DEVELOPMENT AGREEMENT

SH 183 MANAGED LANES PROJECT

BETWEEN

Texas Department of Transportation

and

_____

Dated _____

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DEVELOPMENT AGREEMENT

SH 183 Managed Lanes Project

This Development Agreement ("**Agreement**") is entered into and effective as of _____ __, 201_, by and between the Texas Department of Transportation, a public agency of the State of Texas ("**TxDOT**"), and _____, a _____ ("**Developer**").

R E C I T A L S

A. The State of Texas (the "**State**") desires to facilitate private sector investment and participation in the development of the State's transportation system via comprehensive 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, construct, finance, operate and maintain tolled managed lanes, general purpose lanes and associated facilities along an approximately 14-mile segment of State Highway ("**SH**") 183 from SH 121 to Interstate Highway 35E ("**I-35E**"), which includes the portion of SH 183 known as Segment 2E, and related connecting facilities, in Dallas and Tarrant Counties (the "**Project**").

C. Pursuant to the Code and the Rules, TxDOT issued a Request for Qualifications on February 20, 2013 (as amended, the "**RFQ**").

D. TxDOT received four qualification statements on July 19, 2013 and subsequently shortlisted four proposers.

E. On November 7, 2013, TxDOT issued to the shortlisted proposers a Request for Proposals (as amended, the "**RFP**") to develop, design, construct, finance, operate and maintain the Project.

F. On _____ __, 201_, 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 that best met the selection criteria contained in the RFP and that the Proposal provided the best value to the State.

H. On _____ __, 201_, the Texas Transportation Commission accepted the recommendation of the Executive Director and the RFP evaluation committee and authorized TxDOT staff to negotiate this Agreement.

J. This Agreement 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. On _____ __, 201_, Developer's governing body authorized Developer to negotiate, execute and deliver this Agreement.

M. The Parties intend for this Agreement as it relates to the D&C Work to be a lump sum design-build agreement obligating Developer to perform all work necessary to obtain completion of the Project by the Completion Deadlines specified herein for the D&C Price, subject only to certain specified limited exceptions, and Developer understands that the D&C Payments will be made by TxDOT on a deferred schedule as set forth in Exhibit 5 such that Developer will be responsible for financing certain costs of the D&C Work that are payable from Deferred D&C Payments. In order to allow TxDOT to budget for and finance the D&C Work and to reduce the risk of cost overruns, this Agreement includes restrictions affecting Developer's ability to make claims for increases to the D&C Price or extensions of the Completion Deadlines. Developer hereby agrees to assume such responsibilities and risks and has reflected the assumption of such responsibilities and risks in the D&C Price.

N. 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.

O. The Parties intend for Developer to undertake the O&M Work during the O&M Period, for which TxDOT shall pay Developer in accordance with the provisions set forth herein.

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

Definitions for the terms used in this Agreement and the other Contract Documents are contained in Exhibit 1.

1.2 Contract Documents

The following documents (together, the "**Contract Documents**"), are each an essential part of the agreement between the Parties and the Contract Documents and are intended to be complementary and to be read together as a complete agreement: (a) this Agreement, including all exhibits and attachments and the executed originals of exhibits that are contracts; (b) the Technical Provisions, including all exhibits and attachments; (c) any amendments to the foregoing; and (d) any Change Orders.

1.3 Order of Precedence

1.3.1 General Order. Subject to Sections 1.3.2 and 1.3.3, in the event of any conflict, ambiguity or inconsistency among the Contract Documents (a) later-in-time revisions to the Contract Documents, including Change Orders and amendments, shall prevail; and (b) subject to the foregoing, the provisions that establish the higher quality, manner or method of performing the Work (including statements, offers, terms, concepts or designs included in Developer's Proposal Commitments, ATCs, and Proposal Schematics set forth in Exhibit 2), establish better Good Industry Practice or use more stringent standards shall prevail. 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. If either Party becomes aware of any such conflict, it shall promptly notify the other Party of the conflict: TxDOT shall promptly resolve the conflict by notice to Developer.

1.3.2 Final Design Documents. In the event of any conflict, ambiguity or inconsistency among the Contract Documents and the Final Design Documents to be developed in accordance with the Contract Documents, the other Contract Documents shall prevail; *provided* that: (a) specifications contained in the Final Design Documents shall prevail over plans; (b) no conflict shall be deemed to exist with respect to requirements of the Final Design Documents that TxDOT determines are more beneficial than the other Contract Documents; and (c) other Deviations contained in the Final Design Documents shall prevail over conflicting requirements of other Contract Documents solely to the extent Developer notifies TxDOT of such conflicts and TxDOT approves such Deviations.

1.3.3 Project Management Plan and Maintenance Management Plan. In the event of any conflict, ambiguity or inconsistency between the Project Management Plan, Maintenance Management Plan and any of the Contract Documents, the latter shall prevail.

1.3.4 Reference Information Documents. 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. Portions of the Reference Information Documents that are referenced in the Contract Documents for the purpose of defining certain requirements shall be deemed incorporated into the Contract Documents to the extent so referenced with the same order of priority as the applicable Contract Document.

1.4 Approvals by TxDOT

1.4.1 Whenever the Contract Documents indicate that a matter is subject to TxDOT's approval, consent, acceptance, determination or decision, and no standard is otherwise provided, then such approval, acceptance, consent, determination or decision shall not be unreasonably or arbitrarily withheld, conditioned or delayed. If TxDOT fails to notify Developer of its response to any such request within the applicable time period (or if no time period is provided with respect to the particular matter, then within 60 days after TxDOT receives the request), and if Developer notifies TxDOT of the delay within five days after the expiration of such time period and TxDOT still fails to notify Developer of its response within such five-day period, the delay caused from and after the expiration of such time period may constitute a TxDOT-Caused Delay.

1.4.2 Whenever the Contract Documents indicate that a matter is subject to TxDOT's approval, acceptance, consent, determination or decision in TxDOT's discretion, then TxDOT's decision shall be final, binding and not subject to dispute resolution. TxDOT's failure to notify Developer of its response to any such request within the applicable time period shall be considered disapproval or denial of the request.

1.5 Approvals by Developer

Whenever the Contract Documents indicate that a matter is subject to Developer's approval, consent, determination or decision, and no standard is otherwise provided, then such approval, consent, determination or decision shall not be unreasonably or arbitrarily withheld, conditioned or delayed. Whenever the Contract Documents indicate that a matter is subject to Developer's approval, consent, determination or decision in Developer's discretion, then Developer's decision shall be final, binding and not subject to dispute resolution.

1.6 Construction and Interpretation of Contract Documents

1.6.1 Interpretation. The language in all parts of the Contract Documents shall in all cases be construed simply, as a whole and in accordance with its fair meaning and not strictly for or against any Party. The Parties acknowledge and agree that the Contract Documents are the product of an extensive and thorough, arm's length exchange of ideas, questions, answers, information and drafts during the Proposal preparation process, that each Party has been given the opportunity to independently review the Contract Documents with legal counsel, and that each Party has the requisite experience and sophistication to negotiate, 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, the Contract Documents shall not be interpreted or construed against the Party preparing it, and instead other rules of interpretation and construction shall be utilized. TxDOT's final answers to the questions posed during the Proposal preparation 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 as they may clarify provisions otherwise considered ambiguous.

1.6.2 Number and Gender. In this Agreement, terms defined in the singular have the corresponding plural meaning when used in the plural and vice versa, and words in one gender include all genders.

1.6.3 Headings. The division of this Agreement into parts, articles, sections and other subdivisions is for convenience of reference only and shall not affect the construction or interpretation of this Agreement. The headings in this Agreement are not intended to be full or precise descriptions of the text to which they refer and shall not be considered part of this Agreement.

1.6.4 References to this Agreement. The words "herein", "hereby", "hereof", "hereto" and "hereunder" and words of similar import refer to this Agreement as a whole and not to any particular portion of it. The words "Article", "Section", "paragraph", "sentence", "clause" and "Exhibit" mean and refer to the specified article, section, paragraph, sentence, clause or exhibit of, or to, this Agreement. A reference to a subsection or clause "above" or "below" refers to the denoted subsection or clause within the Section in which the reference appears.

1.6.5 References to Agreements and Other Documents. Unless specified otherwise, a reference to an agreement or other document is considered to be a reference to such agreement or other document (including any schedules or exhibits thereto) as it may be amended, modified or supplemented from time to time in accordance with its terms.

1.6.6 References to Any Person. A reference in this Agreement to any Person at any time refers to such Person's permitted successors and assigns.

1.6.7 Meaning of Including. In this Agreement, the word "including" (or "include" or "includes") means "including without limitation" and shall not be considered to set forth an exhaustive list.

1.6.8 Meaning of Discretion. In this Agreement, the word "discretion" with respect to any Person means the sole and absolute discretion of such Person.

1.6.9 Notice, Approval, Etc., in Writing. Whenever the Contract Documents require or provide for any notice, approval, consent, acceptance, determination, decision, certificate, order, response, waiver, explanation, policy, information or the like, the same and any request therefor must be in writing (unless otherwise waived in writing by the other Party).

1.6.10 Computation of Periods. If a specified date to perform any act or give any notice in the Contract Documents (including the last date "within" a specified time period) falls on a non-Business Day, such act or notice may be timely performed on the next succeeding Business Day; *provided*, *however* that requirements contained in the Contract Documents regarding actions to be taken in the event of an emergency or other requirements for which it is clear that performance is intended to occur on a non-Business Day, such actions or performance shall be required on the date specified**.**

1.6.11 Meaning of Promptly. In this Agreement, the word "promptly" means as soon as reasonably practicable in light of then-prevailing circumstances.

1.6.12 Trade Meanings. Unless otherwise defined herein, words or abbreviations that have well-known trade meanings are used herein in accordance with those meanings.

1.6.13 Dimensions. On plans, working drawings, and standard plans, calculated dimensions shall prevail over scaled dimensions.

1.6.14 Referenced Standards, Policies and Specifications. Except as otherwise specified in the Contract Documents or directed by TxDOT, material and workmanship specified by the number, symbol or title of any standard established by reference to a described publication shall comply with the latest edition thereof (including amendments or supplements thereto) in effect on the Proposal Due Date. Standards, policies and specifications referenced in the Technical Provisions shall be interpreted as follows:

(a) References to the "project owner" mean TxDOT;

(b) References to the "Engineer" in the context of providing compliance judgment means either (i) the Professional Services Quality Control Manager, (ii) the Construction Quality Acceptance Firm or (iii) a TxDOT representative, depending on the context, as determined by TxDOT in its discretion;

(c) References to "plan(s)" means the Final Design Documents; and

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

1.6.15 Laws. Unless specified otherwise, a reference to a Law is considered to be a reference to (a) such Law as it may be amended, modified or supplemented from time to time, (b) all regulations and rules pertaining to or promulgated pursuant to such Law, (c) the successor to the Law resulting from recodification or similar reorganizing of Laws and (d) all future Laws pertaining to the same or similar subject matter.

1.6.16 Currency. Unless specified otherwise, all statements of or references to dollar amounts or money in this Agreement are to the lawful currency of the United States of America.

1.7 Explanations; Omissions and Misdescriptions

Developer shall not take advantage of or benefit from any apparent Error in the Contract Documents. If Developer determines that the Work to be done or any matter relative thereto is not sufficiently detailed or explained in the Contract Documents, Developer shall request further explanation from TxDOT and shall comply with any explanation thereafter provided by TxDOT. If Developer identifies any Errors in the Contract Documents (including those Reference Information Documents described in Section 1.3.3), Developer shall promptly notify TxDOT of such Errors and obtain specific instructions from TxDOT regarding any such Error before proceeding with the affected Work. The fact that the Contract Documents omit or misdescribe any details of any Work

that are necessary to carry out the intent of the Contract Documents, or are customarily performed, shall not relieve Developer from performing such omitted Work (no matter how extensive) or misdescribed details of the Work; rather Developer shall perform such Work as if the details were fully and correctly set forth and described in the Contract Documents without entitlement to a Change Order except as specifically allowed under Section 12.

1.8 Reference Information Documents

TxDOT has provided the Reference Information Documents to Developer. Except as provided in Section 1.3.4, (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 any 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. 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 12 of this Agreement. Except as provided in Section 1.3.4, 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 (for the avoidance of doubt, except any schedule or monetary relief available hereunder as set forth in Section 12 of this Agreement).

1.9 Professional Services Licensing Requirements

TxDOT does not intend to contract for, pay for, or receive any Professional Services that 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 or subcontracts with licensed/registered Professional Service firm(s) as provided herein and any reference 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 as described in this Section 1.9. The terms and provisions of this Section 1.9 shall control and supersede every other provision of all Contract Documents.

1.10 Federal Requirements

1.10.1 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.

1.10.2 Without limiting the obligations set forth in Section 1.10.1 and elsewhere in this Agreement, in the event TxDOT elects to enter into a loan agreement and related documents with the United States Department of Transportation, or any successor governmental entity (the "**TIFIA Lender**") pursuant to TIFIA for the purpose of funding all or a portion of the Project (the "**TIFIA Loan Agreement**"), the following provisions shall apply.

(a) Developer shall reasonably cooperate with TxDOT to facilitate a TIFIA Loan Agreement and shall use its best efforts to promptly provide any additional information, certifications or requested material in order to facilitate a TIFIA Loan Agreement in accordance with this Section 1.10.2, including the certificate described in Section 1.10.2(b).

(b) Upon request by TxDOT, but no more frequently than quarterly after execution of a TIFIA Loan Agreement, deliver to TxDOT within 30 days of such request a certificate in a form provided by TxDOT to the effect that: (i) the representations and warranties applicable to Developer included in the final TIFIA Loan Agreement are true and accurate as of the date of such certificate; (ii) Developer is not in breach of any covenants applicable to Developer included in the final TIFIA Loan Agreement; and (iii) to the best of Developer's knowledge after reasonable and diligent inquiry and investigation, (A) the representations and warranties applicable to the Equity Members, Sureties, Guarantors, Major Subcontractors and any guarantor and surety of Major Subcontractors and any Person owning (excluding Persons owning securities effected on a recognized public stock exchange, unless such securities were acquired in a transaction involving an initial public offering) or Controlling Developer or the any of the foregoing (collectively, the "**TIFIA Parties**") included in the final TIFIA Loan Agreement are true and accurate and (B) the TIFIA Parties are not in breach of any covenants applicable to such TIFIA Parties included in the final TIFIA Loan Agreement, in each case as of the date of such certificate.

(c) Developer shall not do anything to violate any of the representations, warranties and covenants applicable to Developer included in the final TIFIA Loan Agreement and shall cause the TIFIA Parties to not do anything to violate any of the representations, warranties and covenants applicable to the respective TIFIA Party included in the final TIFIA Loan Agreement.

(d) Exhibit 30 sets forth indicative covenants, representations and warranties applicable to Developer and the TIFIA Parties that TxDOT anticipates may be required by the TIFIA Lender in a TIFIA Loan Agreement. Additional covenants, representations, warranties and other obligations applicable to Developer and the TIFIA Parties also may be required by the TIFIA Lender in a TIFIA Loan Agreement. TxDOT shall inform Developer of all such obligations at least 30 days prior to entering into any TIFIA Loan Agreement, or as practicable during the negotiation process, and TxDOT shall deliver to the TIFIA Lender any concerns or suggested revisions related to such requirements that are provided promptly to TxDOT by Developer, but no later than 10 days after notice of such obligations received by Developer; *provided, however*, that rejection by the TIFIA Lender of any of such Developer comments shall not relieve Developer of its obligations under this Section 1.10.2.

(e) The obligations set forth in this Section 1.10.2 shall apply to Developer and any applicable TIFIA Party until the earlier of the date on which (i) the TIFIA Loan Agreement is no longer in effect or (ii) the respective agreement identified in the TIFIA Loan Agreement to which Developer or a TIFIA Party is a party is no longer in effect.

(f) Subject to the last sentence in this Section 1.10.2(f), notwithstanding any other provision of the Contract Documents, Developer's liability for a failure to comply with its obligations under this Section 1.10.2 (excluding any such failure that is separately a default under Section 16), shall be limited to damages incurred by TxDOT in connection with the TIFIA Loan Agreement, including the inability of TxDOT to obtain such TIFIA Loan Agreement or to obtain a future disbursement thereunder, that are directly attributable to such failure by Developer; *provided* that Developer shall be liable for damages at least sufficient to put TxDOT in the same position it would have been if such failure by Developer had not occurred. For the avoidance of doubt, any failure by Developer to comply with the requirements set forth in this Section 1.10.2 shall not be cause for termination under Section 16 unless such failure is separately a default under Section 16. Notwithstanding the foregoing, if a "bankruptcy related event" as such term is defined in the final TIFIA Loan Agreement is caused by Developer, such event shall be an Event of Default under Section 16 and TxDOT shall have the right to terminate the agreement in accordance with Section 16 and TxDOT shall not be obligated to pay any compensation to Developer upon such termination.

(g) TxDOT's obligations under a TIFIA Loan Agreement will not be secured by any of Developer's assets, including its rights and interests under this Agreement.

1.11 Incorporation of ATCs

1.11.1 If the Contract Documents incorporate any 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 the required third-party approval for the ATC, then Developer shall comply with the requirements in the Contract Documents that would have applied in the absence of such ATC, including acquiring Developer Designated ROW necessary to comply with the Contract Documents, and such compliance shall be without any increase in the Price, extension of the Completion Deadlines or any other Change Order.

1.11.2 ATCs contained in proposals submitted by unsuccessful proposers may, in TxDOT's discretion, be presented to Developer as a Request for Change Proposal in accordance with Section 12.2.1 of this Agreement**.**

1.12 TxDOT Monetary Obligations; Appropriation

All TxDOT monetary obligations under the Contract Documents are subject to appropriation by the Texas Legislature; however, in the absence of such appropriation, such monetary obligations shall be payable solely from other unencumbered lawfully available funds of TxDOT (whether available at such time or in the future) that are not funds appropriated by the Texas Legislature. TxDOT shall submit a request in accordance with applicable Law to obtain an appropriation from the Texas Legislature, or shall perform actions permitted by Law to obtain, designate, or use any other lawfully available funds that are not funds appropriated by the Texas Legislature. This Section 1.12 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. GENERAL OBLIGATIONS OF DEVELOPER; TERM; REPRESENTATIONS AND WARRANTIES

2.1 General Obligations of Developer

2.1.1 D&C Work

As more fully described in the Contract Documents, the D&C Work shall include the design and construction of the Project, conforming to the Basic Configuration as set forth in the Draft Schematic and otherwise complying with the requirements of the Contract Documents, except as otherwise approved by TxDOT. All materials, services and efforts necessary to achieve Substantial Completion and Final Acceptance on or before the applicable Completion Deadline shall be solely Developer's responsibility, except as otherwise specifically provided in the Contract Documents. Developer shall plan, schedule, and execute all aspects of the D&C Work and shall coordinate its activities with all Persons who are directly impacted by the D&C Work. Subject to the terms of Section 12, the cost of all D&C Work, including such materials, services and efforts as are necessary for the D&C Work, are included in the D&C Price. Further, the D&C Price shall be payable by TxDOT on a deferred basis in accordance with the schedule set forth in Exhibit 5, subject only to TxDOT's option to prepay pursuant to Section 11.1(a), and Developer shall be responsible for financing any costs of the D&C Work necessary as a result of such deferred payment schedule.

2.1.2 O&M Work

As more fully described in the Contract Documents, the O&M Work shall include the operation and maintenance of the O&M Limits, conforming to the requirements set forth in the Technical Provisions and otherwise complying with the requirements of the Contract Documents, except as otherwise approved by TxDOT. Developer shall furnish all O&M Work throughout the O&M Period for the O&M Limits as more specifically set forth in Sections 19 and 22 of the Technical Provisions. All costs associated with providing the O&M Work are included in the O&M Price described in Section 11.4 and set forth in the payment schedules in Exhibit 23.1 through 23.4 (inclusive, as applicable) as adjusted in accordance with the Contract Documents.

2.2 Term

This Agreement shall take effect on the Effective Date, and shall remain in effect until the earlier to occur of: (a) the end of the O&M Period; or (b) the date that this Agreement is terminated as provided herein (the "**Term**").

2.3 Representations and Warranties of Developer

Developer represents, warrants and covenants 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 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 D&C Work within the Completion Deadlines and for the D&C 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 D&C Price) is feasible and practicable.

2.3.4 Developer has evaluated the feasibility of performing the O&M Work within the deadlines specified herein and for the O&M Price and has reasonable grounds for believing and does believe that such performance is feasible and practicable.

2.3.5 Except as to parcels that TxDOT lacked title or access to prior to the Proposal Due Date, Developer shall have, prior to the Proposal Due Date and in accordance with Good Industry Practice, examined or had the opportunity to examine the Site and surrounding locations, performed or had the opportunity to conduct inspections and tests and 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 12. Before commencing any Work on a particular portion or aspect of the Project, Developer shall verify all governing dimensions of the Site and shall examine all adjoining work (including Adjacent Work) that may have an impact on such Work. Developer shall ensure that any design documents and construction documents furnished as part of the Work accurately depict all governing and adjoining dimensions.

2.3.6 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 12, 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 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.

2.3.7 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.

2.3.8 As of the Effective Date, Developer is a [_____] duly organized and validly existing under the laws of the [_____] with all requisite power and all required licenses to carry on its present and proposed obligations under the Contract Documents and has full power, right and authority to execute and deliver the Contract Documents and the Major Subcontracts to which Developer is (or will be) a party and to perform each and all of the obligations of Developer provided for herein and therein.

2.3.9 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.

2.3.10 Each Guarantor is duly organized, validly existing and in good standing under the laws of the state of its organization, is duly qualified to do business in, and is in good standing in the State, and will remain in good standing throughout the Term and for as long thereafter as any obligations remain outstanding under the Contract Documents and each Guarantor has all requisite power and all required licenses to carry on its present and proposed obligations under the Contract Documents.

2.3.11 All required approvals have been obtained with respect to the execution, delivery and performance of each Guaranty, and performance of each Guaranty will not result in a breach of or a default under any Guarantor's organizational documents or any indenture or loan or credit agreement or other material agreement or instrument to which any Guarantor is a party or by which its properties and assets may be bound or affected.

2.3.12 Each Guaranty has been duly authorized by all necessary corporate action, has been duly executed and delivered by each Guarantor, and constitutes the legal, valid and binding obligation of such Guarantor, enforceable in accordance with its term, subject only to applicable bankruptcy, insolvency and similar laws affecting the enforceability of the rights of creditors generally and the general principles of equity.

2.3.13 The execution, delivery and performance of the Contract Documents and the Major Subcontracts 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 and the Major Subcontracts 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 and the Major Subcontracts have been (or will be) duly executed and delivered by Developer.

2.3.14 Neither the execution and delivery by Developer of the Contract Documents or the Major Subcontracts 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 or organizational documents of Developer or a breach or default under any indenture or loan or credit agreement or other material agreement or instrument to which Developer is a party or by which its properties and assets may be bound or affected.

2.3.15 Each of the Contract Documents and the Major Subcontracts 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, 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.

2.3.16 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 or the Major Subcontracts to which Developer is a party, or which challenges the authority of any of Developer's officials that are executing the Contract Documents or the Major Subcontracts; 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.

2.3.17 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 RFP.

2.3.18 To the extent the Design-Build Contractor, the Lead Engineering Firm, the Lead Operations and Maintenance Firm or the O&M Contractor (if different from the Lead Operations and Maintenance Firm) is not Developer, Developer represents and warrants, as of the effective date of the relevant Subcontract, as follows: (a) each of the Design-Build Contractor(s), the Lead Engineering Firm, the Lead Operations and Maintenance Firm and the O&M Contractor is duly organized, validly existing and in good standing under the laws of the state of its organization and is duly qualified to do business, and is in good standing, in the State, (b) the ownership interests of each of them that is a single purpose entity formed for the Project (including options, warrants and other rights to acquire ownership interests), is owned by the Persons whom Developer has set forth in a written certification delivered to TxDOT prior to the Effective Date; (c) each of them has the power and authority to do all acts and things and execute and deliver all other documents as are required to be done, observed or performed by it in connection with its engagement by Developer; (d) each of them has (i) obtained and will maintain all necessary or required registrations, permits, licenses and approvals required under applicable Law and (ii) expertise, qualifications, experience, competence, skills and know-how to perform the D&C Work and O&M Work, as applicable, in accordance with the Contract Documents; (e) each of them will comply with all health, safety and environmental Laws in the performance of any work activities for, or on behalf of, Developer for the benefit of TxDOT; and (f) none of them is in breach of any applicable Law that would have a material adverse effect on any aspect of the Work.

2.3.19 Developer has no authority or right to impose any fee, toll, charge or other amount for the use of the Project.

2.4 Representations and Warranties of TxDOT

TxDOT represents and warrants that:

2.4.1 As of the Effective Date, TxDOT has full power, right and authority to execute, deliver and perform its obligations under, in accordance with and subject to the terms and conditions of the Contract Documents to which it is a Party.

2.4.2 Each Person executing the Contract Documents on behalf of TxDOT to which TxDOT is a Party has been or at the time of execution will be duly authorized to execute each such document on behalf of TxDOT.

2.4.3 As of the Effective Date, there is no action, suit, proceeding, investigation or litigation pending and served on TxDOT which challenges TxDOT's authority to execute, deliver or perform, or the validity or enforceability of, the Contract Documents to which TxDOT is a Party, or which challenges the authority of the officials executing the Contract Documents.

2.4.4 As of the Effective Date, each of the Contract Documents to which TxDOT is (or will be) a party constitutes (or at the time of execution and delivery will constitute) the legal, valid and binding obligation of TxDOT, enforceable against TxDOT 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.

2.4.5 The execution and delivery by TxDOT of this Agreement will not result, at the time of execution, in a default under any other agreement or instrument to which it is a party or by which it is bound.

2.4.6 The execution and delivery by TxDOT of the Contract Documents and performance by TxDOT of its obligations thereunder will not conflict with any Laws applicable to TxDOT that are valid and in effect on the Effective Date.

2.5 Survival of Representations and Warranties

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

SECTION 3. DESIGN AND CONSTRUCTION

3.1 General Obligations of Developer

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

3.1.1 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 that 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.

3.1.2 At all times during the D&C Period provide a D&C 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 D&C Work is performed, and (d) will be available to respond to TxDOT or TxDOT's Authorized Representatives.

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

3.1.4 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.

3.1.5 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.

3.1.6 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 4.5.1).

3.2 Performance, Design and Construction Standards; Deviations

3.2.1 Developer shall furnish all aspects of the Design Work and all Design Documents, including design required in connection with the operation and maintenance of the Project and Renewal Work and shall construct the Project and Utility Adjustments included in the Construction Work as designed, free from Defects, 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; (g) Safety Compliance, the Safety and Health Plan and

Safety Standards; and (h) all other applicable safety, environmental and other requirements, taking into account the Project ROW limits and other constraints affecting the Project.

3.2.2 Developer also shall construct the Project and Utility Adjustments included in the Construction Work in accordance with (a) the Final Design Documents, and (b) the Construction Documents, in each case taking into account the Project ROW limits and other constraints affecting the Project.

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

3.2.4 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 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 D&C 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 D&C 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 D&C Work already performed. Inconsistent or conflicting provisions of the Contract Documents shall not be treated as erroneous provisions under this Section 3.2.4, but instead shall be governed by Section 1.3.

3.2.5 Developer may apply for TxDOT approval of Deviations from applicable Technical Provisions regarding the design or construction of the Project. The Deviation approval process shall be as follows:

(a) 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.

(b) TxDOT shall consider, in its 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.

(c) No Deviation shall be deemed approved or be effective unless and until stated in writing signed by TxDOT's Authorized Representative. TxDOT's affirmative approval of a component plan of the Project Management Plan shall constitute: (i) approval of the Deviations expressly identified and labeled as Deviations therein, unless TxDOT takes exception to any such Deviation, and (ii) disapproval of any Deviations not expressly identified and labeled as Deviations therein.

(d) TxDOT's lack of issuance of an approval for any Deviation within 14 days after Developer applies therefor shall be deemed a disapproval of such application.

(e) TxDOT's denial or disapproval of a requested Deviation shall be final and not subject to the dispute resolution procedures of this Agreement.

3.2.6 References in the Technical Provisions to manuals or other publications governing the Design Work or Construction 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 Design Work or Construction Work prior to the Substantial Completion Date shall be subject to the Change Order process for a TxDOT-Directed Change in accordance with Section 12.

3.2.7 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 D&C 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; *provided*, *however,* that the foregoing shall not apply to new or revised statutes or regulations that also cause or constitute changes in Adjustment Standards.

3.2.8 The Systems Integrator shall be responsible for installing and testing all Tolling Equipment for the Project. Developer shall coordinate the scheduling and performance of the D&C Work with TxDOT and the Systems Integrator in accordance with the Contract Documents and to minimize impacts and delays to the Project.

3.3 Changes in Basic Configuration

3.3.1 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 21.

3.3.2 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 12, and subject to the limitations contained in Section 3.16. 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.

3.3.3 Developer shall be responsible for any cost increases or delays that 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 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 TxDOT 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 TxDOT 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 Schematic Design that do not require the acquisition of TxDOT 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.

3.3.4 No Change Order shall be required for any non-material changes in the Basic Configuration that 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 12 or unless the proposed change constitutes a VE pursuant to Section 21. 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 Schematic, will impact Developer's ability to make non-material changes in the Basic Configuration.

3.4 Design Requirements; Responsibility for Design

3.4.1 Design Implementation and Submittals

(a) 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.

(b) 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 approval of TxDOT. Developer may modify the Construction Documents without prior approval of TxDOT, but must deliver the modifications to TxDOT in advance of performance of the D&C Work.

3.4.2 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, regardless of the fact that aspects of the Draft 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 Schematic except as specified in Section 3.3.3, (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 Schematic through the design 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 12.8.6.

(c) TxDOT's liability for Errors in the Draft Schematic is limited to its obligations relating to Necessary Basic Configuration Changes as set forth in Section 3.3.3, and is subject to the requirements and limitations of Section 12.

(d) 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 Schematic.

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

3.4.3 Draft Schematic

(a) Developer acknowledges and agrees that if Developer wishes to deviate from the Draft Schematic ROW contained in the Draft Schematic, it must specifically identify such modifications in writing to TxDOT in accordance with Section 3.2.5, provide justification for the modification, and obtain specific approval from TxDOT, in its discretion, prior to use of such modifications. Subject to Section 3.2.4, Developer must obtain TxDOT's prior approval to deviate from the Draft Schematic unless the proposed modification meets all of the following: (i) is within the Draft Schematic ROW and requires no additional right of way; (ii) meets the requirements of the Technical Provisions; (iii) requires no New Environmental Approval; (iv) does not constitute a Design Exception or Design Waiver; (v) does not deviate from the design concepts included in the Proposal; (vi) does not deviate from TxDOT's design intent as embodied in the Draft Schematic; and (vii) is consistent with and will not impose on TxDOT additional costs with respect to carrying out the Ultimate Project. 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 Schematic, in addition to the requirement to obtain approval.

(b) Developer may rely on the Draft Schematic ROW limits as shown on the Draft Schematic and that it is feasible to design and develop the Project within the Draft Schematic ROW limits identified in the Draft 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 12.8.6; *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.

(c) Developer acknowledges that the Draft 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 Schematic, and Developer's entitlement to an increase in the Price in connection with any changes in the Draft Schematic is limited to certain increased costs incurred as a result of Necessary Basic Configuration Changes to the extent allowed under Section 12.8.6.

3.5 Schedule; Notices to Proceed

3.5.1 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 or where Liquidated Damages are payable by Developer with respect to missed Completion Deadlines, 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.

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

3.5.3 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 D&C 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 ROW 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 11.1.4 and 15.9 regarding a D&C Price adjustment to be made in certain circumstances if the effective date of 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.

3.5.4 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 D&C Work and related activities pertaining to the Project.

3.5.5 Notwithstanding Section 3.5.4, 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 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 $3,000 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 3.8 have been satisfied.

3.5.6 TxDOT shall have the option, at its discretion, to direct Developer to proceed with the Additional Scope Work, as described in Section 1 of the Technical Provisions, by issuance of an Additional Scope Notice to Proceed for one or more of the Additional Scope Components. The deadline for issuance of such Additional Scope Notices to Proceed is 180 days following the effective date of NTP1. If TxDOT issues an Additional Scope Notice to Proceed later than 90 days following the effective date of NTP1, the Additional Scope Price for the applicable Additional Scope Component will be subject to adjustment in accordance with Section 11.1.5(a), where for each Additional Scope Component exercised "D&C Price" shall mean the Additional Scope Price of that Additional Scope Component 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 notice to Developer of its intent to proceed with such Additional Scope Component. The schedule for undertaking and completing any such Additional Scope Component shall be agreed upon by TxDOT and Developer and set forth in the applicable Additional Scope Component Notice to Proceed; *provided*, *however*, that any extension of a Completion Deadline associated with Additional Scope Work shall be subject to the limitations on time extensions in Section 12.5.3, and provided further that 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 Additional Scope Component Notice to Proceed.

3.6 Completion Deadlines.

3.6.1 Substantial Completion Deadline

Developer shall achieve Substantial Completion of the Project on the date established in Exhibit 2, subject to extension as permitted hereunder (the "**Substantial Completion Deadline**").

