CAPITAL MAINTENANCE AGREEMENT

FOR THE

DFW CONNECTOR

By and Between

The Texas Department of Transportation

and

NorthGate Constructors, J.V.

Dated as of: October 6, 2009

CAPITAL MAINTENANCE AGREEMENT

DFW CONNECTOR

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CAPITAL MAINTENANCE AGREEMENT

DFW CONNECTOR

This **CAPITAL MAINTENANCE AGREEMENT** ("Capital Maintenance Agreement") is made and entered into as of October 6, 2009, by and between **THE TEXAS DEPARTMENT OF TRANSPORTATION** ("TxDOT") and NorthGate Constructors, J.V. ("Maintenance Contractor").

RECITALS

A. The State of Texas desires to facilitate private sector investment and participation in the development of the State's transportation system via public-private partnership 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 agreements with a private sector developer to develop, design, construct, and, at TxDOT's sole option, maintain improvements along SH 114 in Tarrant County from SH 114L Business to east of International Parkway and SH 121 from FM 2499 to SH 360, including tolled managed lanes along SH 114 from east of FM 1709 to east of International Parkway (the "Project").

C. Pursuant to the Code and the Rules, TxDOT issued a Request for Qualification (as amended, the "RFQ") on December 29, 2006.

D. TxDOT received four qualification statements on May 1, 2007 and subsequently shortlisted three proposers.

E. On March 28, 2008, TxDOT issued to the shortlisted proposers a Request for Proposal (as subsequently amended by addenda, the "RFP") to develop, design, construct and, at TxDOT's sole option, maintain the Project.

F. On July 15, 2008, TxDOT received responses to the RFP, including the response of Developer (the "Proposal").

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

H. On March 26, 200, the Texas Transportation Commission accepted the recommendation of the Texas Turnpike Authority Director and the RFP evaluation committee and authorized TxDOT staff to negotiate a Comprehensive Development Agreement and this Capital Maintenance Agreement.

I. Concurrently herewith TxDOT and Developer are entering into a Comprehensive Development Agreement providing for the development, design and construction of the Project (the "Comprehensive Development Agreement").

J. The Comprehensive Development Agreement provides, among other things, that Developer (hereinafter referred to, for the purposes of this Capital Maintenance Agreement as "Maintenance Contractor") shall, upon the election by TxDOT, in its sole discretion, provide to TxDOT certain maintenance, repair, upkeep and renovation services in connection with the Project.

K. The Executive Director of TxDOT has been authorized to enter into this Capital Maintenance Agreement pursuant to the Code, the Rules and the Texas Transportation Commission Minute Order 111736.

NOW, THEREFORE, in consideration of the sums to be paid to Maintenance Contractor by TxDOT, the Maintenance Services to be performed by Maintenance Contractor, the foregoing premises and the covenants and agreements set forth herein, TxDOT and Maintenance Contractor agree as follows:

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

1.1 Definitions

Exhibit 1 hereto contains the meaning of various terms used in the CMA Documents. Initially capitalized terms not otherwise in Exhibit 1 attached hereto shall have the meanings set forth in the Comprehensive Development Agreement.

1.2 CMA Documents; Order of Precedence

1.2.1 The term "CMA Documents" shall mean the documents listed in Section 1.2.2. Each of the CMA Documents is an essential part of the agreement between the Parties, and a requirement occurring in one is as binding as though occurring in all. The CMA Documents are intended to be complementary and to describe and provide for a complete contract.

1.2.2 Subject to Sections 1.2.3 through 1.2.5, in the event of any conflict among the CMA Documents, the order of precedence shall be as set forth below:

(a) Change Orders and amendments to this Capital Maintenance Agreement (except for amendments to the Maintenance Specification which amendments shall have the order of priority as set forth in clause (c) below);

(b) this Capital Maintenance Agreement (including all exhibits, except Exhibits 2, 3 and 14, subject to Section 1.2.4); and

(c) Exhibit 2 (Maintenance Specification) and all attachments thereto;

(d) Maintenance Contractor's Proposal Commitments as set forth in Exhibit 3.

1.2.3 Notwithstanding the order of precedence among CMA Documents set forth in Section 1.2.2, in the event and to the extent that Exhibit 3 expressly specifies that it is intended to supersede specific provisions of the CMA Documents, Exhibit 3 shall have precedence over the specified provisions. Moreover, if the Proposal includes statements, offers and terms that can reasonably be interpreted as offers to provide higher quality items than otherwise required by the CMA Documents or to perform services or meet standards in addition to or better than those otherwise required, or otherwise contains statements, offers and terms which TxDOT considers to be more advantageous than the requirements of the other CMA Documents, Maintenance Contractor's obligations hereunder shall include compliance with all such statements, offers and terms, which shall have priority over the requirements of the other CMA Documents.

1.2.4 Notwithstanding the order of precedence among CMA Documents set forth in Section 1.2.2, if a CMA Document contains differing provisions on the same subject matter than another CMA Document, the provisions that establish the higher quality, manner or method of performing the Maintenance Services or use more stringent standards will prevail. Further, in the event of a conflict among any standards, criteria, requirements, conditions, procedures, specifications or other provisions applicable to the Project or Maintenance Services established by reference to a described manual or publication within a CMA Document or set of CMA Documents, the standard, criterion, requirement, condition, procedure, specification or other provision offering higher quality or better performance will apply, unless TxDOT in its sole discretion, approves otherwise in writing. If either Party becomes aware of any such conflict, it shall promptly notify the other party of the conflict. TxDOT shall issue a written determination respecting which of the conflicting items is to apply promptly after it becomes aware of any such conflict.

1.2.5 Portions of the CDA and Technical Provisions are referenced in the CMA Documents for the purpose of defining requirements of the CMA Documents applicable to design and construction. The CDA and Technical Provisions shall be deemed incorporated in the CMA Documents to the extent that they are so referenced, with the same order of priority as the CMA Document in which the reference occurs

1.3 Interpretation of CMA Documents

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

include each other gender where appropriate. Unless otherwise specified, lists contained in the CMA Documents defining the Project or the Maintenance Services shall not be deemed all-inclusive. Maintenance Contractor acknowledges and agrees that it had the opportunity and obligation, prior to submission of its Proposal, to review the terms and conditions of the CMA Documents and to bring to the attention of TxDOT any conflicts or ambiguities contained therein. Maintenance Contractor further acknowledges and agrees that it has independently reviewed the CMA Documents with legal counsel, and that it has the requisite experience and sophistication to understand, interpret and agree to the particular language of the provisions of the CMA Documents. Accordingly, if an ambiguity in, or there is a dispute regarding, the interpretation of the CMA Documents, they shall not be interpreted or construed against the Person which prepared them, and, instead, other rules of interpretation and construction shall be used. TxDOT's interim or final answers to the questions posed during the Proposal process for this Capital Maintenance Agreement shall in no event be deemed part of the CMA Documents and shall not be relevant in interpreting the CMA Documents except to the extent they may clarify provisions otherwise considered ambiguous. On plans, as-built drawings, working drawings, and standard plans, calculated or stated dimensions shall take precedence over scaled dimensions.

1.4 Referenced Standards and Specifications

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

1.4.2 In interpreting referenced standards, the following apply:

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

(b) Cross-references to measurement and payment provisions contained in the referenced standard shall be deemed to refer to the measurement and payment provisions contained in the CMA Documents.

1.5 Reference Information Documents

1.5.1 TxDOT has provided and disclosed the Reference Information Documents to Maintenance Contractor. The Reference Information Documents are not mandatory or binding on Maintenance Contractor. Maintenance Contractor is not entitled to rely on the Reference Information Documents as presenting a design, engineering, operating or maintenance solutions or other direction, means or methods for complying with the requirements of the CMA Documents, Governmental Approvals or Law.

1.5.2 TxDOT shall not be responsible or liable in any respect for any causes of action, claims or Losses whatsoever suffered by any Maintenance Contractor-

Related Entity by reason of any use of information contained in, or any action or forbearance in reliance on, the Reference Information Documents or Capital Maintenance Agreement

1.5.3 TxDOT does not represent or warrant that the information contained in the Reference Information Documents is complete or accurate or that such information is in conformity with the requirements of the CMA Documents, Governmental Approvals or Laws. Maintenance Contractor shall have no right to additional compensation based on any incompleteness or inaccuracy in the Reference Information Documents.

1.6 Explanations; Omissions and Misdescriptions

Maintenance Contractor shall not take advantage of or benefit from any apparent Error in the CMA Documents. Should it appear that the Maintenance Services to be done or any matter relative thereto is not sufficiently detailed or explained in the CMA Documents, Maintenance Contractor shall request in writing such further written explanations from TxDOT as may be necessary and shall comply with the explanation provided. Maintenance Contractor shall promptly notify TxDOT in writing of all Errors which it may discover in the CMA Documents, and shall obtain specific instructions in writing from TxDOT regarding any such Error before proceeding with the Maintenance Services affected thereby. The fact that the CMA Documents omit or misdescribe any details of any Maintenance Services that are necessary to carry out the intent of the CMA Documents, or that are customarily performed, shall not relieve Maintenance Contractor from performing such omitted Maintenance Services (no matter how extensive) or misdescribed details of the Maintenance Services, and they shall be performed as if fully and correctly set forth and described in the CMA Documents, without entitlement to a Change Order hereunder except as specifically allowed under Section 10.

1.7 Computation of Periods

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

1.8 Standard for Approvals

In all cases where approvals or consents are required to be provided by TxDOT or Maintenance Contractor hereunder, such approvals or consents shall not be withheld unreasonably except in cases where a different standard (such as sole discretion) is specified. In cases where sole discretion is specified the decision shall not be subject to dispute resolution hereunder.

1.9 Professional Services Licensing Requirements

TxDOT does not intend to contract for, pay for, or receive any professional services which are in violation of any professional licensing or registration laws, and by execution of this Capital Maintenance Agreement, Maintenance Contractor acknowledges that TxDOT has no such intent. It is the intent of the Parties that Maintenance Contractor is fully responsible for furnishing the professional services of the Project as provided in this Capital Maintenance Agreement through itself and/or subcontracts with licensed and/or registered professional service firm(s). Any references in the CMA Documents to Maintenance Contractor's responsibilities or obligations to "perform" the professional services portions of the Maintenance Services shall be deemed to mean that Maintenance Contractor shall "furnish" the professional services for the Project. The terms and provisions of this Section 1.9 shall control and supersede every other provision of all CMA Documents.

1.10 TxDOT Monetary Obligations

All TxDOT monetary obligations under the CMA 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 1.10 applies to all monetary obligations of TxDOT set forth in the CMA Documents, notwithstanding any contrary provisions of the CMA Documents. The CMA Documents do not create a debt under the Texas Constitution.

SECTION 2. TXDOT'S OPTION RIGHTS; COMMENCEMENT OF CAPITAL MAINTENANCE AGREEMENT

2.1 TxDOT Option Rights

2.1.1 This Capital Maintenance Agreement gives TxDOT the right to exercise, in its sole and absolute discretion, up to three consecutive five-year option periods described in Section 4, requiring Maintenance Contractor to provide Maintenance Services for the Project in accordance with the terms and conditions of the CMA Documents.

2.1.2 TxDOT shall have no liability to Maintenance Contractor in the event that TXDOT elects, in its sole and absolute discretion, not to exercise any of the options under this Capital Maintenance Agreement.

2.2 Commencement of Capital Maintenance Agreement

2.2.1 No later than 180 days prior to the Scheduled Substantial Completion Deadline of the Project, TxDOT shall either: (a) issue Maintenance NTP1 to Maintenance Contractor; or (b) terminate this Capital Maintenance Agreement. Failure by TxDOT to issue Maintenance NTP1 by such date shall be deemed a termination under this Section 2.2.1.

2.2.2 If TxDOT elects (or is deemed to elect) to terminate this Capital Maintenance Agreement by failing to issue Maintenance NTP1, neither Party shall have any further rights or obligations hereunder, except for those obligations that expressly survive the expiration or termination hereof.

SECTION 3. SCOPE OF MAINTENANCE SERVICES

3.1 General Obligations

3.1.1 Maintenance Contractor shall furnish all Maintenance Services throughout the term of this Capital Maintenance Agreement, as further described herein. The Maintenance Services are included in the Maintenance Price set forth in Exhibit 4, except as set forth in Section 10. Except for damage caused by a Maintenance Contractor-Related Entity, Maintenance Contractor shall not be responsible for repair of damage to the Project caused by collision (motor vehicle, aircraft or railroad train), vandalism, or other destructive acts of third parties.

3.1.2 Maintenance Contractor shall provide all personnel, labor, materials, supplies, parts, equipment, public and employee safety devices, components, tools, and utilities to undertake and complete the Maintenance Services, regardless of whether the Maintenance Services are considered to constitute ordinary, preventive or replacement maintenance. Maintenance Contractor shall bear the risk of loss, damage, theft and vandalism of such materials, supplies, parts, equipment, components, tools and utilities.

3.1.3 Maintenance Contractor shall furnish all plans and submittals required by the CMA Documents in a timely manner and in the form and with the content required thereby.

3.1.4 Maintenance Contractor shall perform the Maintenance Services in accordance with the CMA Documents, the Governmental Approvals, applicable Laws and Good Industry Practice, and shall cooperate and coordinate the Maintenance Services with TxDOT, Governmental Entities, Utility Owners and other third parties during performance of any Maintenance Services that will or may affect any of their respective facilities or rights.

3.1.5 Maintenance Contractor acknowledges and agrees that, although certain provisions in the CMA Documents include Performance Requirements, such Performance Requirements shall not otherwise limit Maintenance Contractor's obligation to perform the Maintenance Services in a safe, reasonable, and prudent manner, and, in doing so, Maintenance Contractor shall employ Good Industry Practice, and shall conduct its commercial affairs in a manner consistent with good faith and fair dealing.

3.1.6 Maintenance Contractor shall be responsible for obtaining any required permits and required consents from any other Persons in connection with the performance of Maintenance Services required under this Capital Maintenance Agreement.

3.1.7 Maintenance Contractor shall, at all times, schedule and direct its activities to provide an orderly progression of the Maintenance Services to achieve completion within the specified time for completion, including furnishing such employees, materials, facilities and equipment and working such hours, including extra shifts, overtime

operations, Sundays and holidays as may be necessary to achieve such goal, all at Maintenance Contractor's sole cost, except as otherwise specifically provided in Section 10. .

3.2 Capital Asset Replacement Work

3.2.1 General Requirements

3.2.1.1 Maintenance Contractor shall perform Maintenance Services: (a) when required by Maintenance Contractor's approved Maintenance Management Plan and updates thereto as described in the CMA Documents; and (b) when a Performance Requirement is not met and the required level of performance cannot be achieved by means of routine or preventative maintenance.

3.2.1.2 Not later than 60 days after each anniversary of the Initial Maintenance Commencement Date, Maintenance Contractor shall deliver to TxDOT a written report of the Capital Asset Replacement Work performed in the immediately preceding year. The report shall describe: (a) by location, the Maintained Element, as listed in the Capital Asset Replacement Work Submittal, and any other Project component for which Capital Asset Replacement Work was performed; (b) the type of Capital Asset Replacement Work performed; (c) each specific item replaced; (d) any warranty information associated with any replacement item; (e) the dates of commencement and completion of such Capital Asset Replacement Work; and (f) such other information as is reasonably requested by TxDOT.

3.2.2 Capital Asset Replacement Work Submittal

3.2.2.1 As part of the Maintenance Management Plan required under Section 1900 of Exhibit 2, Maintenance Contractor shall prepare and submit, for TxDOT's review and approval, a Capital Asset Replacement Work Submittal. The Capital Asset Replacement Work Submittal shall meet the requirements set forth in Section 1900 of Exhibit 2.

3.2.2.2 Not later than 120 days before each anniversary of the Initial Maintenance Commencement Date thereafter, Maintenance Contractor shall prepare and submit, for TxDOT's review and approval, either: (a) a revised Capital Asset Replacement Work Submittal for the upcoming year or (b) the then-existing Capital Asset Replacement Work Submittal, accompanied by a written statement that Maintenance Contractor intends to continue in effect the then-existing Capital Asset Replacement Work Submittal without revision for the upcoming year (in either case, referred to as the "updated Capital Assert Replacement Work Submittal"). Maintenance Contractor shall make revisions as reasonably indicated by experience and then-existing conditions respecting the Project, changes in technology, changes in Maintenance Contractor's planned means and methods of performing the Capital Asset Replacement Work, and other relevant factors. The updated Capital Asset Replacement Work Submittal shall show the revisions, if any, to the prior Capital Asset Replacement Work Submittal and include an explanation of reasons for revisions. If no

revisions are proposed, Maintenance Contractor shall include an explanation of the reasons that no revisions are necessary.

3.2.2.3 TxDOT shall review the annual Capital Asset Replacement Work Submittal and meet with Maintenance Contractor within 30 Days after its submittal to discuss revisions and clarifications or to resolve any disagreements. Within 15 Days after such meeting, Maintenance Contractor shall resubmit the final Capital Asset Replacement Work Submittal to TxDOT. TxDOT will either approve or disapprove the Capital Asset Replacement Work Submittal within 15 Days, with comments, objections, recommendations or disapprovals noted in writing. If TxDOT disapproves the Capital Asset Replacement Work Submittal, within ten days after receiving written notice of comments, objections, recommendations or disapprovals from TxDOT, Maintenance Contractor shall submit to TxDOT a revised initial or updated Capital Asset Replacement Work Submittal rectifying such matters and, for matters Maintenance Contractor disagrees with, a written notice setting forth those comments, objections, recommendations and disapprovals that Maintenance Contractor disputes, which notice shall give details of Maintenance Contractor's grounds for dispute. If Maintenance Contractor 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 Capital Asset Replacement Work Submittal, 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 dispute notice by Maintenance Contractor, Maintenance Contractor 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 Maintenance Contractor delivers its notice, either Party may refer the Dispute to the disputes resolution procedures applicable to this Capital Maintenance Agreement.

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

3.3 Traffic Control and Operations

Maintenance Contractor shall perform the Maintenance Services in a manner that recognizes that the safety of the public, convenience of the traveling public and providing a safe work environment for all maintenance workers are of prime importance. Maintenance Contractor shall perform its traffic control and operations in accordance with the CMA Documents, including this Section 3.3.

3.3.1 Traffic Management and Control Plans

3.3.1.1 Maintenance Contractor shall be responsible for the safety of traffic and the public associated with the performance of the Maintenance Services, and shall perform all Maintenance Services that affect traffic operations in accordance with Section 1800 of Exhibit 2.

3.3.1.2 Within 60 days after issuance by TxDOT of Maintenance NTP1 and periodically thereafter as required under the CMA Documents, Maintenance Contractor shall prepare and submit, for TxDOT's review and approval, a Traffic Management Plan. The Traffic Management Plan shall be prepared in accordance with and contain the information required under Section 1802 of Exhibit 2.

3.3.1.3 Within 30 days after TxDOT's approval of the Traffic Management Plan, Maintenance Contractor shall prepare and submit, for TxDOT's review, traffic control plans as described in Section 1803 of Exhibit 2.

3.3.2 Traffic Operation Restrictions

3.3.2.1 Maintenance Contractor shall keep the number of Lane Closures to an absolute minimum and shall keep each Lane Closure to the shortest time necessary for safe and efficient operations. The requirements for and restrictions on Lane Closures are set forth in Section 1800 of Exhibit 2 and Attachment 6 to Exhibit 2. If Maintenance Contractor violates such requirements and restrictions, Maintenance Contractor shall be subject to liquidated damages in accordance with Section 12.4 of this Capital Maintenance Agreement.

3.3.2.2 Should Emergencies occur, including vehicle accidents and structural failures, Maintenance Contractor shall repair any damage to the Maintained Elements. TxDOT has the authority to deny a Lane Closure in the case of an emergency, evacuation, a special event or any other public activities.

3.4 Requirements Applicable to Design and Construction Work

3.4.1 To the extent that Maintenance Contractor performs any design or construction work for Capital Asset Replacement Work, Unplanned Capital Maintenance, or Change Orders, Maintenance Contractor shall comply with the requirements and specifications for design and construction set forth in the Technical Provisions and in the applicable sections of the CDA, except as otherwise approved in advance in writing by TxDOT.

3.4.2 In connection with the performance by Maintenance Contractor of any Unplanned Capital Maintenance or Change Orders, Maintenance Contractor shall procure and maintain (a) the insurance deemed appropriate by TxDOT in its sole discretion and (b) payment and performance bonds all in the full amount of the Unplanned Capital Maintenance or Change Order as determined by TxDOT in its sole discretion; provided, however, that subject to applicable law, TxDOT may, in its sole discretion, lower the level of bonding required. In the event the insurance and payment and performance bonds are procured for such design and construction work, Maintenance Contractor shall be entitled to reimbursement (without profit or mark-up) in accordance with Section 7.9 for any actual payments made by Maintenance Contractor for the premiums, except to the extent that: (a) the design and construction work arises from the acts, omissions, negligence, intentional misconduct, or breach of applicable Law, contract, or Governmental Approval by any Maintenance Contactor-Related Entity; or (b) the design and construction work arises from a failure to meet the Performance

Requirements of this agreement; or (c) the premiums result from the claim or performance history of any Maintenance Contractor-Related Entity.

3.5 Coordination

3.5.1 Coordination with TxDOT Maintenance Crews

3.5.1.1 Maintenance Contractor shall coordinate its activities and maintenance with the activities and maintenance undertaken by TxDOT's maintenance personnel and contractors that will be performing maintenance activities not within the scope of the Maintenance Services.

3.5.1.2 Except as otherwise provided in Section 10, Maintenance Contractor shall not be entitled to a Change Order arising out of the activities and maintenance undertaken by TxDOT's maintenance personnel and contractors.

