permitted successors, assigns and legal representatives.

24.4.2 TxDOT may transfer and assign all or any portion of its rights, title and interests in and to the Contract Documents, including rights with respect to the Payment and Performance Bond(s), Guarantees, letters of credit and other security for payment or performance:

(a) without Developer's consent, to any other public agency or public entity as permitted by Law, provided that the successor or assignee has assumed all of TxDOT's obligations, duties and liabilities under the Contract Document then in effect. Any Bond Trustee may, in connection with any default under any financing document, assign any rights assigned to it hereunder to any Person.

(b) without Developer's consent, to any other Person that succeeds to the governmental powers and authority of TxDOT; provided however that such successor(s) has assumed all of TxDOT's obligations, duties and liabilities under the Contract Documents then in effect .

(c) to any other Person with the prior written approval of Developer and the Bond Trustee.

24.4.3 In the event of TxDOT's assignment of all of its rights, title and interests in the Contract Documents as permitted hereunder, Developer shall have no further recourse to TxDOT under the Contract Documents or otherwise except as specifically provided by other contractual agreement or by statute.

24.4.4 Developer shall not voluntarily or involuntarily sell, assign, convey, transfer, pledge, mortgage or otherwise encumber the Developer's interest or any portion thereof without TxDOT's prior written approval, except to any entity that is under the same ultimate management control as Developer. Developer shall not sublease or grant any other special occupancy or use of the Project to any other Person that is not in the ordinary course of Developer performing the Work, without TxDOT's prior written approval. Any sale, assignment, conveyance, transfer, pledge, mortgage, encumbrance, sublease or grant of other special occupancy or use in violation of this provision shall be null and void ab initio and TxDOT, at its option, may declare any such attempted action to be a material Developer Default.

24.4.5 Developer shall not voluntarily or involuntarily cause, permit or suffer any Change of Control prior to Final Acceptance without TxDOT's prior written approval. If there occurs any voluntary or involuntary Change of Control without TxDOT's prior written approval, TxDOT, at its option, may declare it to be a material Developer Default.

24.4.6 Where TxDOT's prior approval is required for a proposed sale, assignment, conveyance, transfer, pledge, mortgage, encumbrance, sublease or grant of other special occupancy or use, or for any proposed Change of Control prior to Final Acceptance, TxDOT may withhold or condition its approval in its sole discretion. Any such decision of TxDOT to withhold consent shall be final, binding and not subject to the dispute resolution procedures set forth in this Agreement.

24.4.7 Assignments and transfers of Developer's interest permitted under this Section 24.4 or otherwise approved in writing by TxDOT shall be effective only upon TxDOT's receipt of written notice of the assignment or transfer and a written recordable

instrument executed by the transferee, in form and substance acceptable to TxDOT, in which the transferee, without condition or reservation, assumes all of Developer's obligations, duties and liabilities under this Agreement and the other Contract Documents then in effect and agrees to perform and observe all provisions thereof applicable to Developer. Each transferee shall take Developer's interest subject to, and shall be bound by, the Project Management Plan, the Major Subcontracts, the Utility Agreements, all agreements between the transferor and railroads, the Governmental Approvals, and all agreements between the transferor and Governmental Entities with jurisdiction over the Project or the Work, except to the extent otherwise approved by TxDOT in writing in its good faith discretion.

24.5 Change of Organization or Name

24.5.1 Developer shall not change the legal form of its organization in a manner that adversely affects TxDOT's rights, protections and remedies under the Contract Documents without the prior written approval of TxDOT, which consent may be granted or withheld in TxDOT's sole discretion.

24.5.2 In the event either Party changes its name, such Party agrees to promptly furnish the other Party with written notice of change of name and appropriate supporting documentation.

24.6 Designation of Representatives; Cooperation with Representatives

24.6.1 TxDOT and Developer shall each designate an individual or individuals who shall be authorized to make decisions and bind the Parties on matters relating to the Contract Documents ("Authorized Representative"). Exhibit 18 hereto provides the initial Authorized Representative designations. Such designations may be changed by a subsequent writing delivered to the other Party in accordance with Section 24.11. The Parties may also designate technical representatives who shall be authorized to investigate and report on matters relating to the design and construction of the Project and negotiate on behalf of each of the Parties, but who do not have authority to bind TxDOT or Developer.