3.6.2 Final Acceptance Deadline

Developer shall achieve Final Acceptance on or before 120 days after Substantial Completion, subject to extension as permitted hereunder (the "**Final Acceptance Deadline**").

3.6.3 No Time Extensions

Except as otherwise specifically provided in Section 12, 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.

3.7 Scheduling of Design, Construction and Payment

3.7.1 Project Schedule

The D&C 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 D&C Work and as the basis for determining the amount of monthly progress payments to be made to Developer.

3.7.2 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 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.

3.7.3 Maximum D&C 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 D&C Payment Schedule established for the Project. The Maximum D&C Payment Schedule shall not limit payment for Change Order D&C Work unless otherwise specified in the Change Order. In other words, at no time shall Developer's cumulative total progress payments for D&C Work (including mobilization payments but exclusive of payments for Change Order Work) exceed the cumulative total expenditure permitted by the Maximum D&C Payment Schedule. The Maximum D&C 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 D&C Payment Schedule for the Project. The Maximum D&C 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 D&C Price as evidenced by Change Orders or amendments. The aggregate amount of progress payments to Developer for the D&C Work hereunder shall not exceed the amount allowed by the Maximum D&C Payment Schedule at any time, exclusive of payments for Change Order Work, without the prior approval of TxDOT, which approval may be withheld in its discretion. For the avoidance of doubt, Developer shall not be required to finance any increase in the D&C Price due to a Change Order.

3.8 Conditions to Commencement of Construction

3.8.1 Construction Work Generally

Except to the extent expressly permitted in writing by TxDOT, in TxDOT's 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 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 D&C Performance Bond, D&C Payment Bond, and D&C Retainage Bond, in form and from a surety approved by TxDOT, required under Section 8 for the D&C Work

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 Guaranties, if any, required under Section 8.5 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 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 or reviewed (as applicable), in accordance with Section 6.4 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 to be submitted in advance of commencing the Construction Work, 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, provided that any representation or warranty of Developer that was made as of a certain date shall have been true and correct in all material respects as of such date;

(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: (i) TxDOT and the Program Manager and (ii) employment relations, in accordance with Section 7.8;

(k) There exists no uncured Developer Default for which Developer has received notice from TxDOT, other than any that would be cured by issuance of NPT2 and commencement of construction; and

(l) Developer has provided to TxDOT at least 10 days' advance notification of the date Developer determines that it will satisfy all of the conditions set forth in this Section 3.8.1.

3.8.2 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 3.8.1 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; and

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

3.9 Recovery Schedule

3.9.1 Subject to Section 3.9.2, if at any time, the D&C Work on any Critical Path item is delayed for a period that 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 12), then Developer, upon TxDOT's request, shall prepare and submit to TxDOT for review and approval with the next Project Baseline 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.

3.9.2 If Developer has failed to meet any Completion Deadline (as it may be extended under this Agreement) by the time required under this Agreement, then Developer shall prepare and submit to TxDOT for review and approval with the next Project Baseline Schedule Update a Recovery Schedule demonstrating Developer's proposed plan to achieve the applicable contractual milestones with as little additional delay as possible.

3.9.3 TxDOT shall notify Developer within 14 days after receipt of each such Recovery Schedule whether the Recovery Schedule is deemed accepted or rejected. Within seven 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.

3.9.4 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 D&C Price, except to the extent that the Recovery Schedule is in lieu of a time extension and a change in the D&C Price is permitted for Acceleration Costs in accordance with Sections 12.2.1(c) or 12.3.2(e).

3.9.5 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 for D&C Work 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.

3.10 Substantial Completion; Punch List; Final Acceptance

3.10.1 Substantial Completion

TxDOT shall issue a written certificate of Substantial Completion on the date that all conditions to DB Substantial Completion have been met as provided in Section 3.10.1 and that all O&M Conditions Precedent have been met as provided in Section 3.10.3.

(a) **Conditions to TxDOT Issuing Certificate Evidencing DB Substantial Completion**

(i) TxDOT will issue a Certificate of DB Substantial Completion at such time as DB Substantial Completion occurs for the Project.

(ii) In determining whether DB 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 O&M Work or required for elements to be installed by the Systems Integrator so long as Developer has complied with the notice requirements set forth in Section 3.10.1(a) and such need for controls or closures is not due to any act or failure to act by any Developer-Related Entity, 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 D&C Work, including all D&C Work required under Section 3.10.1(b), 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.

(iii) 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 DB Substantial Completion has occurred, except to the extent that its later completion will affect public safety or satisfaction of the criterion in Section 3.10.1(a)(ii)(D).

(iv) Developer shall provide TxDOT with Notice in respect of the date Developer determines that it will satisfy all of the conditions to DB Substantial Completion set forth in Section 3.10.1(a)(ii) and the Parties shall undertake such actions, as follows:

A. Developer shall provide TxDOT with 270, 180, 120 and 20 days' advanced notice of the date of expected DB Substantial Completion, in each case to afford the Systems Integrator the opportunity to plan, mobilize and test the ETCS.

B. During the 20-day period following receipt of the 20-day notice, Developer and TxDOT shall meet, confer and exchange information on a regular cooperative basis, and TxDOT shall conduct an inspection of the entire Project and its components, a review of the Final Design Documents and Construction Documents and such other investigation and review of reports, data and documentation as may be necessary to evaluate whether all of the conditions to DB Substantial Completion have been satisfied.

C. After Developer has given the 20 days' notice, Developer shall provide TxDOT a final notice when Developer determines it has achieved DB Substantial Completion. The notice shall include a written certification, in form reasonably acceptable to TxDOT, that Developer has met all the conditions set forth in Section 3.10.1(a)(ii).

D. Within five days after receipt of the notice and certification given by Developer to TxDOT pursuant to Section 3.10.1(a)(iv)(D), TxDOT shall either (1) issue a certificate authorizing DB Substantial Completion and setting forth the date of DB Substantial Completion or (2) provide notice to Developer setting forth, as applicable, why the conditions to DB Substantial Completion have not been satisfied. If TxDOT provides notice under subsection (2) of this Section 3.10.1(a)(iv)(D), and Developer does not Dispute TxDOT's assessment, then the processes set forth in Section 3.10.1(a)(iv)(B), (C) and this Section 3.10.1(a)(iv)(D) shall be repeated until (i) TxDOT issues a certificate authorizing DB Substantial Completion or (ii) the Parties' disagreement as to whether one or more criteria for DB Substantial Completion have been met or the date of DB Substantial Completion is referred to, and resolved according to, the Dispute Resolution Procedures.

(b) **Notification and Completion of Toll Zone Work**

Developer shall complete all D&C Work necessary (excluding work to be performed by the Systems Integrator as detailed in Section 21 of the Technical Provisions) to allow TxDOT to open the Project for revenue operations by the Substantial Completion Deadline. Further, Developer acknowledges and agrees that it is responsible for coordinating the performance of the D&C Work

with the work to be performed by the Systems Integrator and allowing such contractor sufficient time in advance of the Substantial Completion Deadline to install such facilities. Developer shall provide notice to TxDOT no later than 270 days prior to the scheduled date of DB Substantial Completion based on and consistent with the most current Project Baseline 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 notice to TxDOT upon completion of such Toll Zone Work. The work to be completed by the Systems Integrator during this 180-day period shall consist of placement of loops in the pavement and installation and testing of toll systems for each Toll Zone. The Systems Integrator shall perform civil construction of Toll Zone infrastructure prior to this 180-day period.

(c) **Notification of Substantial Completion**

(i) Developer shall provide notice to TxDOT when the Project is within 180 days, 90 days and 60 days of achieving Substantial Completion based on and consistent with the most current Project Baseline Schedule Update.

(ii) In addition to the notice required under Section 3.10.1(c)(i), Developer shall provide TxDOT with not less than 20 days' prior 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.

(iii) 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.

(iv) Developer shall provide TxDOT a second 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 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.

3.10.2 Punch List

(a) 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.

(b) The schedule for preparation of the Punch List either shall be consistent and coordinated with the inspections regarding DB Substantial Completion, or shall follow such inspections.

(c) Developer shall prepare and maintain the Punch List. Developer shall deliver to TxDOT not less than five days' prior 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.

(d) 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.

3.10.3 Conditions to issuance by TxDOT of Certificate Evidencing Satisfaction of O&M Conditions Precedent

(a) TxDOT shall issue a written certificate evidencing satisfaction of O&M Conditions Precedent upon satisfaction of all the following:

(i) Developer demonstrates to TxDOT's reasonable satisfaction that Developer has completed training of operations and maintenance personnel, which demonstration shall consist of (A) delivery to TxDOT of a written certificate, in form acceptable to TxDOT, executed by Developer that it and its Contractors are fully staffed with such trained personnel and are ready, willing and able to operate and maintain the O&M Limits in accordance with the terms and conditions of the Contract Documents and Project Management Plan pertaining to the O&M Period, (B) delivery to TxDOT of training records and course completion certificates issued to each of the subject personnel and (C) TxDOT's verification that the training program and number of trained personnel meet the standards in the Hazardous Material Management Plan and Section 4.3 of the Technical Provisions;

(ii) TxDOT has received and approved, in its reasonable discretion, the Maintenance Management Plan that Developer is required to prepare pursuant to Section 19.2 of the Technical Provisions and the Operations Management Plan that Developer is required to prepare pursuant to Section 22.2 of the Technical Provisions;

(iii) Developer has received, and paid all associated fees for, all applicable Governmental Approvals and other third-party approvals required for use and operation of the O&M Limits, such Governmental Approvals and other third-party approvals are in full force and effect, and there exists no uncured material violation of the terms and conditions of any such Governmental Approval or other third-party approvals;

(iv) All insurance policies required under this Agreement during the O&M Period for the O&M Limits have been obtained and are in full force and effect and Developer has delivered to TxDOT verification thereof as required under Section 9;

(v) Any security for payment and for performance, including the O&M Security required under Section 8.2 and any Guaranty required under Section 8.5 have been obtained and are in full force and effect and Developer has delivered the same to TxDOT;

(vi) Developer has satisfied any other requirements or conditions for commencement of O&M Work set forth in the Technical Provisions including, but not limited to, Section 2.1.1.8 (O&M Work Schedule), Section 19, Section 22 and Table 19-5.

(b) Developer shall provide TxDOT with notice of the date Developer determines that it will satisfy all of the O&M Conditions Precedent as set forth in Section 3.10.3(a), and the Parties shall undertake such actions, as follows:

(i) Developer shall provide TxDOT 30 days' notice of the date of expected satisfaction of the O&M Conditions Precedent.

(ii) During the 30-day period following receipt of such notice, Developer and TxDOT shall meet, confer and exchange information on a regular cooperative basis, and TxDOT shall conduct such investigation and review of reports, data and documentation as may be necessary to evaluate whether all of the O&M Conditions Precedent have been satisfied.

(iii) Developer shall provide TxDOT a final notice when Developer determines it has satisfied the O&M Conditions Precedent. The notice shall include a written certification, in form reasonably acceptable to TxDOT, that Developer has satisfied all the criteria set forth in Section 3.10.3(a). Within five days after receipt of such final notice and certification, TxDOT shall either (A) issue a certificate of satisfaction of O&M Conditions Precedent or (B) provide Notice to Developer setting forth, as applicable, why the O&M Conditions Precedent have not been satisfied. If TxDOT provides notice under subsection (B) of this Section 3.10.3(b)(iii), and Developer does not Dispute TxDOT's assessment, then the processes set forth in Sections 3.10.3(b)(ii) and (iii) shall be repeated until (x) TxDOT issues a certificate that the O&M Conditions Precedent have been satisfied, or (y) the Parties' disagreement as to whether one or more O&M Conditions Precedent have been met or the date of satisfaction of O&M Conditions Precedent is referred to, and resolved according to, the dispute resolution procedures set forth in this Agreement.

3.10.4 Final Acceptance

(a) Promptly after achieving Substantial Completion, Developer shall perform all remaining Construction 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.

(b) TxDOT will issue a Certificate of Final Acceptance for the Project at such time as all of the following conditions have been satisfied:

(i) TxDOT has issued a Certificate of Substantial Completion for of the Project;

(ii) All Punch List items shall have been completed and delivered to the reasonable satisfaction of TxDOT;

(iii) 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, and the plans and designs prepared in accordance therewith;

(iv) TxDOT has received the "as-built schedule" required by Section 2.1.1.5 of the Technical Provisions;

(v) 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;

(vi) 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;

(vii) 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;

(viii) 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;

(ix) 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;

(x) 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 D&C 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;

(xi) 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.

(xii) There exists no uncured Developer Defaults other than those that would be cured by the achievement of Final Acceptance; and

(xiii) 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.

(c) Developer shall provide TxDOT with 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 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.

(d) 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.

(e) Within five days after expiration of such 15-day period, TxDOT shall either: (i) issue a Certificate of Final Acceptance for the Project; or (ii) notify Developer 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.

3.11 Reserved

3.12 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 D&C Payment to Developer, without further acknowledgment by the Parties.

3.13 Acquisition of Project ROW

3.13.1 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 ROW Acquisition Plan and all applicable Laws relating to such acquisition, including the Uniform Act.

3.13.2 TxDOT shall: (a) provide review and approval or disapproval of Acquisition Packages and Condemnation Packages for Project ROW, (b) except as provided below, undertake

eminent domain proceedings, if necessary, and (c) provide review and approval for the following submittals: payment submittals, relocation submittals, administrative settlement submittals, and closing submittals, for Project ROW in accordance with the procedures and time frames established in Section 7 of the Technical Provisions and the approved ROW Acquisition Plan.

3.13.3 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.

3.13.4 Costs of Acquisitions

(a) TxDOT shall be responsible for the purchase price of real property needed for ROW within the Draft Schematic ROW, along with relocation assistance payments and title insurance for all such property. Subject to Sections 3.13.4(g) 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 3.16) 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.

(b) TxDOT shall pay the purchase price and any relocation assistance and title insurance of any real property that is a TxDOT Additional Property and, solely with respect to TxDOT Additional Properties required due to a TxDOT-Directed Change or a Force Majeure Event, any other costs and expenses incurred by Developer to acquire such real property, subject to the limitations in Section 12. 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 Schematic ROW that is acquired for drainage easements hereunder shall be treated as Developer-Designated ROW.

(c) 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 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.

(d) 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 that 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.

(e) 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.

(f) 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 Schematic ROW, a mitigation site or a parcel on which a drainage easement shall be located, TxDOT, in its 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 or condemnation of such parcel.

(g) If a parcel acquired by TxDOT includes: (i) property for which TxDOT is responsible for paying the price of acquisition (*e.g.*, TxDOT Additional Properties) and (ii) property for which Developer is responsible for paying the price of acquisition (*e.g.*, 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 (ii) of this Section 3.13.4(g) as a proportion of the combined physical area of the properties referenced in clauses (i) and (ii) of this Section 3.13.4(g) that is acquired by TxDOT.

3.13.5 Limiting Acquisition of Certain Additional Properties

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

(a) Developer shall use its best efforts to restrict and limit additional costs to the Project associated with acquisitions of TxDOT Additional Properties. 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 TxDOT Additional Properties in lieu of constructing a retaining wall or otherwise modifying the Draft Schematic with an analysis demonstrating cost or time savings or other justification.

(b) 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 21.

(c) 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.

3.13.6 Representations by Developer

(a) Developer's designated ROW 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 3.13.4(g) and this Section 3.13.6.

(b) 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.

(i) Except as provided in Section 3.13.6(b)(ii), any individual person or entity identified by Developer to represent the 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 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. 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.

(ii) 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.

(c) 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.

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

(a) Negotiations for any Project ROW shall be undertaken as set forth in the Contract Documents, including Section 7 of the Technical Provisions. Developer shall obtain TxDOT's 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 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 7.3.6 of the Technical Provisions. TxDOT shall have 10 Business Days either to: (i) approve the Condemnation Package or (ii) provide its comments 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 10 Business Days to approve or provide comments to Developer on any resubmittals.

(b) 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 or condemnation proceedings shall be from the State Attorney General representing TxDOT.

(c) Except as provided in Section 3.13.4(f), delays to the Critical Path due to failure of TxDOT to make available the portion of Draft Schematic ROW, or any TxDOT Additional Properties that must be acquired due to a TxDOT-Directed Change or a Necessary Basic Configuration 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: (i) relocation of occupants and personal property, for occupied parcels, (ii) demolition, for unoccupied, improved parcels, or (iii) construction, for unoccupied, unimproved parcels. 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.

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

TxDOT shall notify Developer of the availability of Project ROW within 10 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 report setting forth its recommendations, which recommendations shall be subject to the approval of TxDOT. TxDOT may, in its 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.

3.13.9 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 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 consent, which may be withheld or withdrawn at any time, in TxDOT's discretion, and subject to the provisions of Section 3.13.8 above and Sections 7.3 and 7.4 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 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).

3.14 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 12, 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 or perform all necessary Utility Adjustments within the time deadlines of the Contract Documents (as they may be modified pursuant to Section 12), 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 3.14 and in accordance with Section 12.

3.14.1 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 3.14.1. Developer shall use its best efforts to minimize costs for which Developer is entitled to compensation pursuant to this Section 3.14.1, and to minimize any delay for which Developer is entitled to an extension in the Completion Deadline pursuant to this Section 3.14.1, 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.

(a) New Utilities. Developer shall be entitled to a Change Order: (i) 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 (ii) 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 12.

(b) Unidentified Utilities.

(i) 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 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 3.14.1(b) for each such Unidentified Utility facility shall be equal to the Basic Costs for that facility, less $50,000 (which amount shall be 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 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 3.14.1(b) 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.

(ii) 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 12.6 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.

(c) No Time Extension. Except as otherwise provided in Section 3.14.1(a) with regard to New Utilities, no time extension will be allowed on account of: (a) any delays attributable to any inaccuracy in the Utility Strip Map; or (b) the performance of Utility Adjustments for Unidentified Utilities.

3.14.2 Utility Enhancements

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

(a) If a Utility Owner requests that Developer design or construct a Betterment, then subject to Section 3.14.3(d), 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 D&C 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 D&C Work pursuant to this Section 3.14.2(a) shall not be treated as a TxDOT-Directed Change or extend the Completion Deadlines.

(b) The D&C Price shall not be increased on account of any Betterment added to the D&C 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 3.14.2(b), concurrently with its delivery to the Utility Owner.

(c) If a Utility Owner requests that Developer design or construct a Utility Owner Project, then subject to Section 3.14.3(d), 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 3.14.8. 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.

(d) Developer is fully responsible for coordinating its efforts with Utility Owners and for addressing requests by Utility Owners that Developer design 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 3.14.2.

3.14.3 Utility Agreements

(a) 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 and Attachment 6-1 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).

(b) 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.

(c) 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.

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

(e) 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: (i) are necessary to conform to applicable Law, or (ii) 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.

3.14.4 Failure of Utility Owners to Cooperate

(a) 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: (i) 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, (ii) 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, (iii) Developer becomes aware that any Utility Owner is not cooperating in a timely manner to provide agreed-upon work or approvals, or (iv) 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.

(b) If Developer requests TxDOT's assistance pursuant to Section 3.14.4(a), Developer shall provide evidence reasonably satisfactory to TxDOT that: (i) the Utility Adjustment is necessary, (ii) 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, (iii) Developer has made diligent efforts to obtain the Utility Owner's cooperation, and (iv) the Utility Owner is not cooperating (the foregoing items (i) through (iv) 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*, that 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 discretion. If TxDOT holds contractual rights that might be used to enforce the Utility Owner's obligation to cooperate and TxDOT elects in its discretion not to exercise those rights, then TxDOT shall assign those rights to Developer upon Developer's request; *provided further*, *however*, that 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 3.14.4.

(c) If TxDOT objects to a request for assistance pursuant to Section 3.14.4(a), based on Developer's failure to satisfy one or both of the conditions to assistance described in Sections 3.14.4(b)(i) and (ii), 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 to a request for assistance pursuant to Section 3.14.4(a) based on Developer's failure to satisfy one or both of the conditions to assistance described in Sections 3.14.4(b)(iii) and (iv), 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.

3.14.5 Delays by Utility Owners

(a) 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.

(b) 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 3.14.4(b) 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 12, the delay shall be deemed a Utility Owner Delay and the provisions of this Section 3.14.5 shall apply.

(c) No Change Order for delay to a Critical Path shall be allowable pursuant to Section 3.14.5(b) unless all of the following criteria are met:

(i) the general requirements and conditions for Change Orders set forth in Section 12 have been met,

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

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

(iv) 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 or rulings required by or with any Person in order to design and construct such Utility Adjustment,

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

(vi) the delay is allowable under Section 12.5.3.

(d) Except as set forth in Section 3.14.5(b) 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 3.14.5(b). Any action or inaction by TxDOT as described in Section 3.14.4(b) shall have no bearing on the restriction set forth in this Section 3.14.5(d).

3.14.6 Utility Adjustment Costs

(a) Except as provided in Section 3.14.1 or Section 12, 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 6.2.4.2 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 3.13.4). 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.

(b) 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.

(c) 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 6.2.4.3 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 3.13.4. Developer shall carry out the same duties for acquisition of an Existing Utility Property Interest, as are assigned to Developer in Section 3.13.4 of the Agreement and Section 6.2.3 of the Technical Provisions for the acquisition of any other necessary real property interests.

(d) If for any reason Developer is unable to collect any amounts owed to Developer by any Utility Owner, then: (i) TxDOT shall have no liability for such amounts; (ii) 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 (iii) 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.

(e) 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.

(f) 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.

3.14.7 FHWA Utility Requirements

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

(a) 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 23 CFR Section 635.410 (Buy America) and FHWA's associated policies. Developer shall comply (and shall require the Utility Owners to comply) with 23 CFR Part 645 Subpart A and 23 CFR Section 635.410. Developer acknowledges, however, that without regard to whether such compliance is required, (i) it is not anticipated that Developer will be eligible for FHWA reimbursement of any Utility Adjustment outlays, and (ii) 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.

(b) 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.

(c) 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.

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

3.14.8 Applications for Utility Permits

(a) 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 Section 3.14.8 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 3.14.1, 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.

(b) For all such utility permit applications pending as of or submitted after the Effective Date, Developer shall furnish the most recent Project design information 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.

(c) Developer shall assist TxDOT in deciding whether to approve a permit described in Section 3.14.8(a). 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, Section 6 and Attachment 6-1. 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 discretion.

3.14.9 Security for Utility Adjustment Costs; Insurance

(a) 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.

(b) 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.

3.14.10 Additional Restrictions on Change Orders for Utility Adjustments

In addition to all of the other requirements and limitations contained in this Section 3.14 and in Section 12, the entitlement of Developer to any Change Order under this Section 3.14 shall be subject to the restrictions and limitations set forth in this Section 3.14.10.

(a) 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 or time incurred by Developer are both necessary and reasonable.

(b) As part of the D&C 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 3.14.5(b), 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 12.

(c) Developer shall not be entitled to a Change Order for any costs or delays which it may incur that are attributable to: (i) 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, or (ii) 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.

(d) Developer shall not be entitled to a Change Order for any costs or delays resulting from the performance of Incidental Utility Adjustment Work by Developer or any Utility Owner (including with respect to New Utilities for which Developer is otherwise entitled to a Change Order under Section 3.14.1).

(e) Any Change Order increasing the Price pursuant to this Section 3.14 shall include only the incremental costs arising from the circumstances giving rise to such Change Order.

(f) 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 3.14.1).

(g) 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 Section 6 of the Technical Provisions. Accordingly, except as provided in Section 3.14.1 of this Agreement, 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 3.14.1 of this Agreement, Developer shall not be entitled to any increase in the Price or time extension as a result of any of the following.

(i) 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;

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

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

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

(v) 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.

(h) 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 12 with respect to TxDOT-Directed Changes, the following provisions shall apply with respect to any increase or decrease in the cost of the Work 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:

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

(ii) 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).

(iii) 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.

(iv) 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.

(i) 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.

(j) Except as specified in this Section 3.14 or in Section 12, 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.

3.15 Hazardous Materials Management

3.15.1 Procedures and Compensation for Hazardous Materials Management

(a) Subject to Section 3.15.1(c), 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: (i) promptly notify TxDOT and advise TxDOT of any obligation to notify Governmental Entities under applicable Law; and (ii) take reasonable steps, including design modifications 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 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.

(b) 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.

(c) Subject to the limitations and exceptions set forth in this Section 3.15 and Section 12, Developer shall be entitled to a Change Order as set forth in Section 12.8.4 with respect to additional costs or delays directly attributable to the discovery of (i) Hazardous Materials other than Developer Releases of Hazardous Materials, within the Draft 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 (ii) Hazardous Materials falling within the definition of Force Majeure Event.

3.15.2 Off-Site Disposal and Hazardous Material Generator

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

(i) 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.

(ii) 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.

(iii) 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 3.15.2, specifically excluding generator liability for actual and threatened Developer Releases of Hazardous Materials.

(b) 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:

(i) 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 time, including an extension of the Completion Deadlines.

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

3.16 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 3.16.1. The Price includes compensation for Developer's performance of all environmental requirements and conditions, including mitigation measures, except as described in Section 3.15 and Section 3.16.1.

3.16.1 TxDOT's Responsibility for Approvals

(a) The following TxDOT-Provided Approvals had not yet been obtained as of the Proposal Due Date: Loop 12/IH 35E Environmental Assessment Re-Evaluation; SH 183 Environmental Assessment Re-Evaluation; SH 121/SH 183 (Segment 2E) Environmental Assessment Re-Evaluation; SH 114 Environmental Assessment Re-Evaluation; Section 408 Submittal Review Plan; and Initial Section 408 Permit Submittal Package Determination. All conditions and requirements, including Section 401 Water Quality Certifications, Section 404 and 408 Permits requirements contained in the NEPA Approvals and Initial Section 408 Permit Submittal Package Determination shall automatically be deemed included in the scope of the Work. Under the NEPA Approvals, the Work not associated with the Elm Fork Trinity River will be assessed and authorized under USACE Nationwide Permits 3, 15 and 25. Work associated with the Elm Fork Trinity River and associated drainage will be assessed and authorized under the Section 408 Permit/Regional General Permit 12. 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.

(b) Approval to construct within the Dallas Floodway must be authorized by the USACE under Section 408. TxDOT will secure approval of the Initial Section 408 Permit Submittal Package Determination from the USACE based on the determination that the Project will not adversely impact the operation and maintenance of the flood risk reduction project (Dallas Floodway). Developer shall be responsible for advancing the Section 408 Permit/Regional General Permit 12 approval process to receive construction approval from the USACE.

(c) Developer shall comply with the USACE approved Section 408 Submittal Review Plan.

(d) TxDOT will be responsible for additional Section 401 Water Quality Certifications, Section 404 and 408 Permit requirements resulting from TxDOT-Directed Changes,

or as a result of modifications that are outside of the General Conditions and environmental commitments set forth in the Project's NEPA Approvals and Initial Section 408 Permit Submittal Package Determination which do not arise out of modifications to the Draft Schematic initiated by Developer.

3.16.2 New Environmental Approvals To Be Obtained by Developer

(a) 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 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 21.

(b) 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 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 12. Should new, revised or modified Section 404 permits be required for any reason other than a TxDOT-Directed Change or a Force Majeure Event, 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.

3.17 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 Substantial Completion or such time as is necessary for Developer to satisfy its obligations under the Agreement or until Developer is terminated pursuant to Sections 15 or 16.

3.18 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 D&C 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.

3.19 Risk of Loss or Damage; Maintenance During Construction Period

3.19.1 Developer shall be responsible for maintenance of the D&C Work and the Project Site in accordance with Section 19 of the Technical Provisions. Upon Substantial Completion, Developer shall be responsible for the O&M Work pursuant to the terms of the Contract Documents. Developer shall be relieved from responsibility for maintenance of all other portions of the Project relating to the D&C Work 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 3.19.1 shall not apply to, or limit Developer's obligations, under Section 5 of this Agreement.

3.19.2 Developer shall maintain, rebuild, repair, restore or replace all D&C 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 3.19.1, 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 Project-related property and any other property controlled by any Developer-Related Entity within the Project ROW whether owned by Developer, TxDOT or any other Person.

3.19.3 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 4. SUBMITTALS; DISCLAIMER; ROLES OF PROJECT MANAGEMENT CONSULTANT AND FHWA; GOVERNMENTAL APPROVALS

4.1 Submittal, Review and Approval Terms and Procedures

4.1.1 General

(a) This Section 4.1 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 4.1 and any other provisions of the Contract Documents or Project Management Plan and component plans thereunder concerning submission, review and approval procedures, this Section 4.1 shall exclusively govern and control, except to the extent that the conflicting provision expressly states that it supersedes this Section 4.1.

(b) 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.

4.1.2 Time Periods

(a) 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.

(b) 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.

(c) If at any given time TxDOT is in receipt of more than: (i) 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 (ii) 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 (ii) 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 4.1.2 regarding such Submittals overlap. Whenever TxDOT is in receipt of excess concurrent Submittals, Developer may establish by 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, 7.3.1 and 6.5.3 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.

(d) 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.

(e) TxDOT shall endeavor to reasonably accommodate a 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 4.1.2(d).

4.1.3 TxDOT Discretionary Approvals

If the Submittal is one where the Contract Documents indicate approval or consent or acceptance is required from TxDOT in its 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 4.1.2 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 12.

4.1.4 Other TxDOT Approvals

(a) 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.

(b) 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 4.1.2, then Developer may deliver to TxDOT a 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 12.3.1.

4.1.5 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 4.1.2, 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 4.1.7(a). No such failure or delay by TxDOT in delivering comments, exceptions, objections, rejections or disapprovals within the applicable time period under Section 4.1.2 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.

4.1.6 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 4.1.7(a). 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.

4.1.7 Resolution of TxDOT Comments and Objections

(a) If the Submittal is one not governed by Section 4.1.3, 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:

(i) 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;

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

(iii) 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;

(iv) 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

(v) 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.

(b) 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 4.1. 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 4.1.7(a). Developer agrees to undertake reasonable efforts to accommodate or otherwise resolve any such comments or objections through the review processes described in this Section 4.1. However, if the Submittal is not governed by Section 4.1.3, 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 4.1.7(a) 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, an 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.

(c) 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.

(d) If Developer fails to notify TxDOT within such time period, TxDOT may deliver to Developer a notice stating the date by which Developer was to have addressed TxDOT's comments and that if 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.

(e) After TxDOT receives Developer's explanation as to why the modifications are not required as provided in Sections 4.1.7(b), 4.1.7(c) and 4.1.7(d), 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 4.1.7, and (b) if TxDOT elects to issue a Directive Letter pursuant to Section 12.1.1(b) with respect to the disputed matter, Developer shall proceed in accordance with TxDOT's directive while retaining any Claim as to the disputed amount.

4.1.8 Limitations on Developer's Right to Rely

(a) 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 discretion and in accordance with Section 6.8.2. 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:

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

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

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

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

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

(vi) 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.

(b) Unless expressly permitted under Section 6.8.2, 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 4.1.8(a) 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 6.8.2 or Developer defaults.

(c) 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.

(d) Notwithstanding the provisions of Sections 4.1.8(a), 4.1.8(b) and 4.1.8(c):

(i) Developer shall be entitled to rely on approvals and acceptances from TxDOT: (A) for the limited purpose of establishing that the approval or acceptance occurred or (B) 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;

(ii) Developer shall be entitled to rely on specific Deviations TxDOT approves under Section 3.2.5;

(iii) 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;

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

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

4.2 Disclaimer

4.2.1 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 Schematic or Reference Information Documents, or any action or forbearance in reliance thereon, except to the extent that TxDOT has specifically agreed in Section 12 that Developer shall be entitled to an increase in the Price 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.

4.2.2 TxDOT DOES NOT REPRESENT OR WARRANT THAT THE INFORMATION CONTAINED IN THE DRAFT 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 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 SCHEMATIC OR (vi) ANY FAILURE OR OMISSION TO DEPICT ANY OF THE FOREGOING IN THE DRAFT 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 12.

4.3 Role of Program Manager and TxDOT Consultants

Jacobs Engineering Group, Inc. 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 other TxDOT Consultants in the exercise of their respective duties and responsibilities in connection with the Project.

4.4 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.

4.5 Governmental Approvals and Third Party Agreements

4.5.1 As of the Effective Date, TxDOT has obtained certain of the TxDOT-Provided Approvals based on the Draft Schematic. TxDOT retains responsibility for processing all other TxDOT-Provided Approvals (based on the Draft 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 ROW 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.

4.5.2 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, as such agreements may be amended or revised:

(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. 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.

4.5.3 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 12, 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.

4.5.4 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.

4.5.5 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 this Section 4.5, including execution and delivery of appropriate applications and other documentation in form approved by TxDOT.

4.5.6 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.

4.5.7 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.

4.5.8 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 its 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.

4.6 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 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 5. OPERATIONS AND MAINTENANCE|

5.1 General

5.1.1 General Obligations

(a) Developer shall be responsible for managing, operating, maintaining, repairing, and performing Renewal Work (including complying with the Handback Requirements) with respect to the Project on and for the O&M Limits throughout the O&M Period.