3.5.2 Coordination with Third Parties

3.5.2.1 Maintenance Contractor shall fully cooperate with third parties, including TxDOT's separate contractors, performing work or activities at or adjacent to the Project, and shall schedule the Maintenance Services as reasonably necessary to accommodate the work or activities of such third parties.

3.5.2.2 Except as provided in Section 10, if Maintenance Contractor asserts that any third parties have hindered or interfered with the progress or performance of the Maintenance Services, Maintenance Contractor's sole remedy shall be to seek recourse against such third parties.

3.6 Transition Requirements

At the expiration of the Maintenance Term or any earlier termination of this Capital Maintenance Agreement, Maintenance Contractor shall ensure and certify that the Maintenance Elements meet the Asset Condition Score requirements. The Maintenance contractor shall develop a Maintenance Transition Plan as set forth in Section 3.6.1.

3.6.1 Maintenance Transition Plan

3.6.1.1 Submission and Approval

Maintenance Contractor, within 240 Days after issuance by TxDOT of Maintenance NTP1, shall submit to TxDOT, for TxDOT's review and approval, a Maintenance Transition Plan as described in Section 0208 of Exhibit 2.

3.6.1.2 Capital Assert Replacement Work under Audit Inspections

Maintenance Contractor shall diligently perform and complete all Capital Asset Replacement Work required to be performed and completed, based on the required adjustments and changes to the Capital Asset Replacement Work

Submittal resulting from the Audit Inspections. Maintenance Contractor shall complete all such Capital Assert Replacement Work:

(a) Prior to the expiration of the Maintenance Term, as extended by the issuance of NTP2 or NTP3, as applicable; or

(b) If the Capital Maintenance Agreement is terminated for any reason prior to the expiration of the Maintenance Term, within 90 days after the effective date of termination. If Maintenance Contractor, despite diligent efforts, is unable to complete such Capital Asset Replacement Work prior to such period or TxDOT elects, at its sole discretion, to perform such Capital Assert Replacement Work, then in lieu of Maintenance Contractor's completion of such Capital Asset Replacement Work, Maintenance Contractor shall reimburse TxDOT, within ten days of delivery of an invoice therefor, for TxDOT's Recoverable Costs of completing such Capital Asset Replacement Work. In lieu of reimbursement, TxDOT may elect, in its sole discretion, to deduct such amounts from any amounts payable to Maintenance Contractor under this Capital Maintenance Agreement.

3.7 Waste Disposal and Hazardous Materials

3.7.1 General Requirements

3.7.1.1 Maintenance Contractor shall manage, store, contain, transport, and dispose of, or cause the disposal of, all waste, residue, construction debris, materials, Hazardous Materials, Recognized Environmental Conditions, and supplies that are produced, used or generated as a result of the activities of any Maintenance Contractor-Related Entity in accordance with all applicable Laws and Governmental Approvals. The foregoing obligations also apply to Hazardous Materials and Releases of Hazardous Materials arising out of, related to, or associated with the actions, omissions, negligence, intentional misconduct, or breach of applicable Law, contract or Governmental Approval by any Maintenance Contractor-Related Entity. Maintenance Contractor's personnel handling Hazardous Materials shall be appropriately trained in Hazardous Materials handling and disposal. Maintenance Contractor shall provide evidence of such personnel's training to TxDOT.

3.7.1.2 For any Hazardous Materials which are Maintenance Contractor's responsibility under this Capital Maintenance Agreement, Maintenance Contractor shall be solely responsible for all costs of Hazardous Materials Management and for restoring the real property affected thereby to its condition prior to the Release of Hazardous Materials, including, to the extent required, any grading and reinforcement necessary to restore the weight-bearing and functional capacity of the Project. If, within a reasonable time (as determined by TxDOT) after a Release of Hazardous Materials for which Maintenance Contractor is responsible, Maintenance Contractor has not taken action under Section 3.7.1.1, TxDOT may undertake such action itself. In such event, Maintenance Contractor shall reimburse TxDOT for TxDOT's Recoverable Costs it

incurs as a result of Maintenance Contractor's failure, and shall do so within ten Business Days of receipt of an invoice therefor. In lieu of reimbursement, TxDOT may elect, in its sole discretion, to deduct such amounts from any amounts payable to Maintenance Contractor under this Capital Maintenance Agreement.

3.7.2 Procedures for Hazardous Materials Management

If during the course of the Maintenance Services, Maintenance Contractor encounters Hazardous Materials or Recognized Environmental Conditions, Maintenance Contractor shall: (a) promptly notify TxDOT in writing and advise TxDOT of any obligation to notify Governmental Entities under applicable Law; and (b) take reasonable steps, including design modifications and/or construction techniques, to avoid excavation or dewatering in areas with Hazardous Materials or Recognized Environmental Conditions. Where excavation or dewatering of Hazardous Materials or Recognized Environmental Conditions is unavoidable, Maintenance Contractor shall utilize appropriately trained personnel and shall select the most cost-effective approach to Hazardous Materials Management, unless otherwise directed by TxDOT. Maintenance Contractor's plan for Hazardous Materials Management shall be subject to the prior written approval of TxDOT. Wherever feasible and consistent with the CMA Documents, applicable Law and Good Industry Practice, contaminated soil and groundwater shall not be disposed off-site.

3.7.2.1 Except where Maintenance Contractor is required to take immediate action under the CMA Documents or applicable Law, Maintenance Contractor 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.

3.7.2.2 Subject to the limitations and exceptions set forth in this Section 3.7 and Section 10 Maintenance Contractor shall be entitled to a Change Order as set forth in Section 10.8.2 with respect to costs and/or delays directly attributable to the discovery of Hazardous Materials within the Project ROW.

3.7.3 Hazardous Material Generator

3.7.3.1 As between Maintenance Contractor and TxDOT, TxDOT shall be considered the generator of and assume generator responsibility for Pre-Existing Hazardous Materials and TxDOT Releases of Hazardous Materials; provided, however, that the foregoing shall not preclude or limit any rights or remedies that TxDOT may have against third parties, including prior owners, lessees, licensees and occupants of the Project ROW.

3.7.3.2 As between Maintenance Contractor and TxDOT, Maintenance Contractor shall be considered the generator of and assume generator responsibility only for Maintenance Contractor Releases of Hazardous Materials.

3.7.4 Hazardous Material Generator Liability of Maintenance Contractor

Hazardous Materials Management costs, including assessment, containment, and remediation expenses, on, arising from or related to Hazardous Materials for which Maintenance Contractor is deemed the generator under Section 3.7.3.2 shall not be compensable to Maintenance Contractor or entitle Maintenance Contractor to schedule relief.

3.7.5 Hazardous Materials Brought to Project ROW by Maintenance Contractor

Maintenance Contractor shall be solely responsible for: (a) compliance with all Laws and Environmental Approvals applicable to Hazardous Materials brought onto the Site by any Maintenance Contractor-Related Entity; (b) use, containment, storage, management, transport and disposal of such Hazardous Materials in accordance with the CMA Documents; and (c) payment of all Losses associated with, arising out of or related to such Hazardous Materials.

3.7.6 Environmental Approvals Relating to Hazardous Materials Management

Maintenance Contractor shall be solely responsible for obtaining all Governmental Approvals relating to Hazardous Materials Management including federal and State surface water and groundwater discharge permits and permits for recycling or reuse of Hazardous Materials. Maintenance Contractor shall be solely responsible for compliance with such Governmental Approvals and applicable Laws, including those governing the preparation of waste profiles, waste manifests and bills of lading.

3.8 Governmental Approvals

3.8.1 Maintenance Contractor shall identify and obtain all Governmental Approvals required in connection with the Maintenance Services, at its sole cost and expense. Except to the extent arising from a Force Majeure Event or TxDOT-Directed Change, Maintenance Contractor shall be responsible for any and all costs, including any liability, penalties, expenses, damages or delays resulting from any suspension, termination, interruption, denial or non-renewal of, or failure to obtain any Governmental Approval.

3.8.2 If any Governmental Approvals required to be obtained by Maintenance Contractor must formally be issued in the name of TxDOT, TxDOT shall cooperate with Maintenance Contractor to obtain such Governmental Approvals as may be reasonably requested by Maintenance Contractor. Maintenance Contractor shall be responsible for preparing all documentation necessary for any application for a Governmental Approval.

3.9 Software Compatibility

Unless otherwise specifically stated in the CMA Documents, Maintenance Contractor 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, Maintenance Contractor must obtain written approval from TxDOT. In addition, Maintenance Contractor shall provide to TxDOT staff, at Maintenance Contractor'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 Maintenance Contractor.

SECTION 4. MAINTENANCE TERM

The term of this Capital Maintenance Agreement includes an initial optional term and two additional options to extend the initial term. The maximum term of this Capital Maintenance Agreement, including both extensions thereof, is 15 years.

4.1 Initial Maintenance Term

Provided that TxDOT issues Maintenance NTP1, the Initial Maintenance Term shall commence upon Substantial Completion of the Project ("Initial Maintenance Commencement Date"), and shall expire five years from the Initial Maintenance Commencement Date, unless terminated earlier in accordance with the terms of this Capital Maintenance Agreement.

4.2 Second Maintenance Term

4.2.1 If TxDOT issues Maintenance NTP1, TxDOT, in its sole and absolute discretion, shall have the option to extend the term of this Capital Maintenance Agreement for an additional five years (the "Second Maintenance Term"). The Second Maintenance Term shall commence as of the expiration of the Initial Maintenance Term and shall continue for a period of five years, unless terminated earlier in accordance with the terms hereof.

4.2.2 If TxDOT elects to exercise its option rights for a Second Maintenance Term, TxDOT shall issue Maintenance NTP2 on or before 90 Days prior to the scheduled expiration of the Initial Maintenance Term. TxDOT shall not be entitled to exercise the extension option for the Second Maintenance Term if it did not issue Maintenance NTP1. TxDOT shall have no liability to Maintenance Contractor for a failure to issue Maintenance NTP2.

4.3 Third Maintenance Term

4.3.1 If TxDOT issues Maintenance NTP2, TxDOT, in its sole and absolute discretion, shall have the option to extend the term of this Capital Maintenance Agreement for an additional term (the "Third Maintenance Term"). The Third Maintenance Term shall commence as of the expiration of the Second Maintenance Term and shall continue for a period of five years, unless terminated earlier in accordance with the terms hereof.

4.3.2 If TxDOT elects to exercise its extension rights for a Third Maintenance Term, TxDOT shall issue Maintenance NTP3 on or before 90 Days prior to the expiration of the Second Maintenance Term. TxDOT shall not be entitled to exercise the extension option for the Third Maintenance Term if it did not issue Maintenance NTP1 and Maintenance NTP2. TxDOT shall have no liability to Maintenance Contractor for a failure to issue Maintenance NTP3.

SECTION 5. MANAGEMENT AND ADMINISTRATION

5.1 TxDOT Responsibility for Policy Decisions

All policy decisions regarding use, operation and maintenance of the Project shall rest solely with TxDOT.

5.2 Use of the Project

Maintenance Contractor shall not use the Project, the Project ROW or any of the premises provided by TxDOT for any purpose other than the performance of Maintenance Services. Maintenance Contractor shall not be entitled to, and shall not purport to, grant the use of the Project or the Project ROW to anyone without the written approval of TxDOT. Maintenance Contractor shall be responsible for paying all tolls for its personnel, Subcontractors and Suppliers, unless directed otherwise in writing by TxDOT. Maintenance Contractor shall have no interest, right or title in or to: (a) any toll or other revenues arising out of the use of the Project; (b) the Project; or (c) the Project ROW.

5.3 Document Management Requirements

Maintenance Contractor shall establish and use a document and electronic communications management system in accordance with Section 0203 of Exhibit 2.

5.4 Key Maintenance Personnel; Qualifications of Employees

5.4.1 On or before 60 Days after TxDOT issues Maintenance NTP1, Maintenance Contractor shall update and obtain TxDOT's written approval of any changes to Key Maintenance Personnel as presented in the Proposal.

5.4.2 During the Maintenance Term, Maintenance Contractor shall promptly notify TxDOT in writing of any proposed changes in any Key Maintenance Personnel. Maintenance Contractor shall not change, or permit any change in, any Key Maintenance Personnel without the prior written consent of TxDOT. Before Maintenance Contractor replaces any Key Maintenance Personnel, TxDOT shall be given the opportunity to interview and approve the replacement candidate(s). Maintenance Contractor's request to replace any Key Maintenance Personnel shall include a proposed replacement, with equivalent or better qualifications, who shall be available within 30 Days after TxDOT's approval.

5.4.3 All individuals performing Maintenance Services shall have the skill and experience and any licenses or certifications required to perform the Maintenance Services assigned to them. If TxDOT determines, in its sole discretion, that any Person employed by Maintenance Contractor or any Subcontractor is not performing the Maintenance Services in a proper and skillful manner or is detrimental to the progress of the Maintenance Services and/or the Project, then, at the written request of TxDOT,

Maintenance Contractor shall remove such Person from the Project and such Person shall not be reemployed on the Project without the prior written approval of TxDOT.

5.4.4 Maintenance Contractor shall designate in writing a field representative who shall have onsite field and office authority to represent and act for Maintenance Contractor. That representative shall be present at the job site at all times while Maintenance Services are actually in progress. Maintenance Contractor shall provide phone, e-mail addresses and pager numbers for all Key Maintenance Personnel. TxDOT requires the ability to contact the Key Maintenance Personnel 24 hours per Day, seven Days per week.

5.4.5 Maintenance Contractor acknowledges and agrees that the award of this Capital Maintenance Agreement by TxDOT to Maintenance Contractor was based, in large part, on the qualifications and experience of the personnel listed in the Proposal and Maintenance Contractor's commitment that such individuals would be available to undertake and perform the Maintenance Services. Maintenance Contractor 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 Maintenance Services. Unless otherwise agreed to by TxDOT in writing, individuals filling Key Personnel roles shall be available for the Maintenance Services and shall maintain active involvement in the prosecution and performance of the Maintenance Services in accordance with the approved Maintenance Management Plan.

5.4.6 If the approved individuals filling the Key Maintenance Personnel roles are not available for the Maintenance Services and do not undertake or perform the Maintenance Services after approval thereof pursuant to Section 5.4.1, as appropriate, Maintenance Contractor acknowledges that TxDOT, the Maintenance Services and the Project will suffer significant and substantial Losses and that it is impracticable and extremely difficult to ascertain and determine the actual Losses which would accrue to TxDOT in such event. Therefore, if such individuals filling the Key Maintenance Personnel roles are not available or not actively involved in the prosecution and performance of the Maintenance Services, as determined by TxDOT in its sole discretion, Maintenance Contractor agrees to pay TxDOT a liquidated amount as follows as deemed compensation to TxDOT for such Losses:

POSITION	LIQUIDATED DAMAGES AMOUNT
Maintenance Manager	$75,000
Maintenance QC Manager	$75,000

Maintenance Contractor understands and agrees that any damages payable in accordance with this Section 5.4.6 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, in its sole discretion, shall have the right to deduct such liquidated damages from any amounts owed by TxDOT to Maintenance Contractor or to

collect such liquidated damages from any bond or Guaranty furnished under this Capital Maintenance Agreement. Notwithstanding the foregoing, Maintenance Contractor shall not be liable for liquidated damages under this Section 5.4.6 if: (a) Maintenance Contractor 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 Maintenance Contractor-Related Entity (provided that moving to an affiliated company shall not be considered grounds for avoiding liquidated damages); or (c) Maintenance Contractor identifies the replacement for any Key Maintenance Personnel within 90 Days after issuance of Maintenance NTP1; provided, however, in each such case, Maintenance Contractor shall promptly propose to TxDOT a replacement for such personnel, which individual shall be subject to TxDOT's written consent. Following any TxDOT-approved substitution or replacement of a Key Maintenance Personnel pursuant to the terms hereof, the new individual shall be considered a Key Maintenance Personnel for all purposes under this Capital Maintenance Agreement, including the provisions of this Section 5.4.6 relative to liquidated damages.

5.4.7 Maintenance Contractor acknowledges and agrees that the Key Maintenance Personnel positions are of critical importance to TxDOT and the Project. In addition to the approval rights of TxDOT set forth in this Section 5.4 and the liquidated damages set forth in Section 5.4.6, if an individual in a Key Maintenance Personnel position leaves that position for a reason other than as set forth in clauses (a)-(c) of Section 5.4.6, TxDOT shall have the right to terminate this Capital Maintenance Agreement for default under Section 12, unless Maintenance Contractor 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) Maintenance Contractor or TxDOT becomes aware that such individual intends to leave his/her position.

5.5 Maintenance Management Plan

5.5.1 On or before 60 days after the date of issuance of Maintenance NTP1, Maintenance Contractor shall prepare and submit, for TxDOT's review and approval, a Maintenance Management Plan. The Maintenance Management Plan shall meet the requirements set forth in Section 1903 of Exhibit 2, and comply with the Capital Maintenance Agreement Documents, applicable Government Approvals, and applicable Law. Following the initial Maintenance Management Plan, Maintenance Contractor shall submit to TxDOT, for TxDOT's review and approval, a Maintenance Management Plan update meeting the requirements of Section 1903 of Exhibit 2 by each anniversary of Initial Maintenance Commencement Date.

5.5.2 The Maintenance Management Plan and each update shall show the timing of and methodology for performing the various Maintenance Services. The duration and number of working days of any Maintenance Services set forth in the Maintenance Management Plan that require Lane Closures shall be subject to the written approval of TxDOT.

5.5.3 TxDOT shall review the Maintenance Management Plan and each update and shall meet with Maintenance Contractor within 30 Days after its submittal to discuss revisions and clarifications or to resolve any disagreements. Within 15 Days after such meeting, Maintenance Contractor shall resubmit the Maintenance Management Plan to TxDOT. TxDOT will either approve or disapprove the Maintenance Management Plan within 15 Days, with comments, objections, recommendations or disapprovals noted in writing. If TxDOT disapproves the Maintenance Management Plan, within ten days after receiving written notice of comments, objections, recommendations or disapprovals from TxDOT, Maintenance Contractor shall submit to TxDOT a revised initial or updated Maintenance Management Plan rectifying such matters and, for matters Maintenance Contractor disagrees with, a written notice setting forth those comments, objections, recommendations and disapprovals that Maintenance Contractor disputes, which notice shall give details of Maintenance Contractor's grounds for dispute. If Maintenance Contractor 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 Maintenance Management Plan, 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, Maintenance Contractor 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 Maintenance Contractor delivers its notice, either Party may refer the Dispute to the disputes resolution procedures applicable to this Capital Maintenance Agreement.

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

5.6 Maintenance Services Quality Control Plan

5.6.1 On or before 60 Days after issuance of Maintenance NTP1 by TxDOT, Maintenance Contractor shall prepare and submit a Maintenance Services quality control plan ("Maintenance QCP") meeting the requirements of this Section 5.6. The Maintenance QCP is intended to: (a) place the responsibility for the quality of all design, construction, maintenance and repair associated with the Maintenance Services on Maintenance Contractor; and (b) allow TxDOT to oversee the Maintenance Services.

5.6.2 Subject to revision to address the Maintenance Services and the specific design and construction work that will be undertaken in connection therewith, the Maintenance QCP must be consistent with the design and construction quality control/quality assurance requirements set forth in Section 0204 of Exhibit 2 and apply Good Industry Practice.

5.6.3 TxDOT shall review the Maintenance QCP and meet with Maintenance Contractor within 30 Days after its submittal to discuss revisions and clarifications or to attempt to resolve any disagreements. Within 15 Days after such meeting,

Maintenance Contractor shall resubmit the final Maintenance QCP to TxDOT. TxDOT will either approve or disapprove the Maintenance QCP within 15 Days, with objections or corrections noted in writing. If TxDOT disapproves the Maintenance QCP, Maintenance Contractor shall resubmit the Maintenance QCP 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 Maintenance QCP.

5.6.4 The Maintenance Contractor shall have a quality control manager ("Maintenance QC Manager") who is responsible to independently oversee and perform quality control for the Maintenance Services in accordance with the Maintenance QCP. The Maintenance QCP shall demonstrate the Maintenance QC Manager's functional independence from the Maintenance Contractor work forces. The Maintenance QC Manager is considered Key Personnel.

5.6.5 The Maintenance QC Manager shall submit an annual report to TxDOT by each anniversary of the Initial Maintenance Commencement Date. This annual report shall include the following elements:

(a) An assessment of the actual Maintenance Services achievements versus the planned goals established in the Maintenance Management Plan, as well as corrective actions and measures to be taken in the ensuing year to ensure that any shortcomings are corrected; and

(b) An assessment of compliance with the various traffic control requirements and limitations contained in Section 3.3, above, and the traffic control plans developed in accordance with Section 1803 of Exhibit 2, as well as any corrective measures taken to correct any breach or violation of such requirements and limitations and any corrective measures necessary to prevent any future breach or violation of such requirements and limitations.

5.7 Inspection and Testing

5.7.1 Maintenance Contractor Inspection and Testing

Maintenance Contractor shall perform the inspection, sampling, testing, quality control and quality assurance necessary for Maintenance Contractor to comply with its obligations under the CMA Documents.

5.7.2 Oversight, Inspection and Owner Verification Testing by TxDOT and Others

All materials and each part or detail of the Maintenance Services shall also be subject to oversight, inspection and owner verification testing by TxDOT and other Persons designated by TxDOT. At all points in performance of the Maintenance Services at which specific inspections and/or approvals by TxDOT are required by the CMA Documents, Maintenance Contractor shall not proceed beyond that point until

TxDOT has made such inspection or approval or waived its right in writing to inspect or approve. Maintenance Contractor hereby consents to such oversight, inspection and owner verification testing. Upon request from TxDOT, Maintenance Contractor shall furnish information to such Persons as are designated in such request and shall permit such Persons access to the Project and all parts of the Maintenance Services.