24.6.2 Developer shall cooperate with TxDOT and all representatives of TxDOT designated as described above.

24.7 Survival

Developer's representations and warranties, the dispute resolution provisions contained in Section 19, the indemnifications and releases contained in Section 18, the express rights and obligations of the Parties following termination of this Agreement under Sections 15 and 16, the provisions regarding invoicing and payment under Section 12.2, the obligations regarding Final Reconciliation under Section 12.4, and all other provisions which by their inherent character should survive termination of this Agreement and/or completion of the Work, shall survive the termination of this Agreement and/or completion of the Work. The provisions of Section 19 shall continue to apply after expiration or earlier termination of this Agreement to all Claims and Disputes between the Parties arising out of the Contract Documents.

24.8 Limitation on Third Party Beneficiaries

It is not intended by any of the provisions of the Contract Documents to create any third party beneficiary hereunder or to authorize anyone not a Party hereto to maintain a suit for personal injury or property damage pursuant to the terms or provisions hereof, except to the extent that specific provisions (such as the warranty and indemnity provisions) identify third parties and state that they are entitled to benefits hereunder. Except as otherwise

provided in this Section 24.8, the duties, obligations and responsibilities of the Parties to the Contract Documents with respect to third parties shall remain as imposed by Law. The Contract Documents shall not be construed to create a contractual relationship of any kind between TxDOT and a Subcontractor or any Person other than Developer.

24.9 No Personal Liability of TxDOT Employees; Limitation on State's Liability

24.9.1 TxDOT's Authorized Representatives are acting solely as agents and representatives of TxDOT when carrying out the provisions of or exercising the power or authority granted to them under the Contract Documents. They shall not be liable to any Developer-Related Entity either personally or as employees of TxDOT for actions in their ordinary course of employment.

24.9.2 The Parties agree to provide to each other's Authorized Representative written notice of any claim which such Party may receive from any third party relating in any way to the matters addressed in the Contract Documents, and shall otherwise provide notice in such form and within such period as is required by Law.

24.9.3 In no event shall TxDOT be liable for injury, damage, or death sustained by reason of a defect or want of repair on or within the Site during the period Developer has operation and control of the Site, nor shall TxDOT be liable for any injury, damage or death caused by the actions, omissions, negligence, intentional misconduct, or breach of applicable Law or contract by any Developer-Related Entity. Developer expressly acknowledges and agrees that TxDOT's rights in this Agreement to take any action with respect to the Project, including the right to review, comment on, disapprove and/or accept designs, plans, specifications, work plans, construction, installation, traffic management details, safety plan and the like, are discretionary in nature and exist solely for the benefit and protection of TxDOT and do not create or impose upon TxDOT any standard or duty of care toward Developer or any other Person, all of which are hereby expressly disclaimed.

24.10 Governing Law

The Contract Documents shall be governed by and construed in accordance with the Laws of the State of Texas.

24.11 Notices and Communications

24.11.1 Notices under the Contract Documents shall be in writing and: (a) delivered personally; (b) sent by certified mail, return receipt requested; (c) sent by a recognized overnight mail or courier service, with delivery receipt requested; or (d) sent by facsimile or email communication followed by a hard copy and with receipt confirmed by telephone, to the addresses set forth in Sections 24.11.2 and 24.11.3, as applicable (or to such other address as may from time to time be specified in writing by such Person).

24.11.2 All notices, correspondence and other communications to Developer shall be delivered to the following address or as otherwise directed by Developer's Authorized Representative:

[_____
_____
_____
_____
Telephone: _____
Facsimile: _____
E-mail: _____]

In addition, copies of all notices to proceed and suspension, termination and default notices shall be delivered to the following Persons:

[_____
_____
_____
_____
_____
_____
E-mail: _____]

24.11.3 All notices, correspondence and other communications to TxDOT shall be marked as regarding the IH 35E Managed Lanes Project and shall be delivered to the following address or as otherwise directed by TxDOT's Authorized Representative:

Texas Department of TransportationDallas District Office
4777 East Highway 80
Mesquite, TX 75150
Attn: John Hudspeth, P.E.
Telephone: (214) 320-6112
Facsimile: (214) 320-6117
E-mail: john.hudspeth@txdot.gov

With a copy to:

Texas Department of Transportation
Chief Planning & Projects Officer
125 East 11th Street
Austin, TX 78701
Attn: Mr. Russell Zapalac, P.E.
Telephone: (512) 305-9516
E-mail: russell.zapalac@txdot.gov

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

Texas Department of Transportation
Office of General Counsel
125 East 11th Street
Austin, Texas 78701
Telephone: (512) 463-8630
Facsimile: (512) 475-3070
E-mail: claire.mcguinness@txdot.gov

24.11.4 Notices shall be deemed received when actually received in the office of the addressee (or by the addressee if personally delivered) or when delivery is refused, as shown on the receipt of the U. S. Postal Service, private carrier or other Person making the delivery. Notwithstanding the foregoing, notices sent by telefacsimile after 4:00 p.m. Central Standard or Daylight Time (as applicable) and all other notices received after 5:00 p.m. shall be deemed received on the first Business Day following delivery (that is, in order for a fax to be deemed received on the same day, at least the first page of the fax must have been received before 4:00 p.m.). Any technical or other communications pertaining to the Work shall be conducted by Developer's Authorized Representative and technical representatives designated by TxDOT.