(b) At all times during the O&M Period, Developer shall carry out the O&M Work in accordance with (i) Good Industry Practice, as it evolves from time to time, (ii) the requirements, terms and conditions set forth in the Contract Documents, as the same may change from time to time, (iii) all Laws, (iv) the requirements, terms and conditions set forth in all Governmental Approvals, (v) the approved Project Management Plan and all component parts, plans and documentation prepared or to be prepared thereunder, and all approved updates and amendments thereof, (vi) the approved Operations Management Plan, and all approved updates and amendments thereof, (vii) the approved Maintenance Management Plan, and all approved updates and amendments thereof, (viii) the approved O&M Quality Management Plan, (ix) Best Management Practices, (x) Safety Compliance, the Safety and Health Plan and Safety Standards and (xi) all other applicable safety, environmental and other requirements, taking into account the O&M Limits and other constraints affecting the Project. If Developer encounters a contradiction between subsections (i) through (ix), Developer shall advise TxDOT of the contradiction and TxDOT shall instruct Developer as to which subsection shall control in that instance. No such instruction shall be construed as a TxDOT Change. Developer is responsible for keeping itself informed of and applying current Good Industry Practice.

(c) At all times during the O&M Period, Developer shall provide an O&M Project Manager approved by TxDOT who: (i) will have full responsibility for the prosecution of the Work, (ii) will act as agent and be a single point of contact in all matters on behalf of Developer, and (iii) will be available to respond to TxDOT or TxDOT's Authorized Representatives.

(d) Developer, at its sole cost and expense unless expressly provided otherwise in this Agreement, shall comply with all Technical Provisions, including Safety Standards, during the O&M Period. Sections 19 & 22 of the Technical Provisions sets forth minimum performance requirements related to the O&M Work. Developer's failure to comply with such requirements shall entitle TxDOT to the rights and remedies set forth in the Contract Documents, including the assessment of Liquidated Damages, deductions from payments otherwise owed to Developer, and termination for uncured Developer Default.

(e) In addition to performing all other requirements of the Contract Documents, Developer shall cooperate with TxDOT and Governmental Entities with jurisdiction in all matters relating to the O&M Work, including their review, inspection and oversight of the operation and maintenance of the Project.

5.1.2 Changes in Performance, Operation and Maintenance Standards

(a) TxDOT shall have the right to adopt at any time, and Developer acknowledges it must comply with, all Discriminatory O&M Changes and Non-Discriminatory

O&M Changes. Refer to Section 12.8.7 for Developer's rights to compensation regarding Non-Discriminatory O&M Changes. TxDOT shall provide Developer with prompt notice of Discriminatory O&M Changes and Non-Discriminatory O&M Changes. Without limiting the foregoing, the Parties anticipate that from time to time after the Proposal Due Date, TxDOT will adopt Non-Discriminatory O&M Changes. TxDOT shall have the right in its discretion to add such Discriminatory O&M Changes and Non-Discriminatory O&M Changes to the Technical Provisions by notice to Developer, whereupon they shall constitute amendments, and become part, of the Technical Provisions and replace and supersede inconsistent provisions of the Technical Provisions. TxDOT will identify the superseded provisions in its notice to Developer. All Discriminatory O&M Changes shall be implemented in accordance with Section 5.1.2(d). Non-Discriminatory O&M Changes shall not require a Change Order or Directive Letter and Developer shall not be entitled to any increase in the Price or schedule relief for any Non-Discriminatory O&M Change.

(b) If compliance with a Non-Discriminatory O&M Change requires major repair, reconstruction, rehabilitation, restoration, renewal or replacement of any Element, Developer shall perform the major repair, reconstruction, rehabilitation, restoration, renewal or replacement not later than the first to occur of (i) any deadline recommended or prescribed in or for the Non-Discriminatory O&M Change, (ii) the date when Developer next performs Renewal Work on such Element, (iii) the date when Developer is first obligated to perform Renewal Work on such Element, or (iv) provided TxDOT gives no less than 30 days' prior notice to Developer, the date on which TxDOT commences actions to implement the Non-Discriminatory O&M Change on any Comparable Limited Access Highway that TxDOT manages or operates, as determined by Section 5.1.2(g). If, however, TxDOT adopts the Non-Discriminatory O&M Change prior to the Substantial Completion Date, TxDOT shall issue a notice informing Developer when to implement such Non-Discriminatory O&M Change. Following commencement of any O&M Work pursuant to this Section 5.1.2(b), Developer shall diligently prosecute such O&M Work until completion, and in any event by any deadline for completion reasonably required by TxDOT for such Non-Discriminatory O&M Change. Should Developer dispute the timing for commencement or completion of Work as described in this Section 5.1.2(b), Developer may submit the Dispute for resolution according to the dispute resolution procedures under Section 19; pending such resolution Developer shall prosecute the Work in accordance with TxDOT's notice delivered pursuant to Section 5.1.2(a).

(c) If compliance with a Non-Discriminatory O&M Change requires construction or installation of new improvements at, for or on the Project (and not major repair reconstruction, etc. of existing improvements, governed by Section 5.1.2(b)), Developer shall complete construction and installation of the new improvements according to the implementation period recommended or prescribed in or for the Non-Discriminatory O&M Change. If no such implementation period is recommended or prescribed, Developer shall complete construction and installation of the new improvements according to the implementation period reasonably required by TxDOT for such Non-Discriminatory O&M Change. Should Developer dispute the timing for commencement or completion of such new improvements, Developer may submit the issue for resolution according to the Dispute Resolution Procedures; pending such resolution Developer shall diligently prosecute the Work in accordance with TxDOT's direction.

(d) Developer shall implement a Discriminatory O&M Change only after TxDOT issues a Change Order or Directive Letter therefor pursuant to Section 12. If a

Discriminatory O&M Change requires major repair, reconstruction, rehabilitation, restoration, renewal or replacement of any Element during the O&M Period, or requires construction or installation of new improvements, Developer shall perform the major repair, reconstruction, rehabilitation, restoration, renewal or replacement or the new improvement work according to the schedule therefor adopted in the Change Order for such work. If a Discriminatory O&M Change requires implementation not entailing such work, Developer shall implement it from and after the date TxDOT issues the Change Order.

(e) In the case of any other Discriminatory O&M Change or Non-Discriminatory O&M Change, Developer shall comply from and after the date it becomes effective and Developer is notified or otherwise obtains knowledge of it. For the avoidance of doubt, if Developer has notice or knows of the Discriminatory O&M Change or Non-Discriminatory O&M Change on or prior to the date Developer commences maintenance, routine repair or routine replacement of damaged, worn or obsolete components or materials of the Project, then Developer shall comply with such changes, additions or replacements in carrying out such maintenance, routine repair or replacement.

(f) Developer may apply for TxDOT approval of Deviations from applicable Technical Provisions regarding O&M Work. All applications shall be in writing. Where Developer requests a Deviation as part of the submittal of a component plan of the Project Management Plan, Developer shall specifically identify and label the Deviation. TxDOT shall consider in its discretion, but have no obligation to approve, any such application, and Developer shall bear the burden of persuading TxDOT that the Deviation sought constitutes sound and safe practices consistent with Good Industry Practice and achieves or substantially achieves TxDOT's applicable Safety Standards and criteria. No Deviation shall be deemed approved or be effective unless and until stated in a writing signed by TxDOT's Authorized Representative. TxDOT's affirmative written approval of a component plan of the Project Management Plan shall constitute (i) approval of the Deviations expressly identified and labeled as Deviations therein, unless TxDOT takes exception to any such Deviation and (ii) disapproval of any Deviations not expressly identified and labeled as Deviations therein. TxDOT's lack of issuance of a written 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 under Section 19. TxDOT may elect to process the application as a Change Request under Section 12 rather than as an application for a Deviation.

(g) For purposes of Section 5.1.2(b)(iii), a change, addition or replacement shall be deemed to have been first applied by TxDOT if and when TxDOT commences implementing actions on other Comparable Limited Access Highways that TxDOT manages or operates. Developer shall not be entitled to delay commencement or completion of its work on grounds that TxDOT is delayed in commencing or completing implementing actions on Comparable Limited Access Highways where:

(i) TxDOT is delayed due to the extensive system of Comparable Limited Access Highways for which TxDOT is responsible; or

(ii) The change, addition or replacement to the Technical Provisions or Safety Standard applies only upon the occurrence of a condition or circumstance that has not yet occurred in respect of a Comparable Limited Access Highway that TxDOT manages or operates.

5.1.3 Duration of Hazardous Materials Management

The provisions of Section 3.15 in respect of Hazardous Materials Management that are not specific to the original construction of the Project shall apply throughout the O&M Period.

5.1.4 Utility Accommodation

(a) It is anticipated that from time to time during the course of the O&M Period, Utility Owners will apply for additional utility permits to install new Utilities that would cross or longitudinally occupy the Project ROW, or to modify, repair, upgrade, relocate or expand existing Utilities within the Project ROW. In such circumstances, the provisions of Section 3.14.4 shall apply.

(b) Throughout the O&M Period, Developer shall monitor Utilities and Utility Owners within the Project ROW that are within the O&M Limits for compliance with applicable utility permits, Utility Joint Use Acknowledgments, Utility Joint Use Agreement, Utility Agreements, easements, the Utility Accommodation Rules and other applicable Laws, and shall use diligent efforts to obtain the cooperation of each Utility Owner having Utilities within the Project ROW that is within the O&M Limits. If (i) Developer reasonably believes that any Utility Owner is not complying with the terms of a utility permit, Utility Joint Use Acknowledgment, Utility Joint Use Agreements, Utility Agreements, easements, the Utility Accommodation Rules or other applicable Law affecting a Utility within the Project ROW, or (ii) any other dispute arises between Developer and a Utility Owner with respect to a Utility within the Project ROW that is within the O&M Limits, despite Developer having exercised its diligent efforts to obtain the Utility Owner's cooperation, Developer shall promptly provide Notice to TxDOT, and TxDOT and Developer shall work together in the manner described in Section 3.14.4; *provided*, *however*, that the "conditions to assistance" (as that term is used in Section 3.14.4) are that Developer shall provide evidence reasonably satisfactory to TxDOT that (x) Developer's position in the dispute is reasonable, (y) Developer has made diligent efforts to obtain the Utility Owner's cooperation, and (z) the Utility Owner is not cooperating. With respect to the Parties' rights and obligations described in Section 3.14.4, for purposes of this Section 5.1.4(b) the conditions to assistance described in clauses (i), (y) and (z) of the preceding sentence shall be treated in the same manner as those described in Sections 3.14.4(a) and (b).

(c) At Developer's request, TxDOT and Developer shall work jointly to establish a scope of work and budget for TxDOT's Recoverable Costs in connection with providing such assistance to Developer. Subject to any agreed scope of work and budget, Developer shall reimburse TxDOT for TxDOT's Recoverable Costs in connection with providing such assistance to Developer (including all reasonable costs of litigation if TxDOT agrees to pursue litigation against a Utility Owner).

5.1.5 Accommodation of Third-Party Signage and Lighting

(a) In addition to the warning, regulatory, and guide signs within the Project ROW, Developer shall accommodate within the Project ROW third-party signs, including logo type signs. Developer shall coordinate and cooperate with any third party performing such work. Developer shall review with TxDOT all third-party requests for new signs in the Project ROW. Such requests are subject to TxDOT's approval. TxDOT may solicit input from Developer in reviewing applications for new third-party signs, but will retain sole authority for approving installation of these signs. All costs associated with fabricating and installing third-party signs shall be borne by the sign applicant. TxDOT may require Developer to fabricate and/or install any of these signs as a TxDOT Change.

(b) All third-party requests for lighting within the Site shall be subject to TxDOT approval, and TxDOT retains sole authority for approving installation of such lighting.

5.1.6 Updates of Record Drawings

Within 30 days after undertaking any O&M Work that results in a significant change to the Project design or construction, Developer shall update the Record Drawings to reflect such change.

5.1.7 Frontage Roads

TxDOT shall be solely responsible, at its expense, for handling requests and permitting for adjacent property access to frontage roads of the Project. Nothing in the Contract Documents shall restrict TxDOT from granting access permits or determining the terms and conditions of such permits. TxDOT will keep Developer regularly informed of access permit applications and will deliver to Developer a copy of each issued access permit within five days after it is issued. Developer shall have no claim for any increase in the Price or other compensation by reason of TxDOT's grant of access permits, the terms and conditions thereof, or the actions of permit holders or their employees, agents, representatives and invitees. Developer at its expense shall cooperate and coordinate with permit holders to enable them to safely construct, repair and maintain access improvements allowed under their access permits.

5.2 O&M Contracts

If Developer elects not to self-perform the O&M Work, it shall enter into an O&M Contract for the O&M Work, which O&M Contract shall be a Major Subcontract. For purposes of this Section 5.2, "self-perform" means performance of at least thirty percent of the aggregate value of the O&M Work over the Term (excluding Rehabilitation Work and Handback Requirements Work). The O&M Contractor shall have the expertise, qualifications, experience, competence, skills and know-how to perform the O&M Work and related obligations of Developer in accordance with this Agreement.

5.3 Coordination of Operations and Maintenance Responsibilities.

5.3.1 Developer recognizes and acknowledges that TxDOT will control operation and maintenance of that portion of the Project that is not included within the O&M Limits. During the period TxDOT retains operation and maintenance responsibility for any portion of the Project, TxDOT shall maintain such portion in accordance with current TxDOT maintenance standards and

conduct traffic management activities on such portion in accordance with TxDOT's standard traffic management practices and procedures.

5.3.2 Developer is responsible for coordinating its traffic management and control, Planned Maintenance, other maintenance activities, and other O&M Work on or for the O&M Limits with that of TxDOT. Developer and TxDOT will cooperate and coordinate with respect to their operation and maintenance activities in order to minimize disruptions of traffic on the Project and ensure that such operation and maintenance activities are carried out in accordance with then-current maintenance standards and then-current traffic management standards, practices and procedures.

5.3.3 Except as otherwise specified in the Contract Documents, no interference with or disruption of traffic due to activities on or the management or condition of that portion of the Project that is not included within the O&M Limits, and no failure to meet such standards, practices and procedures by TxDOT shall entitle Developer to any Claim, Change Order or relief from deductions to any Monthly Disbursement of the O&M Price.

5.4 Developer Inspection, Testing and Reporting

5.4.1 Developer shall carry out General Inspections, Specialist Inspections and Developer Audit Inspections in accordance with the Technical Provisions, including Section 19.10 of the Technical Provisions, and the Project Management Plan. Developer shall use the results of General Inspections, Specialist Inspections and Performance Inspections to develop and update the O&M Work Schedule, to maintain asset condition and service levels, and to develop programs of maintenance and Renewal Work to minimize the effect of O&M Work on Users and other members of the public. Developer shall deliver to TxDOT not less than seven days' prior notice of any General Inspection, Specialist Inspection or Performance Inspection. TxDOT may attend and observe any General Inspection, Specialist Inspection or Performance Inspection.

5.4.2 Developer shall submit all reports relating to the O&M Work, including the O&M annual reports, in the form, with the content and within the time required under the Contract Documents.

5.5 Routine Maintenance Activities

Routine Maintenance activities are identified activities that involve the repair or preservation of any element in order to prevent the deterioration of that asset to an unsafe or irreparable state. The Maintenance Management Plan shall include Developer's plan for performing routine maintenance of all the assets detailed in Table 19-5 for the Term. The Maintenance Management Plan shall include the timing, frequencies, scope and nature of the routine maintenance activities on an annual basis to meet the performance requirements as set forth in Table 19-5.

5.6 Maintenance Management Plan

5.6.1 Developer shall submit the Maintenance Management Plan ("**MMP**") to TxDOT for review and approval at least 60 days prior to NTP2. Approval by TxDOT of the MMP shall be a condition of NTP2. Developer shall update the MMP and submit it along with the initial O&M

Work Schedule to TxDOT for review and approval no later than 90 days before Substantial Completion. The Maintenance Management Plan shall meet the requirements set forth in Section 19.9 of the Technical Provisions, and comply with the Contract Documents, applicable Government Approvals, and applicable Law. Following the delivery of initial MMP, Developer shall submit to TxDOT, for TxDOT's review and approval, a MMP update meeting the requirements of Section 19.9 of the Technical Provisions by each anniversary after Substantial Completion.

5.6.2 The MMP and each update shall show the timing of and methodology for performing the various O&M Work. The duration and number of working days of any O&M Work set forth in the MMP that requires Lane Closures shall be subject to the written approval of TxDOT.

5.6.3 TxDOT shall review the MMP and each update and shall meet with Developer within 30 Days after its submittal to discuss revisions and clarifications or to resolve any disagreements. Within 15 Days after such meeting, Developer shall resubmit the MMP to TxDOT. TxDOT will either approve or disapprove the MMP within 15 Days, with comments, objections, recommendations or disapprovals noted in writing. If TxDOT disapproves the MMP, within ten days after receiving notice of comments, objections, recommendations or disapprovals from TxDOT, Developer shall submit to TxDOT a revised initial or updated MMP rectifying such matters and, for matters with which Developer disagrees, a written notice setting forth those comments, objections, recommendations and disapprovals that Developer Disputes, which notice shall give details of Developer's grounds for Dispute. If Developer fails to give such notice within such time period, it shall be deemed to have accepted the comments, objections and recommendations and the initial or updated MMP, as applicable, shall thereupon be deemed revised to incorporate the comments and recommendations and to rectify the objections or disapprovals. After timely delivery of any such notice, Developer and TxDOT shall endeavor in good faith to reach agreement as to the matters listed in the notice. If no agreement is reached as to any such matter within 30 days after Developer delivers its notice, either Party may refer the Dispute to the Disputes resolution procedures applicable to this Agreement.

5.6.4 All portions of the initial or updated MMP that have been agreed to by the Parties shall govern. Until resolution of any portion of the initial or updated MMP that is in Dispute, the treatment of that portion in the immediately preceding approved MMP shall remain in effect and govern.

5.7 Renewal Work

5.7.1 Section 19 of the Technical Provisions sets forth Performance Requirements for the Elements. Developer shall diligently perform Renewal Work as and when necessary to maintain compliance with such Performance Requirements and restore the Useful Life of each Element at the end of its Residual Life. Developer also shall perform Renewal Work according to the other applicable terms of the Technical Provisions, including, when applicable, the Handback Requirements. Developer shall use the O&M Work Schedule, as updated from time to time, as the principal guide for scheduling and performing Renewal Work; but complying with the O&M Work Schedule shall not excuse or be a defense to any failure to comply with the Performance Requirements.

5.7.2 Not later than 90 days after the end of each calendar year, Developer shall deliver to TxDOT a written report of the Renewal Work performed in the immediately preceding calendar year. The report shall describe, by location, each Element as listed in the O&M Work Schedule and other component, the type of work performed, the dates of commencement and completion and the cost, as well as the total cost of all Renewal Work performed during the calendar year.

5.8 O&M Work Schedule

5.8.1 Section 19 of the Technical Provision details the requirements for the O&M Work Schedule. Not later than 90 days before the Substantial Completion Date, Developer shall prepare and submit to TxDOT for review and comment an O&M Work Schedule.

5.8.2 Developer shall estimate the Useful Life of each Element within the O&M Work Schedule based on (a) Developer's reasonable expectations respecting the manner of use, levels and mix of traffic, environmental conditions, and wear and tear and (b) the assumption that, when subject to Routine Maintenance, the Element will comply throughout its Useful Life with each applicable Performance Requirement. Developer shall estimate the Residual Life of each Element within the O&M Work Schedule based on its Age and whether (i) the Element has performed in service in the manner and with the levels and mix of traffic and wear and tear originally expected by Developer (ii) Developer has performed Routine Maintenance of the Element, and (iii) the Element has complied throughout its Age with each applicable Performance Requirement.

5.8.3 Not later than 90 days before the beginning of the second full calendar year after the Substantial Completion Date and each calendar year thereafter, Developer shall prepare and submit to TxDOT for review and comment either (a) a revised O&M Work Schedule or (b) the then-existing O&M Work Schedule accompanied by a statement that Developer intends to continue in effect the then-existing O&M Work Schedule without revision (in either case, referred to as the "**Updated O&M Work Schedule**"). Developer shall make revisions as reasonably indicated by experience and then-existing conditions respecting the O&M Limits, the factors described in Section 19 of the Technical Provisions, changes in estimated costs of Renewal Work, changes in technology, changes in Developer's planned means and methods of performing Renewal Work, and other relevant factors. The updated O&M Work Schedule shall show the revisions, if any, to the prior O&M Work Schedule and include an explanation of reasons for revisions. If no revisions are proposed, Developer shall include an explanation of the reasons no revisions are necessary. The O&M Work Schedule shall include a detailed description of the Renewal Work activities, if any, planned for the current year and for the next five-year period.

5.8.4 At TxDOT's request, Developer and its O&M Contractor(s) shall promptly meet and confer with TxDOT to review and discuss the original or updated O&M Work Schedule.

5.8.5 Within 30 days after receiving the original or any updated O&M Work Schedule, TxDOT shall have the right to object to the original or updated O&M Work Schedule or any of its elements. TxDOT may base its comments, objections or exceptions on whether the original or updated O&M Work Schedule and underlying assumptions are reasonable, realistic and consistent with Good Industry Practice, Project experience and condition, applicable Technical Provisions, Governmental Approvals and Laws.

5.8.6 Within 30 days after receiving notice of comments, objections, exceptions, recommendations, objections or disapprovals from TxDOT, Developer shall submit to TxDOT a revised original or updated O&M Work Schedule rectifying such matters and, for matters it disagrees with, a Notice setting forth those comments, objections, exceptions, recommendations and disapprovals that Developer disputes. Such Notice shall give details of Developer's grounds for dispute. If Developer fails to give such Notice within such time period, it shall be deemed to have accepted the comments, objections, exceptions and recommendations and the original or updated O&M Work Schedule, as applicable, shall thereupon be deemed revised to incorporate the comments and recommendations and to rectify the objections and exceptions. After delivery of any such Notice, Developer and TxDOT shall endeavor in good faith to reach agreement as to the matters listed in the Notice. If no agreement is reached as to any such matter within 30 days after Developer delivers its notice, either Party may refer the Dispute to the Disputes Resolution Procedures for determination.

5.8.7 Until resolution of any portion of the original O&M Work Schedule that is in Dispute, the treatment of that portion in the original O&M Work Schedule shall remain in effect and govern. Until resolution of any portion of the updated O&M Work Schedule that is in Dispute, the treatment of that portion in the immediately preceding O&M Work Schedule shall remain in effect and govern.

5.9 O&M Quality Management Plan

5.9.1 On or before 60 days prior to NTP2, Developer shall prepare and submit an operation and maintenance quality management plan ("**O&M-QMP**") meeting the requirements of this Section 5.9 and of Section 2.2.9 of the Technical Provisions. Approval by TxDOT of the O&M-QMP shall be a condition of NTP2. Developer shall update the O&M-QMP and submit it to TxDOT for review and approval no later than 90 days before Substantial Completion.

5.9.2 TxDOT shall review the O&M-QMP and meet with Developer within 30 Days after its submittal to discuss revisions and clarifications or to attempt to resolve any disagreements. Within 15 days after such meeting, Developer shall resubmit the final O&M-QMP to TxDOT. TxDOT will either approve or disapprove the O&M-QMP within 15 days, with objections or corrections noted in writing. If TxDOT disapproves the O&M-QMP, Developer shall resubmit the O&M-QMP within ten days to the satisfaction of TxDOT in order to resolve TxDOT's issues and concerns. The foregoing process shall continue until TxDOT has approved the O&M-QMP.

5.10 Policing, Security and Incident Response

5.10.1 Police Services

(a) Developer acknowledges that the Texas Department of Public Safety is empowered to enforce all applicable Laws and to enter the Project at any and all times to carry out its law enforcement duties. No provision of this Agreement is intended to surrender, waive or limit any police powers of the Texas Department of Public Safety or any other Governmental Entity, and all such police powers are hereby expressly reserved.

(b) TxDOT shall not have any liability or obligation to Developer resulting from, arising out of or relating to the failure of the Texas Department of Public Safety or any other public law enforcement agency to provide services, or its negligence or misconduct in providing services.

(c) TxDOT and third parties with responsibility for traffic regulation and enforcement shall have the right to install, operate, maintain and replace cameras or other equipment on the Project that relate to traffic regulation or enforcement. Developer shall coordinate and cooperate, and require its Contractors to coordinate and cooperate, with any such installation, maintenance and replacement activities.

5.10.2 Security and Incident Response

(a) Developer is responsible for the safety and security of the O&M Limits during the O&M Period and the workers and public thereon during all construction, operation and maintenance activities under the control of any Developer-Related Entity.

(b) Developer shall comply with all rules, directives and guidance of the U.S. Department of Homeland Security and comparable State agency, and shall coordinate and cooperate with all Governmental Entities providing security, first responder and other public emergency response services. Without limiting the foregoing, whenever the Homeland Security Advisory System (HSAS) or successor system is raised to "orange" or "red" or comparable level of threat or alert for any region in which the Project is located or that the Project serves, Developer shall assign management personnel with decision-making authority to be personally present at the relevant emergency operations center serving the region. Developer shall provide such service 24 hours a day, seven days a week, until such level or threat or alert is reduced below the "orange", "red" or comparable level, or until the lead agency at the operations center determines such staffing level is no longer necessary.

(c) Developer shall perform and comply with the provisions of the Technical Provisions concerning Incident response, safety and security.

(d) Developer shall implement all Incident response, safety and security procedures, protocols and requirements set forth in the Incident Management Plan and Emergency Plan (components of the Project Management Plan).

5.11 Handback Requirements

5.11.1 Handback Condition

Subject to Section 5.11.3(b), on the Termination Date Developer shall cause the O&M Limits, at no charge to TxDOT, to be in the condition and meet all of the requirements of the Elements detailed in Section 19 of the Technical Provisions for the Residual Life at Handback specified in the Handback Requirements.

5.11.2 Handback Inspections

The Parties shall conduct inspections of the O&M Limits at the times and according to the terms and procedures specified in the Handback Requirements, for the purposes of:

(a) Determining and verifying the condition of all Elements and their Residual Lives;

(b) Adjusting, to the extent necessary based on inspection and analysis, Element Useful Lives, Ages, Residual Lives, estimated costs of Renewal Work and timing of Renewal Work;

(c) Revising and updating the O&M Work Schedule to incorporate such adjustments;

(d) Determining the Renewal Work required to be performed and completed prior to the Termination Date, based on the requirements for Residual Life at Handback specified in the Handback Requirements, the foregoing adjustments and the foregoing changes to the O&M Work Schedule;

(e) Verifying that such Renewal Work has been properly performed and completed in accordance with the Handback Requirements.

5.11.3 Renewal Work under Handback Requirements

(a) Developer shall diligently perform and complete all Renewal Work required to be performed and completed prior to the Termination Date, based on the required adjustments and changes to the O&M Work Schedule to meet the Handback Requirements.

(b) In the event of an early termination of this Agreement (other than under Section 15), this Section 5.11 shall apply to the extent of any Renewal Work in the O&M Work Schedule as of the early Termination Date

5.11.4 Handback Plan

Developer shall prepare a Handback Plan that contains the methodologies and activities to be undertaken or employed to meet the Handback Requirements at the end of the Term. Developer shall submit the Handback Plan, including a Residual Life Methodology plan, to TxDOT for review and approval at least 60 months before the anticipated Termination Date.

5.12 Requirements Applicable to Design and Construction Work

To the extent that Developer performs any design or construction work as part of the O&M Work, Developer shall comply with the requirements and specifications for design and construction set forth in the Technical Provisions and in the applicable sections of this Agreement, except as otherwise set forth herein or approved in advance by TxDOT.

5.13 Future Improvements

The scope of this Agreement is limited to the performance of the Work set out in the Contract Documents and does not pertain to the development, design, construction, financing, operation or maintenance of any Future Improvement. Developer acknowledges that any Future Improvement shall be undertaken by TxDOT in its discretion and that contracts for the design, construction,

financing, operation, maintenance or rehabilitation of any such Future Improvement may be awarded to Persons other than Developer pursuant to such process as TxDOT may determine. Notwithstanding the foregoing, Developer shall perform its obligations under this Agreement and work cooperatively with TxDOT with a view to minimizing the cost to TxDOT of integrating and coordinating such work with the Work.

5.14 Operation, Maintenance and Rehabilitation of Future Improvements

Notwithstanding Section 5.13, TxDOT may issue a Change Order to Developer requiring Developer to take over the operation, maintenance and rehabilitation of any Future Improvements and upon the issuance thereof all such work shall be O&M Work for all purposes of this Agreement and shall be performed by Developer in accordance with the terms and conditions of the Contract Documents.

SECTION 6. CONTROL OF WORK; MANAGEMENT SYSTEMS AND OVERSIGHT

6.1 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.

6.2 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 Developer's Safety and Health Plan and all such requirements under applicable Law.

6.3 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.

6.4 Project Management Plan

6.4.1 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.

6.4.2 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.

6.4.3 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.

6.4.4 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.

6.4.5 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.

6.4.6 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.

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

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

6.4.9 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. Further, (i) Developer shall contract for all CQAF services through an independent firm(s); the CQAF shall not be owned at any time during the Term by Developer or any subsidiary or related company affiliated with Developer or the Design Firm(s) unless agreed to by TxDOT at TxDOT's discretion; and (iii) 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 approval.

6.5 Traffic Management

6.5.1 Developer shall be responsible for the management of traffic on the Project (a) from NTP2 until the commencement of the O&M Period, for the entire Project and (b) from commencement of the O&M Period through the Term, solely for the O&M Limits. Developer shall manage traffic so as to preserve and protect safety of traffic on the Project and Related Transportation Facilities and, to the maximum extent practicable, to avoid disruption, interruption or other adverse effects on traffic flow, throughput or level of service on the Project and Related Transportation Facilities. Developer shall conduct traffic management in accordance with all applicable Technical Provisions, Laws and Governmental Approvals, and in accordance with the Traffic Management Plan.

Developer shall prepare and submit to TxDOT for its approval a Traffic Management Plan, addressing (a) orderly and safe movement and diversion of traffic on Related Transportation Facilities during Project construction, (b) throughout the Term, orderly and safe movement and diversion of traffic on the Project, and (c) orderly and safe diversion of traffic on the Project and Related Transportation Facilities necessary in connection with Renewal Work or with field maintenance and repair work in response to Incidents, Emergencies and lane closures. Developer shall prepare the Traffic Management Plan according to the schedule set forth in the Technical Provisions. The Traffic Management Plan shall comply with the Technical Provisions concerning traffic management and traffic operations. Developer shall carry out all traffic management during the Term in accordance with the approved Traffic Management Plan.

Developer shall implement the Traffic Management Plan to promote safe and efficient operation of the Project and Related Transportation Facilities at all times during the course of any construction or operation of the Project by Developer and during the Utility Adjustment Work.

TxDOT shall have at all times, without obligation or liability to Developer, the right to (a) issue Directive Letters to Developer regarding traffic management and control (with which Developer shall comply), or directly assume traffic management and control, of the Project during any period that the Executive Director determines such action will be in the public interest as a result of an emergency or natural disaster; and (b) provide on the Project, via message signs or other means consistent with Good Industry Practice, non-Discriminatory traveler and driver information, and other public information (*e.g.*, amber alerts), provided that the means to disseminate such information does not materially interfere with the functioning of the ETCS; *provided, however*, that notwithstanding any such material interference, Developer shall nonetheless provide such traveler, driver and other public information as is required to comply with the Technical Provisions and applicable Law.

6.6 Oversight, Inspection and Testing; Meetings

6.6.1 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.

6.6.2 Oversight by TxDOT and Others

(a) 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: (i) to comply with FHWA, U.S. Army Corps of Engineers or other applicable federal agency requirements, (ii) to verify Developer's compliance with the Contract Documents and Project Management Plan as provided in Section 20.5 or (iii) to comply with applicable Law. 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.

(b) 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 10 days after Developer receives them.

(c) At all points in performance of the Work at which specific inspections or approvals by TxDOT are required by the Contract Documents or the Project Management Plan, Developer shall not proceed beyond that point until TxDOT has made such inspection or approval or waived its right 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 or test the work. Such oversight, inspection 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.

(d) 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.

(e) Without limiting the foregoing, Developer shall afford TxDOT and its Authorized Representative: (i) safe and unrestricted access to the Project at all times, (ii) safe access during normal business hours to Developer's Project offices and operations buildings and (iii) unrestricted access to data related to the Work, subject to Section 20.1. 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.

(f) 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.

6.6.3 Obligation to Uncover Finished Work

Developer shall inform TxDOT of any part of the Construction Work, Renewal Work or work required to meet Handback Requirements that 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. 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 the Contract Documents 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 6.6.3 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.

6.6.4 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 notice and a meeting agenda at least three Business Days in advance of each meeting.

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

6.7.1 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 6.8.2) or waiver of any warranty or legal or equitable right with respect thereto. TxDOT may request remedies for Nonconforming Work or identify additional Work which must be done to bring the Work into compliance with the requirements of the Contract Documents at any time (i) with respect to the D&C Work, prior to Final Acceptance and (ii) with respect to the O&M Work, prior to the expiration of the O&M Period, in each case, 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.

6.7.2 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 (i) with respect to the D&C Work, Final Acceptance or (ii) with respect to the O&M Work, the expiration of the O&M Period, as applicable, 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 or Surety 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.

6.8 Nonconforming Work

6.8.1 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 or obtain reimbursement from Developer for such cost.