5.7.3 Obligation to Uncover Finished Construction Work

Maintenance Contractor shall inform TxDOT in writing of any construction work to be performed under this Capital Maintenance Agreement that is to be covered, to allow adequate opportunity to TxDOT to inspect and test such work. Maintenance Contractor 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, Maintenance Contractor shall restore the work to the standard required by the CMA Documents. If the work exposed or examined is not in conformance with the requirements of the CMA Documents, then uncovering, removing and restoring such work and any delay to occasioned thereby shall be at Maintenance Contractor's cost. Furthermore, any construction work done or materials used without adequate notice to and opportunity for prior inspection by TxDOT (if applicable) or without inspection in accordance with CMA Documents may be ordered uncovered, removed or restored at Maintenance Contractor's cost, even if such work proves acceptable and conforming after uncovering. Except with respect to the construction work done or materials used without providing TxDOT adequate notice as described in the foregoing sentence, if the work exposed or examined under this Section 5.7.3 is in conformance with the requirements of the CMA Documents, Maintenance Contractor shall be entitled to recover the reasonable and documented cost of such efforts.

5.8 Effect of Oversight, Spot Checks, Audits, Tests, Acceptance and Approvals

5.8.1 Oversight and Acceptance

The oversight, spot checks, inspections, verifications, audits, tests, reviews, acceptances and approvals conducted by TxDOT and other Persons do not constitute acceptance of Nonconforming Work (except in limited circumstances as expressly provided in Section 5.9.2) or waiver of any warranty or legal or equitable right with respect thereto. TxDOT may request remedies for Nonconforming Work and/or identify additional Maintenance Services, which must be done to bring the Maintenance Services into compliance with the requirements of the CMA Documents at any time, whether or not previous oversight, spot checks, inspections, verifications, audits, tests, reviews, acceptances or approvals were conducted or waived by TxDOT or any such Persons.

5.8.2 No Estoppel

Maintenance Contractor shall not be relieved of obligations to perform the Maintenance Services in accordance with the CMA 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 at any time, 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 Maintenance Services performed and materials furnished by Maintenance Contractor, or from showing that the Maintenance Services do not conform in fact to the requirements of the CMA Documents. Notwithstanding any such measurement, estimate or certificate, or payment made in accordance therewith, TxDOT shall not be precluded or estopped from recovering from Maintenance Contractor and its Guarantor(s) or Surety(ies) such damages as TxDOT may sustain by reason of Maintenance Contractor's failure to comply or to have complied with the terms of the CMA Documents.

5.9 Nonconforming Work

5.9.1 Correction of Nonconforming Work

Subject to Section 5.9.2, Nonconforming Work shall be corrected so as to conform to the requirements of the CMA Documents, at Maintenance Contractor's cost. The fact that TxDOT may not have discovered the Nonconforming Work shall not relieve the Maintenance Contractor of its responsibilities to correct such Nonconforming Work. If Maintenance Contractor fails to correct any Nonconforming Work within the period set forth in Attachment 1 to Exhibit 2, then TxDOT may cause the Nonconforming Work to be corrected. Maintenance Contractor shall reimburse TxDOT, within ten days of delivery of an invoice, for TxDOT's Recoverable Costs of remedying or removing and replacing such Nonconforming Work.

5.9.2 Agreement to allow Nonconforming Work to remain uncorrected

If TxDOT agrees to allow any Nonconforming Work to remain uncorrected, TxDOT shall be entitled to reimbursement of a portion of the Maintenance Price in an amount equal to the greatest of: (a) the amount deemed appropriate by TxDOT to provide compensation for known impacts to all affected Persons (including TxDOT) such as future maintenance and/or other costs relating to the Nonconforming Work, (b) the amount of the Maintenance Price allocated to such Maintenance Services, (c) 100% of Maintenance Contractor's cost savings associated with its failure to perform the Maintenance Services in accordance with the requirements of the CMA Documents or (d) a percentage in TxDOT's sole discretion of the cost to correct such Nonconforming work. Such reimbursement shall be payable to TxDOT within ten Days after Maintenance Contractor's receipt of an invoice therefor. Alternatively, TxDOT, in its sole discretion, may deduct the amount of such costs and expenses from any sums owed by TxDOT to Maintenance Contractor pursuant to this Capital Maintenance Agreement. Maintenance Contractor acknowledges and agrees that TxDOT shall have sole discretion regarding the correction or non-correction of Nonconforming Work and shall have sole discretion with regard to the amount payable in connection therewith. Payment, reimbursement or deduction of the amounts owing to TxDOT under this Section 5.9.2 shall be a condition precedent to allow applicable Nonconforming Work to remain uncorrected. Where such Nonconforming Work is allowed to remain uncorrected

in accordance with this Section 5.9.2 and such Nonconforming Work requires that a Performance Requirement different to that set forth in Attachment 1 to Exhibit 2 is necessary, TxDOT shall establish such different Performance Requirement for such Nonconforming Work.

SECTION 6. CONTRACTING AND LABOR PRACTICES

6.1 DBE / HUB Requirements

6.1.1 Maintenance Contractor shall comply with the TxDOT Disadvantaged Business Enterprise (DBE) program in effect as of the date on which Maintenance NTP1 is issued by TxDOT, including undertaking good faith efforts to encourage DBE participation in the Maintenance Services and maintaining and submitting documentation as required by the TxDOT DBE program. Maintenance Contractor shall submit the documentation required under TxDOT's DBE program within 90 days following issuance of the Maintenance NTP1. TxDOT reserves the right to establish and require Maintenance Contractor to comply with a Historically Underutilized Business (HUB) Program in lieu of the DBE program in connection with the Work, if TxDOT determines that only state funds will be used to fund such Work. The purpose of the DBE Program and HUB Program is to ensure that DBEs and HUBs have an equal opportunity to participate in the performance of contracts financed in whole or in part with federal or State funds. In the event of any conflict between 49 CFR Part 26 and TxDOT DBE Rules, the former shall prevail.

6.1.2 In the event of any change in the DBE program after the date of issuance of Maintenance NTP1 that would materially impact Maintenance Contractor's cost of compliance, as demonstrated by Maintenance Contractor to TxDOT's reasonable satisfaction, TxDOT shall either: (a) adjust the Maintenance Price to reflect the cost increase demonstrated by the Maintenance Contractor as a result of the change in the DBE program; or (b) require compliance with the TxDOT DBE program requirements in effect as of the Proposal Due Date instead of the DBE program in effect on the date of issuance of the Maintenance NTP1.

6.2 Non-Discrimination; Equal Employment Opportunity

6.2.1 Maintenance Contractor 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 Maintenance Services under the CMA Documents. Maintenance Contractor shall carry out, and shall cause the Subcontractors to carry out, applicable requirements of 49 CFR Part 26. Failure by Maintenance Contractor to carry out these requirements is a material breach of this Capital Maintenance Agreement, which may result in the termination of this Capital Maintenance Agreement or such other remedy as TxDOT deems appropriate.

6.2.2 Maintenance Contractor shall include Section 6.2.1 in every Subcontract, and shall require that they be included in all Subcontracts at lower tiers, so that such provisions will be binding upon each Subcontractor.

6.2.3 Maintenance Contractor confirms for itself and all Subcontractors that Maintenance Contractor 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 Maintenance Contractor and each

Subcontractor maintains no employee facilities segregated on the basis of race, color, religion or national origin. Maintenance Contractor shall comply with all applicable Laws relating to Equal Employment Opportunity and nondiscrimination, and shall require its Subcontractors to comply with such Laws.

6.3 Subcontracts

6.3.1 Each instrument evidencing any agreement of Maintenance Contractor with any Subcontractor shall provide that, pursuant to terms in form and substance satisfactory to TxDOT: (a) the rights of Maintenance Contractor under such instrument are assigned to TxDOT contingent only upon written request from TxDOT or its successor or assign following default by Maintenance Contractor or termination or expiration of this Agreement, and (b) all warranties (express and implied) of such Subcontractor shall inure to the benefit of TxDOT.

6.3.2 All Subcontractors must be approved by TxDOT in writing. Maintenance Contractor shall provide TxDOT with a list of all Subcontractors from time to time upon request, shall allow TxDOT access to all Subcontracts and records regarding Subcontracts and shall deliver to TxDOT, within 10 Days after execution, copies of all Major Subcontracts and, within 10 Days after receipt of a request from TxDOT, copies of all other Subcontracts as may be requested.

6.3.3 The appointment of Subcontractors by Maintenance Contractor will not relieve Maintenance Contractor of its responsibility hereunder or for the quality of the Maintenance Services or materials provided by it. Maintenance Contractor will at all times be held fully responsible to TxDOT for the actions, omissions, negligence, intentional misconduct, or breach of applicable Law or contract by its Subcontractors and persons employed by them and no Subcontract entered into by Maintenance Contractor 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 the TxDOT and any Subcontractor of Maintenance Contractor

6.3.4 Each Subcontract shall:

(a) Set forth a standard of professional responsibility or a standard for commercial practice equal to prudent industry standards 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 this Agreement, the Governmental Approvals and applicable Law, including the applicable requirements of the TxDOT DBE program.

(c) Set forth warranties, guaranties and liability provisions of the contracting party in accordance with good commercial practice for work of similar scope and scale.

(d) Be fully assignable without cost to TxDOT, such assignability to include the benefit of all Subcontractor warranties, indemnities, guarantees and professional responsibility and include express requirements that: (i) it will 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 by Maintenance Contractor, and provide progress reports to Maintenance Contractor appropriate for the type of work it is performing sufficient to enable Maintenance Contractor to provide the reports it is required to furnish TxDOT under this Agreement; and (iii) allow TxDOT to assume the benefit of Maintenance Contractor's rights with liability only for those remaining obligations of Maintenance Contractor accruing after the date of assumption by TxDOT.

(e) Not be assignable by the Subcontractor without Maintenance Contractor's prior written consent.

(f) With respect to any Subcontract which, when aggregated with all Subcontracts between Maintenance Contractor and such Subcontractor for the same year, is in excess of $100,000: (i) be terminable by the Subcontractor only for cause; and (ii) include an indemnity from the Subcontractor in favor of Maintenance Contractor and the Indemnified Parties against any and all Losses arising out of, related to or associated with, the actions, omissions, negligence, intentional misconduct, or breach of applicable Law or contract by the Subcontractor or any of its officers, employees, agents or representatives.

(g) Expressly require the Subcontractor to participate in meetings between Maintenance Contractor 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 Maintenance Contractor, and provided further that nothing in this clause (g) shall limit the authority of TxDOT to give such direction or take such action which, in its opinion, is necessary to remove an immediate and present threat to the safety of life or property.

(h) 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 Final ROW.

(i) Be consistent in all other respects with the terms and conditions of this Agreement to the extent such terms and conditions are applicable to the scope of work of such Subcontractors, including Section 14.7.1, and include all provisions required by this Agreement.

6.3.5 Maintenance Contractor shall not amend any Subcontract with respect to any of the foregoing matters without the prior written consent of TxDOT.

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

6.3.7 Maintenance Contractor shall include a provision in each Subcontract requiring the Subcontractor to maintain all licenses required by applicable Laws.

6.3.8 All Subcontracts with Affiliates shall be arm's-length, and on terms no less favorable to Maintenance Contractor than those offered to non-affiliates of the Subcontractor.

6.4 Job Training and Small Business Mentoring Plan

Maintenance Contractor's Job Training and Small Business Mentoring Plan applicable to the Maintenance Services is set forth in Exhibit 5. The purpose of the Job Training and Small Business Mentoring Plan is to ensure that inexperienced and untrained workers have a reasonable opportunity to participate in the performance of the Maintenance Services through apprenticeships, training and similar measures to maintain and grow a diverse, skilled work force. Maintenance Contractor shall perform and comply with all requirements set forth in of the Job Training and Small Business Mentoring Plan.

Maintenance Contractor shall include provisions to effectuate the Job Training and Small Business Mentoring Plan in every Contract to which it is a party (including purchase orders and task orders for Maintenance Services), and shall require that they be included in all Contracts at lower tiers (including purchase orders and task orders for Maintenance Services), so that such provisions will be binding upon each Contractor.

6.5 State Use Program

Maintenance Contractor shall comply with the provisions of Chapter 122 of the Texas Human Resources Code that are placed on 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."

Maintenance Contractor 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.

SECTION 7. BONDS, PERFORMANCE GUARANTEES AND INSURANCE

7.1 Maintenance Payment and Performance Bonds and Retainage Bonds

7.1.1 On or before 60 Days after issuance by TxDOT of Maintenance NTP1, Maintenance Contractor shall provide to TxDOT, and shall maintain at all times, (i) a Maintenance Performance Bond and a Maintenance Payment Bond, in the forms attached as Exhibit 6 and Exhibit 7 respectively that shall guarantee the performance of the Maintenance Services and shall also guarantee payment to Persons performing certain work for Maintenance Contractor under this Capital Maintenance Agreement; (ii) a Retainage Bond in the form attached as Exhibit 8. The retainage bond shall be in the amount of 10% of the Maintenance Price, and is to be used as a guaranty for the protection of any claimants and TxDOT for overpayments, Liquidated Damages, and other deductions or damages owed by the Maintenance Contractor in connection with this Capital Maintenance Agreement.

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

7.1.3 The Maintenance Performance Bond and the Maintenance Payment Bond shall each have a term equal or greater to the then-current Maintenance Term; provided that for any Maintenance Term that exceeds five years, Maintenance Contractor may provide a Maintenance Performance Bond and a Maintenance Payment Bond with a five-year term with renewals of such bonds for the remainder of the Maintenance Term. During each such period, the amount of each bond shall be equal to 75% of the aggregate sum of the remaining annual Maintenance Price for all years of the applicable Maintenance Term, using the current annual Maintenance Price as the annual Maintenance Price for each year remaining in the Maintenance Term. Separate Maintenance Performance Bonds and Maintenance Payment Bonds shall be provided by Maintenance Contractor in the amount of any outstanding Unplanned Capital Maintenance as determined under Section 3.4.2.

7.1.4 Unless TxDOT has notified Maintenance Contractor in writing that it will not elect to extend this Capital Maintenance Agreement for a Second Maintenance Term (or a Third Maintenance Term following a Second Maintenance Term), Maintenance Contractor shall either (1) provide a Maintenance Performance Bond, a Maintenance Payment Bond and a Retainage Bond in connection with the Second Maintenance Term (or a Third Maintenance Term following a Second Maintenance

Term) or (2) provide evidence of renewal, and, if applicable, adjusting the amount, of the existing bonds.

7.1.5 TxDOT will release the Maintenance Performance Bond upon expiration of the Warranty Period, provided that no outstanding claims are then pending against Maintenance Contractor hereunder.

7.1.6 TxDOT will release the Maintenance Payment Bond upon the latest to occur of: (a) receipt of (i) evidence satisfactory to TxDOT that all Persons eligible to file a claim against the Maintenance 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 Maintenance Payment Bond, or (b) expiration of the statutory period for Subcontractors to file a claim against the Maintenance Payment Bond if no claims have been filed.

7.1.7 Performance by a Surety or a Guarantor of any of the obligations of Maintenance Contractor shall not relieve Maintenance Contractor of any of its obligations hereunder.

7.1.8 In the event any of the bonds required herein for the Second Maintenance Term or Third Maintenance Term become commercially unavailable, Maintenance Contractor may substitute a letter of credit or other form of security for the Maintenance Services acceptable to TxDOT, in its sole discretion. The letter of credit shall be separate and in addition to the Letter of Credit described in Section 7.2.

7.2 Letter of Credit

In addition to the Performance Bond set forth in Section 7.1, on or before 90 Days after issuance by TxDOT of Maintenance NTP1, Maintenance Contractor shall provide to TxDOT, and shall maintain at all times, a letter of credit ("Letter of Credit") in the amount of $10 million which shall guarantee the performance of the Maintenance Services under this Capital Maintenance Agreement.

7.2.1 The Letter of Credit shall:

(a) Be a standby letter of credit;

(b) Be issued by a financial institution with a credit rating of "A" or better according to Standard & Poors and with an office in Austin, Dallas, Fort Worth, Houston, or San Antonio at which the Letter of Credit can be presented for payment;

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

(d) 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;

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

(f) Allow for multiple draws; and

(g) Name TxDOT as the payee.

7.2.2 TxDOT shall have the right to draw on the Letter of Credit after not less than two Business Days' prior written notice to Maintenance Contractor for draws under clause (a) below and without prior notice to Maintenance Contractor for draws under clause (b) below, unless otherwise expressly provided in the CMA Documents with respect to the Letter of Credit, and use and apply the proceeds as provided in the CMA Documents for such Letter of Credit, if: (a) Maintenance Contractor has failed to pay or perform when due the duty, obligation or liability under the CMA Documents for which the Letter of Credit is held or (b) Maintenance Contractor 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 CMA 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 Maintenance Contractor, no such notice shall be required if it would preclude a draw before the expiration date of the Letter of Credit. Draws on the Letter of Credit shall not be conditioned on prior resort to any other security or Maintenance Contractor.

7.2.3 TxDOT shall use and apply draws on Letters of Credit toward satisfying the relevant obligation of Maintenance Contractor (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 Maintenance Contractor (or such other Person) after all relevant obligations are satisfied in full, including providing a replacement Letter of Credit as required under the CMA Documents.

7.2.4 Maintenance Contractor'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 which 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 12.7, reimbursement of the reasonable out-of pocket costs Maintenance Contractor incurs as a result of such misapplication; provided that, at the time of such refund, Maintenance Contractor provides a new Letter of Credit or increases the amount of an existing Letter of Credit to the amount (if any) then required under applicable provisions of this Capital Maintenance Agreement. Maintenance Contractor acknowledges that the presentment of sight drafts drawn upon a Letter of Credit could not under any circumstances cause Maintenance Contractor 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, Maintenance Contractor covenants: (a) 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 (b) not to commence or pursue any legal proceeding seeking, and Maintenance Contractor irrevocably waives and relinquishes any right, to enjoin, restrain, prevent, stop or delay any draw on any Letter of Credit.

7.2.5 Maintenance Contractor 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.

7.2.6 In the event TxDOT makes a permitted assignment of its rights and interests under this Capital Maintenance Agreement, Maintenance Contractor 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 Maintenance Contractor.

7.3 Guaranty

7.3.1 Zachry Corporation and Kiewit Construction Company are the Guarantors of Maintenance Contractor's obligations under the CMA Documents. Such guaranty, in the form attached as Exhibit 9, shall assure performance of Maintenance Contractor's obligations hereunder and shall be maintained in full force and effect throughout the duration of this Capital Maintenance Agreement.

7.3.2 Maintenance Contractor shall report to TxDOT, on a yearly basis upon each anniversary of the Initial Maintenance Commencement Date, the Tangible Net Worth of Maintenance Contractor, its equity members, and any Guarantors.

7.3.3 If at any time during the course of this Capital Maintenance Agreement the total combined Tangible Net Worth of Maintenance Contractor, its equity members and any Guarantors, is less than $ 200,000,000 (excluding Tangible Net Worth in excess of any applicable limit of liability stated in the guaranty), Maintenance Contractor shall provide one or more guarantees so that the combined Tangible Net Worth of the Maintenance Contractor, its equity members and any Guarantors is at least $200,000,000. Each such guaranty shall be in the form attached as Exhibit 9, together with appropriate evidence of authorization, execution, delivery and validity thereof, and shall guarantee the Guaranteed Obligations. Each guaranty must be provided by: (a) a parent corporation, affiliate, or a shareholder of Maintenance Contractor, or (b) a parent corporation, affiliate, or a shareholder of an equity member of Maintenance Contractor. The minimum Tangible Net Worth amount described above shall be adjusted annually based on changes in the Engineering News Record Construction Cost Index (ENR CCI), commencing on the first anniversary of the Initial Maintenance Services Commencement Date and continuing annually thereafter during the term of this Capital Maintenance Agreement.

7.4 General Insurance Requirements

Maintenance Contractor 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 7.4 and Exhibit 10.

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

(b) Otherwise approved in writing by TxDOT.

7.4.2 Premiums, Deductibles and Self-Insured Retentions.

Maintenance Contractor shall timely pay the premiums for all insurance required under this Capital Maintenance Agreement. Subject to Exhibit 10, 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.

7.4.3 Primary Coverage

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

7.4.4 Verification of Coverage

7.4.4.1 Within 10 days of TxDOT issuing NTP1, Maintenance Contractor shall deliver to TxDOT a certificate of insurance and a written evidence of insurance. The certificate and evidence must be consistent in all respects. The evidence of insurance shall be on the most recent ACORD form, without disclaimer. Each required certificate must be in standard form, state the identity of all carriers, named insureds and additional insureds, state the type and limits of coverage, deductibles and termination provisions of the policy, include as attachments all

additional insured endorsements, 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. The evidence must be original, state the signer's company affiliation, title and phone number, state the identity of all carriers, named insureds and additional insureds, state the type and limits of coverage, deductibles, subrogation waiver, termination provisions of the policy and other essential policy terms, list and describe all endorsements, include as attachments all additional insured endorsements, and otherwise be in form reasonably satisfactory to TxDOT.

7.4.4.2 Maintenance Contractor shall promptly deliver to TxDOT a certificate of insurance and copies of all endorsements with respect to each renewal policy, as necessary to demonstrate the maintenance of the insurance coverages required under this Capital Maintenance Agreement. Such certificate shall be delivered prior to the expiration date of any policy and shall bear a notation evidencing payment of the premium therefor.

7.4.4.3 Upon TxDOT's request, Maintenance Contractor shall deliver to TxDOT: (a) a complete certified copy of each insurance policy or modification, or renewal or replacement insurance policy and all endorsements thereto and (b) satisfactory evidence of payment of the premium therefor.