24.12 Taxes

24.12.1 Developer shall pay, prior to delinquency, all applicable taxes. Developer shall have no right to an adjustment to the Price or any other Claim, except as provided in Section 24.12.2, due to its misinterpretation of Laws respecting taxes or incorrect assumptions regarding applicability of taxes.

24.12.2 With respect to Expendable Materials any Developer-Related Entity purchases, Developer shall submit or cause the Developer-Related Entity to submit a "Texas Sales and Use Tax Exemption Certification" to the seller of the Expendable Materials. In the event Developer is thereafter required by the State Comptroller to pay sales tax on Expendable Materials, TxDOT shall reimburse Developer for such sales tax. Reimbursement shall be due within 60 days after TxDOT receives from Developer written evidence of the State Comptroller's claim for sales tax, the amount of the sales tax paid, the date paid and the items purchased. Developer agrees to cooperate with TxDOT in connection with the filing and prosecution of any request for refund of any sales tax paid with respect to Expendable Materials. If materials purchased for the Work are not wholly used or expended on the Project, such that they do not qualify as Expendable Materials, Developer will be responsible for applicable sales taxes.

24.13 Interest on Amounts Due and Owing

Unless expressly provided otherwise in this Agreement or in the case of TxDOT's Recoverable Costs, all amounts to which a Party is entitled to assess, collect, demand or recover under this Agreement shall earn interest from the date on which such amount is due and owing at the lesser of: (a) 12% per annum or (b) the maximum rate allowable under applicable Law.

24.14 Integration of Contract Documents

TxDOT and Developer agree and expressly intend that, subject to Section 24.15, this Agreement and other Contract Documents constitute a single, non-severable, integrated agreement whose terms are interdependent and non-divisible.

24.15 Severability

If any clause, provision, section or part of the Contract Documents is ruled invalid under Section 19 or otherwise by a court having proper jurisdiction, then the Parties shall: (a) promptly meet and negotiate a substitute for such clause, provision, section or part, which shall, to the greatest extent legally permissible, effect the original intent of the Parties, including an equitable adjustment to the Price to account for any change in the Work resulting from such invalidated portion; and (b) if necessary or desirable, apply to the court or other decision maker (as applicable) which declared such invalidity for an interpretation of the invalidated portion to guide the negotiations. The invalidity or unenforceability of any such clause, provision, section or part shall not affect the validity or enforceability of the balance of the Contract Documents, which shall be construed and enforced as if the Contract Documents did not contain such invalid or unenforceable clause, provision, section or part.

24.16 Headings

The captions of the articles, sections and subsections herein are inserted solely for convenience and under no circumstances are they or any of them to be treated or construed as part of this Agreement.

24.17 Entire Agreement

The Contract Documents contain the entire understanding of the Parties with respect to the subject matter hereof and supersede all prior agreements, understandings,

statements, representations and negotiations between the Parties with respect to its subject matter.

24.18 Counterparts

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

IN WITNESS WHEREOF, this Agreement has been executed as of the date first set forth above.

Developer: **[Developer]**	**TEXAS DEPARTMENT OF TRANSPORTATION**
By_____ Name: _____ Title: _____	By: _____ Philip Wilson Executive Director

Document comparison by Workshare Compare on Friday, October 19, 2012 8:15:14 AM

Input:	
Document 1 ID	file://C:\Documents and Settings\iaj\Desktop\Addendum 6\Addendum 5\IH 35E Development Agreement (Addendum No. 5) (final).doc
Description	IH 35E Development Agreement (Addendum No. 5) (final)
Document 2 ID	file://C:\Documents and Settings\iaj\Desktop\Addendum 6\Word\IH 35E Development Agreement (Addendum No. 6) (Clean).doc
Description	IH 35E Development Agreement (Addendum No. 6) (Clean)
Rendering set	standard

Legend:	
Insertion	
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Moved to	
Style change	
Format change	
~~Moved deletion~~	
Inserted cell	
Deleted cell	
Moved cell	
Split/Merged cell	
Padding cell	

Statistics:	
	Count
Insertions	61
Deletions	58
Moved from	0
Moved to	0
Style change	0
Format changed	0
Total changes	119