6.8.2 Agreement to Accept Nonconforming Work

If Developer elects not to fully correct any Nonconforming Work pursuant to Section 6.8.1 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 or other costs relating to the Nonconforming Work; (b) the amount of the Price allocated to such Work; (c) 100% of Developer's cost savings associated with its failure to perform the Work in accordance with the requirements of the Contract Documents or (d) solely with respect to the O&M Work, a percentage to be determined in TxDOT's discretion of the cost to correct such Nonconforming Work. 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 6.8.1, including the timelines therein, TxDOT shall have discretion regarding acceptance or rejection of Nonconforming Work and shall have discretion with regard to the amount payable in connection therewith. Payment, reimbursement or deduction of the amounts owing to TxDOT under this Section 6.8.2 shall be a condition precedent to the acceptance of the applicable Nonconforming Work. Where such Nonconforming Work is allowed to remain uncorrected in accordance with this Section 6.8.2 and such Nonconforming Work requires that a Performance Requirement different to

that set forth in Section 19 of the Technical Provisions is necessary, TxDOT shall establish such different Performance Requirement for such Nonconforming Work.

SECTION 7. CONTRACTING AND LABOR PRACTICES

7.1 DBE Requirements

7.1.1 TxDOT's 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 DBE participation goal in the Work for professional services for the Project is established as 7% and for construction of the Project is established as 7%.

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 agrees to use good faith efforts to encourage DBE participation in the O&M Work. 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. Developer shall retain, employ and utilize the firms and organizations specifically listed in the Project Management Plan to fill the corresponding Major Subcontractor positions listed therein. For Major Subcontractors not known as of the Effective Date, Developer's selection thereof shall be subject to TxDOT's prior approval.

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 20.1, 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 approval; and (ii) for Major Subcontracts that are with Key Subcontractors, Developer may terminate the Major Subcontract 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 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 (as applicable), 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 Developer's team;

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

(iv) solely for any Key Subcontractor for which a teaming agreement instead of a Subcontract was provided as of the Effective Date, such Key Subcontractor fails to negotiate in good faith in a timely manner in accordance with provisions established in such teaming agreement.

(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 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 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 notice.

(f) Not be assignable by the Subcontractor to any Person other than TxDOT (or its assignee) without Developer's prior 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 20.4 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 (i) TxDOT delivers 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 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.

7.3.9 Additional Requirements for Design-Build and O&M Contracts

(a) Before entering into a Design-Build Contract or O&M Contract or any supplement or amendment thereto, Developer shall submit a true and complete copy of the proposed Design-Build Contract or O&M Contract to TxDOT for review and comment. TxDOT may disapprove only if the Design-Build Contract or O&M Contract (i) does not comply, or is inconsistent, in any material respect with the applicable requirements of the Contract Documents, including that it does not comply or is inconsistent with this Section 7 or with the applicable requirements of Section 20 regarding maintenance of books and records, does not incorporate the applicable federal requirements set forth in Exhibit 3, or is inconsistent with the requirements of the relevant scope of Work, (ii) increases TxDOT's liability or (iii) adversely affects TxDOT's step-in rights.

(b) The Design-Build Contract and O&M Contract also shall expressly require the personal services of and not be assignable by the Design-Build Contractor or O&M Contractor without Developer's and TxDOT's prior consent, each in its discretion, provided that this provision shall not prohibit the subcontracting of portions of the Work.

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 Sections 7.4.4 and 7.4.5, 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 one or more Authorized Representative(s) who shall have onsite field and office authority to represent and act for Developer. Such Authorized Representative(s) 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) D&C Project Manager during the Construction Period; (b) Design Manager during the Construction Period; (c) Superintendent during the Construction Period; (d) Environmental Compliance Manager during the Construction Period; (e) Maintenance Manager during the O&M Period; (f) Maintenance QC Manager during the O&M Period; and (g) O&M Project Manager during the O&M Period.

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 sufficient for satisfactory performance of the tasks to be performed by such Key Personnel. In addition to the foregoing, TxDOT reserves the right to require a greater time commitment, which could include a 100% time commitment from any Key Personnel during the Construction Period or the O&M Period, as applicable, if TxDOT, in its discretion, determines that such personnel are not devoting sufficient time to the prosecution and performance of the Work for satisfactory performance of the tasks to be performed by such Key Personnel.

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 that would accrue to TxDOT in such event. Therefore, for the period beginning on the Effective Date and ending on the fifth anniversary of the Substantial Completion Date, if an individual filling a Key Personnel role is not available or not actively involved in the prosecution and performance of the Work sufficient for satisfactory performance of the tasks to be performed by such Key Personnel, as determined by TxDOT in its 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
Construction Period	
D&C Project Manager	$323,000

Superintendant	$303,000
Lead Quality Manager	$368,000
Environmental Compliance Manager	$316,000
Design Manager	$287,000
Lead Bridge Design Engineer	$122,000
Lead Roadway Design Engineer	$122,000
Professional Services Quality Control Manager	$213,000
Public Information Coordinator	$168,000
ROW Acquisition Manager	$243,000
Utility Manager	$241,000
D&C Safety Manager	$214,000
O&M Period	
O&M Project Manager	$179,000
Maintenance Manager	$165,000
Maintenance QC Manager	$160,000
O&M Safety Manager	$136,000

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 sufficient for satisfactory performance of the tasks to be performed by such Key Personnel 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 (x) beginning on (i) to the extent Developer shall not have submitted a proposed replacement to TxDOT, (A) the date immediately following the 30-day period after a Key Personnel role is vacated due to death, retirement, injury or no longer being employed by the applicable Developer-Related Entity (except where such employee is moved to an affiliated company) or (B) the date immediately following the fifteen-day period after a Key Personnel role is vacated for any other reason, as applicable, or (ii) to the extent Developer shall have submitted a proposed replacement to TxDOT, the date on which TxDOT rejects the proposed replacement for the vacated Key Personnel role, as applicable, and (y) ending on (and excluding) the date on which such role has been filled by an individual approved by TxDOT, 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
Construction Period	
D&C Project Manager	$21,500
Superintendant	$30,300
Lead Quality Manager	$36,800

Environmental Compliance Manager	$31,600
Design Manager	$28,700
Lead Bridge Design Engineer	$12,200
Lead Roadway Design Engineer	$12,200
Professional Services Quality Control Manager	$21,300
Public Information Coordinator	$16,800
ROW Acquisition Manager	$24,300
Utility Manager	$24,100
D&C Safety Manager	$21,400
O&M Period	
O&M Project Manager	$17,900
Maintenance Manager	$16,500
Maintenance QC Manager	$16,000
O&M Safety Manager	$13,600

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 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, and Developer shall not be liable for liquidated damages under Section 7.4.5 for the reasons set forth in clauses (a) and (c) of this Section 7.4.6; *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 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.

7.5 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 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 Opportunity

7.9.1 Developer's Job Training Plan and Small Business Opportunity Plan applicable to the Project are set forth in Exhibit 8. The purpose of the Job Training and Small Business Opportunity 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 the Small Business Opportunity Plan. Developer may elect to provide on the job training. If Developer makes the election, it shall provide a notice to the Contract Compliance Section of the Office of Civil Rights of the Texas Department of Transportation at 125 East 11th St., Austin, Texas 78701-2483, with a copy to TxDOT as provided in Section 24.11.3, and Developer shall perform and comply with all requirements set forth in the Job Training Plan.

7.9.2 Developer shall include provisions to effectuate the Job Training Plan (if the election is made) and Small Business Opportunity 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 State Use Program

7.11.1 Developer shall comply with the provisions of Chapter 122 of the Texas Human Resources Code that are applicable to the State or TxDOT. The use of Community Rehabilitation Programs (CRP's) is outlined in Chapter 122 and 40 Texas Administrative Code §189 and is strongly encouraged by TxDOT. Specifically, Section 122.008 (Procurement at Determined Prices) states: "A suitable product or service that meets applicable specifications established by the state or its political subdivisions and that is available within the time specified must be procured from a CRP at the price determined by the council to be the fair market price."

7.11.2 Developer will make a good faith effort to negotiate with CRP's and the Texas Industries for the Blind and Handicapped (TIBH) for subcontracts at a fair market price. TxDOT reserves the right to facilitate Disputes involving subcontracts or potential subcontracts with CRP's and TIBH.

7.12 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 AND RETAINAGE BONDS; O&M SECURITY; GUARANTEES

8.1 Provision of Bonds during Construction Period

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

8.1.1 Reserved.

8.1.2 Developer shall maintain its Proposal Security in place until such date as the D&C Performance Bond and the D&C Payment Bond have been provided in accordance with Sections 8.1.3 and 8.1.4 below. Developer shall forfeit its Proposal Security upon failure to provide the D&C Performance Bond and the D&C Payment Bond in accordance with this Section 8.1.

8.1.3 On or before the date that is ten days after the Effective Date, Developer shall deliver to TxDOT a performance bond in the amount of $_____ **[*Insert the amount set forth in line 24 of Form M-1.1*]** in the form attached hereto as Exhibit 9 (the "**D&C Performance Bond**"). On the date that is one year after Final Acceptance, TxDOT shall provide a release of the D&C Performance Bond provided that (and upon such date thereafter that) all of the following have occurred: (a) Developer is not in default under this Agreement; and (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.

8.1.4 On or before the date that is ten days after the Effective Date, Developer shall deliver to TxDOT a payment bond in the amount of $_____ **[*Insert the amount set forth in line 24 of Form M-1.1*]** in the form attached hereto as Exhibit 10 (the "**D&C Payment Bond**"). TxDOT will release the D&C Payment Bond upon: (a) receipt of (i) evidence satisfactory to TxDOT that all Persons eligible to file a claim against the D&C 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 D&C Payment Bond, or (b) expiration of the statutory period for Subcontractors to file a claim against the D&C 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 D&C Retainage Bond in the form attached hereto as Exhibit 11. The D&C Retainage Bond shall be in the amount of four percent of the D&C 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 Developer in connection with this Agreement. TxDOT will release the D&C Retainage Bond upon Final Acceptance.

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 confirmation that the D&C Performance Bond and D&C Payment Bond amounts have been delivered in accordance with this Section 8.

8.1.7 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 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 discretion. If the Price is increased in connection with a Change Order, TxDOT may, in its discretion, require a corresponding proportionate increase in the amount of each bond or alternative security.

8.1.8 Developer may elect to (a) procure the D&C Payment Bond and D&C Performance Bond directly, so that they are security for Developer's payment obligations to Subcontractors and laborers performing the D&C Work and Developer's performance obligations under the Contract Documents respecting the D&C Work, or (b) deliver D&C Payment Bonds and D&C Performance Bonds from the Design-Build Contractor so that each such D&C Payment Bond and D&C Performance Bond is security for payment to subcontractors and laborers and performance of the Design-Build Contractor's obligations under the Design-Build Contract. If Developer makes the election under clause (b) above, then (x) a multiple obligee rider in which TxDOT is named as an additional obligee in the form set forth in Exhibits 9-2 and 10-2 under which all rights of Developer are subordinated to TxDOT also must be provided, (y) the language of the bond form set forth in Exhibits 9-1 and 10-1 shall be adjusted to reflect this election, but only as necessary to identify the Design-Build Contract as the bonded contract, to identify Design-Build Contractor as the principal and to change the obligee to Developer and (z) such bonds shall otherwise conform to the requirements set forth in this Section 8.1.

8.2 O&M Security

8.2.1 As an O&M Condition Precedent pursuant to Section 3.10.3, Developer shall provide to TxDOT, and shall maintain at all times during the O&M Period, the letter of credit required in accordance with this Section 8.2 (the "**O&M Letter of Credit**") in the amount and pursuant to the requirements set forth in this Section 8.2.

(a) Developer shall obtain and deliver to TxDOT an O&M Letter of Credit in an amount not less than $100,000,000 (as such amount shall be adjusted in accordance with Section 8.2.2(b), the "**Maximum O&M LC Amount**") identifying Developer as the obligor under the O&M Letter of Credit (the **"O&M LC Obligor**"), securing all of Developer's obligations during the O&M Period and to ensure that payments owing to Claimants are made with respect to the O&M Work. Notwithstanding the foregoing, Developer may deliver to TxDOT the O&M Letter of Credit in an amount less than the Maximum O&M LC Amount so long as (i) the amount of the O&M Letter of Credit is not less than $40,000,000 (as such amount shall be adjusted in accordance with Section 8.2.2(b)) and (ii) Developer delivers to TxDOT an O&M Guaranty satisfying the requirements of Section 8.5 at the same time the O&M Letter of Credit is provided to TxDOT.

(b) The O&M Letter of Credit shall name TxDOT as beneficiary.

(c) The O&M Letter of Credit shall comply with the provisions and requirements of Section 8.3 except as permitted or required otherwise under this Section 8.2. The O&M Letter of

Credit shall be maintained (through extensions or replacements as provided in Section 8.3.1(b)), in full force and effect at all times from the date of delivery until at least one year and 90 days after the end of the Term.

(d) TxDOT has determined, as permitted by Section 223.205 of the Code, that the O&M Letter of Credit identified in this Section 8.2 constitutes security sufficient to ensure the proper performance of Developer's obligations for maintaining the O&M Limits as required under this Agreement and to protect TxDOT and Claimants with respect thereto.

8.2.2 Increase in O&M Letter of Credit Amount

(a) If TxDOT does not receive any certificate, release, certified payroll or affidavit of wages paid as required by Exhibit 12, it may require Developer to immediately increase the amount of the O&M Letter of Credit to such amount as TxDOT determines is appropriate to protect its interests and the Project, provided that the amount of any such increase shall not exceed the value of work for which TxDOT did not receive any such certificate, release, certified payroll or affidavit of wages paid.

(b) The amounts described in Section 8.2.1(a) shall be adjusted annually based on changes in the CCI commencing on the Effective Date and continuing annually thereafter during the Term and the O&M Letter of Credit shall be increased by Developer in accordance with such adjustments.

8.2.3 Payment Claims Against O&M Letter of Credit

Payment claims against the O&M Letter of Credit shall be governed by this Section 8.2.3. To ensure that all potential Claimants receive notice of the procedures set forth in this Section 8.2.3, Developer shall require that Sections 8.2.3(a) through 8.2.3(f) be restated, with the blanks filled in, in each Subcontract that includes O&M Work during the O&M Period and in all Subcontracts thereunder (including contracts with Suppliers) that include O&M Work during the O&M Period. In addition, each such Subcontract shall include a provision requiring the Subcontractor to provide formal notice regarding the claims procedures under this Section 8.2.3 to each employee performing public work labor (as such term is defined in Texas Government Code Section 2253.001) under the Subcontract, in the same manner in which equal opportunity notices are required to be given to employees.

(a) This contract concerns a public works project (the "Project") for which a letter of credit has been posted to secure obligations that would otherwise be secured by a payment bond provided by _____ (the "Prime Contractor") pursuant to Section 223.205 of the Code. Each person or entity that would have the right under said statute to make a claim against a payment bond provided thereunder (a "Claimant") will instead have the right to make a claim under said letter of credit, as described below. Such alternative security is authorized by and provided in accordance with Section 223.205 of the Code, and no Claimant will have any right to make a claim against TxDOT for failure to obtain a payment bond under Section 223.205 of the Code.

(b) All claims made pursuant to this Section 8.2.3 must:

(i) Be in writing, signed, and sworn by the Claimant or the Claimant's agent;

(ii) Provide a general description of the labor, services, equipment or material furnished or agreed to be furnished, including the approximate dates and place of delivery or performance, in a manner that reasonably identifies the labor, services, equipment or material;

(iii) State the Claimant's name and address;

(iv) State the name of the person or entity to or for which the work or items were done or furnished, including the name and address of the party with which the Claimant contracted;

(v) State the total amount claimed, and that such amount is just and correct;

(vi) State the value of the work already performed or items furnished, and that all known just and lawful offsets, payments, and credits have been allowed; and

(vii) State the amount of any retainage that has not yet become due. A claim for retainage must include the amount of the contract, any amount paid, and the outstanding balance. However, to the extent that any prior claim made under this Section 8.2.3 included retainage, a separate subsequent claim for retainage need not be made.

(c) The notices of claim must be delivered by certified or registered mail to the Prime Contractor at the following address: _____, with a copy to [Developer if Developer is separate from the Prime Contractor] at the following address: _____, and a copy to the Texas Department of Transportation at the following address: _____. In addition, if the Claimant does not have a direct contract with the Prime Contractor, a copy must be delivered to _____ [the party with which the Claimant has entered into a contract] at the following address: _____.

(d) A Subcontractor that has a direct contractual relationship with the Prime Contractor shall make its claim, except for claims for payment of retainage, no later than the 15th day of the third month after each month in which any of the claimed labor was performed or any of the claimed material was delivered. A Subcontractor that does not have a direct contractual relationship with the Prime Contractor shall make its claim, except for claims for payment of retainage, no later than the 15th day of the second month after each month in which any of the claimed labor was performed or any of the claimed material was delivered. Claims for payment of retainage shall be made no later than the 90th day after the date of final completion of the Project.

(e) Any lawsuit filed by a Claimant to enforce its claim must be filed no earlier than the 61st day after the date the notice was mailed to all recipients identified above and no later than one year after such mailing date.

(f) To the maximum extent permitted by law, any claim not made within the specified deadline is forever waived and extinguished, and any lawsuit not filed within the specified deadline is forever barred.

8.2.4 Draws on the O&M Letter of Credit

(a) The O&M Letter of Credit shall be subject to draw by TxDOT prior to expiration in accordance with Section 8.3.1(b).

(b) The O&M Letter of Credit shall be subject to draw by TxDOT for the purpose of disbursement of funds owing to a Claimant under any one of the following circumstances:

(i) TxDOT has received a copy of a claim that complies on its face with Section 8.2.3(b), together with a proof of delivery thereof to the Prime Contractor, TxDOT has not received from the Prime Contractor, within 30 days after service of the notice of claim, a sworn notice stating (i) that the Prime Contractor contests the claim, (ii) whether the claim is contested in whole or in part, and if in part, the portion of the claim amount being contested, (iii) the grounds for contesting the claim and (iv) that the Prime Contractor is acting in good faith in contesting the claim;

(ii) Upon TxDOT's receipt of a settlement agreement signed by all parties with competing interests to the funds that specifically provides that settlement funds are to be paid from the O&M Letter of Credit, in which case, such funds shall be disbursed according to the express terms of the settlement agreement;

(iii) Upon TxDOT's receipt of an entered court order providing for payment of a claim from draw on the O&M Letter of Credit, in which case funds drawn shall be disbursed according to the terms of such court order; or

(iv) A claim has been made and notice thereof given in accordance with Section 8.2.3, and at that time, or at any other time during the pendency of the claim, the O&M LC Obligor is or becomes, voluntarily or involuntarily, a debtor in any bankruptcy proceeding under applicable Law.

No beneficiary of an O&M Letter of Credit shall have any obligation to investigate, verify or ascertain the eligibility of the person making a claim as a Claimant, the validity of any claim, notice of contest of claim, settlement agreement or court order or whether the Claimant has timely provided notice of claim. Rather, for the purpose of determining whether the O&M Letter of Credit is subject to draw, the beneficiary may, without liability, conclusively assume eligibility of the person making a claim as a Claimant and timely notice of a claim, and may conclusively assume the truthfulness and validity of, and may rely on, the claim, notice of contest of claim, settlement agreement, court order or any other information submitted under this Section 8.2.

(c) The O&M Letter of Credit shall be subject to draw by TxDOT due to the failure of Developer to perform its obligations under the Contract Documents during the O&M Period. Any draw by TxDOT is subject to Section 16.2.5.

(d) The O&M Letter of Credit shall also constitute security in favor of TxDOT for payment and performance of Developer's obligation to defend and indemnify TxDOT under Section 18.1.1(f), and accordingly will be subject to draw by TxDOT as provided in Section 16.2.5.

8.3 Letters of Credit

8.3.1 General Provisions

Wherever in the Contract Documents Developer has the option or obligation to deliver to TxDOT a letter of credit, the following provisions shall apply except to the extent expressly provided otherwise in the Contract Documents:

(a) The letter of credit shall:

(i) Be a standby letter of credit;

(ii) Be issued by a financial institution with a credit rating of "A" or better according to Standard & Poors Rating Services, a division of The McGraw-Hill Companies, Inc. and with an office in Austin, Dallas, Houston, or San Antonio at which the letter of credit can be presented for payment;

(iii) Be in form approved by TxDOT in its good faith discretion;

(iv) Be payable immediately, conditioned only on written presentment from TxDOT to the issuer of a sight draft drawn on the letter of credit and a certificate stating that TxDOT has the right to draw under the letter of credit in the amount of the sight draft, up to the amount due to TxDOT, without requirement to present the original letter of credit;

(v) Provide an expiration date not earlier than one year from date of issue;

(vi) Allow for multiple draws; and

(vii) Name TxDOT as beneficiary.

(b) TxDOT shall have the right to draw on the letter of credit as and when provided in Section 16.2.5 for draws under clause (i) below and without prior notice to Developer for draws under clause (ii) below, unless otherwise expressly provided in the Contract Documents with respect to the letter of credit, if (i) Developer has failed to pay or perform when due the duty, obligation or liability under the Contract Documents for which the letter of credit is held or (ii) Developer for any reason fails to deliver to TxDOT a new or replacement letter of credit, on the same terms, or at least a one year extension of the expiration date of the existing letter of credit, by not later than 45 days before such expiration date, unless the applicable terms of the Contract Documents expressly require no further letter of credit with respect to the duty, obligation or liability in question. For all draws conditioned on prior written notice from TxDOT to Developer, no such notice shall be required if it would preclude draw before the expiration date of the letter of credit. Draw on the letter of credit shall not be conditioned on prior resort to any other security of Developer unless otherwise stated in the Contract Documents. If TxDOT draws on the letter of credit under clause (i) above, TxDOT shall use and apply the proceeds as provided in the Contract Documents for such letter of credit. If TxDOT draws on the letter of credit under clause (ii) above, TxDOT shall be entitled to draw on the full face amount of the letter of credit and shall retain such

amount as cash security to secure the obligations under the letter of credit without payment of interest to Developer.

(c) TxDOT shall use and apply draws on letters of credit toward satisfying the relevant obligation of Developer (or, if applicable, any other Person for which the letter of credit is performance security). If TxDOT receives proceeds of a draw in excess of the relevant obligation, TxDOT shall promptly refund the excess to Developer (or such other Person) after all relevant obligations are satisfied in full.

(d) Developer's sole remedy in connection with the improper presentment or payment of sight drafts drawn under letters of credit shall be to obtain from TxDOT a refund of the proceeds that are misapplied, interest thereon, at a floating rate equal to the LIBOR in effect from time to time plus 200 basis points, from the date of improper draw until repaid, and subject to Section 17.8, reimbursement of the reasonable costs Developer incurs as a result of such misapplication; *provided* that at the time of such refund Developer increases the amount of the letter of credit to the amount (if any) then required under applicable provisions of this Agreement. Developer acknowledges that the presentment of sight drafts drawn upon a letter of credit could not under any circumstances cause Developer injury that could not be remedied by an award of money damages, and that the recovery of money damages would be an adequate remedy. Accordingly, Developer covenants (i) not to request or instruct the issuer of any letter of credit to refrain from paying any sight draft drawn under the letter of credit and (ii) not to commence or pursue any legal proceeding seeking, and Developer irrevocably waives and relinquishes any right, to enjoin, restrain, prevent, stop or delay any draw on any letter of credit.

(e) Developer shall obtain and furnish all letters of credit and replacements thereof at its sole cost and expense, and shall pay all charges imposed in connection with TxDOT's presentment of sight drafts and drawing against letters of credit or replacements thereof.

(f) In the event TxDOT makes a permitted assignment of its rights and interests under this Agreement, Developer shall cooperate so that concurrently with the effectiveness of such assignment, either replacement letters of credit for, or appropriate amendments to, the outstanding letters of credit shall be delivered to the assignee naming the assignee as beneficiary, at no cost to Developer.

(g) TxDOT acknowledges that if the letter of credit is performance security for a Person other than Developer (e.g., a Key Subcontractor), TxDOT's draw may only be based on the underlying obligations of such Person.

8.3.2 Special Letter of Credit Provisions

Any terms and conditions applicable to a particular letter of credit that Developer is required to or may provide under this Agreement are set forth in the provisions of this Agreement describing such letter of credit.

8.4 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.

8.5 Guaranty

8.5.1 [*To be inserted if a guaranty is required as of the Effective Date.*] [_____] are the D&C Guarantors guaranteeing Developer's obligations under the Contract Documents as set forth in Section 8.5.2 as of the Effective Date and have provided a guaranty in accordance with the form attached as Exhibit 13-1.

8.5.2 If Developer is required to provide a Guaranty guaranteeing its obligations under the Contract Documents during the Construction Period (the "**D&C Guaranty**"), the D&C Guaranty shall be in the form set forth in Exhibit 13-1 and shall guarantee (a) Developer's obligations with respect to the D&C Work under the Contract Documents and (b), subject to the limitation on Guarantor's liability set forth in Section 8.5.9, Developer's obligations with respect to the O&M Work under the Contract Documents solely until the O&M Letter of Credit and, as applicable, the O&M Guaranty have been provided by Developer as required in accordance with Section 8.2 and this Section 8.5.

8.5.3 Developer shall be required to provide a Guaranty guaranteeing Developer's obligations under the Contract Documents during the O&M Period in the form set forth in Exhibit 13-2 (the "**O&M Guaranty**") from a Guarantor approved by TxDOT in its discretion as of and as a condition to Substantial Completion if the initial O&M Letter of Credit provided at Substantial Completion is less than the Maximum O&M LC Amount. Additionally, Developer shall be required to provide an O&M Guaranty satisfying the requirements of this Section 8.5 from a Guarantor approved by TxDOT in its discretion if at any time during the O&M Period, the O&M Letter of Credit is less than the Maximum O&M LC Amount and the O&M Letter of Credit is not increased to an amount equal to the Maximum O&M LC Amount.

8.5.4 Developer shall report to TxDOT, on a quarterly basis during the Term, the Tangible Net Worth of Developer 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."

8.5.5 If at any time during the course of this Agreement the total combined Tangible Net Worth of Developer and either the D&C Guarantors or the O&M Guarantors (if required), as applicable, is less than $200,000,000, Developer shall provide one or more guarantees so that the combined Tangible Net Worth of Developer and the applicable Guarantors is at least $200,000,000. The minimum Tangible Net Worth amount described in this Section 8.5.5 shall be adjusted annually based on changes in the CCI commencing on the first anniversary of the Effective Date and continuing annually thereafter during the Term.

8.5.6 Each Guaranty shall be in the applicable form attached as Exhibit 13 together with appropriate evidence of authorization, execution, delivery and validity thereof, and shall guarantee the Guaranteed Obligations.

8.5.7 Developer may replace an existing Guaranty with a new Guaranty upon prior approval by TxDOT in its discretion. Any new Guaranty shall be provided in the applicable form attached as Exhibit 13 together with appropriate evidence of authorization, execution, delivery and validity thereof, and shall guarantee the Guaranteed Obligations. The Guaranty being replaced shall remain in effect until the approved replacement Guaranty becomes effective.

8.5.8 Notwithstanding anything herein to the contrary, if Developer is required to provide an O&M Guaranty, TxDOT shall first make demand and draw upon the O&M Letter of Credit prior to making any demand upon the O&M Guaranty; *provided, however,* that nothing in this Section 8.5.8 is intended to limit any of TxDOT's rights with respect to the O&M Guaranty in the event the O&M Letter of Credit is unavailable or otherwise insufficient to satisfy Developer's obligations.

8.5.9 Notwithstanding any other provision of the Contract Documents, TxDOT will not seek to recover damages from any Guarantor resulting from breach of this Agreement with respect to the O&M Work (whether arising in contract, negligence or other tort, or any other theory of law) in excess of an amount equal to $100,000,000 (which amount shall specifically include any Liquidated Damages paid with respect to the O&M Work pursuant to Section 17 and shall be adjusted annually based on changes in the CCI commencing on the Effective Date and continuing annually thereafter during the Term).

SECTION 9. INSURANCE; CLAIMS AGAINST THIRD PARTIES

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 by TxDOT.

9.1.2 Premiums, Deductibles and Self-Insured Retentions

Developer shall timely pay, or cause to be paid, the premiums for all insurance required under this Agreement. Subject to Section 12, 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

(a) 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 Indemnified Parties, except for coverage that by its nature cannot be written as primary. For each property policy, such policy shall provide that the coverage thereof is primary and noncontributory with respect to all insureds as their interest may appear. 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.

(b) 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

(a) At each time Developer is required to initially obtain or cause to be obtained each insurance policy, and thereafter not later than 10 days 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 cancellation 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.

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

(c) If Developer has not provided TxDOT with the foregoing proof of coverage and payment within five days after TxDOT delivers to Developer 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: (i) obtain such an insurance policy; and Developer shall reimburse TxDOT for the cost thereof upon demand, and (ii) 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

(a) 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.

(b) 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: (i) causing such Subcontractor to obtain the requisite insurance and providing to TxDOT proof of insurance; (ii) procuring the requisite insurance for such Subcontractor and providing to TxDOT proof of insurance; or (iii) 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.

(a) 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, if applicable, TxDOT Consultants).

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

(c) All endorsements adding TxDOT and the other additional insureds as required by the Contract Documents to the 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 such 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 that 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 commercial general liability 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

(a) 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 notice (or 10 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 required by the Contract Documents; 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.

(b) 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.

(c) 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).

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

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 12.

9.1.10 Support of Indemnifications

The insurance coverage provided, or caused to be 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

(a) 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.

(b) 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 at commercially reasonable rates, TxDOT will consider in good faith granting 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. For purposes of this Section 9.1.11, commercially reasonable rates are rates equal to or less than 200% of the benchmark for the insurance policy at issue as described in Section 9.1.12. If the required insurance coverage is available in the market, TxDOT's decision to approve or disapprove a variance from the requirements of this Section 9 shall be final and not subject to the Dispute Resolution Procedures. 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 Exhibit 14 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.

(c) Developer shall not be entitled to any time extension to the Completion Deadlines resulting from the unavailability of coverage and the requirement to provide acceptable alternatives and Developer shall be entitled to an increase in the Price solely in the manner set forth in Section 9.1.12 for increased costs of the insurance policies required to be maintained at any time during the O&M Period pursuant to this Section 9 and Exhibit 14. TxDOT shall be entitled to a reduction in the Price (i) 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) and (ii) solely with respect to the insurance policies required to be maintained at any time during the O&M Period, in the manner set forth in Section 9.1.12.

9.1.12 Insurance Premium Benchmarking

(a) Except as otherwise provided in Section 9.1.11 and this Section 9.1.12, Developer shall bear the full risk of any insurance premium increases from the Effective Date until the Substantial Completion Date, and shall not be entitled to any Claim for relief for such increases. Solely with respect to insurance policies required to be maintained at any time during the O&M Period under this Section 9 and Exhibit 14, TxDOT will allocate the risk of significant increases in insurance premiums through an insurance benchmarking process as set forth in this Section 9.1.12. In no event shall TxDOT participate in any insurance premium risk associated with either deductibles less than the maximum deductibles set forth in, or additional or extended coverages beyond those required under, this Section 9 or Exhibit 14, or changes in premiums that are not the result of market-based factors.

(b) The benchmarking process will occur at each insurance renewal period, but no less than triennially, through the following:

(i) Not later than 60 days after the Substantial Completion Date and 45 days prior to each insurance renewal period (but no less than triennially), Developer shall submit a report ("**Insurance Review Report**") to TxDOT that includes the following elements:

A. Firm quotes from three established and recognized insurance providers for the Insurance Policies required, without any variation, in Exhibit 14 to be maintained during the O&M Period ("**Required Minimum Insurance Policies**"). The quotes shall represent the current and fair market cost of providing the Required Minimum Insurance Policies.

B. The written binders of insurance in the form and content required under this Section 9 and Exhibit 14 with the premium invoices for the actual

insurance policies required hereunder and thereunder for the subject annual insurance period as obtained by Developer ("**Actual Insurance Policies**").

C. Except with respect to the initial Insurance Review Report, a comprehensive written explanation of any effect that Developer's loss experience has had on the premiums for the Required Minimum Insurance Policies and the Actual Insurance Policies. The explanation shall include: (i) an assessment by Developer's independent insurance broker addressing industry trends in premiums for the Required Minimum Insurance Policies and analysis (if applicable) of any Project-specific reasons for the increase in premiums; and (ii) detailed analysis of any claims (paid or reserved) since the last review period, with claim date(s), description of incident(s), claims amount(s), and the level of deductibles provided.

(ii) TxDOT, at its discretion, may independently assess the accuracy of the information in the Insurance Review Report and retains the right to perform its own independent insurance review, which may include retaining advisors, obtaining independent quotes for the Required Minimum Insurance Policies or performing its own assessment as to the impact of claims history on renewal costs.

(c) The Starting O&M Insurance Benchmarking Premiums shall be calculated based on the greater of:

(i) premium information obtained from the initial Insurance Review Report; or

(ii) if TxDOT deems appropriate in its reasonable discretion, from information obtained pursuant to Section 9.1.12(b)(ii);

(d) The Starting O&M Insurance Benchmarking Premiums shall be used in the benchmarking process for the remainder of the Term in accordance with the following procedures:

(i) Sixty days prior to each renewal date (but no less than triennially), Developer shall provide the Insurance Review Report, with the information specified in Section 9.1.12.1. TxDOT shall determine the change in premium costs on a coverage-by-coverage basis for the Required Minimum Insurance Policies calculated based on the information obtained from the initial Insurance Review Report or, if TxDOT deems appropriate in its reasonable discretion, from information obtained pursuant to Section 9.1.12.2.