7.4.5 Subcontractor Insurance Requirements

Maintenance Contractor's obligations regarding Subcontractor's insurance are set forth in Exhibit 10. Maintenance Contractor shall cause each Subcontractor to provide such insurance in the manner and in the form consistent with the requirements contained in this Capital Maintenance Agreement.

7.4.6 Policies with Insureds in Addition to Maintenance Contractor

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

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

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

7.4.6.3 All endorsements adding additional insureds to required insurance policies, shall contain no limitations, conditions, restrictions or exceptions to coverage in addition to those that apply under the insurance policy generally, and shall state that the interests and protections of each additional insured shall not be affected by any misrepresentation, act or omission of a named insured or any breach by a named insured of any provision in the policy which would otherwise result in forfeiture or reduction of coverage. Additional insured endorsements may exclude liability due to the sole negligence of the additional insured party. The commercial general liability/builder's third-party liability insurance shall include completed operations liability coverage.

7.4.7 Additional Terms and Conditions

7.4.7.1 Each insurance policy shall be endorsed to state that coverage cannot be canceled, voided, suspended, adversely modified, or reduced in coverage or in limits (including for non-payment of premium) except after 30 days' prior written notice (or ten days in the case of cancellation for non-payment of premium) by registered or certified mail, return receipt requested, has been given to TxDOT and each other insured or additional insured party; provided that Maintenance Contractor may obtain as comparable an endorsement as possible if it establishes unavailability of this endorsement as set forth in Section 7.4.4.1. Such endorsement shall not include any limitation of liability of the insurer for failure to provide such notice.

7.4.7.2 The commercial general liability insurance policy and any builder's third party liability insurance policy (if furnished by Maintenance Contractor in lieu of commercial general liability insurance) shall cover liability arising out of the acts or omissions of Maintenance Contractor's employees engaged in the Maintenance Services and employees of Subcontractors that are enrolled and provided coverage under such liability policy.

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

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

7.4.8 Waivers of Subrogation

TxDOT waives all rights against the Maintenance Contractor-Related Entities, and Maintenance Contractor waives all rights against the Indemnified Parties,

for any claims to the extent covered by insurance obtained pursuant to this Section 7.4, except such rights as they may have to the proceeds of such insurance. If Maintenance Contractor is deemed to self-insure a claim or loss under Section 7.5.3, then Maintenance Contractor's waiver shall apply as if it carried the required insurance. Maintenance Contractor shall require all Subcontractors to provide similar waivers in writing each in favor of all other Persons enumerated above. Subject to Section 7.4.4.1, 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.

7.4.9 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 Maintenance Contractor hereunder, except to the extent such costs are recoverable under Section 10.

7.4.10 Support of Indemnifications

The insurance coverage provided hereunder by Maintenance Contractor is not intended to limit Maintenance Contractor's indemnification obligations under the CMA Documents.

7.4.11 Inadequacy or Unavailability of Required Coverages

7.4.12 Defense Costs

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

7.4.13 Contesting Denial of Coverage

If any insurance carrier under an insurance policy denies coverage with respect to any claims reported to such carrier, upon Maintenance Contractor'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 Maintenance Contractor shall bear all costs of contesting the denial of coverage.

7.4.14 Umbrella and Excess Policies

Maintenance Contractor 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 Capital Maintenance Agreement for the applicable type of coverage.

7.5 Prosecution of Insurance Claims

7.5.1 Unless otherwise directed by TxDOT in writing with respect to TxDOT's insurance claims, Maintenance Contractor shall be responsible for reporting and processing all potential claims by TxDOT or Maintenance Contractor against the insurance policies required hereunder. Maintenance Contractor agrees to report timely to the insurer(s) under such insurance policies any and all matters which may give rise to an insurance claim by Maintenance Contractor 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. Maintenance Contractor 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 Maintenance Contractor shall be deemed to have satisfied this obligation if a judgment is not collectible through the exercise of lawful and diligent means.

7.5.2 TxDOT agrees to promptly notify Maintenance Contractor of TxDOT's incidents, potential claims against TxDOT, and matters which may give rise to an insurance claim against TxDOT, to tender to the insurer TxDOT's defense of the claim under such insurance policies, and to cooperate with Maintenance Contractor as necessary for Maintenance Contractor to fulfill its duties hereunder.

7.5.3 If in any instance Maintenance Contractor has not performed its obligations respecting insurance coverage set forth in this Capital Maintenance 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 Maintenance Contractor's liability and the limits thereon or determining reductions in compensation due from TxDOT to Maintenance Contractor on account of available insurance, Maintenance Contractor shall be treated as if it has elected to self-insure up to the full amount of insurance coverage which would have been available had Maintenance Contractor performed such obligations and not committed such failure. Nothing in the CMA Documents shall be construed to treat Maintenance Contractor as electing to self-insure where Maintenance Contractor is unable to collect due to the bankruptcy or insolvency of any insurer which at the time the insurance policy is written meets the rating qualifications set forth in Section 7.4.1.

7.5.4 If in any instance Maintenance Contractor 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 Maintenance Contractor in writing of TxDOT's intent to report the claim directly with the insurer and thereafter process the claim; and (b) proceed with reporting and processing the claim if TxDOT or the other Indemnified Party does not receive from Maintenance Contractor, within ten days after so notifying Maintenance Contractor, written proof that Maintenance Contractor has

reported the claim directly to the insurer. TxDOT or the other Indemnified Party may dispense with such notice to Maintenance Contractor if TxDOT or the other Indemnified Party has a good faith belief that more rapid reporting is needed to preserve the claim.

7.5.5 Unless otherwise directed by TxDOT in writing, Maintenance Contractor shall be responsible for reporting and processing all potential claims by TxDOT or Maintenance Contractor against the insurance required to be provided under Section 7.4. Maintenance Contractor agrees to report timely to the insurer(s) any and all matters which may give rise to an insurance claim and to promptly and diligently pursue any and all insurance claims on behalf of TxDOT, whether for defense or indemnity or both. TxDOT agrees to promptly notify Maintenance Contractor of TxDOT's incidents, potential claims, and matters which may give rise to an insurance claim by TxDOT, to tender its defense or the claim to Maintenance Contractor, and to cooperate with Maintenance Contractor as necessary for Maintenance Contractor to fulfill its duties hereunder.

7.6 Insurance and Commencement of Maintenance Services

Maintenance Contractor shall not commence the Maintenance Services under this Capital Maintenance Agreement until it has obtained the insurance required under Section 7.4, has furnished original certificates of insurance evidencing the required coverage as required under Section 7.4.4 and such insurance has been approved in writing by TxDOT, and Maintenance Contractor shall not allow any Subcontractor (nor shall such Subcontractor be entitled) to commence work under its Subcontract until the insurance required of the Subcontractor has been obtained and approved by Maintenance Contractor. A delay in securing such certificates of insurance or approvals shall not provide Maintenance Contractor any relief or entitlement to a Change Order.

7.7 TxDOT's Right to Remedy Breach by Maintenance Contractor Regarding Insurance

If Maintenance Contractor or any Subcontractor fails to provide insurance as required herein, TxDOT shall have the right, but not the obligation, to purchase such insurance or to suspend Maintenance Contractor's right to proceed until proper evidence of insurance is provided. TxDOT's Recoverable Costs shall, at TxDOT's sole option, be deducted from amounts payable to Maintenance Contractor or reimbursed by Maintenance Contractor upon demand. Nothing herein shall preclude TxDOT from exercising its rights and remedies under Section 12 as a result of the failure of Maintenance Contractor or any Subcontractor to satisfy its insurance obligations herein.

7.8 Disclaimer Regarding Insurance

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

7.9 Premiums

Except for premiums that are Maintenance Contractor's responsibility under Section 3.4.2, Maintenance Contractor shall be entitled to reimbursement for the costs of bonds, letters of credit and insurance premiums, as follows:

7.9.1 Premiums may be included in invoices hereunder only after payment thereof by Maintenance Contractor. Said premiums shall be passed through without any profit or overhead or compensation for any costs incurred by Maintenance Contractor in obtaining bonds, letters of credit and insurance in excess of the actual premiums paid therefor.

7.9.2 TxDOT shall be entitled to any return or retrospective premiums with respect to said bonds, letters of credit and insurance. Maintenance Contractor shall deliver any such funds to TxDOT within ten days following Maintenance Contractor's receipt thereof.

7.9.3 Maintenance Contractor shall use best efforts to obtain the bonds, letters of credit and insurance required hereunder, and renewals thereof, at cost-effective rates. Promptly following a request by TxDOT, or promptly following issuance of the notice to proceed for the applicable Maintenance Term (if not earlier requested), Maintenance Contractor shall obtain quotes for said bonds, letters of credit and insurance policies, shall notify TxDOT of the same, and shall accommodate any changes in providers, coverage or payment terms desired by TxDOT.

7.9.4 Maintenance Contractor shall promptly notify TxDOT if it becomes apparent at any time during the Maintenance Term that required bonds, letters of credit or insurance are no longer available or if the premiums for renewals materially increase from the prior rates. In such event, Maintenance Contractor shall work with TxDOT to find commercially reasonable alternatives to the required coverages that are acceptable to TxDOT; provided, however, that if letters of credit are no longer available, Maintenance Contractor shall provide cash collateral in the amount of the letter of credit unless TxDOT accepts an alternative security and collateral approach.

SECTION 8. COMPENSATION

8.1 Payment for Maintenance Services

8.1.1 During the term of this Capital Maintenance Agreement, in full consideration for the performance by the Maintenance Contractor of its duties and obligations under the Capital Maintenance Agreement Documents, TxDOT shall pay the amounts determined as set forth in Section 8.1.2, as adjusted in accordance with Section 8.1.3 ("Maintenance Price") subject only to such additions to and deductions from the compensation as may be provided for in Section 10. The term "Maintenance Price" as used herein shall initially mean the pro-rated "yearly maintenance cost" for "year 1" set forth in Exhibit 4. The Maintenance Price shall be paid in accordance with this Section 8.1. The Maintenance Price (and the individual components thereof) shall be increased or decreased only by a Change Order issued in accordance with Section 10 or by an amendment to this Capital Maintenance Agreement. No portion of the Maintenance Price shall be payable on account of services provided: (a) prior to issuance of Maintenance NTP1, or (b) after the termination, expiration or non-renewal of the term of this Capital Maintenance Agreement.

8.1.2 Maintenance Contractor shall be paid for Maintenance Services provided under this Capital Maintenance Agreement, a monthly payment equivalent to one-twelfth (1/12) of the "yearly maintenance cost" for the applicable Maintenance Term year as set forth in Exhibit 4. Such amount shall be payable in arrears pursuant to Draw Requests submitted on the first day of each month of such Maintenance Term year.

8.1.3 The annual Maintenance Price (MP) will be escalated or reduced based on changes in the Engineering News Record Construction Cost Index (ENR CCI), commencing on the Initial Maintenance Services Commencement Date and continuing annually thereafter during the term of this Capital Maintenance Agreement. The procedure for determining the escalation or reduction shall be as follows:

(a) The ENR CCI for the month three months prior to the month in which this Capital Maintenance Agreement is executed will establish the Base Index (BI); and

(b) The annual Maintenance Price for the ensuing Maintenance Term year shall be escalated or reduced by multiplying the annual Maintenance Price for such year, by the ENR CCI for the month three months prior to the month in which the Maintenance Term year commences and dividing such amount by the Base Index.

(c) The formula that reflects the foregoing is:

(d) Adjusted MP = (annual MP) x ENR CCI/(BI)

8.2 Invoicing and Payment

8.2.1 On or about the fifth Business Day of each month, Maintenance Contractor shall submit to TxDOT five copies of a Draw Request in the form of Exhibit 11 for Maintenance Services performed for the preceding month and meeting all requirements specified herein. Each Draw Request shall be executed by Maintenance Contractor's Authorized Representative and Maintenance QC Manager. Maintenance Contractor acknowledges that TxDOT may obtain funding for portions of the Maintenance Services from the federal government, local agencies and other third parties, and Maintenance Contractor agrees to segregate Draw Requests for all such Maintenance Services 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.

8.2.2 Within ten Business Days after TxDOT's receipt of a complete Draw Request, TxDOT will review the Draw Request and all attachments and certificates thereto, and shall notify Maintenance Contractor 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. Maintenance Contractor 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 CMA Documents related thereto. Within ten Business Days after the approval by TxDOT of a Draw Request, TxDOT shall pay Maintenance Contractor the amount of the 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.

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

(a) Any TxDOT or third party Losses for which Maintenance Contractor is responsible hereunder or any Liquidated Damages for Lane Closures that have accrued as of the date of the application for payment;

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

(c) Any sums, including TxDOT's Recoverable Costs, expended by TxDOT in performing any of Maintenance Contractor's obligations under the CMA Documents that Maintenance Contractor has failed to perform; and

(d) Any other sums which TxDOT is entitled to recover from Maintenance Contractor under the terms of this Capital Maintenance Agreement;

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.

8.3 Payment to Subcontractors

8.3.1 No later than ten Days after receipt of payment from TxDOT, Maintenance contractor shall promptly pay each Subcontractor, out of the amount paid to Maintenance Contractor on account of such Subcontractor's portion of the Maintenance Services, the amount to which such Subcontractor is entitled, less any retainage provided for in the Subcontract, and any other offsets and deductions provided in the Subcontract or by Law. No later than ten days after satisfactory completion of all Maintenance Services to be performed by a Subcontractor, including provision of appropriate releases, certificates and other evidence of the Subcontractor's compliance with its Subcontract and all applicable requirements of the CMA Documents, Maintenance Contractor shall pay to the Subcontractor moneys withheld in retention from the Subcontractor. Such payment shall be made promptly following satisfaction of the foregoing requirements, even if the Maintenance Services to be performed by Maintenance Contractor or other Subcontractors is not completed.

8.3.2 For the purpose of Section 8.3, satisfactory completion shall have been accomplished when:

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

(b) the Maintenance Services performed by the Subcontractor have been inspected and approved in accordance with the CMA Documents and the final quantities of the Subcontractor's work have been determined and agreed upon.

8.3.3 The inspection and approval of a Subcontractor's work does not eliminate or impair Maintenance Contractor's responsibility for the Maintenance Services. Any delay or postponement of payments to Subcontractors from the above-referenced time frames may occur only for good cause following written approval by TxDOT. TxDOT shall have no obligation to pay or to see to the payment of money to a Subcontractor, except as may otherwise be required by Law. Interest on late payments to Subcontractors shall be Maintenance Contractor's responsibility, and shall not be a part of the Maintenance Price.

8.4 Disputes

Failure by TxDOT to pay any amount in dispute shall not alleviate, diminish or modify in any respect Maintenance Contractor's obligation to perform under the CMA Documents, and Maintenance Contractor shall not cease or slow down its performance under the CMA Documents on account of any such amount or dispute. Any Claim or Dispute regarding such payment shall be resolved pursuant to Section 16 of this Capital Maintenance Agreement. Upon resolution of such Claim or Dispute, each Party shall promptly pay to the other any amount owing.

8.5 Claims Against Third Parties

Maintenance Contractor shall not have the authority or responsibility to assert and pursue any claims against any third party for damage to the Project and shall not be obligated to repair such damage as part of the Maintenance Services. However, Maintenance Contractor shall provide reasonable assistance to, and shall reasonably cooperate with, TxDOT regarding such claims.

SECTION 9. WARRANTIES FOR MAINTENANCE SERVICES

9.1 Warranties for Maintenance Services

Maintenance Contractor warrants that:

(a) all Maintenance Services furnished pursuant to the CMA Documents shall conform to Good Industry Practice;

(b) the Maintenance Services shall be free of Defects, including design Errors, except to the extent such Defects are inherent in prescriptive specifications included in the Maintenance Documents;

(c) materials and equipment installed or incorporated under the CMA Documents shall be of good quality and new;

(d) all design and construction work shall be fit for use for the intended function; and

(e) such Maintenance Services shall meet all of the requirements of the CMA Documents.

The warranties set forth in clauses (a)-(e) above shall individually be referred to herein as a "Warranty" and, collectively, as the "Warranties".

9.2 Warranty Period

9.2.1 The Warranty Period for Maintenance Services shall commence at the conclusion of the Maintenance Term during which such Maintenance Services were provided. Subject to extension under Section 9.2.2, all Warranties shall remain in effect until one year after the conclusion of the Maintenance Terms ("Warranty Period"). If TxDOT determines that such Maintenance Services have not met the standards set forth in Section 9.1 at any time during the Warranty Period, then Maintenance Contractor shall correct such Maintenance Services as specified in this Section 9, even if performance of such corrective Maintenance Services extend beyond the applicable Warranty Period.

9.2.2 The Warranties shall apply to all Maintenance Services re-done, repaired, corrected or replaced pursuant to the terms of this Capital Maintenance Agreement. The Warranty Period for each repaired, corrected or replaced element of the Maintenance Services shall extend beyond the original Warranty Period in order that each element of the Project will have at least a one-year warranty period (but not to exceed two years after the expiration or termination of this Capital Maintenance Agreement).

9.3 Implementation of Warranty

9.3.1 Within seven Days of receipt by Maintenance Contractor of notice from TxDOT specifying: (a) a failure of the Maintenance Services to satisfy the Warranties, (b) the failure of any Subcontractor warranty, guarantee or obligation which Maintenance Contractor is responsible to enforce, or (c) a misrepresentation by a Subcontractor regarding an obligation which Maintenance Contractor is responsible to enforce, Maintenance Contractor and TxDOT shall mutually agree when and how Maintenance Contractor shall remedy such failure or misrepresentation; provided, however, that in case of an emergency requiring immediate curative action or a situation which poses a significant safety risk, Maintenance Contractor shall implement such action as it deems necessary and shall immediately notify TxDOT in writing of the emergency and the urgency of the decision. Maintenance Contractor and TxDOT shall promptly meet in order to agree on a remedy. If Maintenance Contractor does not use its best efforts to effectuate such remedy within the agreed time, or if Maintenance Contractor 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 Maintenance Contractor. Reimbursement for TxDOT's Recoverable Costs associated with such work shall be payable to TxDOT within ten Days after Maintenance Contractor's receipt of an invoice therefor. Alternatively, TxDOT, in its sole discretion, may deduct the amount of such costs and expenses from any sums owed by TxDOT to Maintenance Contractor pursuant to this Capital Maintenance Agreement. TxDOT may agree to accept Nonconforming Work in accordance with Section 5.12.2.

9.3.2 Maintenance Contractor shall be responsible for obtaining any required encroachment permits and required consents from any other Persons in connection with the performance of Maintenance Services required under this Section 9. Maintenance Contractor shall bear all costs of such Maintenance Services, including additional testing and inspections, and Maintenance Contractor shall reimburse TxDOT or pay TxDOT's expenses made necessary thereby, including any costs incurred by TxDOT for independent quality assurance and/or quality control with respect to such Maintenance Services within ten days after Maintenance Contractor's receipt of invoices therefor (including, subject to the limitations in Section 12.7, any lost revenue arising from or relating to such Maintenance Services). Alternatively, TxDOT, in its sole discretion, may deduct the amount of such costs and expenses from any sums owed by TxDOT to Maintenance Contractor pursuant to this Capital Maintenance Agreement.

9.4 Subcontractor and Extended Warranties

9.4.1 Without in any way derogating the Warranties and Maintenance Contractor's own representations and warranties and other obligations with respect to the Maintenance Services, Maintenance Contractor shall obtain from all Subcontractors and cause to be extended to TxDOT, 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 9. All representations,

warranties, guarantees and other obligations of Subcontractors: (a) shall be written so as to survive all TxDOT inspections, tests and approvals; and (b) shall run directly to and be enforceable by Maintenance Contractor and TxDOT and their respective successors and assigns. Maintenance Contractor assigns to TxDOT all of Maintenance Contractor's rights and interest in and to all extended warranties for periods exceeding the applicable Warranty Period which are received by Maintenance Contractor from any of its Subcontractors. To the extent that any Subcontractor warranty or guaranty would be voided by reason of Maintenance Contractor's negligence or failure to comply with the CMA Documents in incorporating material or equipment into the work, Maintenance Contractor shall be responsible for correcting such Defect.

9.4.2 Upon receipt from TxDOT of notice of a failure of any Subcontractor warranty, guaranty or obligation, or a misrepresentation by a Subcontractor, Maintenance Contractor shall enforce or perform any such Subcontractor warranty, guaranty or obligation, or remedy such misrepresentation, in addition to Maintenance Contractor's other obligations hereunder. TxDOT's rights under this Section 9.4 shall commence at the time such representation, warranty, guaranty, or obligation is furnished and shall continue until the expiration of Maintenance Contractor's relevant Warranty Period (including extensions thereof under Section 9.2.2). Until such expiration, the cost of any equipment, material, labor (including re-engineering) or shipping shall be for the account of Maintenance Contractor if such cost is covered by such a representation, warranty, guaranty, or obligation and Maintenance Contractor shall be required to replace or repair defective equipment, material or workmanship furnished by Subcontractors.

9.4.3 The foregoing provisions concerning Subcontractor warranties are intended to provide TxDOT with an additional Person and source in which to seek recourse if Maintenance Services fails to meet the requirements of the CMA Documents. In no event shall the foregoing provisions be interpreted to modify, limit, discharge, release, negate or waive the Warranties or Maintenance Contractor's obligations with respect to the Maintenance Services, and Maintenance Contractor shall not be entitled to use the existence of Subcontractor warranties as a defense to Maintenance Contractor's obligations under this Capital Maintenance Agreement and the other CMA Documents.

9.5 Effect of TxDOT Activities on Warranties

Maintenance Contractor acknowledges and agrees that TxDOT and its respective agents may perform certain maintenance work during the period in which the Warranties are in effect, and Maintenance Contractor agrees that the Warranties shall apply notwithstanding such work; provided that Maintenance Contractor's obligations under this Section 9 shall only apply to the extent the repair, replacement or correction of Maintenance Services is required as a result of the Maintenance Services failing to satisfy the Warranties set forth in Section 9.1.