(ii) TxDOT will use the Starting O&M Insurance Benchmarking Premiums to measure changes in premium costs at each renewal period (but no less than triennially) for each of the Required Minimum Insurance Policies. The Starting O&M Insurance Benchmarking Premiums shall be escalated by applying a fixed 5.0% annual increase ("**Escalated Benchmark O&M Insurance Premiums**"). Broker's fees and agent's commissions will not be considered as part of the benchmarking exercise described in this Section 9.1.12, and are the exclusive responsibility of Developer.

(iii) The subsequent Insurance Review Reports shall be used to establish the renewal premiums for the Required Minimum Insurance Policies for purposes of the benchmarking process described in this Section 9.1.12. In no event shall premium increases that are caused by Project-specific losses, changes in deductibles or matters within the control of Developer or any Developer-Related Entity be subject to the benchmarking exercise or risk sharing described in this Section 9.1.12. Developer may voluntarily choose to procure an insurance package that varies from the Required Minimum Insurance Policies (with for example different deductibles, different coverage amounts, different exclusions, etc.), in which case both Parties recognize that: (i) the actual variations in Developer's insurance premiums may not necessarily reflect the variations in the minimum insurance requirements and (ii) TxDOT will disregard the actual insurance package and will rely upon the analysis from the Insurance Review Report and its own independent analysis of the effect on the minimum insurance requirements. Any insurance beyond the Required Minimum Insurance Policies shall not be subject to the insurance benchmarking process and O&M Payment adjustment described in Section 9.1.12(d).

(iv) If TxDOT, in its discretion, elects to retain its own insurance advisor to analyze the extent of eligible premium increases, Developer shall cooperate in good faith with any reasonable requests for additional information from TxDOT's insurance advisor. No later than 30 days after Developer's submission of the Insurance Review Report, TxDOT shall make its determination of the eligible premium increases subject to the risk-allocation described in Section 9.1.12(d) below. In the event of a dispute, TxDOT's determination shall be subject to the Dispute Resolution Procedures.

(e) If the annual insurance premiums for the Actual Insurance Policies, as such premiums may be adjusted pursuant to Section 9.1.12(d)(iii), are in excess of 130% of the applicable Escalated Benchmark O&M Insurance Premiums, TxDOT shall increase the O&M Price for the applicable year an amount equal to 85% of such premiums that are in excess of 130% of the applicable Escalated Benchmark O&M Insurance Premiums until the next benchmarking period. If the annual insurance premiums for the Actual Insurance Policy, as such premiums may be adjusted pursuant Section 9.1.12(d)(iii), are below 70% of the applicable Escalated Benchmark O&M Insurance Premiums, TxDOT shall reduce the O&M Price for the applicable year in an amount equal to 85% of the difference between such premiums and 70% of the applicable Escalated Benchmark Insurance Premiums until the next benchmarking period.

9.1.13 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 and investigation and expert defense costs may also be included within the limits of coverage of professional liability policies.

9.1.14 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.

9.1.15 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.

9.1.16 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 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(c); 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, 9.1.14 and 9.2 shall apply to all such policies of insurance coverage.

9.1.17 Adjustments in Coverage Amounts

(a) At least once every three years during the Term (commencing initially on the Substantial Completion Date), TxDOT and Developer shall review and increase, as appropriate, the per occurrence and aggregate limits or combined single limits for the insurance policies required under this Agreement that have stated dollar amounts set forth in Exhibit 14. At the same frequency TxDOT and Developer shall review and adjust, as appropriate, the deductibles for such policies.

(b) Developer shall retain a qualified and reputable insurance broker or independent, unaffiliated advisor not involved in the Project, experienced in insurance brokerage and underwriting practices for major bridge, highway or other relevant transportation facility projects, to analyze and recommend adjustments, if any, to such limits and adjustments to deductibles. Developer shall deliver to TxDOT, not later than 90 days before each two-year adjustment date, a written report including such analysis and recommendations for TxDOT's approval. TxDOT shall have 45 days after receiving such report to approve or disapprove the proposed adjustments to limits and adjustments to deductibles or self-insured retentions.

(c) In determining adjustments to limits and adjustments to deductibles, Developer and TxDOT shall take into account (i) claims and loss experience for the Project, provided that premium increases due to adverse claims experience shall not be a basis for justifying increased deductibles; (ii) the condition of the Project, including records of Asset Condition Scores, (iii) the Renewal Work record for the Project, (iv) the Safety Compliance and Noncompliance Points record for the Project and (v) then-prevailing Good Industry Practice for insuring comparable transportation projects.

(d) Any Dispute regarding adjustments to limits or adjustments to deductibles or self-insured retentions shall be resolved according to the Dispute Resolution Procedures.

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 that 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 Developer shall immediately notify TxDOT, and thereafter keep TxDOT fully informed, of any incident, potential claim, claim or other matter of which Developer becomes aware that involves or could conceivably involve an Indemnified Party.

9.2.3 TxDOT agrees to promptly notify Developer of TxDOT's incidents, potential claims against TxDOT, and matters that 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.

9.2.4 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 that 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 that at the time the insurance policy is written meets the rating qualifications set forth in this Section 9.

9.2.5 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 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 10 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.

9.2.6 All insurance proceeds received by Developer for any insured loss under the builder's risk and/or property 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 TxDOT's Right to Remedy Developer Breach Regarding Insurance

If Developer or any Subcontractor fails to provide insurance as required herein, TxDOT shall have the right, but not the obligations, to purchase such insurance or to suspend Developer's right to proceed with the Work until proper evidence of insurance is provided. TxDOT's costs in respect thereof, at TxDOT's option, shall be deducted from amounts payable to Developer or reimbursed by Developer upon demand from TxDOT. Nothing herein shall preclude TxDOT from exercising its rights and remedies under Section 16 as a result of the failure of Developer or any Subcontractor to satisfy its insurance obligations herein.

9.4 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 that they deem advisable, whether or not specified herein.

9.5 Claims Against Third Parties

In connection with Developer's obligations under the Contract Documents, including repair of damage to the Project caused by collision (motor vehicle, aircraft or railroad train), vandalism, or other destructive acts of third parties, Developer shall pursue claims against third parties for damage caused to the Project. In the event Developer is required to repair any damage to the Project caused by third parties and TxDOT receives payment pursuant to a third-party claim regarding such damage, TxDOT shall pay the funds received to Developer upon completion by Developer of the applicable Work.

SECTION 10. WARRANTIES

10.1 Warranties

10.1.1 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; (e) all construction Work shall be fit for use for the intended function; and (f) the Work shall meet all of the requirements of the Contract Documents (collectively, the "**Warranty**" or "**Warranties**").

10.1.2 Warranty Term

(a) The warranty term for the D&C Work shall commence upon Substantial Completion thereof (the "**D&C Warranty Term**"). Subject to extension under Section 10.2, the D&C Warranties regarding all elements of the Project that will be owned by TxDOT shall remain in effect until one year 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 one year thereafter. If TxDOT determines that any of the D&C Work has not met the standards set forth in this Section 10.1 at any time within the applicable D&C Warranty Term, then Developer shall correct such D&C Work as specified in this Section 10, even if the performance of such corrective D&C Work extends beyond the applicable D&C Warranty Term. TxDOT and Developer shall conduct a walkthrough of the Site prior to expiration of the applicable D&C Warranty Term and shall produce a punch list of those items requiring corrective D&C Work.

(b) The warranty term for the O&M Work shall commence at the conclusion of the O&M Period. Subject to extension under clause (c) below, all O&M Warranties shall remain in effect until one year after the conclusion of the O&M Period ("**O&M Warranty Period**"). If TxDOT determines that such O&M Work has not met the standards set forth in Section 10.1 at any time during the O&M Warranty Period, then Developer shall correct such as specified in this Section 10.1.2, even if performance of such corrective O&M Work extends beyond the applicable O&M Warranty Period.

10.1.3 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 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 6.8.2.

10.1.4 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 10.1. Developer shall bear all costs of such Work, including additional testing and inspections, and shall reimburse TxDOT or pay TxDOT's expenses made necessary thereby, including any costs incurred by TxDOT for independent quality assurance 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, 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.

10.2 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 (a) with respect to the D&C Work, one year from Final Acceptance, and (b) with respect to the O&M Work, one year after the expiration of the O&M Period).

10.3 Subcontractor Warranties

10.3.1 Warranty Requirements

(a) 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 10.

(b) 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.

(c) 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.

10.3.2 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 10.3.2 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 10.2). 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.

10.4 Effect of TxDOT or Developer Activities on Warranties

Developer acknowledges and agrees that TxDOT and Developer 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 entitled as a result of such activities.

10.5 No Limitation of Liability

Subject to Section 17.7, 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.

10.6 Damages for Breach of Warranty

Subject to Section 17.7 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 11. PAYMENT FOR SERVICES

11.1 D&C Price

11.1.1 Amount

As full compensation for the D&C Work and all related obligations to be performed by Developer under the Contract Documents, TxDOT shall pay to Developer the lump sum "**D&C Price**." The D&C Price as used herein shall mean the lump sum amount of $**[*Insert D&C Price from Proposal.*]**, subject to adjustment from time to time to account for adjustments in the Benchmark Rates, if any, Change Orders, Additional Scope Work, if any, and Value Engineering adjustments. The D&C Price shall be increased or decreased only by a Change Order issued in accordance with Section 12, by an adjustment in the Benchmark Rates in accordance with Section 11.1.3, by the addition of any of the Additional Scope Work pursuant to Section 3.5.6, or a Value Engineering adjustment made in accordance with Section 21. The D&C Price shall be paid in accordance with Sections 11.2 and 11.3.

11.1.2 Items Included in D&C Price

(a) Developer acknowledges and agrees that, subject only to Developer's rights under Section 12, the D&C 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 D&C Work, equipment, materials, labor and services provided by Subcontractors and intellectual property rights necessary to perform the D&C Work); (b) performance of each and every portion of the D&C Work; (c) the cost of obtaining all Governmental Approvals (except as specified in Section 2.3.6) related to the D&C Work and incurred prior to the Substantial Completion Date; (d) all costs of compliance with and maintenance of the Governmental Approvals and compliance with Laws related to the D&C Work, 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 or royalties imposed with respect to the D&C Work and any equipment, materials, labor or services included therein; (f) compensation for all risks and contingencies assigned to Developer under the Contract Documents; and (g) all carrying costs incurred by Developer as a direct result of the Deferred D&C Payments owed to Developer until such amounts are paid by TxDOT; *provided* that all of the costs set forth in Subsections (a) through (f) above are included in the D&C Price solely to the extent such costs relate to the D&C Work and are incurred by Developer prior to Final Acceptance.

(b) The D&C Price does not include the costs of the Additional Scope Work, unless TxDOT exercises its option to add any such Additional Scope Work to the D&C Work to be performed in accordance with the provisions of Section 3.5.6. In the event TxDOT elects to exercise its right to include any of the Additional Scope Work, the D&C Price shall be increased by the Additional Scope Price for each Additional Scope Component selected by TxDOT to be performed by Developer. In the event TxDOT elects to include Additional Scope Work in the D&C Work, the Maximum D&C Payment Schedule shall be increased by adding the amounts set forth in the applicable Additional Scope Payment Schedule in Exhibit 5-2 to the corresponding months in

the Maximum D&C Payment Schedule. Upon such amendment thereof, all references to the Maximum D&C Payment Schedule set forth herein shall mean the schedule as amended hereby.

11.1.3 Market Interest Rates and Change in Financial Plan

(a) Subject to TxDOT's right to Termination for Convenience under Section 15, and solely to the extent Developer elected to utilize the market interest rate adjustment as set forth in Exhibit 21, TxDOT will bear the risk and have the benefit of changes in market interest rates (either positive or negative), subject to the limitations set forth in subclause (b), for the period beginning at 10:00 a.m. on April 4, 2014 and ending on the earliest of (i) the date that is 30 days after the Effective Date (the "**Interest Rate Adjustment Expiration Date**"), (ii) the date on which Developer achieves financial close for the Developer Debt, (iii) the date of execution of any interest rate hedging agreement regarding the Developer Debt or (iv) the date of the execution of a bond purchase agreement relating to the purchase and sale of bonds issued as Developer Debt, (the "last date of the market interest rate adjustment period").

(b) The interest rate adjustment will be based on the movement, if any, in the Benchmark Rates. Developer and TxDOT will jointly adjust the D&C Price to reflect any change in the Benchmark Rates solely to the extent permitted herein. On the last date of the market interest rate adjustment period, Developer and TxDOT shall agree upon the Benchmark Rates based on a reading taken from the sources provided in Exhibit 21 and the related swap rates or pricing of any other hedging instruments (as applicable); *provided* that any swap rates and pricing of other hedging instruments (as applicable) must be reasonable in TxDOT's sole judgment. Developer and TxDOT shall then jointly update the Financial Model in accordance with this Section 11.1.3(b) and meeting the requirements of Exhibit 25 as of such date to reflect the agreed upon changes (if any) in the Benchmark Rates, swap rates or pricing of other hedging instruments (as applicable) and any other revisions approved by the Parties but not any potential errors identified in the Financial Model and not any planned or actual changes to Developer's plan of finance. TxDOT and Developer will use the updated Financial Model to calculate the adjustment to the D&C Price (if any) as follows: (i) if positive, and solely to the extent Developer has executed its Funding Agreements and Security Documents on or before the Interest Rate Adjustment Expiration Date, as an increase *pro rata* to the first $600,000,000 of the D&C Price set forth in the Maximum D&C Payment Schedule and (ii) if negative, as a decrease in the Deferred D&C Payments to be made by TxDOT to Developer, which decrease shall be applied in reverse chronological order. Notwithstanding anything herein to the contrary, in the event Developer has not executed its Funding Agreements and Security Documents on or before the Interest Rate Adjustment Expiration Date, the D&C Price shall not be increased to reflect changes in the Benchmark Rates.

(c) To the extent Developer closes financing for Developer Debt before the Interest Rate Adjustment Expiration Date under a financial plan that is different from the financial plan included in its Proposal and such revised financial plan results in a reduction in the documented and verifiable costs due to Lenders under the Funding Agreements, TxDOT shall be entitled to 60% of the benefit of such reduced costs, which benefit shall be reflected in a reduction to the D&C Price in accordance with the process set forth in Exhibit 29.

(d) The Maximum D&C Payment Schedule shall be amended to reflect any adjustment to the D&C Price in accordance with Sections 11.1.3(b) and 11.1.3(c).

11.1.4 NTP Work Payments

Developer acknowledges and agrees that the amount of funds available to pay for D&C Work prior to issuance of NTP2 is limited to $40,000,000. TxDOT has no obligation to make any payments to Developer in excess of $40,000,000 until such time (if any) as NTP2 is issued.

11.1.5 Delay in NTP1

(a) TxDOT anticipates that it will issue NTP1 concurrently with or shortly after execution and delivery of this Agreement, but shall have the right in its discretion to defer issuance. If the effective date of NTP1 is more than 180 days after the Proposal Due Date and such delay in issuing 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 pursuant to a Change Order solely by adding the following to the D&C Price (which amount may not be less than zero) and without the right to any additional compensation pursuant to the Change Order:

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

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 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.

(b) 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 11.1.5(a) above, with "B" being the CCI for the month in which the Change Order is approved.

(c) 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 D&C Price. Developer shall provide evidence satisfactory to TxDOT, meeting the requirements of Section 12.4, justifying the amount of any D&C 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 11.1.5(c), then Developer's sole remedy shall be to terminate this Agreement in accordance with Section 15.9.

11.1.6 Additional Provisions Relating to Delays in NTP1

(a) Notwithstanding anything to the contrary contained herein, Developer shall not be entitled to an increase in the D&C 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.

(b) Any D&C Price increase under this Section 11.1 shall be amortized proportionally over all D&C Work at issue.

11.1.7 D&C 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 satisfy any particular condition(s) to NTP2), the D&C Price shall be subject to adjustment, as described in this Section 11.1.7.

(a) The D&C Price adjustment shall be applied to the period beginning on the date of issuance of NTP2.

(b) The D&C Price for D&C Work performed on and after the date of issuance of NTP2 will be adjusted pursuant to a Change Order solely by adding the product of the following to the D&C Price (which amount may not be less than zero) and without the right to any additional compensation pursuant to the Change Order:

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

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 D&C Work performed prior to issuance of NTP2;

"N" is the number of days in the period starting on the later of the 361st 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 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.

(c) In the event of a delay to NTP2 as described in this Section 11.1.7, Developer will be entitled to request a Change Order to extend a Completion Deadline in accordance with Section 12.3.1(a)(vii).

11.1.8 Aesthetic Allowance

The D&C Price includes an aesthetic allowance in the amount of $8,000,000, which shall be used to cover the costs of aesthetic treatments and aesthetic enhancements, and not for items that would be required for standard construction, in accordance with Section 15 of the Technical Provisions. The aesthetic allowance shall not be used to cover the costs of any aesthetics elements of the Project that are otherwise included in the D&C Price. The aesthetics elements for the Project shall be consistent with the Dallas District Green Ribbon Guidelines included in the Reference Information Documents. TxDOT shall have the right at any time to reduce the D&C Price by an amount equal to that portion of the aesthetic allowance that TxDOT has determined it will not use, and in no event shall less than the full amount of the allowance be used without TxDOT's prior approval. If funds remain available in such allowance following achievement of Final Acceptance, the D&C Price shall be reduced by an amount equal to such remaining allowance amount

11.2 Invoicing and Payment for the D&C Price

The following process shall apply solely to invoicing and payment of the D&C Price:

11.2.1 Delivery of Draw Request for Payment of the D&C Price

On or about the fifth Business Day of each month following NTP1 and continuing through the last date of the Maximum D&C Payment Schedule shown on Exhibit 5 (exclusive of any dates occurring after Final Acceptance), 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 by TxDOT. Each Draw Request shall be executed by Developer's Authorized Representative. Developer acknowledges that TxDOT will obtain funding for portions of the D&C 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.

11.2.2 Contents of Draw Request

(a) Each Draw Request must contain the following items:

(i) Draw Request cover sheet;

(ii) An approved Monthly Project Baseline Schedule Update as described in Section 2.1.1.3 of the Technical Provisions;

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

(iv) Monthly report of personnel hours;

(v) 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 D&C 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 D&C Work) and showing the maximum amount payable based on the Maximum D&C Payment Schedule;

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

(vii) Traffic incident reports;

(viii) Cash flow curves and comparison to the Maximum D&C Payment Schedule; and

(ix) Such other items as TxDOT reasonably requests.

(b) 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 that are then due in accordance with the Maximum D&C 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 12.7; (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.

11.2.3 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.

11.2.4 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, that is the subject of the Draw Request has been checked

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 that 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.

11.2.5 Draw Request Data Sheets

With respect to the D&C Work, 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 D&C 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 approval.

11.2.6 Payment by TxDOT

Within 10 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. Subject to Section 11.3.2, 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 D&C Work times the D&C Price (for non-unit-priced Work) or (ii) the Maximum D&C Payment

Schedule for the month to which the Draw Request applies, plus amounts allowed by Change Orders.

11.3 Financing of Deferred Payments of the D&C Price

After payment of the first $600,000,000 of the D&C Price pursuant to the Maximum D&C Payment Schedule (exclusive of payments owed pursuant to Change Orders), TxDOT acknowledges that Developer may satisfactorily perform D&C Work that entitles it to payment amounts in excess of the cumulative monthly amounts then allowed under the Maximum D&C Payment Schedule (exclusive of payments owed pursuant to a Change Order) (the "**Deferred D&C Payments**"). Deferred D&C Payments will be paid from funds available on the applicable anniversary of the Scheduled Substantial Completion Date as set forth in Exhibit 5-1 under the Maximum D&C Payment Schedule.

11.3.1 Financing Responsibilities

(a) Developer is solely responsible for obtaining and repaying, at its own cost and risk without recourse to TxDOT, all financing necessary for the portion of the completed D&C Work payable out of the Deferred D&C Payments in accordance with this Section 11.3 (including any refinancing thereof).

(b) Developer exclusively bears the risk of any changes in the interest rate (except for the adjustment to the D&C Price permitted under Section 11.1.3), payment provisions, collateral requirements, financing charges or the other terms of its financing (or any refinancing).

(c) Notwithstanding the foreclosure or other enforcement of any security interest created by a Security Document, Developer shall remain liable to TxDOT for the payment of all sums owing to TxDOT under this Agreement and the performance and observance of all of Developer's covenants and obligations under the Contract Documents.

(d) Developer shall deliver to TxDOT for review and approval (which approval shall be limited to approval that the requirements set forth in this Section 11.3 have been met) (a) draft proposed Funding Agreements, Security Documents (other than minor ancillary documents normally delivered after financial closing and containing no new material commercial terms) and Financial Model not later than 14 days prior to the proposed date for closing the financing or any refinancing of Developer Debt and (b) copies of all executed Funding Agreements and Security Documents and the final updated Financial Model in connection with the financing or any refinancing not later than 30 days after close of the financing or any refinancing of Developer Debt. The Financial Model shall be compliant with requirements and updated as specified in Exhibit 25.

11.3.2 Certification Regarding Payment

(a) Within five Business Days after TxDOT's approval in accordance with Section 11.2 of the final amount owed under a Draw Request, including the Final D&C Payment to be made pursuant to the Final Reconciliation under Section 11.7, where such amount is payable in whole or in part from Deferred D&C Payments, TxDOT shall certify all such earned, but unpaid

amounts by issuing to Developer a payment certificate in the form attached hereto as Exhibit 27 (the "**Deferred D&C Payment Certificate**").

(b) Notwithstanding any other provision herein to the contrary, amounts that have been certified in a Deferred D&C Payment Certificate shall not be subject to set-off, deduction, reduction or withholding for any reason by TxDOT, including defective work, Liquidated Damages, default, termination, latent defects, or warranty claims. Any set-off, deduction, reduction or withholding of payment shall be applied only to amounts owing under subsequent Draw Requests or the Final D&C Payment that have not yet been certified by TxDOT pursuant to this Section 11.3.2; *provided, however*, that in the event TxDOT is entitled to any set-off, deductions, reductions or withholding of payment, Developer shall have the right to notify TxDOT in its Draw Request that it intends to pay for such deductions in cash and to submit a cash payment in full for all such amounts at the time it submits the applicable Draw Request in accordance with Section 11.2 (or within 5 Business Days after notification from TxDOT that such Draw Request is subject to further deduction in accordance with this Agreement) and upon payment in cash therefor, TxDOT shall certify the full amount of such Draw Request. 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 D&C Payment Schedule or from exercising its rights under the D&C Retainage Bond, D&C Performance Bond, D&C Payment Bond or Guaranty. Payment of any amounts set forth in a Deferred D&C Payment Certificate is subject to appropriation as set forth in Section 1.12.

(c) Subject to the requirements set forth in this Section 11.3, Developer may sell or assign all or any portion of its rights, title and interests in and to payment of the amounts certified by TxDOT in any Deferred D&C Payment Certificate and to payment of any Breakage Costs owed to Developer hereunder to any Person from which Developer or Borrower obtains financing to complete the D&C Work or that has committed to purchase the Deferred D&C Payment Certificates (together with any agents or trustees for such Person or Persons, a "**Lender**") or any D&C Surety.

(d) TxDOT will deliver payments owed pursuant to the executed Deferred D&C Payment Certificates into a lockbox account or other account established by Developer commencing not less than 30 business days following TxDOT's receipt of a direction for deposit into such account in the form set forth in Exhibit 28, executed by Developer. Any such payment direction shall be irrevocable unless mutual written request to TxDOT is made by Developer and its Lenders.

(e) TxDOT may pay amounts certified in any Deferred D&C Payment Certificate earlier than the date for payment identified in such certificate pursuant to the conditions set forth in subsection (f) below for payment of the Deferred D&C Payments on a current cash basis and Section 15.5.1(e) upon Termination for Convenience.

(f) (i) Upon notice to Developer, TxDOT, in its discretion, may elect to accelerate the amounts available under the Maximum D&C Payment Schedule so as to make the Deferred D&C Payments on a current cash basis in the same manner that payments of the D&C Price are paid under Section 11.2. Upon such election, TxDOT shall pay the sum of (A) Breakage Costs payable by Developer or Borrower (as applicable) in respect of the Developer Debt as a result of such election, subject to Developer, Borrower (if not Developer) and Lenders mitigating all such

costs to the extent reasonably possible, minus (B) to the extent it is a positive amount, the aggregate of all Breakage Costs payable to Developer or Borrower (as applicable) in respect of the Developer Debt as a result of such election. Further, the D&C Price shall be reduced to reflect Developer's avoided costs that are attributable to Developer's financing of the Deferred D&C Payments. The Maximum D&C Payment Schedule shall be amended by TxDOT to reflect the revised payment schedule and D&C Price reduction as set forth herein (if any).

(ii) Upon notice to Developer, TxDOT, in its discretion, may elect to pay, in whole or in part, amounts owed under any Deferred D&C Payment Certificate prior to the payment date set forth in the applicable certificate. Upon such election, TxDOT shall pay the sum of (A) the amount under the Deferred D&C Payment Certificates subject to early payment as set forth in the notice delivered to Developer, plus (B) Breakage Costs payable by Developer or Borrower (as applicable) as a result of such election, subject to Developer, Borrower (if not Developer) and Lenders mitigating all such costs to the extent reasonably possible, minus (C) to the extent it is a positive amount, the aggregate of all Breakage Costs payable to Developer or Borrower (as applicable) as a result of such election, minus (D) avoided costs that are attributable to Developer's financing of the Deferred D&C Payments. Such amount shall be payable as a lump sum within 45 days of Developer's receipt of notice to prepay.

(iii) All Breakage Costs payable to Developer pursuant to this Section 11.3.2 shall be reasonable in TxDOT's sole judgment and shall be supported by documentation reasonably satisfactory to TxDOT provided by Developer no later than 20 days after receipt by Developer of notice from TxDOT of its election under subsection (i) or (ii) of this Section 11.3.2, as applicable.

(iv) If Developer has not previously submitted a Financial Model to TxDOT, in lieu of Breakage Costs, compensation to Developer for Deferred D&C Payments shall be calculated by using the Base Scope Schedule of Anticipated Draw Requests set forth in Exhibit 26, an updated Base Scope Schedule of Anticipated Draw Requests to be provided at the time set forth in this subclause (iii) and an implied interest rate of 6.0%.

(v) TxDOT shall calculate Developer's avoided costs attributable to Developer's financing of the Deferred D&C Payments pursuant to Sections 11.3.2(f)(i) and 11.3.2.(f)(ii), as follows: (A) if Developer has submitted a Financial Model, TxDOT shall use Developer's most recently submitted Financial Model prior to such prepayment or termination, as applicable, and Developer's Financial Model updated in accordance with Exhibit 25 at the time of prepayment or termination, as applicable, or (B) if Developer has not submitted a Financial Model previously, TxDOT will derive the avoided costs using the Base Scope Schedule Anticipated Draw Requests set forth in Exhibit 26, a Base Scope Schedule of Anticipated Draw Requests updated at the time of prepayment or termination, as applicable, and an implied interest rate of 6.0% as follows: TxDOT will calculate the anticipated percentage complete of D&C Work for any month after NTP1 as a ratio of Column B in Exhibit 26 divided by the total D&C Price; then, using the anticipated percentage complete, the D&C Price identified in Developer's Proposal and the implied interest rate of 6.0%, TxDOT will derive the construction draw schedule at Proposal submission and determine the avoided costs using this Proposal construction draw schedule and Developer's updated Base Scope Schedule of Anticipated Draw Requests.

(g) If (i) a Change Order is issued pursuant to Section 11.1.5(a) with respect to a delay in the issuance of NTP1 or Section 11.1.7 with respect to a delay in the issuance of NTP2, (ii) there is a reduction in the D&C Price due to a reductive Change Order issued in accordance with Section 12 or (iii) a Completion Deadline is extended pursuant to a Change Order issued in accordance with Section 12, then Developer shall have the right to request that TxDOT begin issuing Deferred D&C Payment Certificates before the first $600,000,000 of the D&C Price (exclusive of Change Orders) has been paid to Developer in accordance with this Section 11. Any such request shall be delivered no later than 45 days prior to the date on which Developer requests that Deferred D&C Payment Certificates be issued and such request shall describe in reasonable detail the reason for such request, the start date for early issuance of the Deferred D&C Payment Certificates and the impact to Developer's financing if such request is not granted. Upon receipt of such request, TxDOT shall have 30 days to review, request additional information related to such request and reasonably approve or deny such request; *provided*, that failure by TxDOT to respond within such 30-day period shall be deemed a reasonable denial of such request. No actual or deemed denial of a request submitted in accordance with this subclause (g) shall prejudice Developer's right to resubmit a revised request or to submit a new request in accordance with this subclause (g). Nothing in this Section 11.3.2(g) shall in any way limit TxDOT's rights under Section 11.3.2(f).

(h) The parties agree that an amount equal to the Certificate Value of each Deferred D&C Payment Certificate (but not the excess of the face amount of each such Deferred D&C Payment Certificate over its respective Certificate Value (the "Excess")) will be treated for income tax purposes only: (x) as received by the Developer at the time it receives a Deferred D&C Payment Certificate, and (y) as deemed to be advanced by the Developer to TxDOT to be paid in cash by TxDOT on the payment date(s) of such Deferred D&C Payment Certificate. Such Certificate Value shall be included in the total contract price within the meaning of Section 460 of the Internal Revenue Code of 1986, as amended, and the U.S. Treasury Regulations thereunder. Furthermore, for income tax purposes only, the Excess shall be treated as interest received separately from the contract for the provision of services incident to or necessary for the manufacture, building, installation or construction of the Project within the meaning of Treas. Reg. Sec. 1.460-1(d). As used herein, "**Certificate Value**" of a Deferred D&C Payment Certificate means the fair market value of such Deferred D&C Payment Certificate on the date such Deferred D&C Payment Certificate is received by the Developer, as determined in the good faith discretion of Developer.

(i) Notwithstanding any other provision herein to the contrary, in the event Developer has assigned its rights, title and interests in and to payment of Breakage Costs hereunder and has delivered at least 30 business days' advance notice of such assignment to TxDOT, which notice shall include evidence to TxDOT's reasonable satisfaction of such assignment, then any such assigned Breakage Costs shall not be subject to set-off, deduction, reduction or withholding for any reason by TxDOT, including defective work, Liquidated Damages, default, termination, latent defects, or warranty claims. 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 D&C Payment Schedule or from exercising its rights under the D&C Retainage Bond, D&C Performance Bond, D&C Payment Bond or Guaranty.

11.3.3 No TxDOT Liability

(a) TxDOT shall have no obligation to pay debt service on any debt issued or incurred in connection with the Project or this Agreement. TxDOT shall have no obligation to join in, execute or guarantee any note or other evidence of indebtedness incurred in connection with the Project or this Agreement, any other Funding Agreement or any Security Document.

(b) None of the State, TxDOT, the Commission or any other agency, instrumentality or political subdivision of the State, and no board member, director, officer, employee, agent or representative of any of them, has any liability whatsoever for payment of the principal sum of any Developer Debt, any other obligations issued or incurred by any Person in connection with this Agreement or the Project, or any interest accrued thereon or any other sum secured by or accruing under any Funding Agreement or Security Document. Except for a violation by TxDOT of obligations to make payments certified in the Deferred D&C Payment Certificates in accordance with this Section 11.3, no Lender is entitled to seek any damages or other amounts from TxDOT, whether for Developer Debt or any other amount. TxDOT's review of any Funding Agreements or Security Documents or other D&C Work financing documents is not a guarantee or endorsement of the Developer Debt, and is not a representation, warranty or other assurance as to the ability of any such Person to perform its obligations with respect to the Developer Debt or any other obligations issued or incurred by such Person in connection with this Agreement or the Project, or any other obligations issued or incurred by such Person in connection with this Agreement or the Project.

(c) TxDOT shall not have any obligation to any Lender pursuant to the Contract Documents except for the express obligations to make payments certified in the Deferred D&C Payment Certificates in accordance with this Section 11.3. TxDOT has no responsibility for the validity or enforceability of a security interest pursuant to any Security Documents.

11.3.4 Mandatory Terms of Project Debt, Funding Agreements and Security Documents

(a) No Security Document or other instrument purporting to mortgage, pledge, encumber, or create a lien, charge or security interest on or against the Deferred D&C Payment Certificate shall extend to or affect the right, title and interest of TxDOT in the Project or the Right-of-Way or TxDOT's rights or interests under the Contract Documents.

(b) Each note, bond or other negotiable or non-negotiable instrument evidencing Developer Debt, or evidencing any other obligations issued or incurred by any Person in connection with this Agreement or the Project must include or refer to a document controlling or relating to the foregoing that includes a conspicuous recital to the effect that payment of the principal thereof and interest thereon is a valid claim only as against the obligor and the security pledged by Developer or the obligor therefor, is not an obligation, moral or otherwise, of the State, TxDOT, the Commission, any other agency, instrumentality or political subdivision of the State, or any elected official, board member, director, officer, employee, agent or representative of any of them, and neither the full faith and credit nor the taxing power of the State, TxDOT, the Commission or any other agency, instrumentality or political subdivision of the State is pledged to the payment of the principal thereof and interest thereon.