9.6 No Limitation on Liability

Subject to Section 12.6, the foregoing Warranties and Subcontractor warranties are in addition to all rights and remedies available under the CMA Documents or applicable Law or in equity, and shall not limit Maintenance Contractor's liability or responsibility imposed by the CMA Documents or applicable Law or in equity with respect to the Maintenance Services, including liability for design Defects, latent construction Defects, strict liability, actions, omissions, negligence, intentional misconduct, or breach of applicable Law or contract by any Maintenance Contractor-Related Entity; provided, however, that upon expiration of the Warranties, Maintenance Contractor shall have no further liability hereunder for patent construction Defects.

9.7 Damages for Breach of Warranty

Subject to Section 12.7 and in addition to TxDOT's other rights and remedies hereunder, at law or in equity, Maintenance Contractor shall be liable for actual damages resulting from any breach of an express or implied warranty or any Defect in the Maintenance Services.

SECTION 10. CHANGES IN THE MAINTENANCE SERVICES

This Section 10 sets forth the requirements for obtaining all Change Orders under this Capital Maintenance Agreement. Maintenance Contractor hereby acknowledges and agrees that the Maintenance Price constitutes full compensation for performance of all of the Maintenance Services, subject only to those exceptions specified in this Section 10, and that TxDOT is subject to constraints limiting its ability to increase the Maintenance Price. Maintenance Contractor unconditionally and irrevocably waives the right to any Claim for any monetary compensation in addition to the Maintenance Price and other compensation specified in this Capital Maintenance Agreement, except in accordance with this Section 10. To the extent that any other provision of this Capital Maintenance Agreement expressly provides for a Change Order to be issued, such provision is incorporated into and subject to this Section 10.

10.1 Circumstances Under Which Change Orders May Be Issued

10.1.1 Definition of and Requirements Relating to Change Orders

10.1.1.1 Definition of Change Order

The term "Change Order" shall mean a written amendment to the terms and conditions of the CMA Documents issued in accordance with this Section 10. TxDOT may issue unilateral Change Orders as specified in Section 10.2.2. Change Orders may be requested by Maintenance Contractor only pursuant to Section 10.3. A Change Order shall not be effective for any purpose unless executed by TxDOT. Change Orders may be issued for the following purposes (or combination thereof):

(a) to modify the scope of the Maintenance Services;

(b) to revise the Maintenance Price; and

(c) to revise other terms and conditions of the CMA Documents.

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

10.1.1.2 Issuance of Directive Letter

TxDOT may at any time issue a Directive Letter to Maintenance Contractor in the event of any desired change in the Maintenance Services or in the event of any Claim or Dispute regarding the scope of the Maintenance Services. The Directive Letter will state that it is issued under this Section 10.1.1.2, will describe the

Maintenance Services in question and will state the basis for determining compensation, if any. Maintenance Contractor 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 Maintenance Services are within Maintenance Contractor's original scope of Maintenance Services, Maintenance Contractor shall proceed with the Maintenance Services as directed but shall have the right pursuant to Section 10.3 to request that TxDOT issue a Change Order with respect thereto).

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

10.1.1.3.1 Maintenance Contractor shall not be entitled to additional compensation for any such work performed prior to receipt of a Directive Letter or Change Order, except to the extent that Section 10.3.2.2 preserves Maintenance Contractor's right to compensation for work performed following delivery of a Request for Partnering. Maintenance Contractor 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 10.3.2, receipt of a Directive Letter from TxDOT shall be a condition precedent to Maintenance Contractor's right to make a Claim that a TxDOT-Directed Change has occurred.

10.1.1.3.2 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 CMA Documents and a determination whether the Directive Letter in fact constituted a change in those requirements. The requirements of Section 10.1.1.3.1 shall not imply that a Directive Letter would be required in order for Maintenance Contractor to have the right to receive compensation for Maintenance Services within its original scope for which additional compensation is specifically allowed under this Section 10.

10.1.2 Right of TxDOT to Issue Change Orders

TxDOT may, at any time, without notice to any Surety, authorize and/or require changes in the Maintenance Services within the general scope of this Capital Maintenance Agreement pursuant to a Change Order. For the purpose of this Section 10.1.2, any direction to perform work shall be deemed to be within the general scope of this Capital Maintenance Agreement if it is related to the Project; any direction to delete or modify Maintenance Services shall be considered to be within the general scope unless as a result this Capital Maintenance Agreement would no longer be considered a maintenance contract for the Project of the nature initially contemplated by the parties. Maintenance Contractor shall have no obligation to perform any work outside the general scope of this Capital Maintenance Agreement, except on terms mutually acceptable to TxDOT and Maintenance Contractor.

10.2 TxDOT-Initiated Change Orders

This Section 10.2 concerns: (a) Change Orders issued by TxDOT following a Request for Change Proposal and (b) Change Orders unilaterally issued by TxDOT.

10.2.1 Request for Change Proposal

10.2.1.1 If TxDOT desires to issue a TxDOT-Directed Change or to evaluate whether to initiate such a change, then TxDOT may, at its discretion, issue a Request for Change Proposal. A Directive Letter may also constitute a Request for Change Proposal.

10.2.1.2 Within ten Business Days after Maintenance Contractor's receipt of a Request for Change Proposal, or such longer period as may be mutually agreed to by TxDOT and Maintenance Contractor, TxDOT and Maintenance Contractor shall consult to define the proposed scope of the change. Within five Business Days after the initial consultation, or such longer period as may be mutually agreed to by TxDOT and Maintenance Contractor, TxDOT and Maintenance Contractor shall consult concerning the estimated cost impacts.

10.2.1.3 Within ten Business Days after the second consultation and provision of any data described in Section 10.2.1.2, TxDOT shall notify Maintenance Contractor whether TxDOT: (a) wishes to issue a Change Order, (b) wishes to request Maintenance Contractor to provide a Cost and Schedule Proposal, (c) wishes to request Maintenance Contractor to prepare a modified work plan for the change and a Cost and Schedule Proposal based on the modified plan, or (d) no longer wishes to issue a Change Order.

10.2.1.4 If so requested, Maintenance Contractor shall, within ten Business Days after receipt of the notification described in Section 10.2.1.3, or such longer period as may be mutually agreed to by TxDOT and Maintenance Contractor, 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 10.4, and incorporating and fully reflecting all requests made by TxDOT. Maintenance Contractor 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.

10.2.1.5 If Maintenance Contractor and TxDOT agree that a change in the requirements relating to the Maintenance Services has occurred but disagree as to whether the change justifies additional compensation or time or disagree as to the amount of any change to be made to the Maintenance Price, TxDOT may, in its sole discretion, order Maintenance Contractor to proceed with the performance of the

Maintenance Services in question notwithstanding such disagreement. Such order may, at TxDOT's option, be in the form of: (a) a Time and Materials Change Order as provided in Section 10.7 or (b) a Directive Letter under Section 10.1.1.2.

10.2.1.6 If it is not practicable, due to the nature and/or timing of the event giving rise to a proposed Change Order, for Maintenance Contractor to provide a complete Cost and Schedule Proposal meeting all of the requirements of Section 10.4, Maintenance Contractor shall provide an incomplete proposal that includes all information capable of being ascertained. Said incomplete proposal shall: (a) include a list of those Change Order requirements which are not fulfilled together with an explanation reasonably satisfactory to TxDOT stating why such requirements cannot be met, and (b) 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. Maintenance Contractor 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 10.3.2.6.2.

10.2.2 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. Maintenance Contractor shall be entitled to compensation in accordance with Section 10.7 for additional Maintenance Services that are required to be performed as the result of any such unilateral Change Order. For deductive unilateral Change Orders, the Change Order may contain a Maintenance Price deduction deemed appropriate by TxDOT, and Maintenance Contractor shall have the right to submit the amount of such Maintenance Price deduction to dispute resolution in accordance with Section 16.

10.3 Maintenance Contractor-Requested Change Orders

10.3.1 Eligible Changes

10.3.1.1 Maintenance Contractor may request a Change Order to increase the Maintenance Price only for increased costs of performance of the Maintenance Services as follows:

(a) subject to Section 10.2.3, additional costs directly attributable to additional Maintenance Services resulting from TxDOT-Directed Changes for which TxDOT has not submitted a Change Order or a Request for Change Proposal;

(b) additional costs relating to Hazardous Materials, and Force Majeure Events, to the extent provided in Section 10.8; and

(c) additional costs directly attributable to uncovering, removing and restoring the work, to the extent provided in Section 5.5.3.

10.3.1.2 Maintenance Contractor's entitlement to a Change Order for eligible changes is subject to the restrictions and limitations contained in this Section 10 and elsewhere in the CMA Documents, and furthermore is subject to Maintenance Contractor's compliance with all notification and other requirements identified herein. Maintenance Contractor shall initiate the Change Order process by delivery of a PCO Notice as described in Section 10.3.2, followed by submittal of a Request for Change Order and supporting documentation to TxDOT.

10.3.2 Procedures

The requirements set forth in this Section 10.3.2 constitute conditions precedent to Maintenance Contractor's entitlement to request and receive a Change Order except those involving a Request for Change Proposal. Maintenance Contractor understands that it shall be forever barred from recovering against TxDOT under this Section 10 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 10.3.

10.3.2.1 Delivery of Requests for Partnering and PCO Notices

Maintenance Contractor acknowledges the importance of providing prompt notification to TxDOT upon occurrence of any event or thing entitling Maintenance Contractor to a Change Order under Section 10.3.1. 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 10.3.2.3 or (b) if permitted by Section 10.3.2.2, a Request for Partnering followed by a PCO Notice if appropriate.

10.3.2.2 Requests for Partnering

The term "Request for Partnering" shall mean a notice delivered by Maintenance Contractor requesting that TxDOT enter into partnering discussions with Maintenance Contractor with regard to an event or situation that has occurred within the scope of Section 10.3.1.2. The Request for Partnering shall reference this Section 10.3.2.2 and shall describe the event or situation as well as action which Maintenance Contractor would like to take with respect thereto. The Parties shall promptly meet and confer for the purpose of determining what action should be taken and also to determine whether the Parties are in agreement as to entitlement to a Change Order. Either Party may at any time terminate partnering discussions by delivery of written notice to the other, and partnering discussions shall automatically terminate 60 days after delivery of the Request for Partnering unless both Parties agree in writing to an extension. Within five Business Days after termination of partnering discussions, if TxDOT has not issued either a Directive Letter or Change Order, Maintenance Contractor must submit a PCO Notice in order to preserve its right to pursue a Change Order.

10.3.2.3 PCO Notices

The term "PCO Notice" shall mean a notice delivered by Maintenance Contractor, meeting the requirements set forth below, stating that an event or situation has occurred within the scope of Section 10.3.1 and stating which subsection thereof is applicable. The first notice shall be labeled "PCO Notice No. 1" and subsequent notices shall be numbered sequentially.

10.3.2.3.1 The PCO Notice shall: (a) state in detail the facts underlying the anticipated Request for Change Order, the reasons why Maintenance Contractor believes additional compensation will or may be due and the date of occurrence, (b) state the name, title, and activity of each Program Manager and TxDOT representative knowledgeable of the facts underlying the anticipated Request for Change Order, (c) identify any documents and the substance of any oral communication involved in the facts underlying the anticipated Request for Change Order, (d) state in detail the basis that the work is not required by this Capital Maintenance Agreement, if applicable, (e) identify particular elements of performance for which additional compensation may be sought under this Section 10.3.2, and (f) provide an estimate of the time within which a response to the notice is required to minimize cost, delay or disruption of performance.

10.3.2.3.2 If the Request for Change Order relates to a decision which this Capital Maintenance Agreement leaves to the discretion of a Person or as to which this Capital Maintenance Agreement provides that such Person's decision is final, the PCO Notice shall set out in detail all facts supporting Maintenance Contractor'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.

10.3.2.3.3 Written notification provided in accordance with Section 10.8.1.3 or 10.8.4.1.1 may also serve as a PCO Notice provided it meets the requirements for PCO Notices.

10.3.2.3.4 Any adjustments made to this Capital Maintenance Agreement shall not include increased costs resulting from Maintenance Contractor's failure to timely provide requested additional information under this Section 10.3.2.3.

10.3.2.4 Waiver

10.3.2.4.1 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 Maintenance Contractor first discovered (or should have discovered in the exercise of reasonable prudence) the occurrence described therein, Maintenance Contractor shall be deemed to have waived 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). Furthermore, if any PCO Notice concerns any condition or material described in Section 10.8.2.1,

Maintenance Contractor 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.

10.3.2.4.2 In addition to the limitations set forth in Section 10.3.2.4.1, Maintenance Contractor's failure to provide a PCO Notice within 60 days after Maintenance Contractor first discovered (or should have discovered in the exercise of reasonable prudence) the occurrence of a given event or situation shall preclude Maintenance Contractor from any relief, unless Maintenance Contractor can show, based on a preponderance of the evidence, that: (a) TxDOT was not materially prejudiced by the lack of notice, or (b) TxDOT's Authorized Representative specified in accordance with Section 19.5.1 had actual knowledge, prior to the expiration of the 60-day period, of the event or situation and that Maintenance Contractor believed it was entitled to a Change Order with respect thereto. For situations involving Requests for Partnering, the 60-day period shall be extended until two Business Days following termination of the partnering period. In other words, if the requirements of clause (a) or clause (b) above are satisfied, Maintenance Contractor 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 that accrued prior to the date of delivery of the PCO Notice.

10.3.2.5 Delivery of Request for Change Order

Maintenance Contractor shall deliver a Request for Change Order under this Section 10.3.2.5 to TxDOT within 30 days after delivery of the PCO Notice, or such longer period of time as may be allowed in writing by TxDOT. TxDOT may require design and construction costs to be covered by separate Requests for Change Order. If Maintenance Contractor fails to deliver a complete Request for Change Order or incomplete Request for Change Order meeting all of the requirements of Section 10.3.2.6 within the appropriate time period, Maintenance Contractor shall be required to provide a new PCO Notice before it may submit a Request for Change Order.

10.3.2.6 Incomplete Requests for Change Order

10.3.2.6.1 Each Request for Change Order provided under Section 10.3.2.5 shall meet all requirements set forth in Section 10.4; provided that if any such requirements cannot be met due to the nature and/or timing of the occurrence, Maintenance Contractor shall provide an incomplete Request for Change Order which fills in all information capable of being ascertained. Said incomplete Request shall: (a) include a list of those Change Order requirements which are not fulfilled together with an explanation reasonably satisfactory to TxDOT stating why such requirements cannot be met, and (b) 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.

10.3.2.6.2 Maintenance Contractor 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. Maintenance Contractor agrees that it shall give TxDOT or its designee access to any and all of Maintenance Contractor's books, records and other materials relating to the Maintenance Services, and shall cause its Subcontractors to do the same, so that TxDOT or its designee can investigate the basis for such proposed Change Order. Maintenance Contractor 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. TxDOT may reject the Request for Change Order at any point in the process. TxDOT's failure to respond to a complete Request for Change Order within 15 Business Days of delivery of the request shall not be deemed an acceptance of such request, and the Maintenance Contractor shall have the burden of following up with TxDOT on the status of any such Request for Change Order.

10.3.2.7 Importance of Timely Response

Maintenance Contractor 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 Maintenance Contractor to evaluate promptly upon the occurrence of any event or situation whether the event or situation will affect the Maintenance Price and, if so, whether Maintenance Contractor believes a Maintenance Price increase is required hereunder. If an event or situation occurs which may affect the Maintenance Price, 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 Maintenance Contractor's failure to provide timely notice: (a) the effect of the delay on alternatives available to TxDOT (that is, a comparison of alternatives which are available at the time notice was actually given and alternatives which would have been available had notice been given within ten days after occurrence of the event or when such occurrence should have been discovered in the exercise of reasonable prudence); and (b) the impact of the delay on TxDOT's ability to obtain and review objective information contemporaneously with the event.

10.3.2.8 Review of Subcontractor Request for Price Increase

Prior to submission by Maintenance Contractor of any Request for Change Order that is based in whole or in part on a request by a Subcontractor to Maintenance Contractor for a price increase under its Subcontract, Maintenance Contractor shall have reviewed all invoices by the Subcontractor which constitute the basis for the Request for Change Order and determined in good faith that each such request is justified hereunder and that Maintenance Contractor is acting reasonably in requesting an increase in the Maintenance Price in the amounts specified in the Request for Change Order. Each Request for Change Order involving Subcontractor Maintenance Services, and each update to an incomplete Change Order request involving such Maintenance Services shall include a summary of Maintenance Contractor's analysis of all Subcontractor invoice components and shall include a certification signed by Maintenance Contractor's Project Manager stating that

Maintenance Contractor has investigated the basis for the Subcontractor's request and has determined that all such request is justified as to entitlement and amount of money requested, has reviewed and verified the adequacy of all back-up documentation to be placed in escrow pursuant to Section 17.2, and has no reason to believe and does not believe that the factual basis for the Subcontractor's request is falsely represented. Any Request for Change Order involving Subcontractor Maintenance Services which is not accompanied by such analysis and certification shall be considered incomplete.

10.3.3 Performance of Disputed Maintenance Services

If TxDOT refuses to issue a Change Order based on Maintenance Contractor's request, Maintenance Contractor 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 16. Maintenance Contractor shall maintain and deliver to TxDOT, upon request, contemporaneous records, meeting the requirements of Section 10.10, for all work performed that Maintenance Contractor believes constitutes extra work (including non-construction work), until all Claims and Disputes regarding entitlement or cost of such work are resolved.

10.4 Contents of Change Orders

10.4.1 Form of Change Order

Each Cost and Schedule Proposal and Request for Change Order shall (i) be prepared in a form acceptable to TxDOT, (ii) meet all applicable requirements of this Section 10; and (iii) be substantially in the form of Exhibit 12.

10.4.2 Scope of Work, Cost Estimate, and Other Supporting Documentation

Maintenance Contractor shall prepare a scope of work and cost estimate, and such other information as required by this Section 10.4.2 for each Cost and Schedule Proposal and Request for Change Order.

10.4.2.1 Scope of Work

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

10.4.2.2 Cost Estimate

The cost estimate shall set out the estimated costs in such a way that a fair evaluation can be made. It shall include a breakdown for labor, materials, equipment and markups for overhead and profit, unless TxDOT agrees otherwise. If the work is to be performed by Subcontractors and if the work is sufficiently defined to obtain Subcontractor quotes, Maintenance Contractor 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 Maintenance Contractor's estimate. No markup shall be allowed in excess of the amounts allowed under Section 10.7. Maintenance Contractor 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.

10.4.2.3 Other Supporting Documentation

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

10.4.3 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 10 which permit a Change Order to be issued, and describing the data and documents (including all data and reports required under Section 10.10) which establish the necessity and amount of such proposed change.

10.4.4 Maintenance Contractor Representation

Each Change Order shall be accompanied by a certification under penalty of perjury, in a form acceptable to TxDOT, executed by Maintenance Contractor and stating that: (a) the amount of compensation requested is justified as to entitlement and amount, (b) the amount of 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 Maintenance Services by a Subcontractor for which pricing data is required to be provided under Section 17.2 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 17.2.

10.4.5 Effect of Change Order Under Comprehensive Development Agreement

Maintenance Contractor acknowledges that it has reviewed the Comprehensive Development Agreement and provisions affecting Change Orders requested by Maintenance Contractor under this Capital Maintenance Agreement. Maintenance Contractor expressly agrees to comply with and be bound by Section 13.4.5 of the Comprehensive Development Agreement.

10.5 Certain Limitations

10.5.1 Limitation on Maintenance Price Increases

Any increase in the Maintenance 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 Maintenance Contactor-Related Entity; (b) costs to the extent that they are unnecessary or could reasonably be avoided by Maintenance Contractor, including by re-sequencing, reallocating or redeploying its forces to other portions of the Maintenance Services or to other activities unrelated to the Maintenance Services; 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.

10.5.2 Maintenance Services Performed Without Direction

To the extent that Maintenance Contractor undertakes any efforts outside of the scope of the Maintenance Services, unless Maintenance Contractor has received a Directive Letter or Change Order signed by TxDOT to undertake such efforts, Maintenance Contractor 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 Maintenance Contractor to remove or otherwise undo any such work, at Maintenance Contractor's sole cost.

10.6 Change Order Pricing

The price of a Change Order under this Section 10.6 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 Maintenance Price to comparable activities, whenever possible. If reference to price allocations is inappropriate and if requested by TxDOT, 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.

10.6.1 Detailed Cost Proposal

Maintenance Contractor may be required to submit a detailed cost proposal identifying all categories of costs in accordance with the requirements of Section 10.7: (a) showing all impacts on the CMA Documents from Maintenance Services 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 Maintenance Services to Maintenance Contractor's scope, the increase in the Maintenance Price shall be negotiated based on estimates or actual costs of labor, material and equipment. When the Change Order deletes Maintenance Services from Maintenance Contractor's scope, the amount of the reduction in the Maintenance 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 10.7 shall apply to Maintenance Services added and deleted by Change Orders.

10.6.2 Identification of Conditions

Maintenance Contractor 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.

10.6.3 Contents

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

10.6.4 Added Maintenance Services

When the Change Order adds Maintenance Services to Maintenance Contractor's scope, the increase in the Maintenance Price shall be negotiated based on estimated costs of labor, material and equipment, or shall be based on actual costs in accordance with Section 10.7. For negotiated Change Orders, markups for profit and overhead shall be consistent with Section 10.7.7. Risk associated with the Maintenance Services described in the Change Order shall be addressed through the assumptions contained therein regarding the scope of such Maintenance Services.