(c) Each Funding Agreement and Security Document shall state that the Lender shall not seek any damages or other amounts from TxDOT, the Commission, any other agency, instrumentality or political subdivision of the State, or any elected official, board member, director, officer, employee, agent or representative of any of them, whether for Project Debt or any other amount except damages from TxDOT for a violation by TxDOT of its express obligation to make payments certified in the Deferred D&C Payment Certificates in accordance with this Section 11.3.

(d) Each Funding Agreement and Security Document shall expressly state that the Lender shall not name or join TxDOT, the Commission, any other agency, instrumentality or political subdivision of the State, or any elected official, member, director, officer, employee, agent or representative of any of them in any legal proceeding seeking collection of the Developer Debt or other obligations secured thereby or the foreclosure or other enforcement of the Funding Agreement or Security Document.

(e) Each Funding Agreement and Security Document shall expressly state that the Lender, D&C Sureties and any collateral agent shall respond to any request from TxDOT or Developer for consent to a modification or amendment of any of the Contract Documents within a reasonable period of time.

(f) Each Funding Agreement and Security Document shall state that the Lender agrees to exclusive jurisdiction and venue in the federal and State courts in Travis County in any action by or against TxDOT or its successors and assigns.

11.4 O&M Price

11.4.1 During the O&M Period, in full consideration for the performance by Developer of its duties and obligations related to the O&M Work, TxDOT shall pay the O&M Price in the amounts determined as set forth in Sections 11.4.2 through 11.4.4, as adjusted in accordance with Section 11.4.5, subject only to such additions to and deductions from the compensation as may be provided for pursuant to this Section 11 and Sections 7.4, 12, 13 and 17, including deductions for O&M Liquidated Damages. The term "**O&M Price**" as used herein shall mean:

(a) the sum of (1) the annual payments set forth in the Routine O&M Payment Schedule in Exhibit 23-1.1, and, if applicable, Exhibit 23-1.[2][3] for any O&M Additional Scope Work for which TxDOT exercised its option as of the Substantial Completion Date, plus (2) the annual payments set forth in the Renewal-Other Work Payment Schedule in Exhibit 23-2.1, and, if applicable, Exhibit 23-2.[2][3] for any O&M Additional Scope Work for which TxDOT exercised its option as of the Substantial Completion Date (collectively, the "**Annual O&M Payment**"); plus

(b) the amounts payable in each year for pavement Renewal Work set forth in the Pavement Renewal Work and Payment Schedule in Exhibit 23-3.1 and, if applicable, Exhibits 23-3.[2][3], for any O&M Additional Scope Work for which TxDOT exercises its options as of the Substantial Completion Date (the "**Pavement Payment**") calculated and payable in accordance with Section 11.4.3; plus

(c) the lump sum amounts for each bridge identified in the Bridge Renewal Work and Payment Schedule set forth in Exhibit 23-4, payable in year 10 of the O&M Period as

lump sum payments for the Renewal Work for the specified bridge in accordance with Section 11.4.4 (the "**Bridge Payment**").

The O&M Price shall be paid in accordance with this Section 11.4 and Section 11.5. Except for the adjustments and deductions to the O&M Price otherwise described herein, the O&M Price (and the individual components thereof) shall be increased or decreased only by a Change Order issued in accordance with Section 12 or by an amendment to this Agreement. The obligation of TxDOT to pay the O&M Price to Developer shall commence upon the Substantial Completion Date and no portion of the O&M Price shall be payable on account of services provided: (a) as part of the D&C Work, (b) prior to the Substantial Completion Date, or (c) after the termination or expiration this Agreement.

11.4.2 Subject to deductions as permitted herein, Developer shall be paid for O&M Work performed under this Agreement, a monthly payment composed of the sum of: (a) the amount that is equivalent to one-twelfth (1/12) of the Annual O&M Payment due in each year of the O&M Period, plus (b) beginning in year [__]***[Insert first year of payment for pavement Renewal Work from Proposal Form N-2.3]*** of the O&M Period, the amount of Pavement Payment available to Developer calculated in accordance with Section 11.4.3, plus (c) solely in year 10 of the O&M Period, the amount of Bridge Payment available to Developer for bridge Renewal Work calculated in accordance with Section 11.4.4 (collectively, the "**Monthly Disbursement**"). Such amount shall be payable pursuant to O&M Draw Requests submitted in accordance with Section 11.5.

11.4.3 Subject to deductions as permitted herein, Developer shall be paid for pavement Renewal Work based on the amounts of pavement Renewal Work and the cumulative maximum available Pavement Payments set forth in Exhibit 23-3.1 (and Exhibits 23-3.[2][3], as applicable), as such amounts may be escalated pursuant to Section 11.4.5, provided that:

(a) The amount payable in each month for pavement Renewal Work will be calculated in accordance with the following sentence, but not to exceed the cumulative maximum Pavement Payment available for the applicable year. The amount payable for pavement Renewal Work will be calculated by multiplying the total number of square yards of pavement Renewal Work completed and not yet invoiced by the Annual Unit Cost;

(b) If the amount payable as calculated in accordance with subclause (a) above exceeds the maximum cumulative Pavement Payment available in the applicable year as set forth in Exhibit 23-3.1 (and Exhibits 23-3.[2][3], as applicable), Developer shall not be entitled to receive payment for such excess amount; and

(c) For any amount of the Pavement Payment not payable in accordance with subclause (b) above, Developer may include such amount for payment in any subsequent O&M Draw Request and such amount shall be paid only at such time (if any) as funds are available to Developer pursuant to the maximum cumulative Pavement Payment Schedule set forth in Exhibit 23-3.1 (and Exhibits 23-3.[2][3], as applicable).

(d) For the avoidance of doubt, other than pursuant to a Change Order executed in accordance with Section 12, in no event shall Developer be paid more than the total cumulative maximum Pavement Payment set forth in Exhibit 23-3.1 (and Exhibits 23-3.[2][3], as applicable),

for the Term, regardless of the number of total square yards of pavement Renewal Work actually performed by Developer.

11.4.4 Subject to deductions as permitted herein, solely in year 10 of the O&M Period, Developer shall be paid for bridge Renewal Work in the amount specified for each of the bridges identified in Exhibit 23-4, provided that all elements of the bridge have achieved a BRINSAP rating of 7 in year 10 of the O&M Period.

11.4.5 The annual payment of the O&M Price will be escalated or reduced as follows:

(a) For the annual payments set forth in the Routine O&M Payment Schedule, based on changes in CPI as follows:

(i) The CPI for April 2014 will establish the Base Index (BI_{CPI}); and

(ii) The annual payments set forth in the Routine O&M Payment Schedule shall be escalated or reduced by multiplying the annual amount for such year, by the CPI for the month that is three months prior to the month in which the applicable year commences and dividing such amount by the BI_{CPI}.

(iii) The formula that reflects the foregoing is: Adjusted Routine O&M Payment = (annual Routine O&M Payment) x CPI/(BI_{CPI}).

(b) For the annual payments set forth in the Renewal-Other Work Payment Schedule, for the annual payments set forth in the Pavement Payment Schedule and for the years in which the Bridge Payment Schedule are available, based on changes in CCI as follows:

(i) The CCI for April 2014 will establish the Base Index (BI_{CCI}); and

(ii) The annual payments set forth in the Renewal-Other Work Payment Schedule, and for the years in which the Pavement Payment Schedule and the Bridge Payment Schedule are available, such amounts shall be escalated or reduced by multiplying the amount in payable in such year, by the CCI for the month that is three months prior to the month in which the applicable year commences and dividing such amount by the BI_{CCI}.

(iii) The formula that reflects the foregoing is: Adjusted Renewal Work Payments = (annual Renewal Work Payments) x CCI/(BI_{CCI}).

(c) Each year during the O&M Period, the escalated annual payment amounts for each of the Routine O&M Payment and the Renewal-Other Work Payment calculated in accordance with this Section 11.4.5 shall be inputted into the third column of the Routine O&M Payment Schedules set forth in Exhibits 23-1.1[2][3] and the Renewal-Other Work Payment Schedules set forth in Exhibits 23-2.1[2][3], respectively, for the applicable year. Additionally, with respect to the Pavement Payments, in each year during the O&M Period, the escalated annual amount of Pavement Payments calculated in accordance with this Section 11.4.5 shall be inputted into the fourth column of the Pavement Renewal Work and Payment Schedules set forth in Exhibits 23-3.1[2][3] for the applicable year, and the updated maximum cumulative Pavement Payment for such year shall be inputted into the fifth column for the applicable year, which cumulative maximum

amount shall be calculated by adding the amount in the fourth column of such Exhibit to the amount in the fifth column for the immediately preceding year.

11.5 Invoicing and Payment for the O&M Price

The following process shall apply solely to invoicing and payment of the O&M Price:

11.5.1 On or about the fifth Business Day of each month, Developer shall submit to TxDOT five copies of an O&M Draw Request in the form of Exhibit 12 for a Monthly Disbursement for O&M Work performed for the preceding month and meeting all requirements specified herein, including any pavement or bridge Renewal Work for which Developer seeks payment pursuant to Sections 11.4.3 and 11.4.4, respectively. Each Draw Request shall be executed by Developer's Authorized Representative and Maintenance QC Manager. Developer acknowledges that TxDOT may obtain funding for portions of the O&M Work from the federal government, local agencies and other third parties, and Developer agrees to segregate O&M Draw Requests for all such O&M Work in a format reasonably requested by TxDOT and with detail and information as reasonably requested by TxDOT. Each O&M Draw Request shall be organized to account for applicable reimbursement requirements and to facilitate the reimbursement process. In addition, the O&M Draw Request for a Monthly Disbursement must be accompanied by an attached report containing information that TxDOT can use to verify the O&M Draw Request and Monthly Disbursement and all components of the Liquidated Damages for the prior month. Such attached report shall include:

(a) A description of any pavement or bridge Renewal Work for which Developer is claiming payment pursuant to Sections 11.4.3 and 11.4.4, respectively, and additional materials supporting the amount of payment requested thereunder;

(b) A description of any Noncompliance Events, Noncompliance Points assessed during the prior month and any O&M Liquidated Damages owed for assessed Noncompliance Points;

(c) A description of any other Liquidated Damages (including Liquidated Damages for O&M Period Lane Closures) assessed against Developer during the prior month in relation to the O&M Work, including the date and time of occurrence and a description of the events and duration of the events for which the Liquidated Damages were assessed;

(d) Any adjustments to reflect previous over-payments and/or under-payments;

(e) A detailed calculation of any interest payable in respect of any amounts owed; and

(f) Any other amount due and payable from Developer to TxDOT or from TxDOT to Developer under this Agreement, including deductions related to the O&M Work that TxDOT is entitled to make and any carry-over deductions or other adjustments from prior months not yet paid by Developer.

11.5.2 Within ten Business Days after TxDOT's receipt of a complete O&M Draw Request, TxDOT will review the O&M Draw Request and all attachments and certificates thereto,

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 O&M Draw Request. Developer may include such disapproved amounts in the next month's O&M Draw Request after correction of the deficiencies noted by TxDOT and satisfaction of the requirements of the Contract Documents related thereto. Within ten Business Days after the approval by TxDOT of an O&M Draw Request, TxDOT shall pay Developer the Monthly Disbursement in the amount of the O&M Draw Request approved for payment less any amounts that TxDOT is otherwise entitled to withhold or deduct. No payment by TxDOT shall, at any time, preclude TxDOT from showing that such payment was incorrect, or from recovering any money paid in excess of those amounts due hereunder.

11.5.3 The Annual O&M Payments payable for any partial month or payable for any partial year shall be prorated.

11.5.4 TxDOT shall not be required to pay any Monthly Disbursement if Developer has failed to file the Operations Reports required to be filed under the Technical Provisions, unless and until the required reports are filed.

11.5.5 TxDOT shall have the right to dispute, in good faith, any amount specified in an O&M Draw Request submitted pursuant to this Section 11.5. TxDOT shall pay the amount of the O&M Draw Request in question that is not in Dispute. Developer and TxDOT shall use their reasonable efforts to resolve any such Dispute within 30 days after the Dispute arises. If they fail to resolve the Dispute within that period, then the Dispute shall be resolved according to the Dispute Resolution Procedures.

11.5.6 Any amount determined to be due pursuant to the Dispute Resolution Procedures will be paid within 20 days following resolution of the Dispute, together with interest thereon in accordance with this Agreement accruing from the date on which the payment should originally have been made to the date on which the payment is made.

11.6 Deductions, Exclusions and Limitations

11.6.1 Reserved

11.6.2 Deductions

TxDOT may deduct from (i) each payment of the O&M Price any of the following applicable to the O&M Work or accruing during the O&M Period and (ii) from each payment of the D&C Price, including the Final D&C Payment, any of the following applicable to the D&C Work accrued prior to Final Acceptance:

(a) Any TxDOT or third party Losses for which Developer is responsible hereunder or any Liquidated Damages that have accrued as of the date of the application for payment or for D&C Work that 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 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 that TxDOT is entitled to recover from Developer under the terms of this Agreement, including any carry-over deductions (including for Liquidated Damages) or other adjustments from prior months not yet paid by Developer.

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

Notwithstanding the foregoing, any Liquidated Damages or offsets related to the D&C Work shall be deducted solely from the D&C Price and any Liquidated Damages or offsets related to the O&M Work shall be deducted solely from the O&M Price.

11.6.3 Unincorporated Materials

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

(a) 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 discretion; or (c) stored at a Supplier's fabrication site, which must be a bonded commercial location approved by TxDOT, in its 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 discretion, 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.

(b) 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.

(c) 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 discretion, determines that is appropriate after considering the availability of insurance coverage and Developer's actions to replace the lost, damaged or unsatisfactory items.

(d) Payment for material furnished and delivered as indicated in this Section 11.6.3 will not exceed the amount paid by Developer as evidenced by a bill of sale supported by paid invoice.

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

(a) 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 D&C 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 D&C 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 D&C Price (less mobilization) is earned. The amounts paid under this Section 11.6.4 shall be taken into account in assessing the maximum amount payable under a Draw Request through application of the Maximum D&C Payment Schedule.

(b) The portion of the D&C 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 11.6.4 shall be taken into account in assessing the maximum amount payable under a Draw Request through application of the Maximum D&C Payment Schedule.

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

11.6.5 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 11.6.4, 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 12.7.3.

11.7 Final D&C Payment

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

11.7.1 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 payments that do not exceed the amounts set forth on the Maximum D&C 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 payment schedule, (c) such other documentation as TxDOT may reasonably require; and (d) the release described in Section 11.7.4, 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 12 and 19.

11.7.2 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 11.7.4 and otherwise satisfactory in form and content to TxDOT, will pay in accordance with the payment schedule described in Section 11.7.6 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 11.7.2 above.

11.7.3 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 D&C 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.

11.7.4 The executed release from Developer shall be from any and all claims arising from the D&C 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 D&C 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 11.7.3);

(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, D&C Warranties and the D&C Payment Bond, the D&C Performance Bond and the D&C Retainage Bond are in full force and effect.

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

11.7.6 TxDOT will review Developer's proposed Final Reconciliation, and any changes or corrections, including deductions and withholding described in Section 11.7.2, will be forwarded to Developer for correction within 20 Business Days. Any changes or corrections made pursuant to this Section 11.7.6 will be reflected in an updated payment schedule showing the net amount owed to Developer by applicable period.

11.7.7 TxDOT shall fulfill its payment obligations in respect of the D&C Work under this Agreement by paying the amounts identified in Section 11.7.6, in accordance with the schedule described in Section 11.7.6.

11.7.8 Upon receipt of TxDOT's response under Section 11.7.6, Developer may request TxDOT to execute and deliver to Developer a certification of payment in the manner set forth in Section 11.3.2.

11.8 Payment to Subcontractors

11.8.1 Developer shall pay each Subcontractor for Work performed within 10 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.

11.8.2 For the purpose of this Section 11.8, 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.

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

11.9 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.

SECTION 12. CHANGES IN THE WORK

This Section 12 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 12 and Developer's right to collect certain payments from Utility Owners for Betterments as specified in Section 3.14.2, 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 12. 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 12.

12.1 Circumstances Under Which Change Orders May Be Issued

12.1.1 Definition of and Requirements Relating to Change Orders

(a) 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 12. TxDOT may issue unilateral Change Orders as specified in Section 12.2.2. Change Orders may be requested by Developer only pursuant to Section 12.3. 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): (i) to modify the scope of the Work; (ii) to revise a Completion Deadline; (iii) to revise the Price; or (iv) 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 discretion of TxDOT, direct Developer to proceed with the Work with the amount of any adjustment of time, including 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.

(b) 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 12.1.1(b), will describe the Work in question and will state the basis for determining compensation, if any. Subject to Section 12.2.1(e), 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 12.3 to request that TxDOT issue a Change Order with respect thereto).

(c) 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 12.3.2(b) 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 12.3.2, 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.

12.1.2 TxDOT Right to Issue Change Orders

(a) TxDOT may, at any time and from time to time, without notice to any Surety, authorize 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 as provided in Section 5.1.2(a); except TxDOT has no right to require any change that:

(i) Is not in compliance with applicable Laws;

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

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

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

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

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

(vii) Is not technically feasible to construct.

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

12.2 TxDOT-Initiated Change Orders

12.2.1 Request for Change Proposal

(a) 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.

(b) 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.

(c) Within five Business Days after the second consultation and provision of any data described in Section 12.2.1(b), TxDOT shall notify Developer whether TxDOT: (i) wishes to issue a Change Order; (ii) wishes to request Developer to provide a Cost and Schedule Proposal as discussed at the meeting; (iii) 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 (iv) no longer wishes to issue a Change Order. TxDOT may at any time, in its 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 applicable, as well as any additional costs permitted hereunder.

(d) If so requested, Developer shall, within 10 Business Days after receipt of the notification described in Section 12.2.1(c), 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 12.4, 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.

(e) If Developer and TxDOT are unable to reach agreement on a Change Order, TxDOT may, in its 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: (i) a Time and Materials Change Order as provided in Section 12.7 or (ii) a Directive Letter under Section 12.1.1(b). 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, (x) Developer shall implement and perform the Work in question as directed by TxDOT and (y) 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.

(f) If it is not practicable, due to the nature 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 12.4, Developer shall provide an incomplete proposal that includes all information capable of being ascertained. Said incomplete proposal shall: (i) 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, (ii) provide such information regarding projected impact on a critical path or operation and maintenance plan, as applicable, and as is requested by TxDOT, and (iii) 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 12.3.2(f).

12.2.2 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 12.7 for additional Work that 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.

12.2.3 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.

12.3 Developer-Requested Change Orders

12.3.1 Eligible Changes

(a) 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 that change the duration of a Critical Path:

(i) Force Majeure Events;

(ii) TxDOT-Caused Delays;

(iii) delays relating to Utilities, to the extent permitted by Sections 3.14.1, 3.14.5 and 12.8.2;

(iv) delays relating to Differing Site Conditions or discovery of Hazardous Materials, to the extent permitted by Section 12.8;

(v) delays relating to access to ROW, to the extent permitted by Section 12.8.5; or

(vi) delays due to a delay in the issuance of NTP2 that extend beyond the dates on which escalation in the D&C Price is first available under Section 11.1.7.

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

(i) subject to Section 12.2.3, 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;

(ii) additional costs relating to Differing Site Conditions, Hazardous Materials, and Force Majeure Events, to the extent provided in Section 12.8;

(iii) certain additional costs relating to Utility Adjustment Work, as described in Section 3.14 and Section 12.8.2, to the extent provided therein;

(iv) additional costs directly attributable to uncovering, removing and restoring Work, to the extent provided in Section 6.6.3;

(v) Price adjustments as specified in Section 11.1;

(vi) additional costs for Utility Adjustment Work directly attributable to Necessary Basic Configuration Changes, to the extent provided in Section 12.8; or

(vii) certain additional costs for additional Work directly attributable to a Non-Discriminatory O&M Change, as described in Section 12.8.7 and to the extent provided therein.

(c) Developer's entitlement to a Change Order for eligible changes is subject to the restrictions and limitations contained in this Section 12 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 12.3.2, followed by submittal of a Request for Change Order and supporting documentation to TxDOT.

12.3.2 Procedures

The requirements set forth in this Section 12.3.2 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 11.1.5. Developer understands that it shall be forever barred from recovering against TxDOT under this Section 12 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 12.3.

(a) 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 12.3.1. 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 12.3.2(c); or (b) if permitted by Section 12.3.2(b), a Request for Partnering followed by a PCO Notice if appropriate.

(b) 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 12.3.1(b). The Request for Partnering shall reference this Section 12.3.2(b) and shall describe the event or situation as well as action that 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 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 12.3.2(c).

(c) 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 12.3.1 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: (i) 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; (ii) state the name, title, and activity of each Program Manager and TxDOT representative knowledgeable of the facts underlying the anticipated Request for Change Order; (iii) identify any documents and the substance of any oral communication involved in the facts underlying the anticipated Request for Change Order; (iv) state in detail the basis for necessary accelerated schedule performance, if applicable; (v) state in detail the basis that the work is not required by this Agreement, if applicable; (vi) identify particular elements of performance for which additional compensation may be sought under this Section 12.3.2; (vii) identify any insurance available to Developer, or deemed to be self-insured by Developer under Section 9.2.4, with respect to the event giving rise to the request for additional compensation; (viii) identify any potential critical path or operation and maintenance plan impacts; and (ix) 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 that 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 12.8.1(c) or 12.8.4(a) 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 12.3.2(c).

(d) 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: (i) 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 (ii) the right to seek an extension of any Completion Deadline with respect to any delay in a critical path that accrued prior to the date of delivery of the notice. Furthermore, if any PCO Notice concerns any condition or material described in Section 12.8.4(a), 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 (except to the extent expressly permitted hereunder or otherwise required in accordance with Law).

In addition to the limitations set forth in Section 12.3.2(d), 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: (i) TxDOT was not materially prejudiced by the lack of notice, or (ii) 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 (i) or clause (ii) 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 that accrued prior to the date of delivery of the PCO Notice.

(e) Delivery of Request for Change Order

Developer shall deliver a Request for Change Order under this Section 12.3.2(e) 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, construction, operation and maintenance costs to

be covered by separate Requests for Change Order. With respect to the D&C Work, if Developer requests a time extension, then TxDOT, in its 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 12.3.2(f) within the appropriate time period, Developer shall be required to provide a new PCO Notice before it may submit a Request for Change Order.

(f) Incomplete Requests for Change Order

Each Request for Change Order provided under Section 12.3.2(e) shall meet all requirements set forth in Section 12.4; *provided* that if any such requirements cannot be met due to the nature or timing of the occurrence, Developer shall provide an incomplete Request for Change Order that fills in all information capable of being ascertained. Said incomplete Request shall: (i) include a list of those Change Order requirements that are not fulfilled together with an explanation reasonably satisfactory to TxDOT stating why such requirements cannot be met; (ii) provide such information regarding projected impact on a critical path or operation and maintenance plan, as applicable, and as is requested by TxDOT; and (iii) 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 Developer shall have the burden of following up with TxDOT on the status of any such Request for Change Order.

(g) 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 other schedule requirements, or the Price and, if so, whether Developer believes a time extension or Price increase is required hereunder. If an event or situation occurs that may affect the Price or schedule,

including 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: (i) the effect of the delay on alternatives available to TxDOT (that is, a comparison of alternatives that are available at the time notice was actually given and alternatives that 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 (ii) the impact of the delay on TxDOT's ability to obtain and review objective information contemporaneously with the event.

(h) Review of Subcontractor Claims

Prior to submission by Developer of any Request for Change Order that 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 that 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 time requirements, including Completion Deadlines (if applicable), 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 D&C Project Manager or O&M Project Manager, as applicable, 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 or time requested, has reviewed and verified the adequacy of all back-up documentation to be placed in escrow pursuant to Section 20.1, 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 that is not accompanied by such analysis and certification shall be considered incomplete.

12.3.3 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 12.9, 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.

12.4 Contents of Change Orders

12.4.1 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 12.

12.4.2 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 12.4.2 for each Cost and Schedule Proposal and Request for Change Order.

(a) 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.

(b) 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 12.5.2, 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 12.5.2 and 12.7. 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. Developer shall also identify any insurance available to Developer, or deemed to be self-insured by Developer under Section 9.2.4, with respect to the event giving rise to the Change Order.

(c) Delay Analysis

With respect to the D&C Work, 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, that compares the proposed new schedule to the current approved Project Schedule.

(d) Other Supporting Documentation

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

12.4.3 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 12 which permit a Change Order to be issued, and describing the data and documents (including all data and reports required under Section 12.9) which establish the necessity and amount of such proposed change.

12.4.4 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 or compensation requested is justified as to entitlement and amount; (b) the amount of time or compensation requested includes all known and anticipated impacts or amounts that 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 20.3 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 20.3.

12.5 Certain Limitations

12.5.1 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.

12.5.2 Limitation on Delay and Disruption Damages

(a) 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 12.2.1(c) and 12.3.2(e). Other delay and disruption damages shall be compensable hereunder only in the case of delays that entitle Developer to an extension of a Completion Deadline and qualify as 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.

(b) Other Limitations

Delay and disruption damages shall be limited to direct costs directly attributable to the delays described in Section 12.5.2(a) and markups thereon in accordance with Section 12.7.7 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:

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

(ii) the change in the D&C 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 D&C Work that 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

(iii) 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

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

(v) 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.

12.5.3 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, upon request, 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 that 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 that 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.

12.5.4 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.

12.6 Change Order Pricing

The price of a Change Order under this Section 12.6 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.

12.6.1 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 12.7: (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 12.7.7 shall apply to Work added and deleted by Change Orders.

12.6.2 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.

12.6.3 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 that includes an estimated construction cost and that 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.

12.6.4 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 12.7. For negotiated Change Orders, markups for profit and overhead shall be consistent with Sections 12.5.2 and 12.7.7. Risk associated with the Work

described in the Change Order shall be addressed through the assumptions contained therein regarding the scope of such Work.

12.6.5 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 Developer applied to develop the original Price, as well as markup for profit and variable overhead at the rates 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: (a) reasonable demobilization costs of Developer associated with the deleted Work; (b) reasonable costs associated with terminating related Subcontractors; (c) 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; (d) 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; and (e) Breakage Costs payable by Developer or Borrower (as applicable) as a result of such deleted Work, subject to Developer, Borrower (if not Developer) and Lenders mitigating all such costs to the extent reasonably possible, minus to the extent it is a positive amount, the aggregate of all Breakage Costs payable to Developer or Borrower (as applicable) as a result of such deleted Work. All such Breakage Costs shall be reasonable in TxDOT's sole judgment and shall be supported by documentation reasonably satisfactory to TxDOT provided by Developer no later than 20 days after notice to Developer of intent to delete the Work.

12.6.6 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 12.6.4 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 12.6.5 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.

12.6.7 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.

12.6.8 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.

12.6.9 Insurance Deductible

Any increase to the Price under any Change Order shall be net of all insurance available to Developer, or deemed to be self-insured by Developer under Section 9.2.4, with respect to the event giving rise to the increase in Price.

12.7 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.

12.7.1 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.

12.7.2 Material Costs

Material costs for Change Order work shall be the actual cost of all materials to be used in the performance of the 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.

12.7.3 Equipment

(a) 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:

(i) 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

(ii) 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 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.

(b) 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.

(c) 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.

12.7.4 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 12.7, unless otherwise approved 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.

12.7.5 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 prior to any payment authorization being granted.

12.7.6 Other Direct Costs

For any justified direct cost incurred for Change Order work not covered by the categories of costs contained in Sections 12.7.1 through 12.7.5, 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 prior to any payment authorization being granted.

12.7.7 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.

12.7.8 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 12.7 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, Completion Deadlines and the Maintenance Management Plan 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.

(a) Developer shall maintain its records in such a manner as to provide a clear distinction between: (i) 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 (ii) the costs of other operations. Developer shall furnish daily, on forms approved by TxDOT, reports of all costs described in the foregoing clause (i). 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.

(b) 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.

12.8 Change Orders for Differing Site Conditions, Utilities, Force Majeure Events, Hazardous Materials, Access to ROW, Necessary Basic Configuration Changes and Non-Discriminatory O&M Changes

12.8.1 Differing Site Conditions

Subject to the restrictions and limitations set forth in this Section 12, Developer shall be entitled to a Change Order for certain additional costs that are directly attributable to any Differing Site Conditions to the extent permitted in this Section 12.8.1. 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 D&C Work resulting from the existence of Differing Site Conditions and such costs are not reimbursed by insurance proceeds (except to the extent such non-reimbursement is due to Developer's failure to maintain the insurance required to be maintained under the Agreement), TxDOT and Developer shall share the risk as follows:

(a) 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.

(b) 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 12.8.1(a), and a Change Order shall be issued to compensate Developer for such additional costs.

(c) During progress of the D&C Work, if Differing Site Conditions are encountered, Developer shall immediately notify TxDOT thereof telephonically or in person, to be followed immediately by 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.

(d) 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 12.7 and shall track the costs incurred in excess of $150,000 in accordance with the requirements and limitations in Section 12.6.

(e) 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.

12.8.2 Utilities

Developer shall be entitled to a Change Order with respect to certain additional costs or delays relating to Utility Adjustments, as specified in Section 3.14 and Section 12.8.6 (with respect to Necessary Basic Configuration Changes) and subject to the restrictions and limitations set forth

in Section 3.14 and in this Section 12. 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.

12.8.3 Force Majeure Events

Subject to the limitations contained in, and upon Developer's fulfillment of all applicable requirements of, this Section 12, TxDOT shall issue Change Orders: (a) to compensate Developer for additional costs incurred directly attributable to Force Majeure Events; and (b) with respect to the D&C Work only, 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.

12.8.4 Hazardous Materials Management

If compensation is payable to Developer pursuant to Section 3.15 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 12.8.4, including the cost sharing provisions set forth in Section 12.8.4(a) with respect to Hazardous Materials Management related solely to the D&C Work. Developer shall not be entitled to a Change Order for additional compensation with respect to Hazardous Materials Management responsibilities for which it is responsible under Section 3.15 and Section 5.1.3.

(a) 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 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 notice).

In cases involving reimbursement for Hazardous Materials Management under this Section 12.8.4, 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.

Solely with respect to the D&C Work, and except as otherwise provided and subject to the limitations in this Section 12.8, TxDOT shall compensate Developer for (i) 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 (ii) 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.

Solely with respect to the D&C Work, and except as otherwise provided and subject to the limitations in this Section 12, Developer shall be entitled to a Change Order in accordance with Section 12.8.3 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 12.8.3.

Developer shall take all reasonable steps to minimize any such costs described in this Section 12.8.4. Compensation shall be allowed only to the extent that Developer demonstrates to TxDOT's satisfaction that: (i) the Hazardous Materials Management could not have been avoided by reasonable design modifications or construction techniques and (ii) 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.

(b) 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 12.8.4, 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.

(c) 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. No compensation or time extension shall be allowed with respect to: (i) immaterial quantities of Hazardous Materials; (ii) any Hazardous Materials that could have been avoided by reasonable design modifications or construction techniques; (iii) any costs that could have been avoided; (iv) Hazardous Materials on any Additional Properties other than TxDOT Additional Properties; (v) any Hazardous Materials encountered during or in connection with the demolition of buildings, fixtures or other improvements on any parcels within the Site; or (vi) 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 12.8.4.

(d) 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.

12.8.5 Access to ROW

With respect to the D&C Work, except as otherwise provided and subject to the limitations in this Section 12 and Section 3.13.7(c), 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 3.13.7(c) and clause (b) of the definition for TxDOT-Caused Delay. Such events shall be handled in accordance with the procedures in Section 12.3.

12.8.6 Necessary Basic Configuration Changes

(a) Notwithstanding the fact that this Agreement generally obligates Developer to undertake all work necessary to complete the D&C Work without an increase in the D&C Price, this Section 12.8.6(a) provides for an increase in the D&C Price to be made in the amount of the increased costs for additional Utility Adjustment Work required on TxDOT 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 or shall exclude any additional costs associated with redoing the work already performed.

(b) Developer shall be responsible for any delays (including those that affect the duration of a Critical Path), except delays described in subsection (b) of the definition of TxDOT-Caused Delay related to a Necessary Basic Configuration Change, and, except as set forth in Section 12.8.1, any cost increases resulting from changes in requirements and obligations of Developer relating to the Project due to Errors in the Draft Schematic.

12.8.7 Non-Discriminatory O&M Changes

(a) In no event shall Developer be entitled to compensation for increases in costs of O&M Work due to a Non-Discriminatory O&M Change, except for capital costs of required major new improvements or required major repair, reconstruction, rehabilitation, restoration, renewal or replacement of any affected Element. Developer shall be entitled to additional costs for extra Work only if TxDOT directs Developer to implement the Non-Discriminatory O&M Changes (or Developer is otherwise obligated by Law to implement such Non-Discriminatory O&M Changes) (i) prior to the date when Developer performs or is scheduled to perform the Renewal Work (if any) on the affected Element or (ii) otherwise outside the ordinary course of performing the O&M Work. Developer shall not be entitled to any additional costs for implementing Non-Discriminatory O&M Changes if Developer replaces the affected Element during the ordinary course of performing the O&M Work.