10.6.5 Deleted Maintenance Services

When the Change Order deletes Maintenance Services from Maintenance Contractor's scope, the amount of the reduction in the Maintenance Price shall be based upon Maintenance Contractor'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 Maintenance Services. Estimated costs that the Maintenance Contractor applied to develop the original Maintenance Price, as well as markup for profit and variable overhead at the rates the Maintenance Contractor applied to develop the Maintenance Price, as reflected in the EPDs, shall apply for determining the amount of the Maintenance Price reduction for deleted Maintenance Services Change Orders. The amount of risk associated with such Maintenance Services as of the Effective Date by Maintenance Contractor shall be an additional factor in determining the amount of the Maintenance Price reduction for deleted Maintenance Services Change Orders. When a deduction is involved, documented cancellation and restocking charges may be included in costs and subtracted from the Maintenance Price deduction. Reimbursement will be made for actual work done and all costs incurred, including mobilization of materials, prior to the date of the Directive Letter or other notification by TxDOT eliminating the work.

10.6.6 Change Order Both Adding and Deleting Maintenance Services

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

(a) Net increase in cost, the change shall be treated as Maintenance Services added and the provisions of Section 10.6.4 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 Maintenance Price.

(b) Net decrease in cost, the change shall be treated as Maintenance Services deleted and the provisions of Section 10.6.5 shall be used on the net decrease in cost in order to establish the amount deduct from the Maintenance Price.

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

10.6.7 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 Maintenance 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 Maintenance Price.

10.6.8 All-Inclusive Change Orders

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

10.7 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 Maintenance Contractor to perform the Maintenance Services, indicating expressly the intention to treat the items as changes in the Maintenance Services, and setting forth the kind, character, and limits of the Maintenance Services as far as they can be ascertained, the terms under which changes to the Maintenance Price will be determined and the estimated total change in the Maintenance Price anticipated thereunder. Upon final determination of the

allowable costs, TxDOT shall issue a modified Change Order setting forth the final adjustment to the Maintenance Price.

10.7.1 Labor Costs

The cost of labor for workers used in the actual and direct performance of the Change Order work, whether provided by Maintenance Contractor 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 Capital Maintenance 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.

10.7.2 Material Costs

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

10.7.3 Equipment

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

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

(b) The equipment rental rates shall be those tabulated in the most recent version of the *Rental Rate Blue Book*. The rental rates to be used shall be the published monthly rate divided by 175 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.

Maintenance Contractor shall be considered to own such items if an ownership interest therein is held by: (i) Maintenance Contractor, (ii) any equity participant in Maintenance Contractor, (iii) any Subcontractor performing construction work, or (iv) any Affiliate of Maintenance Contractor, any equity participant in Maintenance Contractor 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.

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

10.7.3.3 The time to be paid for use of equipment on the Site shall be the time the equipment is in operation on the Change Order work being performed. The time shall include the reasonable time required to move the equipment to the location of the Change Order work and return it to the original location or to another location requiring no more time than that required to return it to its original location. Moving time will not be paid for if the equipment is also used at the Site other than for Change Order work. Loading and transporting costs will be allowed, in lieu of moving time, when the equipment is moved by means other than its own power. Payment for loading and transporting will be made only if the equipment is used for Change Order work and cannot be used to perform other Maintenance Services. 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.

10.7.4 Subcontracted Maintenance Services

To the extent that any Change Order is intended to compensate Maintenance Contractor for the cost of work performed by Subcontractors, the Change Order shall provide for compensation equal to: (a) the actual cost to Maintenance Contractor of such work (which shall be charged by the Subcontractor on a time and materials basis in accordance with this Section 10.7, unless otherwise approved in writing by TxDOT), plus (b) 5% of such cost. The 5% markup for subcontracted work shall not apply to: (i) Subcontracts with Affiliates; or (ii) Subcontracts with Suppliers.

10.7.5 Other Direct Costs

For any justified direct cost incurred for Change Order work not covered by the categories of costs contained in Sections 10.7.1 through 10.7.4, Maintenance Contractor shall accept as full payment therefor an amount equal to the actual cost to Maintenance Contractor for such direct cost item without additional mark-up. Back-up

documentation supporting each cost item for this category shall be provided by Maintenance Contractor and approved by TxDOT in writing prior to any payment authorization being granted.

10.7.6 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 Maintenance Services which are not a part of the finished product) and other indirect costs of the added or changed Maintenance Services, 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 Maintenance Services. Maintenance Contractor'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.

10.7.7 Change Order Data

10.7.7.1 Maintenance Contractor shall contemporaneously collect, record in writing, segregate and preserve: (a) all data necessary to determine the costs described in this Section 10.7 with respect to all Maintenance Services which are 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, and (b) all data necessary to show the actual impact (if any) on the applicable deadlines with respect to all Maintenance Services which are 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 Maintenance Services. Maintenance Contractor hereby waives

the right to obtain compensation for any Maintenance Services for which cost data is required to be provided hereunder, if Maintenance Contractor fails to maintain and timely provide to TxDOT cost data meeting the requirements of this Capital Maintenance Agreement.

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

10.7.7.3 All reports shall be signed by Maintenance Contractor. TxDOT will compare its records with Maintenance Contractor's reports, make the necessary adjustments and compile the costs of Maintenance Services 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.

10.8 Change Orders for Force Majeure Events and Hazardous Materials

10.8.1 Force Majeure Events

Subject to the limitations contained in, and upon Maintenance Contractor's fulfillment of all applicable requirements of, this Section 10, TxDOT shall issue Change Orders to compensate Maintenance Contractor for additional costs incurred arising directly from Force Majeure Events. Maintenance Contractor's rights to recover additional costs incurred arising directly from Force Majeure Events shall not include delay and disruption damages.

10.8.2 Hazardous Materials Management

If compensation is payable to Maintenance Contractor pursuant to Section 3.7 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 10.8.2. Maintenance Contractor shall not be entitled to a Change Order for additional compensation with respect to the Hazardous Materials Management responsibilities set forth in Sections 3.7.1 and 3.7.2.

Entitlement to compensation shall be limited to work performed pursuant to Maintenance Contractor's Hazardous Materials Management Plan and any site investigation report or workplan for such Hazardous Materials as approved by TxDOT,

in writing. No compensation shall be allowed with respect to: (a) immaterial quantities of Hazardous Materials, (b) any Hazardous Materials that could have been avoided by reasonable design modifications, maintenance procedures or construction techniques, or (c) any costs that could have been avoided.

10.8.2.1 Determination of Reimbursable Amount

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

10.8.2.1.2 In cases involving reimbursement for Hazardous Materials Management under this Section 10.8.4, 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 are included in the Maintenance Price and Maintenance Contractor shall not be entitled to additional compensation therefor. Maintenance Contractor shall take all reasonable steps to minimize any such costs. Compensation shall be allowed only to the extent that Maintenance Contractor demonstrates to TxDOT's satisfaction that: (a) the Hazardous Materials Management could not have been avoided by reasonable design modifications, maintenance procedures or construction techniques and (b) Maintenance Contractor's plan for the Hazardous Materials Management represents the approach which is most beneficial to the Project and the public. Maintenance Contractor 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.

10.8.2.2 Limitations on Change Orders

Maintenance Contractor shall have no right to receive any compensation for any Hazardous Materials Management resulting from a situation described in Section 15.1.1(G).

10.8.2.3 Insurance Proceeds

If the cost of any Hazardous Materials Management is covered by the insurance described in Section 7, Maintenance Contractor 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 Maintenance Contractor's responsibility. To the extent that such proceeds are available, Maintenance Contractor shall not be entitled to payment hereunder on any other basis for such Hazardous Materials Management.

10.9 Change Order Records

Maintenance Contractor shall maintain its records in such a manner as to provide a clear distinction between the direct costs of Maintenance Services for which it is entitled (or for which it believes it is entitled) to an increase in the Maintenance Price and the costs of other operations. Maintenance Contractor shall contemporaneously collect, record in writing, segregate and preserve all data necessary to determine the costs of all Maintenance Services which are the subject of a Change Order or a requested Change Order, specifically including costs associated with design work. 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 Maintenance Contractor's predetermined overhead and profit markups.

10.9.1 Daily Work Reports and Data Collection

Maintenance Contractor shall furnish TxDOT completed daily work reports for each day's Maintenance Services that 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.

10.9.2 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 Maintenance Services, less any discounts available.

10.9.3 Execution of Reports

All Time and Materials Change Order reports shall be signed by the Maintenance Manager.

10.9.4 Adjustment

TxDOT will compare its records with the completed daily time and material Maintenance Services reports furnished by Maintenance Contractor 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 Maintenance Services performed, but shall not preclude subsequent adjustment based on a later audit. Maintenance Contractor's cost records pertaining to Maintenance Services 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 Capital Maintenance Agreement and for a period of not less than five years after the termination of contract , and Maintenance Contractor shall retain such records for that period. Where payment for materials or labor is based on the cost thereof to any Person other than Maintenance Contractor, Maintenance Contractor 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 Maintenance Contractor. 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 termination of contract , Maintenance Contractor will be given a reasonable notice of the time when such audit is to begin.

10.10 Matters Not Eligible for Maintenance Price Increase

Maintenance Contractor acknowledges and agrees that no increase in the Maintenance Price is available except in circumstances expressly provided for herein, that such Maintenance Price increase shall be available only as provided in this Section 10 and that Maintenance Contractor shall bear full responsibility for the consequences of all other events and circumstances. Matters which are Maintenance Contractor's exclusive responsibility include the following:

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

(b) 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 Maintenance Contractor-Related Entity or Developer-Related Entity;

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

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

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

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

(g) design or construction defects, omissions, errors, flaws or inaccuracies.

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

(i) 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);

(j) groundwater levels or subsurface moisture content;

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

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

(m) 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 Capital Maintenance Agreement or arise out of the nature of the Maintenance Services; and

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

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

MAINTENANCE CONTRACTOR HEREBY EXPRESSLY WAIVES ALL RIGHTS TO ASSERT ANY AND ALL CLAIMS BASED ON ANY CHANGE IN THE MAINTENANCE SERVICES, DELAY, DISRUPTION, SUSPENSION OR ACCELERATION (INCLUDING ANY CONSTRUCTIVE CHANGE, DELAY, DISRUPTION, SUSPENSION OR ACCELERATION) FOR WHICH MAINTENANCE CONTRACTOR 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 MAINTENANCE SERVICES EXCEPT TO THE EXTENT THAT THE CMA DOCUMENTS EXPRESSLY SPECIFY THAT MAINTENANCE CONTRACTOR IS ENTITLED TO A CHANGE ORDER OR OTHER COMPENSATION, DAMAGES OR TIME EXTENSION.

10.11 Disputes

If TxDOT and Maintenance Contractor agree that a request to increase the Maintenance Price by Maintenance Contractor has merit, but are unable to agree as to the amount of such Maintenance Price increase, TxDOT agrees to mark up the Request for Change Order or Cost and Schedule Proposal, as applicable, provided by Maintenance Contractor to reduce the amount of the Maintenance Price increase as deemed appropriate by TxDOT. In such event, TxDOT will execute and deliver the marked-up Change Order to Maintenance Contractor within a reasonable period after receipt of a request by Maintenance Contractor to do so, and thereafter will make payment based on such marked-up Change Order. The failure of TxDOT and Maintenance Contractor to agree to any Change Order under this Section 10 (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 Maintenance Price in connection with a Change Order as described above) shall be a Dispute to be resolved pursuant to Section 16. 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 Maintenance Contractor of any nature arising from or relating to the Maintenance Services covered by the Change Order. Maintenance Contractor's Claim and any award by the Dispute resolver shall be limited to the incremental costs incurred by Maintenance Contractor with respect to the Dispute (crediting TxDOT for any corresponding reduction in Maintenance Contractor's other costs) and shall in no event exceed the amounts allowed by Section 10.7 with respect thereto.

10.12 Changes Not Requiring Change Order

Changes in the Maintenance Services or requirements in the CMA Documents that have no net cost effect on the Maintenance Price may be approved in writing by TxDOT as a Deviation, and in such event shall not require a Change Order. Any other change in the requirements of the CMA Documents shall require either a Directive Letter or a Change Order.

10.13 No Release or Waiver

10.13.1 No Change Order granted hereunder shall release Maintenance Contractor's Surety from its obligations. Maintenance Services shall continue and be carried out in accordance with all the provisions of the CMA Documents and this Capital Maintenance Agreement shall be and shall remain in full force and effect, unless formally suspended or terminated by TxDOT in accordance with the terms hereof. Extending time or permitting Maintenance Contractor to finish the Maintenance Services or any part thereof after the applicable deadline, or the making of payments to Maintenance Contractor after such date, shall not constitute a waiver on the part of TxDOT of any rights under this Capital Maintenance Agreement.

10.13.2 The performance and acceptance of any part of the Maintenance Services or materials specified by this Capital Maintenance Agreement after the date fixed for such performance, shall not be deemed to be a waiver by TxDOT of its right to terminate this Capital Maintenance Agreement for abandonment or failure to complete within the time specified or to impose and deduct damages as may be provided.

10.13.3 No course of conduct or dealings between the Parties nor express or implied acceptance of alterations or additions to the Maintenance Services, and no claim that TxDOT has been unjustly enriched shall be the basis for any claim, request for additional compensation or time extension. Further, Maintenance Contractor 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. Maintenance Contractor shall be deemed to have performed such work as a volunteer and at its sole risk and cost. In addition, TxDOT may require Maintenance Contractor to remove or otherwise undo any such work, at Maintenance Contractor's sole risk and cost.

SECTION 11. REPRESENTATIONS, WARRANTIES AND ACKNOWLEDGMENTS

11.1 Acknowledgments by Maintenance Contractor

Maintenance Contractor acknowledges and agrees that:

11.1.1 To the extent of the Maintenance Services, Maintenance Contractor has full responsibility for the maintenance, repair and upkeep of the Project.

11.1.2 Maintenance Contractor assumes the risk of the design and construction of the Project; design defects, omissions, errors or inaccuracies; construction defects and flaws; the materials and supplies used in connection with the construction of the Project; the Maintenance Services; and the actions, omissions, negligence, intentional misconduct, or breach of applicable Law or contract by any member of the Maintenance Contractor-Related Entities and the Developer-Related Entities and acknowledges and agrees that it has incorporated into the Maintenance Price all costs associated with such risks.

11.1.3 Maintenance Contractor shall not be entitled to: (a) assert or use the design and construction of the Project; design defects, omissions, errors or inaccuracies; construction defects and flaws; the materials and supplies used in connection with the construction of the Project; the Maintenance Services; and/or the actions, omissions, negligence, intentional misconduct, or breach of applicable Law or contract by any member of the Maintenance Contractor-Related Entities and the Developer-Related Entities as defenses to the full and complete performance of the Maintenance Services and any other obligation under the CMA Documents; and (b) any Change Order resulting from, related to or arising out of the design and construction of the Project; design defects, omissions, errors or inaccuracies; construction defects and flaws; the materials and supplies used in connection with the construction of the Project; the Maintenance Services; and/or the actions, omissions, negligence, intentional misconduct, or breach of applicable Law or contract by any member of the Maintenance Contractor-Related Entities and the Developer-Related Entities.

11.1.4 Except to the limited extent provided by Section 1.2.4, Maintenance Contractor shall not be entitled to rely on any documents or information provided by TxDOT relating to the design or construction of the Project, including the Reference Information Documents.

11.1.5 TxDOT shall not be responsible or liable in any respect for any Losses suffered by any member of the Maintenance Contractor-Related Entities by reason of the design and construction of the Project; design defects, omissions, errors or inaccuracies; construction defects or flaws; the materials and supplies used in connection with the construction of the Project; the Maintenance Services; or the actions, omissions, negligence, intentional misconduct, or breach of applicable Law or contract by any member of the Maintenance Contractor-Related Entities or the Developer-Related Entities.

11.2 Disclaimers By TxDOT

11.2.1 TxDOT does not represent or warrant the design and construction of the Project; the existence or non-existence of any design defects, omissions, errors, or inaccuracies; the existence of any construction defects or flaws; the traffic volume projections or revenue projections; the materials and supplies used in connection with the construction of the Project; the Maintenance Services; the compliance by any member of the Developer-Related Entities with the terms of the Comprehensive Development Agreement; or, the utility, suitability, or fitness of the Project for its intended use.

11.2.2 EXCEPT AS OTHERWISE EXPRESSLY PROVIDED HEREIN, TXDOT EXPRESSLY DISCLAIMS ANY REPRESENTATIONS OR WARRANTIES OF ANY KIND OR NATURE, EXPRESS OR IMPLIED, AS TO THE CONDITION OR QUALITY OF THE PROJECT, THE PROJECT ROW OR THE PROSPECTS (FINANCIAL AND OTHERWISE), RISKS AND OTHER INCIDENTS OF THE PROJECT ROW, THE WORK, THE MAINTENANCE SERVICES AND THE PROJECT AND TXDOT SPECIFICALLY DISCLAIMS ANY REPRESENTATION OR WARRANTY OF MERCHANTABILITY, USAGE, SUITABILITY OR FITNESS FOR ANY PARTICULAR PURPOSE WITH RESPECT TO THE PROJECT, THE PROJECT ROW, THE WORK AND THE MAINTENANCE SERVICES, OR ANY PART THEREOF, OR COMPLIANCE WITH APPLICABLE LAWS OR GOVERNMENTAL APPROVALS. WITHOUT LIMITING THE GENERALITY OF THE FOREGOING, EXCEPT AS OTHERWISE EXPRESSLY PROVIDED HEREIN, TXDOT EXPRESSLY DISCLAIMS ANY REPRESENTATION OR WARRANTY OF ANY KIND REGARDING THE CONDITION OF THE PROJECT, THE WORK, THE PROJECT ROW, OR THE SUITABILITY THEREOF IN CONNECTION WITH THE MAINTENANCE SERVICES AND NO SCHEDULE OR EXHIBIT TO THE CMA DOCUMENTS, NOR ANY OTHER MATERIAL OR INFORMATION PROVIDED BY OR COMMUNICATIONS MADE BY TXDOT, SHALL CAUSE OR CREATE ANY WARRANTY, EXPRESS OR IMPLIED, AS TO THE CONDITION OR QUALITY OF THE PROJECT, THE WORK OR THE PROJECT ROW.

11.3 TxDOT Representations and Warranties

TxDOT represents and warrants to Maintenance Contractor as follows:

11.3.1 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 CMA Documents to which it is a Party.

11.3.2 Each Person executing the CMA 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.

11.3.3 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 CMA Documents to which TxDOT is a Party, or which challenges the authority of the officials executing the CMA Documents.

11.4 Maintenance Contractor Representations and Warranties

Maintenance Contractor represents, warrants and covenants to TxDOT as follows:

11.4.1 Maintenance Contractor and its Subcontractors have maintained, and throughout the term of this Capital Maintenance Agreement shall maintain, all required authority, license status, professional ability, skills and capacity to perform Maintenance Contractor's obligations hereunder and shall perform them in accordance with the requirements contained in the CMA Documents.

11.4.2 Maintenance Contractor has evaluated the feasibility of performing the Maintenance Services within the deadlines specified herein and for the Maintenance Price and has reasonable grounds for believing and does believe that such performance is feasible and practicable.

11.4.3 Maintenance Contractor has, prior to executing this Capital Maintenance Agreement, in accordance with Good Industry Practice, reviewed and taken appropriate steps to verify the information included in the Reference Information Documents, inspected and, to the extent access was made available by TxDOT or was otherwise available to it, examined the Site and surrounding locations, performed appropriate field studies, and undertaken other activities sufficient to familiarize itself with existing Utilities, surface conditions and subsurface conditions affecting the Project to the extent Maintenance Contractor deems necessary or advisable for performing its obligations under the CMA Documents, and as a result of such review, inspection, examination and other activities Maintenance Contractor is familiar with and accepts the physical requirements of the Maintenance Services. Maintenance Contractor acknowledges and agrees that it has been afforded the opportunity to review information and documents and, to the extent access was made available by TxDOT or was otherwise available to it, to conduct inspections and tests of the Site and surrounding locations as described above. Before commencing any work on a particular portion or aspect of the Project, Maintenance Contractor 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. Maintenance Contractor shall ensure that any design documents and construction documents furnished as part of the Maintenance Services accurately depict all governing and adjoining dimensions.

11.4.4 Maintenance Contractor acknowledges and agrees that it 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 Capital Maintenance Agreement. Maintenance Contractor shall comply with the foregoing at its sole cost and expense and without any increase in the Maintenance Price on account of such compliance, regardless of whether such compliance would require additional time for performance or additional labor, equipment and/or materials not expressly provided for in the CMA Documents. Maintenance Contractor has no reason to believe that any Governmental Approval required to be obtained by Maintenance Contractor will not be granted in due course and, thereafter, remain in effect in order to enable the Maintenance Services to proceed in accordance with the CMA Documents. If any

Governmental Approvals required to be obtained by Maintenance Contractor must formally be issued in the name of TxDOT, Maintenance Contractor shall undertake all efforts to obtain such approvals subject to TxDOT's reasonable cooperation with Maintenance Contractor, including execution and delivery of appropriate applications and other documentation prepared by Maintenance Contractor in form approved by TxDOT. Maintenance Contractor shall assist TxDOT in obtaining any Government Approvals which TxDOT may be obligated to obtain, including providing information requested by TxDOT, preparing necessary supporting materials and participating in meetings regarding such approvals.

11.4.5 All Maintenance Services furnished by Maintenance Contractor shall be performed by or under the supervision of Persons who hold all necessary and valid licenses to perform the Maintenance Services 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 Maintenance Services in accordance with the CMA Documents and who shall assume professional responsibility for the accuracy and completeness of all design and construction documents prepared or checked by them.