(b) Developer shall only be entitled to compensation for increases in costs of O&M Work due to a Non-Discriminatory O&M Change in excess of an annual aggregate deductible of $150,000 ("**Annual Non-Discriminatory O&M Change Deductible**"). The Annual Non-Discriminatory O&M Change Deductible reflects the Parties' agreement that: (a) Developer will bear the financial risks for additional Work costs incurred in a Fiscal Year due to Non-Discriminatory O&M Changes up to the Annual Non-Discriminatory O&M Change Deductible and (b) TxDOT will compensate Developer for additional Work costs incurred in a Fiscal Year due to Non-Discriminatory O&M Changes in excess of the Annual Non-Discriminatory O&M Change Deductible; provided that no such compensation shall be made for any Non-Discriminatory O&M Change that is required solely to conform to Good Industry Practice.

(c) The amount of the Annual Non-Discriminatory O&M Change Deductible shall be adjusted annually at the beginning of each Fiscal Year after the Effective Date by a percentage equal to the percentage adjustment in the CPI between the CPI most recently published for the second immediately preceding Fiscal Year and the CPI most recently published for the immediately preceding Fiscal Year.

12.9 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 (if any), and (b) all data necessary to show the actual impact (if any) of the change on each Critical Path with respect to all D&C 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.

12.9.1 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.

12.9.2 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.

12.9.3 Execution of Reports

All Time and Materials Change Order reports shall be signed by Developer's D&C Project Manager or O&M Project Manager, as applicable.

12.9.4 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 (i) with respect to the D&C Work, for a period of not less than five

years after the date of Final Acceptance and (ii) with respect to the O&M Work, for a period not less than five years after the expiration of the O&M Period, and, in each case, 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 or more than 60 days after the end of the Term, as applicable, Developer will be given a reasonable notice of the time when such audit is to begin.

12.10 Matters Not Eligible for Change Orders and Waiver

12.10.1 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 12 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) With respect to the D&C Work only:

(i) Errors in the Design Documents and Construction Documents (including Errors therein traceable to Errors in the Draft Schematic), subject only to the right to a Change Order to the extent permitted by Section 12.8);

(ii) 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 or applicable Laws;

(iii) 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);

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

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

(vi) 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 12.8.2;

(vii) delays not on a Critical Path; and

(viii) delays caused by untimely provision of access to Project ROW, except to the extent TxDOT has agreed in this Section 12 to be responsible for any such delays which constitute TxDOT-Caused Delays;

(b) With respect to the O&M Work only:

(i) delay from TxDOT or other parties' maintenance activities;

(ii) maintenance, replacement or repair of any component (whether or not it is a Maintained Element), necessitated by any act, omission, negligence, intentional misconduct, or breach of applicable Law, contract, or Governmental Approval by any Developer-Related Entity;

(iii) changes arising out of design or construction of the Project or the materials and supplies used with the construction;

(iv) costs to the extent they could be avoided through mitigation by Developer by re-sequencing, re-allocating or redeploying workforces;

(v) materials replacing, re-seeding and re-vegetation for erosion; and

(vi) design or construction Errors;

(c) With respect to the Work:

(i) 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;

(ii) any costs covered by insurance proceeds received by (or on behalf of) Developer, or any costs that would have been covered by insurance deemed to be self-insured by Developer under Section 9.2.4;

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

(iv) 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);

(v) groundwater levels or subsurface moisture content;

(vi) 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;

(vii) acts, omissions, negligence, intentional misconduct or breach of contract, Law, or any Governmental Approval by any Developer-Related Entity; and

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

12.10.2 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.

12.10.3 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.

12.11 Disputes.

If TxDOT and Developer agree that a request to increase the Price or extend any Completion Deadline by Developer has merit, but are unable to agree as to the amount of such Price increase 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 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 12 (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 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 12.7 with respect thereto.

12.12 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 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.

12.13 No Release or Waiver

12.13.1 No extension of time granted hereunder shall release Developer's Surety from its obligations. The 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.

12.13.2 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.

12.13.3 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 13. O&M NONCOMPLIANCE EVENTS AND NONCOMPLIANCE POINTS

13.1 Noncompliance Points System

13.1.1 Certain of Developer's failures and breaches of its contractual obligations under the Contract Documents during the O&M Period in relation to the O&M Work constitute Noncompliance Events that may result in the assessment of Noncompliance Points. Exhibit 24 to this Agreement sets forth a table identifying such Noncompliance Events and the "Cure Period" (if any) available to Developer for each such Noncompliance Event and the amount of Noncompliance Points that may be assessed. Noncompliance Points are a system to measure Developer performance levels and trigger the remedies set forth or referenced in this Section 13. The persistent accumulation of Noncompliance Points may also result in a Persistent Developer Default calculated in accordance with Section 13.5. The inclusion in Exhibit 24 to this Agreement of a breach or failure to perform bears no implication as to whether the breach or failure is material. For purposes of this Section 13.1, "Cure Period" shall be the period identified in the context of Noncompliance Events, as indicated in the table labeled "O&M Noncompliance Events" in such Exhibit 24.

13.1.2 Exhibit 24 to this Agreement contains a representational, but not exhaustive, list of Noncompliance Events possible under the Contract Documents. Accordingly, subject to Sections 13.1.3 and 13.1.4, TxDOT may from time to time add an entry to Exhibit 24 to this Agreement describing a Noncompliance Event under the existing Contract Documents that was not previously included in Exhibit 24 to this Agreement, establishing the number of Noncompliance Points applicable to such Noncompliance Event, and setting a "Cure Period" therefor. TxDOT's right to make additions or adjustments to Exhibit 24 to this Agreement shall not be exercised in a manner to expand, nor shall it be deemed to expand, Developer's existing contractual obligations as set forth in the Contract Documents, but rather to add existing contractual obligations with greater detail as set forth in the Contract Documents to the list of Noncompliance Events for which Noncompliance Points may be assessed in accordance herewith.

13.1.3 TxDOT's right to add existing contractual obligations to Exhibit 24 to this Agreement or otherwise make adjustments to Exhibit 24 based on existing contractual obligations is limited to obligations respecting O&M Work and is limited such that the total number of Noncompliance Points set forth in Exhibit 24 to this Agreement as they exist on the Effective Date shall not increase by more than ten percent for the Term. In order to comply with the ten percent growth limit, TxDOT may elect to (a) remove contractual obligations, or (b) reduce Noncompliance Points assigned to Noncompliance Events. Further, TxDOT shall have no right to assess Noncompliance Points on account of a Noncompliance Event that occurs prior to the date it is added to Exhibit 24 to this Agreement.

13.1.4 On or within 30 days following the third anniversary of the Substantial Completion Date, and every third anniversary thereafter for the Term, and only upon such dates (and not at any other time, except by mutual agreement of the Parties), TxDOT shall provide notice to Developer that TxDOT proposes to make additions or other adjustments to Exhibit 24 to this

Agreement, subject to the aggregate limit set forth in Section 13.1.3. Developer shall have 15 days after receipt of any recommended additions or adjustments to deliver comments to TxDOT. TxDOT shall consider Developer's comments and, within 15 days after receipt of Developer's comments, and subject to the limitations otherwise set forth in this Section 13.1, TxDOT shall deliver to Developer a revised Exhibit 24, which shall be determined in TxDOT's good faith discretion, which revised Exhibit 24 shall set forth the revised terms and/or additions or other adjustments to the Noncompliance Points regime therein. Such revised Exhibit 24 shall be effective upon the earlier of the date it was received by Developer and three days after transmittal to Developer by TxDOT

13.2 Assessment Notification and Cure Process

13.2.1 Notification Initiated by Developer

(a) As an integral part of Developer's self-monitoring obligations, Developer shall establish and maintain an electronic database of each Noncompliance Event specified in Exhibit 24 to this Agreement, as it may be revised from time to time; and Developer shall enter each Noncompliance Event into the database in real time upon discovery or no later than 12:00 noon the next business day if the occurrence takes place after normal business hours. The format and design of the database shall provide TxDOT the ability to make entries and be subject to TxDOT's reasonable approval. At a minimum, the database shall:

(i) Include a description of each Noncompliance Event in reasonable detail, including the number of Noncompliance Points assigned thereto as set forth in Exhibit 24 to this Agreement;

(ii) Identify the Project location (if applicable);

(iii) Identify the date and time of occurrence;

(iv) Identify the applicable response time, if any;

(v) Indicate the applicable cure period, if any, as set forth in Exhibit 24 ;

(vi) Indicate status; and

(vii) Indicate date and time of cure (if any).

(b) Developer shall ensure that TxDOT has electronic access to the database at all times and ability to make entries as provided in Section 13.2.1(a). Developer shall retain each Noncompliance Event entry into the database until at least four years after the date of cure.

(c) Each Operations Report to TxDOT shall include a report of all Noncompliance Events occurring during the preceding quarter. At its discretion, TxDOT may require more frequent reports of Noncompliance Events; *provided, however*, that TxDOT may not require a frequency greater than monthly; *provided further, however*, that TxDOT may require reports more frequently during any period of a Persistent Developer Default. The Operations Report (or more frequent report) shall include all the same information required in the electronic database

and shall identify each Noncompliance Event for which cure has not yet occurred. Within a reasonable time after receiving the Operations Report (or more frequent report), TxDOT shall deliver to Developer for each Noncompliance Event, TxDOT's determination whether the Noncompliance Event was cured during the applicable cure period (if any), and the Noncompliance Points to be assessed with respect thereto (a "**Notice of Determination**").

13.2.2 Notification Initiated by TxDOT

If TxDOT believes there has occurred any Noncompliance Event specified in Exhibit 24, as it may be revised from time to time, TxDOT may deliver to Developer a Notice of Determination setting forth the Noncompliance Event, the applicable cure period (if any), TxDOT's determination whether the Noncompliance Event was cured during the applicable cure period (if any), and the Noncompliance Points to be assessed with respect thereto. TxDOT may deliver the Notice of Determination via the electronic database, and delivery shall be deemed given upon proper entry of the information into the electronic database.

13.2.3 Cure Periods

(a) Developer shall cure each Noncompliance Event by the end of the cure period (if any) for each such Noncompliance Event set forth in Exhibit 24.

(b) For each Noncompliance Event with a cure period specified in Exhibit 24, Developer's cure period with respect to such Noncompliance Event shall be deemed to start upon the earliest of the date and time Developer first obtained knowledge of, or first reasonably should have known of, the Noncompliance Event or the date and time Developer received notice thereof by any third party. For this purpose, if the notice of the Noncompliance Event is initiated by TxDOT, Developer shall be deemed to first obtain knowledge of the Noncompliance Event no later than the date and time of delivery of the initial notice to Developer as described in Section 13.2.2.

(c) Each of the cure periods set forth in Exhibit 24 shall be the only cure period for Developer applicable to the Noncompliance Events; and if such cure period set forth in Exhibit 24 differs from any cure period set forth in Section 16.1.2 that might otherwise apply to the Noncompliance Event, such cure period set forth in Exhibit 24 shall control for purposes of the assessment of Noncompliance Points under this Section 13.

13.2.4 Notification of Cure

(a) When Developer determines that it has completed cure of any Noncompliance Event for which it is being assessed Noncompliance Points, Developer shall enter in the electronic database, as well as in the next Operations Report (or more frequent report), notice identifying the Noncompliance Event, stating that Developer has completed cure and briefly describing the cure, including any modifications to the Project Management Plan to protect against future similar Noncompliance Events.

(b) Thereafter, TxDOT shall have the right, but not the obligation, to inspect to verify completion of the cure. If satisfied that the Noncompliance Event is fully cured, TxDOT shall deliver to Developer a certification of cure either by entry into the database or in a separate writing

within a reasonable time from the date that TxDOT has completed its inspection to verify completion of the cure. If TxDOT does not inspect to ensure the defect was cured, then the cure time shall end at the time Developer has stated the defect was cured.

(c) TxDOT may reject any Developer notice of cure if TxDOT determines that Developer has not fully cured the Noncompliance Event. Upon making this determination, TxDOT shall deliver a notice of rejection to Developer either by entry into the database or in a separate writing. Any Dispute regarding rejection of cure shall be resolved according to the dispute resolution procedures set forth in this Agreement.

13.3 Assessment of Noncompliance Points

If the electronic database or Operations Report (or more frequent report) indicates or TxDOT is notified or otherwise becomes aware of a Noncompliance Event or TxDOT serves Notice of Determination under Section 13.2.2, TxDOT may assess Noncompliance Points in accordance with Exhibit 24, subject to the following terms and conditions.

13.3.1 The date of assessment shall be deemed to be the date of the end of the first cure period, and the date of the end of each subsequent cure period, regardless of the date of the initial Notice of Determination under Section 13.2.2.

13.3.2 A failure by Developer to keep record of or report to TxDOT a Noncompliance Event as and when required under Section 13.2.1(a) or 13.2.1(b), on the one hand, and the subject Noncompliance Event, on the other hand, constitute separate and distinct breaches and failures to perform for the purpose of assessing Noncompliance Points.

13.3.3 The number of points listed in Exhibit 24 for any particular Noncompliance Event is the maximum number of Noncompliance Points that may be assessed for each event or circumstance that is a Noncompliance Event. TxDOT may, but is not obligated to, assess less than the maximum number of Noncompliance Points for any particular Noncompliance Event.

13.3.4 If a Noncompliance Event for which a cure period is provided in Exhibit 24 is not fully cured within the applicable cure period, then continuation of such Noncompliance Event beyond such cure period shall be treated as a new and separate Noncompliance Event, without necessity for further notice, for the purpose of assessing Noncompliance Points. Additionally, without further notice, (i) a new cure period equal to the interval of recurrence set forth in Tables 19-3 and 19-5 of the Technical Provisions, as applicable, shall apply upon expiration of the initial cure period or prior interval of recurrence, as applicable, and (ii) if applicable, additional O&M Liquidated Damages shall be assessed against Developer in accordance with Section 17.4 and deducted from the applicable Monthly Disbursement of the O&M Price in accordance with Section 11. Regardless of the continuing assessment of Noncompliance Points under this Section 13.3, TxDOT shall be entitled to exercise its step-in rights in accordance with Section 16.4 and, if applicable, its work suspension rights in accordance with Section 14, after expiration of the initial cure period available to Developer.

13.3.5 For each Noncompliance Event for which a cure period is identified in Exhibit 24, provided that the Noncompliance Event is not cured, the Noncompliance Points shall first be

assessed at the end of the first cure period, and shall be assessed again at the end of each subsequent cure period, as described in Section 13.3.4.

13.3.6 For each Noncompliance Event for which there is no applicable cure period identified in Exhibit 24, the Noncompliance Points will first be assessed on the date on which the breach of failure occurred. Continuation of such Noncompliance Event will not be treated as a new or separate breach or failure.

13.4 Records Regarding Assessment of Noncompliance Points

Developer is responsible for keeping and providing TxDOT with current records of the number of assessed Noncompliance Points for each Noncompliance Event, the date of each assessment, and the date when the Noncompliance Event is cured.

13.5 Trigger Points for Persistent Developer Default.

13.5.1 A "**Persistent Developer Default**", entitling TxDOT to require submittal of Developer's remedial plan under Section 16.2.2, shall exist on any date during the O&M Period when: (a) 100 or more Noncompliance Points, cured or uncured, have been assessed in any consecutive 365-day period; or (b) 250 or more Noncompliance Points, cured or uncured, have been assessed in any consecutive 1,095-day period .

13.5.2 The number of cured Noncompliance Points that would otherwise then be counted under Section 13.5.1 is subject to reduction in accordance with Section 16.2.2(c).

13.6 Special Provisions for Certain Noncompliance Events

13.6.1 The provisions of this Section 13.6 apply to a Noncompliance Event that has a cure period identified in Exhibit 24 and is directly attributable to a Force Majeure Event.

13.6.2 If any such Noncompliance Event occurs, then:

(a) The applicable cure period for any such Noncompliance Event shall be extended if such Noncompliance Event is not reasonably capable of being cured within the applicable cure period solely due to the occurrence of such Force Majeure Event. The extension shall be for a reasonable period of time under the circumstances, taking into account the scope of the efforts necessary to cure, the effect of the Force Majeure Event on Developer's ability to cure, availability of temporary remedial measures, and need for rapid action due to impact of the Noncompliance Event on safety or traffic movement;

(b) It shall not be counted toward a Persistent Developer Default for purposes of Section 13.5, provided the Noncompliance Event is cured within the applicable cure period, as it may be extended pursuant to Section 13.6.2(a);

(c) Regardless of which Party initiates notice of such Noncompliance Event, no Noncompliance Points shall be assessed if Developer cures such Noncompliance Event within the applicable cure period, as it may be extended pursuant to Section 13.6.2(a); and

(d) Such Noncompliance Event shall not result in O&M Liquidated Damages under Section 17.4 if the Noncompliance Event is cured within the applicable cure period, as it may be extended pursuant to Section 13.6.2(a).

13.6.3 For the avoidance of doubt, it is understood that for any Noncompliance Event directly attributable to a Force Majeure Event where Developer is unable to comply with the underlying performance requirement due to an ongoing Force Majeure Event, then solely during the period that such Force Majeure Event is continuing, no Noncompliance Points or O&M Liquidated Damages will be assessed for such Noncompliance Event and Developer shall be excused from performance of the underlying performance requirement.

13.7 Special Provisions for TxDOT Step-in

13.7.1 If TxDOT exercises a step-in right under Section 16.4 with respect to any portion of the Project (the "**affected Project portion**"), then:

(a) During the period that TxDOT is in control of the Work for the affected Project portion (the "**step-in or suspension period**"), neither the condition of the affected Project portion nor the performance of or failure to perform Work respecting the affected Project portion shall result in a new Noncompliance Event, assessment of new Noncompliance Points or new O&M Liquidated Damages under Section 17.4;

(b) All cure periods that are available for Noncompliance Events respecting the affected Project portion and that arose prior to and are pending as of the date the step-in or suspension period commences shall be deemed forfeited by Developer;

(c) During the step-in or suspension period for the affected Project portion, Section 13.3.5 shall not be applied to Noncompliance Events that arose prior to the date such step-in or suspension period commences;

(d) The step-in or suspension period for the affected Project portion shall be disregarded for purposes of determining a Persistent Developer Default under Section 13.6. For avoidance of doubt, this means that (i) such step-in or suspension period shall not be included in counting the consecutive time periods set forth in Section 13.5 and (ii) such consecutive time periods shall be treated as consecutive notwithstanding the intervening step-in or suspension period; and

13.7.2 Refer to Section 16.4.3 for TxDOT's right to damages and to offset the payments to Developer under this Agreement if TxDOT incurs costs arising out of exercise of its step-in right under Section 16.4.

13.8 Increased Oversight, Testing and Inspection

13.8.1 In addition to other remedies available under this Agreement, TxDOT shall be entitled to change the type and/or increase the level of its and its representatives' monitoring, inspection, sampling, measuring, testing, auditing and oversight of the Project or the Work and Developer's compliance with its obligations under the Contract Documents, in such manner and to such level as TxDOT sees fit, if at any time:

(a) The number of Uncured Noncompliance Points assessed against Developer equals or exceeds 25 for any date occurring on or after the Substantial Completion Date;

(b) There exists a Persistent Developer Default; or

(c) Developer receives one or more notices of a Developer Default that may become an Event of Default as set forth in Section 16.

13.8.2 If TxDOT changes the type or increases the level of its monitoring, inspection, sampling, measuring, testing, auditing and oversight of the Project or the Work pursuant to Section 13.8.1, then Developer shall pay and reimburse TxDOT within 30 days after receipt of demand and reasonable supporting documentation all reasonable increased costs and fees TxDOT incurs in connection with such action, including TxDOT Recoverable Costs. Such obligation to pay and reimburse shall apply to all changes in the type or increases in the level of TxDOT's monitoring, inspection, sampling, measuring, testing, auditing and oversight of the Project or the Work occurring until Developer has:

(a) Reduced the number of Uncured Noncompliance Points below the threshold triggering such heightened scrutiny;

(b) Reduced by fifty percent the number of Uncured Noncompliance Points outstanding on the date TxDOT delivers the notice invoking such heightened scrutiny;

(c) Fully cured the breaches and failures that are the basis for a potential Event of Default and any other then-existing Developer Defaults; and

(d) Completed delivery to TxDOT and performance of an approved remedial plan required to be prepared and implemented by Developer pursuant to Section 16.2.2.

13.8.3 The foregoing does not preclude TxDOT, at its discretion and expense, from increasing its level of monitoring, inspection, sampling, measuring, testing, auditing and any other monitoring, inspection, sampling, measuring, testing, auditing and oversight of the Project or the Work at other times.

13.9 Provisions Regarding Dispute Resolution

13.9.1 Developer may object to the assessment of Noncompliance Points or the starting point for or duration of the cure period respecting any Noncompliance Event by delivering to TxDOT notice of such objection not later than five days after TxDOT delivers its Notice of Determination. Such notice also shall constitute notice for purposes of Section 19.3.

13.9.2 Developer may object to TxDOT's rejection of any certification of completion of a cure given pursuant to Section 13.2.4(c) by delivering to TxDOT notice of such objection not later than 15 days after TxDOT delivers its notice of rejection. Such notice also shall constitute notice for purposes of Section 19.3.

13.9.3 If for any reason Developer fails to deliver its notice of objection within the applicable time period, Developer shall be conclusively deemed to have accepted the matters set forth in the applicable notice, and shall be forever barred from challenging them.

13.9.4 If Developer gives timely notice of objection and the Parties are unable to reach agreement on any matter in Dispute within 10 days of such objection, either Party may refer the matter for resolution according to the dispute resolution procedures set forth in this Agreement. The Parties agree to such 10-day period in lieu of (and not in addition to) the period for Informal Resolution Procedures set forth in Section 19.3.3.

13.9.5 In the case of any Dispute as to the number of Noncompliance Points to assign for Noncompliance Events added to Exhibit 24, the sole issue for decision shall be how many Noncompliance Points should be assigned in comparison with the number of Noncompliance Points set forth in Exhibit 24 to this Agreement for Noncompliance Events of equivalent severity.

13.9.6 Pending the resolution of any Dispute arising under this Section 13.9, the provisions of this Section 13 shall take effect as if the matter were not in Dispute. If the final decision regarding the Dispute is that (a) the Noncompliance Points should not have been assessed, (b) the number of Noncompliance Points must be adjusted, (c) the starting point or duration of the cure period must be adjusted, or (d) a Noncompliance Event has been cured, then the number of Noncompliance Points assigned or assessed, the uncured Noncompliance Points balance and the related liabilities of Developer shall be adjusted to reflect such decision.

13.9.7 For the purpose of determining whether TxDOT may declare an "Event of Default" under Section 16.1.1(r) for failure to timely submit or comply with the remedial plan, the number of Noncompliance Points in Dispute:

(a) Shall not be counted pending resolution of the Dispute if Developer initiates the dispute resolution procedures and, if applicable, any proceedings available following action by the Disputes Board within the applicable time limit set forth in Section 19.3;

(b) Shall be counted if Developer for any reason does not initiate the dispute resolution procedures or any, if applicable, proceedings available following action by the Disputes Board within the applicable time limit set forth in Section 19.3, or does not diligently pursue the dispute resolution procedures to conclusion (and in any such case Developer shall be deemed to have irrevocably waived the Dispute).

SECTION 14. SUSPENSION

14.1 Suspensions for Convenience

TxDOT may, at any time and for any reason, by 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 suspension order. Developer shall promptly recommence the Work upon receipt of 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 (i) not exceeding 48 hours each up to a total of 96 hours during the Construction Period and (ii) not exceeding 48 hours each up to a total of 480 hours during the O&M Period, which shall not be considered a TxDOT-Directed Change. Adjustments of the Price and any time extension, including adjustment to 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 12.

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 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;

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

(g) Failure to perform the Work in compliance with, or other breach of, the Contract Documents, except Noncompliance Events where no Persistent Developer Default exists, where such failure is not substantially cured within 15 days after TxDOT delivers notice thereof to Developer;

(h) Failure to deliver or maintain D&C Payment Bond, D&C Performance Bond, O&M Security and any other bonds, letters of credit or security required hereunder; or

(i) Failure to comply with any quality control plan or safety plan required under the Contract Documents.

14.2.2 Developer shall promptly comply with any such suspension order, even if Developer disputes the grounds for suspension. Developer shall promptly recommence the Work upon receipt of 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 time extension, including adjustments in the 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 in which 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 NTPS

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 discretion, that a termination is in TxDOT's best interest ("**Termination for Convenience**"). TxDOT shall terminate by delivering to Developer a 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; ***provided, however***, that Developer may retain claims against Subcontractors for which TxDOT has been fully compensated.

15.2.6 Subject to the prior 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 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

15.4.1 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 (i) with respect to a termination of the D&C Work, the total D&C Price and (ii) with respect to a termination related to the O&M Work and subject to Section 15.4.2, the sum of the total Annual O&M Payment for the year in which the termination occurs, plus, if terminated prior to year 11, the maximum amount of Bridge Payments available for each bridge set forth in Exhibit 23-4, provided that each amount is payable solely with respect to Work done on the respective bridge, and in each of (i) and (ii), 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 D&C Performance Bond, D&C Payment Bond, O&M Security or Guaranty as to such completed or non-terminated Work.

15.4.2 Solely with respect to a Termination for Convenience or Partial Termination for Convenience with respect to the O&M Work, if TxDOT elects to terminate the Agreement in accordance with this Section 15 at any time on or after the fifth anniversary of the Substantial Completion Date, Developer shall be entitled to receive additional termination compensation in an amount equal to the sum of (a) 6% of the sum of the unescalated Annual O&M Payments for the next five years after the year in which such termination occurs, plus (b) for any pavement Renewal Work completed by Developer as of the Termination Date and for which Developer has not received payment pursuant to Section 11.4.4, the amount payable calculated in accordance with Section 11.4.4 not to exceed an amount equal to the sum of the maximum cumulative amount of Pavement Payments for the year in which such termination occurs, plus the annual unescalated Pavement Payments for the two subsequent years set forth in Exhibits 23-3.1, 23-3.2 and 23-3.3, as applicable, minus all Pavement Payment amounts previously paid to Developer for pavement Renewal Work. The amount of compensation payable in accordance with this Section 15.4.2 shall be in addition to any other amount owed for a termination with respect to the O&M Work determined pursuant to Section 15.4.1 or Section 15.5, as applicable.

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 termination set forth in 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 12.7.3 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 the Final D&C Payment and each Monthly Disbursement of the O&M Price. 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) (i) solely with respect to termination of D&C Work, a sum, as profit on clause (a) above as it relates to D&C Work, 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 four percent of the cost owing to Developer under clause (a) and (ii) solely with respect to termination of O&M Work on or after the fifth anniversary of the Substantial Completion Date, the amount determined in accordance with Section 15.4.2, if any;

(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.

(e) Only to the extent Termination for Convenience occurs prior to Substantial Completion or prior to final payment of all amounts owed under the Deferred D&C Payment Certificates, the sum of (i) all amounts outstanding on such date under the Deferred D&C Payment Certificates (if any), plus (ii) Breakage Costs payable by Developer or Borrower (as applicable) as a result of such early termination, subject to Developer, Borrower (if not Developer) and Lenders mitigating all such costs to the extent reasonably possible, minus (iii) to the extent it is a positive amount, the aggregate of all Breakage Costs payable to Developer or Borrower (as applicable) as a result of such early termination, minus (iv) Developer's avoided costs that are attributable to Developer's financing of the Deferred D&C Payments. All amounts owed under this Section 15.5.1(e) shall be paid as a lump sum within 45 days of the early Termination Date; ***provided, however***, that TxDOT reserves the right in its discretion to pay, in whole or in part, any amounts owed under then unpaid Deferred D&C Payment Certificates on the payment dates set forth the respective Deferred D&C Payment Certificates. TxDOT shall deliver to Developer a preliminary schedule of repayment as part of the Notice for Termination for Convenience or Notice of Partial Termination for Convenience, as applicable, which schedule shall be revised in TxDOT's discretion upon further negotiation with Developer. All Breakage Costs payable to Developer pursuant to this

Section 15.5.1(e) shall be reasonable in TxDOT's sole judgment and shall be supported by documentation reasonably satisfactory to TxDOT provided by Developer no later than 20 days after receipt by Developer of notice of Termination for Convenience. Amounts payable by TxDOT pursuant to subclause (ii) reduced, if applicable, by subclause (iii) of this Section 15.5.1(e) shall not be subject to Section 15.13.

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, except to the extent provided in Section 15.5.1(b)(ii), 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 (i) for a termination with respect to the D&C Work, exclusive of costs described in Sections 15.5.1 (c) and (d) and the net amount owed pursuant to Section 15.5.1(e)(ii)-(iv), may not exceed the total D&C Price less the amount of payments previously made and (ii) for a termination with respect to the O&M Work, exclusive of the payment described in Section 15.5.1(b)(ii) and the costs described in Sections 15.5.1 (c), (d) and, to the extent applicable, the net amount owed pursuant to Section 15.5.1(e), may not exceed the sum of the total Annual O&M Payment for the year in which the termination occurs, plus, if terminated prior to year 11, the maximum amount of Bridge Payments available for each bridge set forth in Exhibit 23-4, provided that each amount is payable solely with respect to Work done on the respective bridge, 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 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 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 discretion, the amount of the reimbursement to which TxDOT is entitled under Section 6.8.2); 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 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

15.9.1 If NTP1 has not been issued within 365 days after the Effective Date 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 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 (a) 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, plus (b) the lesser of, (i) documented, actual, reasonable Lender fees and external costs incurred by Developer in connection with Developer Debt between the Effective Date and the date of termination, where external costs mean only those costs for the work necessary to achieve financial close for Developer Debt that are payable for work or services performed by rating agencies, financial advisors, insurance advisors and legal counsel that are not Equity Members, and (ii) $4,000,000, plus (c) Breakage Costs payable by Developer or Borrower (as applicable) as a result of such early termination, subject to Developer, Borrower (if not Developer) and Lenders mitigating all such costs to the extent reasonably possible, minus (d) to the extent it is a positive amount, the aggregate of all Breakage Costs payable to Developer or Borrower (as applicable) as a result of such early termination. All Breakage Costs payable to Developer pursuant to this Section 15.9.1 shall be reasonable in TxDOT's sole judgment and shall be supported by documentation

reasonably satisfactory to TxDOT provided by Developer no later than 20 days after receipt by TxDOT of notice of termination in accordance with this Section 15.9.1.

15.9.2 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 notice of such conditional election. If Developer delivers a 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 notice of TxDOT's choice not later than 30 days after receipt of Developer's notice. If TxDOT does not deliver 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 $40,000,000 except as set forth in the next sentence. In no event, shall Developer be entitled to payment of more than $40,000,000, including for Work performed, if NTP2 is not issued except for the payment of any Breakage Costs payable to Developer in accordance with this Section 15. If TxDOT delivers timely notice choosing to continue this Agreement in effect, then the Price adjustment provisions described in Section 11.1.7 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 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 Toll Zone Work, or achieve Substantial Completion or Final Acceptance, 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 16.5);

(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 Guarantor, 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) In any voluntary or involuntary case seeking liquidation, reorganization or other relief with respect to Developer or its debts under any U.S. or foreign bankruptcy, insolvency or other similar Law now or hereafter in effect, this Agreement or any of the other Contract Documents is rejected, including a rejection pursuant to 11 USC § 365 or any successor statute.

(m) 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;

(n) Developer fails to discharge or obtain a stay within ten Days of any final judgment(s) or order for the payment of money against it in excess of $100,000 in the aggregate arising out of the prosecution of the O&M Work (provided that, for purposes hereof, posting of a bond in the amount of 125% of such judgment or order shall be deemed an effective stay).

(o) Any Guarantor revokes or attempts to revoke its obligations under its guarantee or otherwise takes the position that such instrument is no longer in full force and effect.

(p) Any final judgment is issued holding Developer or any Guarantor liable for an amount in excess of $100,000 based on a finding of intentional or reckless misconduct or violation of a state or federal false Claims act.

(q) Developer fails to resume performance of Developer that has been suspended or stopped, within the time specified in the originating notification after receipt of notice from TxDOT to do so or (if applicable) after cessation of the event preventing performance.

(r) There occurs any Persistent Developer Default, TxDOT delivers to Developer notice of the Persistent Developer Default, and either (a) Developer fails to deliver to TxDOT, within 45 days after such notice is delivered, a remedial plan meeting the requirements for

approval set forth in Section 16.2.2 or (b) Developer fails to fully comply with the schedule or specific elements of, or actions required under, the approved remedial plan.

16.1.2 Notice and Opportunity to Cure

For Developer breaches or failures listed in Exhibit 24 to this Agreement, the cure periods set forth therein shall exclusively govern for the sole purpose of assessing Noncompliance Points and O&M Liquidated Damages. 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), (c) through (g), (n) and (q) of Section 16.1.1, a period of 15 days after TxDOT delivers to Developer notice of the Developer Default; *provided, however* 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 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), (k), (l), (o), (p) and (r) of Section 16.1.1, no cure period, and there shall be no right to notice of a Developer Default under clauses (b), (j), (k), (l), (o), (p) and (r) of Section 16.1.1.

(d) Respecting a Developer Default under clauses (m) 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

(a) 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 so terminated for an Event of 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):

(i) 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 (excluding, for the avoidance of doubt, from any Deferred D&C Payments that have been certified in a Deferred D&C Payment Certificate), 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.