11.4.6 At all times, including during the course of, and notwithstanding the existence of, any dispute, Maintenance Contractor shall perform as directed by TxDOT, in a diligent manner and without delay, shall abide by TxDOT's decision or order, and shall comply with all applicable provisions of the CMA Documents.

11.4.7 Maintenance Contractor is a joint venture, duly organized and validly existing under the Laws of the State of Texas with all requisite power and all required licenses to carry on its present and proposed obligations under the CMA Documents. Maintenance Contractor is composed of Kiewit Texas Construction, L.P. and Zachry Construction Corporation. Each member of Maintenance Contractor is duly qualified to do business, and is in good standing, in the State, and will remain in good standing throughout the Maintenance Term and for as long thereafter as any obligations remain outstanding under the CMA Documents. Guarantors are corporations duly organized and validly existing under the laws of the State of Delaware, with all requisite power and all required licenses to carry on their present and proposed obligations under the CMA Documents. Guarantors are duly qualified to do business, and are in good standing, in the State, and will remain in good standing throughout the Maintenance Term and for as long thereafter as any obligations remain outstanding under the CMA Documents.

11.4.8 The execution, delivery and performance of this Capital Maintenance Agreement have been duly authorized by all necessary corporate action of Maintenance Contractor, and this Capital Maintenance Agreement has been duly executed and delivered by Maintenance Contractor.

11.4.9 All required approvals have been obtained with respect to the execution, delivery and performance of this Capital Maintenance Agreement, and performance of this Capital Maintenance Agreement will not result in a breach of or a default under Maintenance Contractor's organizational documents or any indenture or loan or credit agreement or other material agreement or instrument to which

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

11.4.10 This Capital Maintenance Agreement constitutes the legal, valid and binding obligation of Maintenance Contractor, enforceable against Maintenance Contractor and, if applicable, each member of Maintenance Contractor, in accordance with its terms. Each Guaranty has been duly authorized by all necessary corporate action, has been duly executed and delivered by Guarantor, and constitutes the legal, valid and binding obligation of the Guarantor, enforceable in accordance with its terms.

11.4.11 There is no action, suit, proceeding, investigation or litigation pending and served on Maintenance Contractor which challenges Maintenance Contractor's authority to execute, deliver or perform, or the validity or enforceability of, the CMA Documents or which challenges the authority of Maintenance Contractor official executing the CMA Documents.

SECTION 12. DEFAULT AND REMEDIES; LIQUIDATED DAMAGES

12.1 Maintenance Contractor Defaults

Maintenance Contractor shall be in default under this Capital Maintenance Agreement upon the occurrence of any one or more of the following events or conditions (each a "Maintenance Contractor Default"):

(a) A Developer Event of Default under the Comprehensive Development Agreement.

(b) Maintenance Contractor fails to timely observe or perform or cause to be observed or performed any covenant, agreement, obligation, term or condition required to be observed or performed by Maintenance Contractor under the CMA Documents, including failure to perform the Maintenance Services in accordance with the CMA Documents.

(c) Maintenance Contractor fails to resume performance of Maintenance Services which have been suspended or stopped, within the time specified in the notification after receipt of notice from TxDOT to do so or (if applicable) after cessation of the event preventing performance.

(d) Maintenance Contractor suspends, ceases, stops or abandons the Maintenance Services or fails to continuously and diligently prosecute the Maintenance Services (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).

(e) Maintenance Contractor fails to maintain the insurance, bonds, letters of credit and guarantees required hereunder; provided, however, that TxDOT shall not seek recourse against the then-current Maintenance Performance Bond in the event of Maintenance Contractor's failure to provide a Maintenance Payment Bond or a Maintenance Performance Bond for any subsequent Maintenance Term.

(f) Maintenance Contractor attempts or purports to assign or transfer the CMA Documents or any right or interest herein, except as expressly permitted under this Capital Maintenance Agreement.

(g) Maintenance Contractor 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 shall have failed to comply with any Law or failed reasonably to comply with the instructions of TxDOT consistent with the CMA Documents, or fails to make payment to TxDOT when due of any amounts owing to TxDOT under this Capital Maintenance Agreement

(h) Maintenance Contractor breaches any other agreement, representation, covenant or warranty contained in the CMA Documents.

(i) Maintenance Contractor 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 Maintenance Services (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).

(j) 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.

(k) Any final judgment is issued holding Maintenance Contractor 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.

(l) Any representation or warranty made by Maintenance Contractor or any Guarantor in the CMA Documents or any certificate, invoice, schedule, instrument or other document delivered by Maintenance Contractor pursuant to the CMA Documents was false or materially misleading when made.

(m) Maintenance Contractor commences a voluntary case seeking liquidation, reorganization, or other relief with respect to itself or its debts under any bankruptcy, insolvency, or other similar Law now or hereafter in effect; seeks the appointment of a trustee, receiver, liquidator, custodian or other similar official to protect a substantial part of Maintenance Contractor's 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; or any of the foregoing acts or events shall occur with respect to any of Maintenance Contractor's partners, members or joint venturers, or any Surety or Guarantor.

(n) An involuntary case shall be commenced against Maintenance Contractor seeking liquidation, reorganization, dissolution, winding up, a composition or arrangement with creditors, a readjustment of debts or other relief with respect to Maintenance Contractor or Maintenance Contractor's debts under any 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 Maintenance Contractor or any substantial part of Maintenance Contractor'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 Maintenance Contractor in good faith or shall remain undismissed and unstayed for a period of 60

Days; or any of the foregoing acts or events shall occur with respect to any of Maintenance Contractor's partners, members or joint venturers, or any Surety or Guarantor.

12.2 Notice and Opportunity to Cure

12.2.1 For the purpose of TxDOT's exercise of remedies and subject to remedies that this Section 12 expressly states may be exercised before lapse of a cure period, Maintenance Contractor shall have the following cure periods with respect to the following Maintenance Contractor Defaults:

(a) Respecting a Maintenance Contractor Default under clauses (b) through (d), and clauses (g) through (i) of Section 12.1, a period of 10 days after TxDOT delivers to Maintenance Contractor written notice of the default, provided that no such notice and opportunity to cure is required for any Maintenance Contractor Default which by its nature cannot be cured (which shall include the items described in clauses (e) through (f) and clauses (j) through (n) of Section 12.1).

(b) If a Maintenance Contractor Default is capable of cure but, by its nature, cannot be cured within 10 days, as determined by TxDOT, such additional period of time shall be allowed as may be reasonably necessary to cure the default so long as Maintenance Contractor commences such cure within such 10-day period and thereafter diligently prosecutes such cure to completion; provided, however, that in no event shall such cure period exceed 60 days in total.

12.2.2 Failure to provide notice to the Surety shall not preclude TxDOT from exercising its remedies against Maintenance Contractor. Notwithstanding the provisions in this Section 12, TxDOT may, without notice and without awaiting lapse of the period to cure any default, in the event of existence of a condition on or affecting the Project which TxDOT believes poses an immediate and imminent danger to public health or safety, rectify the dangerous condition at Maintenance Contractor's cost, and so long as TxDOT undertakes such action in good faith, even if under a mistaken belief in the occurrence of such default, such action shall not expose TxDOT to any liability to Maintenance Contractor and shall not entitle Maintenance Contractor to any other remedy, it being acknowledged that TxDOT has a paramount public interest in providing and maintaining safe public use of and access to the Project. TxDOT's good faith determination of the existence of such danger shall be deemed conclusive in the absence of clear and convincing evidence to the contrary.

12.3 TxDOT Remedies

12.3.1 If any Maintenance Contractor Default described in Section 12.1 is not subject to cure or is not cured within the period (if any) specified in Section 12.2, TxDOT may declare that an "Event of Default" has occurred and notify Maintenance Contractor to discontinue the Maintenance Services. The declaration of an Event of Default shall be in writing and given to Maintenance Contractor, with a copy to Surety and Guarantor. In addition to all other rights and remedies provided by Law or equity and such rights and remedies as are otherwise available under the CMA Documents, including the Maintenance Performance Bond, Letter of Credit, and Guaranty, if an Event of Default shall occur, TxDOT shall have the following rights without further notice and without waiving or releasing Maintenance Contractor from any obligations and Maintenance Contractor shall have the following obligations (as applicable):

(a) TxDOT may terminate this Capital Maintenance Agreement or a portion thereof for default, including Maintenance Contractor's rights of entry upon, possession and control of the Project, in which case, the provisions of Sections 14.3(b) and 14.3(c) shall apply.

(b) If and as directed by TxDOT, Maintenance Contractor shall withdraw from the Site and shall remove such materials, equipment, tools and instruments used by, and any debris or waste materials generated by, any Maintenance Contractor-Related Entity in the performance of the Maintenance Services.

(c) Maintenance Contractor shall deliver to TxDOT possession of any or all design or construction documents and all other completed or partially completed drawings (including plans, elevations, sections, details and diagrams), specifications, records, information, schedules, samples, shop drawings and other documents and facilities related to the Project that TxDOT deems necessary in connection with Maintenance Services.

(d) Maintenance Contractor shall assign to TxDOT the Subcontracts requested by TxDOT and Maintenance Contractor shall terminate, at its sole cost, all other Subcontracts.

(e) TxDOT, in its sole discretion, may deduct from any amounts payable by TxDOT to Maintenance Contractor such amounts (including interest thereon as permitted under this Capital Maintenance Agreement) payable by Maintenance Contractor to TxDOT, including reimbursements owing, liquidated damages and 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 Maintenance Services or Nonconforming Work or other damages or

amounts that TxDOT has determined are or may be payable to TxDOT under the CMA Documents.

(f) TxDOT shall have the right, but not the obligation, to pay any amount and/or perform any act as may then be required from Maintenance Contractor under the CMA Documents or Subcontracts.

(g) 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 Capital Maintenance Agreement or may enter into an agreement for the completion of this Capital Maintenance 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 Maintenance Services and the requirements of the CMA Documents, including completion of the Maintenance Services by TxDOT.

(h) If TxDOT exercises any right to perform any obligations of Maintenance Contractor, in the exercise of such right TxDOT may, but is not obligated to, among other things: (i) perform or attempt to perform, or cause to be performed, such Maintenance Services; (ii) spend such sums as TxDOT deems necessary and reasonable to employ and pay such architects, engineers, consultants and contractors and obtain materials and equipment as may be required for the purpose of completing such Maintenance Services; (iii) execute all applications, certificates and other documents as may be required for completing the Maintenance Services; (iv) modify or terminate any contractual arrangements; (v) take any and all other actions which it may in its sole discretion consider necessary to complete the Maintenance Services; and (vi) prosecute and defend any action or proceeding incident to the Maintenance Services.

12.3.2 If an Event of Default occurs, Maintenance Contractor and each Guarantor shall be jointly and severally liable to TxDOT for all costs incurred by TxDOT or any Person acting on TxDOT's behalf in completing the Maintenance Services. Upon the occurrence of an Event of Default, TxDOT shall be entitled to withhold all or any portion of further payments to Maintenance Contractor until such time as TxDOT is able to determine how much, if any, remains payable to Maintenance Contractor and the amount payable by Maintenance Contractor to TxDOT in connection with TxDOT's damages and claims against Maintenance Contractor-Related Entities or as otherwise required by the CMA Documents. Promptly upon such determination, TxDOT shall notify Maintenance Contractor in writing of the amount, if any, that Maintenance Contractor shall pay TxDOT, or TxDOT shall pay Maintenance Contractor the applicable amount. All costs and charges incurred by TxDOT, including attorneys', consultants', accountants' and expert witness fees and costs, together with the cost of completing the Maintenance Services under the CMA Documents, will be deducted from any moneys

due or which may become due Maintenance Contractor or its Surety. If such expense exceeds the sum which would have been payable to Maintenance Contractor under this Capital Maintenance Agreement, then Maintenance Contractor and each Guarantor shall be liable and shall pay to TxDOT the amount of such excess. If the Maintenance Contractor or Guarantor fails to pay such amount immediately upon TxDOT's demand, then TxDOT shall be entitled to collect interest from the Maintenance Contractor or Guarantor on the amounts TxDOT is required to pay in excess of the remaining balance of the Maintenance Price for the applicable Maintenance Term. The interest rate which the Maintenance Contractor, Surety and each Guarantor shall pay shall be the lesser of: (a) 12% per annum; and (b) the maximum rate allowable under applicable Law. The interest rate shall accrue on all amounts TxDOT has had to pay in excess of the remaining balance of the Maintenance Price for the applicable Maintenance Term from the date of TxDOT payment. TxDOT's rights against the Maintenance Contractor in this Section 12.3.2 shall include the right to draw on the Letter of Credit pursuant to Section 7.2.2.

12.3.3 Maintenance Contractor acknowledges that if a Maintenance Contractor Default under Section 12.1.1(m) or (n) occurs, such default could impair or frustrate Maintenance Contractor's performance of the Maintenance Services. Accordingly, Maintenance Contractor agrees that upon the occurrence of any such default, TxDOT shall be entitled to request of Maintenance Contractor, or its successor in interest, adequate assurance of future performance in accordance with the terms and conditions hereof. Failure to comply with such request within ten days of delivery of the request shall entitle TxDOT to terminate this Capital Maintenance Agreement and to the accompanying rights set forth above. Pending receipt of adequate assurance of performance and actual performance in accordance therewith, TxDOT shall be entitled to proceed with the Maintenance Services with its own forces or with other contractors on a time and material or other appropriate basis, the cost of which will be credited against and deducted from TxDOT's payment obligations hereunder. The foregoing shall be in addition to all other rights and remedies provided by law or equity and such rights and remedies as are otherwise available under the CMA Documents, including the Maintenance Performance Bond, Letter of Credit and Guaranty.

12.3.4 In lieu of the provisions of this Section 12.3 for terminating this Capital Maintenance Agreement for default and completing the Maintenance Services, TxDOT may, in its sole discretion, pay Maintenance Contractor for the parts already done according to the provisions of the CMA Documents and may treat the parts remaining undone as if they had never been included or contemplated by this Capital Maintenance Agreement. No Claim under this Section 12.3.4 will be allowed for prospective profits on, or any other compensation relating to, Maintenance Services uncompleted by Maintenance Contractor.

12.3.5 If this Capital Maintenance 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 14.

12.3.6 The exercise or beginning of the exercise by TxDOT of any one or more rights or remedies under this Section 12.3 shall not preclude the simultaneous or

later exercise by TxDOT of any or all other such rights or remedies, each of which shall be cumulative.

12.3.7 If TxDOT suffers damages as a result of any Maintenance Contractor-Related Entity's breach, omission or failure to perform an obligation under the CMA Documents, then, subject to the limitation on liability contained in Section 12.7, TxDOT shall be entitled to recovery of such damages from Maintenance Contractor regardless of whether the breach, omission or failure that gives rise to the damages ripens into an Event of Default.

12.3.8 Maintenance Contractor and Surety shall not be relieved of liability for continuing Liquidated Damages for Lane Closures on account of a breach or default by Maintenance Contractor hereunder or by TxDOT's declaration of an Event of Default, or by actions taken by TxDOT under this Section 12.3.

12.3.9 TxDOT's remedies with respect to Nonconforming Work shall include the right to allow such work to remain uncorrected and receive payment as provided in Section 5.7.2 in lieu of the remedies specified in this Section 12.

12.3.10 TxDOT Step-in Rights

Upon the occurrence of a Maintenance Contractor Default and expiration, without full and complete cure, of the cure period, if any, available to Maintenance Contractor, and without waiving or releasing Maintenance Contractor from any obligations, TxDOT shall have the right, but not the obligation, for so long as such Maintenance Contractor Default remains uncured by TxDOT or Maintenance Contractor, to pay and perform all or any portion of Maintenance Contractor's obligations and the Maintenance Services that are the subject of such Maintenance Contractor Defaults, as well as any other then-existing breaches or failures to perform for which Maintenance Contractor received prior written notice from TxDOT but has not commenced diligent efforts to cure.

12.3.10.1 In connection with such action, TxDOT may, to the extent and only to the extent reasonably required for or incident to curing the Maintenance Contractor Default or such other breaches or failures to perform for which Maintenance Contractor received prior written 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 Maintenance Contractor or any Contractors for loss of opportunity to perform the same Maintenance Services 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 Maintenance Services 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 Maintenance Contractor irrevocably appoints TxDOT as its attorney-in-fact will full power and authority to act for and bind Maintenance Contractor 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 Maintenance Services undertaken.

12.3.10.2 Maintenance Contractor shall reimburse TxDOT, within ten days of receiving an invoice, for TxDOT's Recoverable Costs in connection with the performance of any act or Maintenance Services authorized by this Section 12.3.10. In lieu of reimbursement, TxDOT may elect, in its sole discretion, to deduct such amounts from any amounts payable to Maintenance Contractor under this Capital Maintenance Agreement.

12.3.10.3 Neither TxDOT nor any of its Authorized Representatives, contractors, subcontractors, vendor and employees shall be liable to Maintenance Contractor 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 12.3.10, 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 12.3.10, it nevertheless shall have no liability to Maintenance Contractor 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.

12.3.10.4 TxDOT's rights under this Section 12.3.10 are subject to the right of any Surety under payment and performance bonds to assume performance and completion of all bonded work.

12.3.10.5 In the event TxDOT takes action described in this Section 12.3.10 and it is later finally determined that TxDOT lacked the right to do so because there did not occur a Maintenance Contractor Default and expiration, without full and complete cure, of the cure period, if any, available to Maintenance Contractor, then TxDOT's action shall be treated as a Directive Letter for a TxDOT-Directed Change.

12.4 Liquidated Damages for Lane Closures

12.4.1 Maintenance Contractor acknowledges and agrees that because of the unique nature of the Project, the fact that it is an essential part of the Texas highway system, and the fact that inconvenience to the traveling public will be one of the significant impacts of any failure by Maintenance Contractor to perform the Maintenance Services in an efficient and timely manner, it is impracticable and extremely difficult to ascertain and determine the actual Losses which would accrue to TxDOT and the public in such event. Consequently, Maintenance Contractor agrees to pay TxDOT the following sums of money ("Liquidated Damages for Lane Closures") as deemed compensation to TxDOT resulting from Maintenance Contractor's failure to meet the Lane Closure restrictions herein. Maintenance Contractor further acknowledges and agrees that such amounts 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.

12.4.2 Maintenance Contractor shall pay to TxDOT a liquidated amount as set forth in Attachment 6 to Exhibit 2 for any Lane Closure that occurs in connection with the performance of Maintenance Services, if the Lane Closure violates the requirements in an approved Traffic Control Plan applicable to such Maintenance Services; provided, however, that the amount shall escalate $200.00 per Lane Closure per hour annually as of each anniversary of the Initial Maintenance Commencement Date.

12.4.3 Liquidated Damages for Lane Closures shall be payable by Maintenance Contractor to TxDOT within ten Business Days after Maintenance Contractor's receipt of an invoice therefore from TxDOT. In lieu of reimbursement, TxDOT may elect, in its sole discretion, to deduct such amounts from any amounts payable to Maintenance Contractor under this Capital Maintenance Agreement.

12.5 Right to Stop Performance for Failure by TxDOT to Make Undisputed Payment

Maintenance Contractor shall have the right to stop performance under this Capital Maintenance Agreement if TxDOT fails to make an undisputed payment due hereunder within 15 Business Days after TxDOT's receipt of written notice of nonpayment from Maintenance Contractor. Maintenance Contractor shall not have the right to terminate this Capital Maintenance Agreement for default as the result of any failure by TxDOT to make an undisputed payment due hereunder. However, if such nonpayment continues for more than 180 days, upon written notice from Maintenance Contractor to TxDOT, such nonpayment may be deemed a Termination for Convenience pursuant to Section 14. Upon such termination, the Parties' rights and obligations shall be as set forth in Section 14.

12.6 Limitation of Liability

12.6.1 Notwithstanding any other provision of the CMA Documents and except as set forth in Section 12.6.2, to the extent permitted by applicable Law, Maintenance Contractor shall not be liable 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 TxDOT releases Maintenance Contractor from any such liability.

12.6.2 The foregoing limitation on Maintenance Contractor's liability for 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 7.4, and (ii) covered by the proceeds of insurance actually carried by or insuring any Maintenance Contractor-Related Entity under policies solely with respect to the Project and the Maintenance Services, regardless of whether required to be carried pursuant to Section 7.4, or (iii) Maintenance Contractor is deemed to have self-insured the Loss pursuant to Section 7.5.3;

(b) Losses arising out of fraud, criminal conduct, intentional misconduct (which does not include any intentional Event of Default), recklessness, bad faith or gross negligence on the part of any Maintenance Contractor-Related Entity;

(c) Maintenance Contractor's indemnities set forth in Section 15.1 or elsewhere in the CMA Documents;

(d) Maintenance Contractor's obligation to pay liquidated damages in accordance with Section 12.4 or any other provision of the CMA Documents; and

(e) Losses arising out of Maintenance Contractor Releases of Hazardous Materials.

SECTION 13. SUSPENSION

13.1 Suspensions for Convenience

TxDOT may, at any time and for any reason, by written notice, order Maintenance Contractor to suspend all or any part of the Maintenance Services required under the CMA Documents for the period of time that TxDOT deems appropriate for the convenience of TxDOT. Maintenance Contractor shall promptly comply with any such written suspension order. Maintenance Contractor shall promptly recommence the Capital Maintenance Agreement upon receipt of written notice from TxDOT directing Maintenance Contractor to resume work. Any such suspension for convenience shall be considered a TxDOT-Directed Change; provided that TxDOT shall have the right to direct suspensions for convenience not exceeding 24 hours each up to a total of 96 hours, which shall not be considered a TxDOT-Directed Change. Adjustments of the Maintenance Price and any time extension shall be available for any such TxDOT-Directed Change, subject to Maintenance Contractor's compliance with the terms and conditions set forth in Section 10.