(ii) TxDOT shall have the right, but not the obligation, to pay such amount or perform such act as may then be required from Developer under the Contract Documents or Subcontracts.

(iii) 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.

(iv) 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: (1) perform or attempt to perform, or cause to be performed, such Work; (2) 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; (3) execute all applications, certificates and other documents as may be required for completing the Work; (4) modify or terminate any contractual arrangements; (5) take any and all other actions that it may in its discretion consider necessary to complete the Work; and (6) prosecute and defend any action or proceeding incident to the Work.

(b) 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 such time as TxDOT is able to determine (i) how much, if any, remains payable to Developer and (ii) the amount payable by Developer to TxDOT in connection with TxDOT's damages and Claims against Developer-Related Entities or as otherwise required by the Contract Documents. Promptly

following the date set forth in the preceding sentence, the total cost of all completed Work shall be determined, and TxDOT shall notify Developer and each Guarantor 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.

(c) 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 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(c) will be allowed for prospective profits on, or any other compensation relating to, Work uncompleted by Developer.

(d) If TxDOT determines under Section 16.2.1(b) that amounts are owed by TxDOT to Developer or its Surety related to the D&C Work or TxDOT elects to pay Developer the amount owed for D&C Work completed in accordance with Section 16.2.1(c), such amounts shall be payable by TxDOT solely in accordance with the Maximum D&C Payment Schedule set forth in Exhibit 5, unless TxDOT elects in its discretion to prepay such amounts in accordance with Section 11.3.2(f).

(e) 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 Remedial Plan Delivery and Implementation Upon Persistent Developer Default

(a) Developer recognizes and acknowledges that a pattern or practice of continuing, repeated or numerous Noncompliance Events, whether such Noncompliance Events are cured or not, will undermine the confidence and trust essential to the success of the public-private arrangement under this Agreement and will have a material, cumulative adverse impact on the value of this Agreement to TxDOT. Developer acknowledges and agrees that measures for determining the existence of such a pattern or practice described in the definition of Persistent Developer Default are a fair and appropriate objective basis to conclude that such a pattern or practice will continue.

(b) (b) Upon the occurrence of a Persistent Developer Default (refer to the trigger points in Sections 13.6), Developer shall, within 45 days after notice of the Persistent Developer Default, be required to prepare and submit a remedial plan for TxDOT approval. The remedial plan shall set forth a schedule and specific actions to be taken by Developer to improve its performance and reduce (i) Developer's cumulative number of Noncompliance Points assessed under Section 13.5 to the point that such Persistent Developer Default will not continue and (ii) the cumulative number of Uncured Noncompliance Points outstanding by at least fifty percent. TxDOT may require that such actions include improving Developer's quality management practices, plans and procedures, revising and restating Management Plans, changing organizational and

management structure, increasing monitoring and inspections, changing Key Personnel and other important personnel, replacement of Subcontractors, and delivering security to TxDOT.

(c) If (i) Developer complies in all material respects with the schedule and specific elements of, and actions required under, the approved remedial plan; (ii) as a result thereof Developer achieves the requirements set forth in Sections 16.2.2(b)(i) and (ii); and (iii) as of the date it achieves such requirements there exist no other uncured Developer Defaults for which a Notice was given, then TxDOT shall reduce the number of cured Noncompliance Points that would otherwise then be counted toward Persistent Developer Default by 25%. Such reduction shall be taken from the earliest assessed Noncompliance Points that would otherwise then be counted toward Persistent Developer Default.

(d) Developer's failure to deliver to TxDOT the required remedial plan within such 45-day period shall constitute a material Developer Default that may result in issuance of a notice thereof by TxDOT triggering a five-day cure period. Failure to comply in any material respect with the schedule or specific elements of, or actions required under, the remedial plan shall constitute a material Developer Default that may result in issuance of a notice thereof by TxDOT triggering a 30-day cure period. If either of the events remains uncured within the period specified in this subclause (d), TxDOT may declare that an "Event of Default" has occurred in accordance with Section 16.1.3.

16.2.3 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 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.

16.2.4 Damages

(a) 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.

(b) 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.

(c) Developer, Sureties and Guarantors shall not be relieved of liability for continuing Liquidated Damages on account of a Developer Default nor by TxDOT's declaration of an Event of Default, or by actions taken by TxDOT under this Section 16.2.

(d) TxDOT's remedies with respect to Nonconforming Work shall include the right to accept such Work and receive payment as provided in Section 6.8.2 in lieu of the remedies specified in this Section 16.2.

16.2.5 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.

16.2.6 Other Rights and Remedies; Cumulative Remedies

Subject to Sections 17.7 and 17.8, 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 beyond 365 days after the Substantial Completion Deadline or Final Acceptance beyond 180 days after the Final Acceptance 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: (x) the approved Project Schedule demonstrates that Developer is capable of meeting such Completion Deadline within 365 days of the Substantial Completion Deadline or 180 days of the Final Acceptance Deadline, as applicable; and (y) 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 365-day period or 180-day period, as applicable.

16.3.2 If Substantial Completion or Final Acceptance of the Project has not occurred within 365 days or 180 days, respectively, 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; 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 Work within the applicable deadline set forth in Section 3.10.1(b), 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 365 days after the deadline for completion of such Work.

16.4 TxDOT Step-in Rights

16.4.1 Upon the occurrence of a Developer Default and expiration, without full and complete cure, of the cure period, if any, available to Developer, and without waiving or releasing Developer from any obligations, TxDOT shall have the right, but not the obligation, for so long as such Developer Default remains uncured by TxDOT or Developer, to pay any obligees of Developer and perform all or any portion of Developer's obligations and the Work that is the subject of such Developer Defaults, as well as any other then-existing breaches or failures to perform for which Developer received prior written notice from TxDOT but has not commenced diligent efforts to cure.

16.4.2 In connection with such action, TxDOT may, to the extent and only to the extent reasonably required for or incident to curing the Developer Default or such other breaches or failures to perform for which Developer received prior notice from TxDOT but has not commenced and continued diligent efforts to cure:

(a) Employ security guards and other safeguards to protect the Project;

(b) Spend such sums as are reasonably necessary to employ and pay such architects, engineers, consultants and contractors and obtain materials and equipment as may be required, without obligation or liability to Developer, Subcontractors or any other Persons for loss of opportunity to perform the same Work or supply the same materials and equipment;

(c) Draw on and use proceeds from letters of credit, or make a Claim against payment and performance bonds, guarantees and other performance security and use the proceeds to the extent available under the terms thereof to pay such sums;

(d) Execute all applications, certificates and other documents as may be required;

(e) Make decisions respecting, assume control over and continue the Work as may be reasonably required;

(f) Meet with, coordinate with, direct and instruct Subcontractors and suppliers, process invoices and applications for payment from contractors and suppliers, pay Subcontractors and Suppliers, and resolve Claims of Subcontractors and Suppliers, and for this purpose Developer irrevocably appoints TxDOT as its attorney-in-fact with full power and authority to act for and bind Developer in its place and stead;

(g) Take any and all other actions as may be reasonably required or incident to curing; and

(h) Prosecute and defend any action or proceeding incident to the Work undertaken.

16.4.3 Developer shall reimburse TxDOT, within ten days of receiving an invoice, for TxDOT's Recoverable Costs in connection with the performance of any act or Work authorized by this Section 16.4. In lieu of reimbursement, TxDOT may elect, in its discretion, to deduct such amounts from any amounts payable to Developer under this Agreement.

16.4.4 Neither TxDOT nor any of its Authorized Representatives, contractors, subcontractors, vendor and employees shall be liable to Developer in any manner for any inconvenience or disturbance arising out of its entry onto the Project or the Project ROW in order to perform under this Section 16.4, unless caused by the gross negligence, recklessness, intentional misconduct or bad faith of such Person. If any Person exercises any right to pay or perform under this Section 16.4, it nevertheless shall have no liability to Developer for the sufficiency or adequacy of any such payment or performance, or for the manner or quality of design, construction, operation or maintenance, unless caused by the gross negligence, recklessness, intentional misconduct or bad faith of such Person.

16.4.5 TxDOT's rights under this Section 16.4 are subject to the right of any Surety under payment and performance bonds to assume performance and completion of all bonded work.

16.4.6 In the event TxDOT takes action described in this Section 16.4 and it is later finally determined that TxDOT lacked the right to do so because there did not occur a Developer Default and expiration, without full and complete cure, of the cure period, if any, available to

Developer, then TxDOT's action shall be treated as a Directive Letter for a TxDOT-Directed Change.

16.5 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 (including failure due to non-appropriation) within 15 Business Days after TxDOT's receipt of 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 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, respectively:

(a) $107,000.00 for each day after the Substantial Completion Deadline, not to exceed 365 days; and

(b) $50,000.00 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 3.10.1(b), 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 $33,000.00 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 earlier 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 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 Except for Permitted Closures, Developer shall be liable for and pay to TxDOT Liquidated Damages for Construction Period Lane Closures assessed against Developer as

described in Exhibit 17, Section 1 and Sections 18.3.1.2 and 19 of the Technical Provisions and in the amounts set forth in Exhibit 17, Sections 1.

17.2.2 Except for Permitted Closures, Developer shall be liable for and pay to TxDOT Liquidated Damages for O&M Period Lane Closures assessed against Developer as described in Exhibit 17, Section 2 and Section 18.3.1.2 of the Technical Provisions and in the amounts set forth in Exhibit 17, Sections 2.

17.2.3 Developer acknowledges and agrees 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 or the O&M Limits, as applicable, and connection to 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 or the O&M Limits, as applicable, 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 O&M Limits, as applicable, and the unavailability of a substitute for it.

17.3 Liquidated Damages for Defect Hazard Mitigation Classifications and Construction Violation Events

17.3.1 Developer shall be liable for and pay to TxDOT Construction Liquidated Damages for Defect Hazard Mitigation Classifications and Construction Violation Events that constitute Developer's failure to satisfy certain of the operating and maintenance requirements for the Project during the Construction Period as described in Exhibit 17, Section 3 and in Tables 19-3 and 19-4 of the Technical Provisions and in the amounts set forth in Exhibit 17, Section 3.

17.3.2 Developer acknowledges and agrees 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 Construction Events. Such damages include loss of potential revenue for TxDOT, loss of use, enjoyment and benefit of the Project and connection to 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.

17.4 O&M Liquidated Damages for Noncompliance Points

17.4.1 Upon assessment of the 25th Noncompliance Point pursuant to Section 13.3, and upon assessment of each additional 25th Noncompliance Point pursuant to Section 13.3, TxDOT shall be entitled to immediate and automatic liquidated damages from Developer in an amount equal to $30,000 (such amount calculated at a rate of $1,200 per Noncompliance Point) (the "O&M Liquidated Damages"), which O&M Liquidated Damages shall be deducted from Monthly Disbursements of the O&M Price in accordance with Section 11.

17.4.2 The O&M Liquidated Damages shall be increased commencing on the Substantial Completion Date and annually thereafter throughout the Term by the percentage based on CCI set forth in Section 11.4.3(a). In no event shall the amount be less than the amount in effect during the immediately preceding year. If there is a decrease or no increase in the CCI index then there shall be no increase in the amount of O&M Liquidated Damages.

17.4.3 Developer acknowledges that the O&M Liquidated Damages assessed in accordance with the Contract Documents are reasonable liquidated damages in order to compensate TxDOT for damages it will incur by reason of Developer's failure to comply with the availability and performance standards. The damages addressed by the O&M Liquidated Damages include: (a) TxDOT's increased costs of administering this Agreement, including the increased costs of engineering, legal, accounting, monitoring, oversight and overhead, and could also include obligations to pay or reimburse Governmental Entities with regulatory jurisdiction over the O&M Limits for violation of applicable Governmental Approvals or for their increased costs of monitoring and enforcing Developer's compliance with applicable Governmental Approvals; (b) potential harm and future costs to TxDOT from reduction in the condition and Useful Life of the O&M Limits; (c) potential harm to the credibility and reputation of TxDOT with other Governmental Entities, with policy makers and with the general public who depend on and expect timely and quality O&M Limits delivery and availability of service; (d) potential harm and detriment to Users, which may include loss of use, enjoyment and benefit of the O&M Limits and of facilities connecting to the O&M Limits, additional wear and tear on vehicles, and increased costs of congestion, travel time and accidents; (e) TxDOT's increased costs of addressing potential harm to the Environment, including increased harm to air quality caused by congestion, and harm to water quality, soils conditions, historic structures and other environmental resources caused by Noncompliance Events; and (f) loss of Toll Revenues.

Developer further acknowledges that these damages would be difficult and impracticable to measure and prove, because, among other things: (i) the O&M Limits are of a unique nature and no substitute for them is available; (ii) the costs of monitoring and oversight prior to increases in the level thereof will be variable and extremely difficult to quantify; (iii) the nature and level of increased monitoring and oversight will be variable depending on the circumstances; and (iv) the variety of factors that influence use of and demand for the O&M Limits make it difficult to sort out causation of the matters that will trigger these liquidated damages and to quantify actual damages.

17.5 Additional Acknowledgements Regarding Liquidated Damages

17.5.1 Developer further agrees and acknowledges that:

(a) 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.

(b) Such damages are incapable of accurate measurement and difficult to prove for the reasons stated in Section 17.1.3.

(c) 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.

(d) 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.

(e) 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.

(f) 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.

17.6 Payment; Satisfaction; Waiver; Non-Exclusive Remedy

17.6.1 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.

17.6.2 TxDOT shall have the right to deduct and offset liquidated damages from any amounts owing to Developer (except with respect to Deferred D&C Payments that have been certified in a Deferred D&C Payment Certificate). 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.

17.6.3 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.

17.6.4 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.

17.7 Limitation on Developer's Liability

17.7.1 D&C Work. Notwithstanding any other provision of the Contract 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 with respect to the D&C Work (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 D&C Work or having the D&C Work completed or corrected by another Person in excess of the sum otherwise payable to Developer under this Agreement for the D&C Work, including the cost of the work required or arising under the D&C Warranties; (b) an amount equal to $100,000,000 (which amount shall specifically include any Liquidated Damages paid with respect to the D&C Work pursuant to this Section 17); (c) any amounts paid by or on behalf of Developer with respect to the D&C Work that 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 related to the D&C Work or occurring during the Construction Period.

17.7.2 O&M Work. Notwithstanding any other provision of the Contract 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 with respect to the O&M Work (whether arising in contract, negligence or other tort, or any other theory of law) in excess of the sum of: (a) an amount equal to $100,000,000 (which amount shall specifically include any Liquidated Damages paid with respect to the O&M Work pursuant to this Section 17); and (b) 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 related to the O&M Work or occurring during the O&M Period. The amount set forth in this Section 17.7.2 shall be adjusted annually based on changes in the CCI commencing on the Effective Date and continuing annually thereafter during the Term.

17.8 Limitation on Consequential Damages

17.8.1 Notwithstanding any other provision of the Contract Documents and except as set forth in this Section 17.8.1 and in Section 17.8.2, 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.

17.8.2 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 any Developer-Related Entity 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 9.2.4;

(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 or any other provision of the Contract Documents, including Liquidated Damages for Lane Closures and O&M Liquidated Damages;

(e) Losses arising out of Developer Releases of Hazardous Materials; and

(f) Any other consequential damages arising from a breach of this Agreement by Developer that occurs (i) prior to Final Acceptance subject to a cap in the amount of $1,000,000 and (ii) after Final Acceptance and before the end of the Term subject to a separate 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 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 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, CONSTRUCTION, OPERATION OR MAINTENANCE OF THE PROJECT 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 4.1.8 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 material 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.

18.1.5 Developer hereby acknowledges and agrees that it is Developer's obligation to perform the Work in accordance with the Contract Documents and that the Indemnified Parties are fully entitled to rely on Developer's performance of such obligation. Developer further agrees that any certificate, review and/or approval by TxDOT and/or others hereunder shall not relieve Developer of any of its obligations under the Contract Documents or in any way diminish its liability for performance of such obligations or its obligations under this Section 18.

18.1.6 The indemnities set forth in Section 18 are intended to operate as agreements pursuant to Section 107(e) of the Comprehensive Environmental Response, Compensation and

Liability Act, 42 U.S.C. Section 9607(e), and Health and Safety Code section 25364, to insure, protect, hold harmless and indemnify the Indemnified Parties. The obligations under this Section 18 shall not be construed to negate, abridge, or reduce other rights or obligations that would otherwise exist in favor of an Indemnified Party hereunder.

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 Subject to Section 18.2.6, 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 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 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 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 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 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 191.112 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(g); and

(ii) Ineligible Matters.

(e) Any disagreement between the Parties as to whether the Informal Resolution Procedures 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.

(g) 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.

(h) Matters Ineligible for Dispute Resolution Procedures

The Dispute Resolution Procedures shall not apply to the following (collectively, "**Ineligible Matters**"):

(i) Any matters that the Contract Documents expressly state are final, binding or not subject to dispute resolution;

(ii) Any claim or dispute that does not arise under the Contract Documents;

(iii) 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;

(iv) Any claim for indemnity under Section 18;

(v) Any claim for injunctive relief;

(vi) Any claim against an insurance company, including any Subcontractor Dispute that is covered by insurance;

(vii) Any claim arising solely in tort or that is covered by the Texas Tort Claims Act;

(viii) 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);

(ix) 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;

(x) Any claim for, or dispute based on, remedies expressly created by statute; and

(xi) 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(c) (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

(a) Notice of Dispute to Designated Agent. A Party desiring to pursue a Dispute against the other Party shall initiate the Informal Resolution Procedures by serving a notice on the responding Party's designated agent. Unless otherwise indicated by 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.

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: (x) the notice of Dispute is served in good faith; (y) 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 (z) the designated representative is duly authorized to execute and deliver the notice and such certification on behalf of the claiming Party.

If the responding Party agrees with the claiming Party's position and desired resolution of the Dispute, it shall so state in a 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.

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 or the amount of money or other right, remedy or relief sought.

(b) 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(c) shall not be required.

(c) 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.

(d) 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(b).

19.3.4 Disputes Board; Finality of Disputes Board Decision

(a) Disputes Board Agreement. 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. 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.

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. 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(a). The Disputes Board shall not have the authority to order that one Party compensate the other Party for attorneys' fees and expenses.

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). 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.

If the notice of Dispute fails to meet the certification requirements under Section 19.3.3(a), on motion of the responding Party the Disputes Board shall suspend proceedings on the Dispute until a correct and complete 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.

(b) Submission of Dispute to Disputes Board. 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 notice on the other Party. The notice shall include the same information as a notice of Dispute issued under Section 19.3.3(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 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(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.

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 this Section 19.3.4(b), except for Ineligible Matters and Disputes for which TxDOT is entitled to seek relief in court.

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.

(c) 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

(a) Appeal of Disputes Board Decision. 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 or (ii) TxDOT may seek a formal administrative hearing before SOAH pursuant to Texas Government Code, Chapter 2001, and Section 191.112 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.

If Developer does not request, and TxDOT does not seek for itself, a formal administrative hearing before SOAH under this Section 19.3.5(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.

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.

(b) Appeal of Disputes Board Error to SOAH. "**Disputes Board Error**" means one or more of the following: (i) 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 (ii) 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.

(c) SOAH Proceeding and ALJ Proposal For Decision. 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.

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, 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.

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 this Section 19.3.5(c) as set forth in the preceding paragraph, any objection to the Disputes Board's authority to resolve the applicable Dispute shall be deemed waived by such Party.

(d) Final Orders of Executive Director. 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 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 explanatory statement required under Section 201.112(c) of the Code), and approving and fully implementing the Disputes Board Decision.

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: (x) 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 (y) 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 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

(a) Subject to the requirements of the Public Information Act, 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.

(b) With respect to all discussions, negotiations, testimony and evidence between the Parties or in a proceeding before the Disputes Board, an administrative hearing before an ALJ or a judicial proceeding in court:

(i) 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.

(ii) 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 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, 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 the Certificate of Final Acceptance of the Project under Section 3.10.4; 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 that is less than the amount requested in the original claim, then 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. RECORDS AND AUDITS; OWNERSHIP OF DOCUMENTS AND INTELLECTUAL PROPERTY

20.1 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, including the Financial Model (as it may be updated from time to time) (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, update to the Financial Model or amendment to any Contract Document, one copy of all documentary information used in preparation of the Change Order, update 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; (b) all Warranty Periods have expired pursuant to this Agreement; (c) all Claims or Disputes regarding the Work have been settled; and (c) Final Payment has been made and accepted.

20.1.1 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, updates to the Financial Model and resolution of Claims or Disputes under the Contract Documents, and also as described in Section 20.1.6. 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.

Without limiting the foregoing, the Financial Model shall be available during business hours for joint review by Developer and TxDOT at any time and may be used by TxDOT, in its discretion, in determining any potential amounts owed under this Agreement.

20.1.2 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 20.1. 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 20.1, *provided* that the Parties execute a mutually agreeable confidentiality agreement with respect to EPDs that constitute trade secrets or proprietary information, which confidentiality agreement shall explicitly acknowledge that it is subject to applicable Law (including the Public Information Act).

20.1.3 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.

20.1.4 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.

20.1.5 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 20.1.4. 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 20.1.4.

20.1.6 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.

20.2 Financial Reporting Requirements

20.2.1 Developer shall deliver to TxDOT financial and narrative reports, statements, certifications, budgets and information as and when required under the Contract Documents.

20.2.2 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:

(a) 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;

(b) 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 GAAP 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 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 GAAP is required; and

(c) 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 applicable.

20.2.3 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.

20.2.4 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 or any other Governmental Entity with jurisdiction over the Project.

20.2.5 All reports and information delivered by Developer under Sections 20.2.3 and 20.2.4 shall also be delivered electronically, to the extent electronic files exist, and be suitable for posting on the web.

20.3 Subcontract Pricing Documents

Developer shall require each Major Subcontractor to submit to Developer a copy of all documentary information used in determining its Subcontract price (including the price for Subcontract work included in any Change Order), immediately prior to executing the Subcontract and each Subcontract change order, to be held in the same manner as the EPDs and which shall be accessible by TxDOT, Developer and Dispute resolvers, on terms substantially similar to those contained herein. Each Major Subcontract shall include a representation and warranty from the Subcontractor, for the benefit of Developer and TxDOT, stating that its submission in the EPDs, constitutes all the documentary information used in establishing its Subcontract price, and agreeing to provide a sworn certification in favor of Developer and TxDOT together with each supplemental set of EPDs, stating that the information contained therein is complete, accurate and current. Each Subcontract that is not subject to the foregoing requirement shall include a provision requiring the Subcontractor to preserve all documentary information used in establishing its Subcontract price and to provide such documentation to Developer and/or TxDOT in connection with any Claim made by such Subcontractor.

20.4 Maintenance and Inspection of Records

20.4.1 Except for EPDs (which shall be maintained as set forth in Section 20.1), Developer shall keep and maintain in Dallas County, Texas, or in another location TxDOT approves in its discretion, all books, records and documents relating to the Project, Project ROW, 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.

20.4.2 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 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 20.4.2 are subject to the following:

(a) 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

(b) 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.

20.5 Audits

20.5.1 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 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 notice, or unannounced and without prior notice where there is good faith suspicion of fraud.

20.5.2 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 (i) within 60 days after Final Acceptance or (ii) within 60 days after termination of this Agreement. 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, Subcontractors 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.

20.5.3 Full compliance by Developer with the provisions of this Section 20.5 is a contractual condition precedent to Developer's right to seek relief under Section 19.

20.5.4 Any rights of the FHWA to review and audit Developer, its Subcontractors and their respective books and records are set forth in Exhibit 3.

20.5.5 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.

20.5.6 TxDOT's rights of audit include the right to observe the business operations of Developer and its Subcontractors to confirm the accuracy of books and records.

20.5.7 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.

20.5.8 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.

20.6 Public Information Act

20.6.1 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. To the extent that this Agreement involves the exchange or creation of "public information" as such term is defined by the Texas Public Information Act, that TxDOT collects, assembles, or maintains or has a right of access to, and is not otherwise excepted from disclosure under the Public Information Act, Developer is required, at no additional charge to the State, to make any such information available in pdf format, which is accessible by the public. 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 20.5 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.

20.6.2 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.

20.6.3 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 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 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.

20.7 Ownership of Documents

Subject to Section 20.8, 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 20.7 in accordance with the requirements of Section 20.4 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.

20.8 Intellectual Property

20.8.1 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.

20.8.2 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 however* 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.

20.8.3 Subject to the license and rights granted to TxDOT pursuant to Section 20.8.2, 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.

20.8.4 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.

20.8.5 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 20.8.6.

20.8.6 Subject to Section 20.6, 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.

20.8.7 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 20.8.6 if such breach is not the result of gross negligence or intentional misconduct. Developer hereby irrevocably waives all claims to any such damages.

20.8.8 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.

20.8.9 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 20.8.2. 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 20.8.3 through 20.8.6 shall also apply to TxDOT's licenses in such Proprietary Intellectual Property.

SECTION 21. VALUE ENGINEERING

21.1 General

This Section 21 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 D&C Work through changes in the requirements relating to the D&C 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 12.

21.2 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 D&C 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 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.

21.3 Required Information

21.3.1 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 that 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 that must be changed if the VE is approved;

(e) A complete cost analysis including: (i) Developer's cost estimate for performing the subject D&C Work in accordance with the Contract Documents absent the VEs compared to Developer's cost estimate for performing the subject D&C Work in accordance with the proposed changes; (ii) Developer's cost estimate for performing the O&M Work in accordance with the Contract Documents absent the VEs compared to Developer's cost estimate for performing the O&M Work in accordance with the proposed changes; (iii) an estimate of additional costs that

will be incurred by TxDOT due to the VEs; and (iv) 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.

21.3.2 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.

21.4 TxDOT Review and Approval

21.4.1 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.

21.4.2 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 21. 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.

21.4.3 TxDOT may approve, in its 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 discretion of TxDOT and shall be final and not subject to partnering, dispute resolution or appeal.

21.5 Price Adjustment

If TxDOT accepts a VE, the D&C Price and the O&M Price, as applicable, shall be adjusted in accordance with the following:

21.5.1 For VEs that reduce Developer's costs of the D&C Work, the D&C 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 Developer, resulting from the VE (excluding any impact on the D&C Price itself) plus (b) 50% of estimated net savings. For VEs that result in a reduction of Developer's costs for the D&C Work, the term "estimated net savings" shall mean: (i) the difference between the cost of performing the D&C Work according to the Contract Documents and the actual cost to perform the D&C 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 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.

21.5.2 For VEs that result in an increase in Developer's costs of the D&C Work, the D&C 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 12 resulting from the VE plus (b) 50% of estimated net savings. For VEs that result in an increase of Developer's costs for the D&C Work, 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 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.

21.5.3 For VEs that would result in a reduction in Developer's costs for the O&M Work, TxDOT, in its discretion, may require a reduction in the O&M Price as a condition to its approval of such VE. In such case, the O&M Price shall be reduced by an amount equal to 50% of estimated net savings. For VEs that result in a reduction of Developer's costs for the O&M Work, the term "estimated net savings" shall mean the difference between the cost of performing the O&M Work according to the Contract Documents and the mutually agreed upon estimated cost to perform the O&M Work as modified by the VE. Developer's profit shall not be considered part of the cost. Other than as provided in this Section 21.5.3, 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.

21.5.4 In a case where a VE involves acquisition of Additional Property 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.

21.5.5 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 D&C 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.

21.6 Implementation of VEs

21.6.1 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.

21.6.2 Developer's share of any VE cost savings shall be payable at such time as payments would have been made for the D&C Work that is the subject of the VE had the VE not been implemented. If a VE results in a D&C Price increase, payment for the additional Construction D&C Work will be made in the ordinary course of progress of the D&C Work.

21.7 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 22. COOPERATION AND COORDINATION WITH OTHER CONTRACTORS AND ADJACENT PROPERTY OWNERS

22.1 Cooperation with Other Contractors

Developer acknowledges that TxDOT has awarded 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.

22.2 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.

22.3 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.

22.4 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 Systems Integrator to construct civil Elements and install and test toll system components for the Toll Zones concurrent with Developer's Work.

SECTION 23. SAFETY COMPLIANCE; EMERGENCY REPAIR WORK

23.1 Reserved.

23.2 Safety Compliance

23.2.1 TxDOT is entitled from time to time to issue Safety Compliance Orders to Developer with respect to the Project to correct a specific safety condition or risk involving the Project that TxDOT has reasonably determined exists through investigation or analysis.

23.2.2 TxDOT shall use good faith efforts to inform Developer at the earliest practicable time of any circumstance or information relating to the Project that in TxDOT's reasonable judgment is likely to result in a Safety Compliance Order. Except in the case of Emergency, TxDOT shall consult with Developer prior to issuing a Safety Compliance Order concerning the risk to public or worker safety, alternative compliance measures, cost impacts, and the availability of Developer resources to fund the Safety Compliance work.

23.2.3 Subject to conducting such prior consultation (unless excused in the case of Emergency), TxDOT may issue Safety Compliance Orders to Developer at any time from and after the Effective Date.

23.2.4 Developer shall implement each Safety Compliance Order as expeditiously as reasonably possible following its issuance. Developer shall diligently prosecute the work necessary to achieve such Safety Compliance until completion. In no event shall Developer be entitled to claim that any Force Majeure Event relieves Developer from compliance with any Safety Compliance Order except where Developer's compliance with such Safety Compliance Order is delayed due to an ongoing Force Majeure Event and only so long as such Force Majeure Event is continuing.

23.2.5 Issuance by TxDOT of a Safety Compliance Order shall be deemed to be either a Discriminatory O&M Change or a Non-Discriminatory O&M Change, as applicable, and Developer shall be entitled to additional compensation and/or time extension in accordance with the terms of Section 12; *provided, however*, for any Safety Compliance Order that is caused by or arises out of any act or omission of Developer or any other Developer-Related Entity, such Safety Compliance Order shall be completed by Developer at its sole cost and Developer shall not be entitled to any additional compensation and/or time under this Agreement for such Safety Compliance Order.

23.3 Emergency Repair Work

23.3.1 Developer shall be responsible for procuring and overseeing temporary and/or permanent repair work in response to an Emergency for the Project from and after issuance of NTP2. Developer shall solicit competitive bids for such work if FHWA or FEMA regulations, policies or procedures require competitive bidding in order to obtain reimbursement for eligible costs. TxDOT shall provide oversight relating to such Emergency-related repair work in accordance with the Contract Documents.

23.3.2 Developer shall ensure that such repair work is performed in accordance with the Contract Documents and State and federal Law applicable to such Emergency-related repair work, including the requirements of the FHWA Emergency Relief Manual as most recently published by

the FHWA (http://www.fhwa.dot.gov/reports/erm/). Further, Developer shall maintain estimates, cost records and supporting documentation in accordance with such Laws, and in a form and content to enable TxDOT to seek reimbursement for eligible costs from FHWA or FEMA, if applicable.

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 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 D&C Payment Bond, the D&C Performance Bond, the O&M Security, 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.

(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 approval of Developer.

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 Developer's interest or any portion thereof without TxDOT's prior approval, except to any entity that is under the same ultimate management control as Developer and except to the extent permitted in Section 11.3 with respect to Deferred D&C Payment Certificates and Breakage Costs. 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 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 during the Term without TxDOT's prior approval. If there occurs any voluntary or involuntary Change of Control without TxDOT's prior 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 during the Term, TxDOT may withhold or condition its approval in its 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 by TxDOT shall be effective only upon TxDOT's receipt of 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 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 approval of TxDOT, which consent may be granted or withheld in TxDOT's discretion.

24.5.2 In the event either Party changes its name, such Party agrees to promptly furnish the other Party with 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 Sections 11.2, 11.3 and 11.5, the obligations regarding Final Reconciliation under Section 11.6, and all other provisions that by their inherent character should survive termination of this Agreement or completion of the Work, shall survive the termination of this Agreement 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 Each of the Parties agrees to provide to the other Party's Authorized Representative notice of any claim received by the Party 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 or accept designs, plans, specifications, work plans, construction, installation, traffic management details, safety plans 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.

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 23.11.2 and 23.11.3, 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: ___-___-____
Mobile: ___-___-____
Facsimile: ___-___-____
E-mail: _____@_____

With a copy to:

_____
_____
_____
_____
Telephone: ___-___-____
Mobile: ___-___-____
Facsimile: ___-___-____
E-mail: _____@_____

In addition, copies of all notices to proceed and suspension, termination and default notices shall be delivered to the following Persons:

_____
_____
_____
_____
Telephone: ___-___-____
Mobile: ___-___-____

Facsimile: ___-___-____
E-mail: _____@_____

24.11.3 All notices, correspondence and other communications to TxDOT shall be marked as regarding the SH 183 Managed Lanes Project and shall be delivered to the following address or as otherwise directed by TxDOT's Authorized Representative:

Texas Department of Transportation
Dallas District Office
4777 East Highway 80
Mesquite, TX 75150
Attn: Mr. Dan H. Peden, P.E.
Telephone:
Facsimile:
E-mail: dan.peden@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: jack.ingram@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 facsimile 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 17 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:

[_____]

By: **[_____]**

By_____
Name:
Title:

By: **[_____]**

By_____
Name:
Title:

By: **[_____]**

By_____
Name:
Title:

TEXAS DEPARTMENT OF TRANSPORTATION

By: _____
[_____]
Executive Director