13.2 Suspensions for Cause

TxDOT has the authority to suspend the Maintenance Services for cause by written order, wholly or in part, for Maintenance Contractor's failure to:

(a) Correct conditions unsafe for the Project personnel or the general public;

(b) Comply with any Governmental Approval, Law, including Environmental Laws, or otherwise carry out the requirements of the CMA Documents;

(c) Carry out orders of TxDOT; or

(d) Comply with requirements for developing and implementing the Maintenance Services Quality Program.

Maintenance Contractor shall promptly comply with any such written suspension order. Maintenance Contractor shall promptly recommence the Maintenance Services upon receipt of written notice from TxDOT directing Maintenance Contractor to resume work. TxDOT shall have no liability to Maintenance Contractor in connection with any such suspension.

13.3 Responsibilities of Maintenance Contractor During Suspension Periods

During periods that any Maintenance Services are suspended, Maintenance Contractor shall continue to be responsible for the Maintenance Services that are not suspended 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, Maintenance Contractor shall maintain in a

growing condition all newly established plantings, seedings and soddings furnished under the CMA Documents and shall protect new tree growth and other vegetative growth against injury, replacing all dead plants requiring replacement during the suspension period. Additionally, Maintenance Contractor shall continue other Maintenance Services that have been or can be performed at the Site or offsite during the period that the Maintenance Services are suspended.

SECTION 14. TERMINATION FOR CONVENIENCE

14.1 Termination for Convenience

TxDOT may, at any time, terminate this Capital Maintenance Agreement and performance of the Maintenance Services, in whole or in part, if TxDOT determines, at its sole and absolute discretion, that a termination is in TxDOT's best interest ("Termination for Convenience"). TxDOT shall terminate by delivering to Maintenance Contractor a written Notice of Termination for Convenience or Notice of Partial Termination for Convenience specifying the extent of termination and its effective date. Termination (or partial termination) of this Capital Maintenance Agreement under this Section 14 shall not relieve Maintenance Contractor, any Surety or Guarantor of its obligation for any claims arising out of Maintenance Services performed.

14.2 Termination Closing

In addition to the performance by Maintenance Contractor of the requirements set forth in the Maintenance Transition Plan, on the effective date of the termination of this Capital Maintenance Agreement or upon expiration of a Maintenance Term without extension thereof by TxDOT, Maintenance Contractor shall deliver to TxDOT:

(a) Any reports then required to be delivered pursuant to the Maintenance Work Plan or otherwise required by the CMA Documents;

(b) Subcontracts and other agreements which TxDOT agrees in writing to assume in accordance with Section 14.4; and

(c) Possession and control of the Project in the condition Maintenance Contractor is required to maintain at that time under this Capital Maintenance Agreement.

14.3 Maintenance Contractor's Responsibilities After Receipt of a Notice of Termination

After receipt of a Notice of Termination for Convenience or Notice of Partial Termination for Convenience, and except as otherwise directed in writing by TxDOT, Maintenance Contractor shall immediately proceed with the following obligations, regardless of any delay in determining or adjusting any amounts due under this Section 14:

(a) Stop the Maintenance Services as specified in the notice;

(b) Notify all affected Subcontractors and Suppliers that this Capital Maintenance 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;

(c) Enter into no further Subcontracts (including orders for materials, services or facilities), except as necessary to complete the continued portion of the Maintenance Services, if any, or for mitigation of damages;

(d) Unless instructed otherwise by TxDOT, terminate all Subcontracts to the extent they relate to the Maintenance Services terminated;

(e) Assign to TxDOT, in the manner, at the times, and to the extent directed by TxDOT, all of Maintenance Contractor's right, title, and interest in the Subcontracts so terminated, in which case TxDOT will have the right, in its sole discretion, to accept performance, settle or pay any termination settlement proposal arising out of the termination of such Subcontracts;

(f) Subject to the prior written approval of TxDOT, settle all outstanding liabilities and all termination settlement proposals arising from termination of Subcontracts that are required to be terminated hereunder;

(g) No later than 90 days from the effective date of termination, unless extended in writing by TxDOT upon written request of Maintenance Contractor within this 90-day period, provide TxDOT with an inventory list of all materials, supplies and equipment previously produced, purchased or ordered from Suppliers for use in performing the Maintenance Services and not yet used, including its storage location, as well as any documentation or other property required to be delivered hereunder which is either in the process of development or previously completed but not yet delivered to TxDOT, and such other information as TxDOT may request; and transfer title and deliver to TxDOT through bills of sale or other documents of title, as directed by TxDOT: (i) work in process, completed work, supplies, equipment and other material produced or acquired for the Maintenance Services terminated, and (ii) all design and construction documents related to the Project and/or the Maintenance Services and all other completed or partially completed drawings (including plans, elevations, sections, details and diagrams), specifications, records, samples, information and other property that would have been required to be furnished to TxDOT if the Maintenance Services had been completed;

(h) Complete performance in accordance with the CMA Documents of all Maintenance Services not terminated;

(i) Take all action that may be necessary, or that TxDOT may direct, for the protection and preservation of: (i) the public, including public and private vehicular movement, (ii) the Maintenance Services, and (iii) the equipment, machinery, materials and property related to the

Project that is in the possession of Maintenance Contractor and in which TxDOT has or may acquire an interest;

(j) As authorized by TxDOT in writing, use its best efforts to sell, at reasonable prices, any property of the types referred to in subsection (i) of clause (g); provided, however, that Maintenance Contractor: (i) is not required to extend credit to any purchaser, and (ii) 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 CMA Documents or paid in any other manner directed by TxDOT; and

(k) Take other actions directed by TxDOT.

14.4 Disposition of Subcontracts

14.4.1 Not later than 60 Days prior to the effective date of termination under Section 14.1, Maintenance Contractor shall assemble at its offices in the State and make available for TxDOT's review at such offices, at any time or times during normal business hours, all Subcontracts which are in effect and pertain in any way to the performance of the Maintenance Services.

14.4.2 Maintenance Contractor shall terminate, or cause to be terminated, effective on the same date as the effective date of termination of this Capital Maintenance Agreement, any such Subcontracts which TxDOT elects, in its sole and absolute discretion, not to assume.

14.4.3 On the effective date of termination: (a) Maintenance Contractor and TxDOT shall execute and deliver a written assignment and assumption agreement with respect to any such Subcontracts that TxDOT elects, in its sole and absolute discretion, to assume; and (b) Maintenance Contractor shall deliver to TxDOT true and complete copies of all such assigned and assumed Subcontracts.

14.4.4 TxDOT's assumption of any such Subcontracts shall pertain only to obligations arising from and after the effective date of termination.

14.4.5 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 14.

14.5 Settlement Proposal

After receipt of a Notice of Termination or Notice of Partial Termination for Convenience, Maintenance Contractor shall submit a final termination settlement proposal to TxDOT in the form and with the certification prescribed by TxDOT.

Maintenance Contractor shall submit the proposal promptly, but no later than 90 Days from the effective date of termination unless Maintenance Contractor has requested a time extension in writing within such 90-Day period and TxDOT has agreed in writing to such extension. Maintenance Contractor's termination settlement proposal shall then be reviewed by TxDOT and acted upon, returned with comments, or rejected. If Maintenance Contractor fails to submit the proposal within the time allowed, TxDOT may conclusively determine, on the basis of information available to it, the amount, if any, due Maintenance Contractor because of the termination and shall pay Maintenance Contractor the amount so determined.

14.6 Amount of Negotiated Termination Settlement

14.6.1 Subject to the provisions of Section 14.5, Maintenance Contractor and TxDOT may agree upon the amount to be paid to Maintenance Contractor by reason of the total or partial termination of Maintenance Services pursuant to this Section 14. Such agreed amount, exclusive of settlement costs, shall not exceed the Maintenance Price for the applicable Maintenance Term, less the amount of payments previously made to Maintenance Contractor during such Maintenance Term and less the portions of the Maintenance Price related to Maintenance Services not terminated. Upon determination of the settlement amount, this Capital Maintenance Agreement will be amended accordingly, and Maintenance Contractor will be paid the agreed amount. TxDOT's execution and delivery of any settlement agreement shall not affect any of its rights under the CMA Documents with respect to completed Maintenance Services, relieve Maintenance Contractor from its obligations with respect thereto, including Warranties, or affect TxDOT's rights under the Maintenance Performance Bond and/or the Maintenance Payment Bond.

14.7 No Agreement as to Amount of Termination Settlement

If Maintenance Contractor and TxDOT fail to agree upon either all or some portion of the amount to be paid Maintenance Contractor by reason of a Termination for Convenience pursuant to this Section 14, the amount payable 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 14.6:

14.7.1 To the extent not previously paid, TxDOT will pay Maintenance Contractor the sum of the following amounts for Maintenance Services performed prior to the effective date of the Notice of Termination for Convenience or Notice of Partial Termination for Convenience:

(a) Maintenance Contractor's actual reasonable out-of-pocket cost, without profit, and including equipment costs only to the extent permitted under the CMA Documents for all Maintenance Services 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 Maintenance Contractor, amounts realized by the sale of such items, and for other appropriate credits against the cost of the Maintenance Services, including those deductions that would be permitted in connection with Final Payment under this Capital Maintenance Agreement. When, in the opinion of TxDOT's Authorized Representative, the cost of a contract item of Maintenance Services 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 Maintenance Services in compliance with the requirements of the CMA Documents and the excessive actual cost shall be disallowed.

(b) The cost of settling and paying reasonable claims arising out of the termination of Maintenance Services under Subcontracts as provided in Section 14.3(f), 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, which amounts shall be included in the cost on account of which payment is made under clause (a) above.

(c) The reasonable out-of-pocket cost (including reasonable overhead) of the preservation and protection of property incurred pursuant to Section 14.3(i) and any other reasonable out-of-pocket cost (including overhead) incidental to termination of the Maintenance Services under this Capital Maintenance Agreement, including the reasonable cost to Maintenance Contractor of handling material returned to the Supplier, delivered to TxDOT or otherwise disposed of as directed by TxDOT, and including a reasonable allowance for Maintenance Contractor's administrative costs in determining the amount payable due to termination of this Capital Maintenance Agreement.

14.7.2 Maintenance Contractor acknowledges and agrees that it shall not be entitled to any compensation in excess of the value of the Maintenance Services performed (determined as provided in Section 14.7.1) plus its settlement costs, and that items such as lost or anticipated profits, unabsorbed overhead and opportunity costs shall not be recoverable by it upon termination of this Capital Maintenance Agreement. The total amount to be paid to Maintenance Contractor, exclusive of costs described in Sections 14.7.1(b) and (c), may not exceed the total Maintenance Price for the applicable Maintenance Term, 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 Maintenance Contractor, 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 Maintenance Contractor under Section 14.7.1, 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 14.3(j). Information contained in the EPDs may be a factor in determining the value of the Maintenance Services terminated. Upon determination of the amount of the termination payment, this Capital Maintenance Agreement shall be amended to reflect the agreed termination payment, Maintenance Contractor shall be paid the agreed amount, and the Maintenance Price shall be reduced to reflect the reduced scope of Maintenance Services.

14.7.3 If a termination hereunder is partial, Maintenance Contractor may file a proposal with TxDOT for an equitable adjustment of the Maintenance Price for the continued portion of this Capital Maintenance Agreement. Any proposal by Maintenance Contractor for an equitable adjustment under this Section 14.7.3 shall be requested within 90 days from the effective date of termination unless extended in writing by the TxDOT. The amount of any such adjustment as may be agreed upon shall be set forth in an amendment to this Capital Maintenance Agreement.

14.8 Reduction in Amount of Claim

The amount otherwise due Maintenance Contractor under this Section 14 shall be reduced by: (a) the amount of any claim which TxDOT may have against any Maintenance Contractor-Related Entity in connection with this Capital Maintenance Agreement, (b) the agreed price for, or the proceeds of sale, of property, materials, supplies, equipment or other things acquired by Maintenance Contractor or sold, pursuant to the provisions of this Section 14, and not otherwise recovered by or credited to TxDOT, (c) all unliquidated advance or other payments made to or on behalf of Maintenance Contractor applicable to the terminated portion of the Maintenance Services or Capital Maintenance Agreement, (d) amounts that TxDOT deems advisable, in its sole discretion, to retain to cover any existing or threatened claims, Liens and stop notices relating to the Project, (e) the cost of repairing any Nonconforming Work (or, in TxDOT's sole discretion, the amount of the credit to which TxDOT is entitled under Section 5.12.2); and (f) any amounts due or payable by Maintenance Contractor to TxDOT.

14.9 Payment

TxDOT may from time to time, under such terms and conditions as it may prescribe and in its sole discretion, make partial payments for costs incurred by Maintenance Contractor in connection with the terminated portion of this Capital Maintenance Agreement, whenever in the opinion of TxDOT the aggregate of such payments shall be within the amount to which Maintenance Contractor 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 14, such excess shall be payable by Maintenance Contractor to TxDOT upon demand.

14.10 No Consequential Damages

Under no circumstances shall Maintenance Contractor be entitled to anticipatory or unearned profits or consequential or other damages as a result of a termination or partial termination under this Section 14. The payment to Maintenance Contractor determined in accordance with this Section 14 constitutes Maintenance Contractor's exclusive remedy for a termination hereunder.

14.11 No Waiver

Notwithstanding anything contained in this Capital Maintenance Agreement to the contrary, a termination under this Section 14 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 CMA Documents.

14.12 Dispute Resolution

The failure of the Parties to agree on amounts due under this Section 14 shall be a Dispute to be resolved in accordance with Section 16.

14.13 Allowability of Costs

All costs claimed by Maintenance Contractor under this Section 14 must be allowable, allocable and reasonable in accordance with the cost principles and procedures of 48 CFR Part 31.

SECTION 15. INDEMNIFICATION; RELEASES

15.1 Indemnification by Maintenance Contractor

SUBJECT TO SECTION 15.2, MAINTENANCE CONTRACTOR SHALL RELEASE, DEFEND, INDEMNIFY AND HOLD HARMLESS EACH OF THE INDEMNIFIED PARTIES FROM AND AGAINST ANY AND 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 CMA DOCUMENTS BY ANY MAINTENANCE CONTRACTOR-RELATED ENTITY.

(B) THE FAILURE OR ALLEGED FAILURE BY ANY MAINTENANCE CONTRACTOR-RELATED ENTITY TO COMPLY WITH ANY APPLICABLE LAWS OR GOVERNMENTAL APPROVALS.

(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 MAINTENANCE SERVICES, OR ARISING OUT OF ANY USE IN CONNECTION WITH THE PROJECT OR ANY DEVELOPMENT OF METHODS, PROCESSES, DESIGNS, INFORMATION, OR OTHER ITEMS FURNISHED OR COMMUNICATED TO TXDOT OR ANOTHER INDEMNIFIED PARTY PURSUANT TO THIS CAPITAL MAINTENANCE AGREEMENT; PROVIDED THAT THIS INDEMNITY SHALL NOT APPLY TO ANY INFRINGEMENT RESULTING FROM TXDOT'S FAILURE TO COMPLY WITH SPECIFIC WRITTEN INSTRUCTIONS REGARDING USE PROVIDED TO TXDOT BY MAINTENANCE CONTRACTOR.

(D) THE ACTUAL OR ALLEGED CULPABLE ACT, ERROR OMISSION, NEGLIGENCE, BREACH OR MISCONDUCT BY ANY MAINTENANCE CONTRACTOR-RELATED ENTITY IN OR ASSOCIATED WITH THE PERFORMANCE OF THE MAINTENANCE SERVICES.

(E) ANY AND ALL CLAIMS BY ANY GOVERNMENTAL ENTITY CLAIMING TAXES BASED ON GROSS RECEIPTS, PURCHASES OR SALES, THE USE OF ANY PROPERTY OR INCOME OF ANY MAINTENANCE CONTRACTOR-RELATED ENTITY WITH RESPECT TO ANY PAYMENT FOR THE MAINTENANCE SERVICES MADE TO OR EARNED BY ANY MAINTENANCE CONTRACTOR-RELATED ENTITY.

(F) ANY AND ALL STOP NOTICES AND/OR LIENS FILED IN CONNECTION WITH THE MAINTENANCE SERVICES, PROVIDED THAT TXDOT HAS PAID ALL UNDISPUTED AMOUNTS OWING TO MAINTENANCE CONTRACTOR WITH RESPECT TO SUCH MAINTENANCE SERVICES.

(G) ANY RELEASE(S) OF HAZARDOUS MATERIALS ATTRIBUTABLE TO THE ACTIONS, OMISSIONS, NEGLIGENCE, INTENTIONAL MISCONDUCT, OR BREACH OF APPLICABLE LAW OR CONTRACT BY ANY MAINTENANCE CONTRACTOR-RELATED ENTITY; OR THE RELEASE OF ANY HAZARDOUS MATERIALS CAUSED TO BE PRESENT ON THE PROJECT ROW OR ELSEWHERE BY ANY MAINTENANCE CONTRACTOR-RELATED ENTITY REGARDLESS OF WHETHER THOSE ARE THE PERSONS WHO ACTUALLY CAUSED THE RELEASE AND REGARDLESS OF THE CAUSE FOR THE RELEASE.

(H) THE CLAIM OR ASSERTION BY ANY OTHER CONTRACTOR THAT ANY MAINTENANCE CONTRACTOR-RELATED ENTITY INTERFERED WITH OR HINDERED THE PROGRESS OR COMPLETION OF WORK BEING PERFORMED BY SUCH OTHER CONTRACTOR, OR FAILED TO COOPERATE REASONABLY WITH SUCH OTHER CONTRACTOR, SO AS TO CAUSE INCONVENIENCE, DISRUPTION, DELAY OR LOSS, EXCEPT WHERE A MAINTENANCE CONTRACTOR-RELATED ENTITY WAS NOT IN ANY MANNER ENGAGED IN PERFORMANCE OF THE MAINTENANCE SERVICES.

(I) ERRORS, OMISSIONS, INCONSISTENCIES OR OTHER DEFECTS IN THE PROJECT DESIGN OR CONSTRUCTION, REGARDLESS OF WHETHER SUCH ERRORS, OMISSIONS, INCONSISTENCIES OR DEFECTS WERE ALSO INCLUDED IN THE SCHEMATIC DESIGN OR REFERENCE INFORMATION DOCUMENTS.

(J) (i) ANY MAINTENANCE CONTRACTOR-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 MAINTENANCE CONTRACTOR OR (ii) THE ACTS OR OMISSIONS OF ANY MAINTENANCE CONTRACTOR-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 IS PREVIOUSLY DISCLOSED OR KNOWN TO MAINTENANCE CONTRACTOR.

(K) INVERSE CONDEMNATION, TRESPASS, NUISANCE OR SIMILAR TAKING OF OR HARM TO REAL PROPERTY BY REASON OF: (i) THE

FAILURE OF ANY MAINTENANCE CONTRACTOR-RELATED ENTITY TO COMPLY WITH GOOD INDUSTRY PRACTICES, REQUIREMENTS OF THE CMA, MAINTENANCE MANAGEMENT PLAN OR GOVERNMENTAL APPROVALS RESPECTING CONTROL AND MITIGATION OF CONSTRUCTION ACTIVITIES AND CONSTRUCTION IMPACTS, (ii) THE INTENTIONAL MISCONDUCT OR NEGLIGENCE OF ANY MAINTENANCE CONTRACTOR-RELATED ENTITY, OR (iii) THE ACTUAL PHYSICAL ENTRY ONTO OR ENCROACHMENT UPON ANOTHER'S PROPERTY BY ANY MAINTENANCE CONTRACTOR-RELATED ENTITY.

15.2 Restrictions

Subject to the releases and disclaimers herein, Maintenance Contractor's indemnity obligations under Section 15.1 shall not extend to any Losses incurred by an Indemnified Party 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 CMA Documents, or

(c) An Indemnified Party's violation of any Laws or Governmental Approvals.

15.3 Employee Claims

With respect to claims by an employee of any Maintenance Contractor-Related Entity, a Subcontractor or anyone directly or indirectly employed by them or anyone for whose acts they may be liable, the indemnification obligation under Section 15.1 shall not be limited by a limitation on the amount or type of damages, compensation or benefits payable by or for Maintenance Contractor or a Subcontractor under workers' compensation, disability benefit or other employee benefits laws.

15.4 Right to Rely

Maintenance Contractor hereby acknowledges and agrees that it is Maintenance Contractor's obligation to perform the Maintenance Services in accordance with the CMA Documents and that the Indemnified Parties are fully entitled to rely on Maintenance Contractor's performance of such obligation. Maintenance Contractor further agrees that any certificate, review and/or approval by TxDOT and/or others hereunder shall not relieve Maintenance Contractor of any of its obligations under the CMA Documents or in any way diminish its liability for performance of such obligations or its obligations under this Section 15.

15.5 CERCLA Agreement

The indemnities set forth in Sections 15.1.1(G) 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.

15.6 No Effect on Other Rights

The obligations under this Section 15 shall not be construed to negate, abridge, or reduce other rights or obligations which would otherwise exist in favor of an Indemnified Party hereunder.

15.7 No Relief from Responsibility

No rights of TxDOT described in this Section 15, no exercise or failure to exercise such rights, no failure of TxDOT to meet any particular standard of care in the exercise of such rights and no certificates or statements by TxDOT regarding completion or acceptance shall:

(a) relieve Maintenance Contractor of its responsibility for the selection and the competent performance of all Maintenance Contractor-Related Entities;

(b) relieve Maintenance Contractor of any of its obligations or liabilities under the CMA Documents;

(c) be deemed or construed to waive any of TxDOT's rights and remedies under the CMA Documents; or

(d) be deemed or construed as any kind of representation or warranty, express or implied, by TxDOT.

15.8 Third Parties Definition

For purposes of this Section 15.8, "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.

SECTION 16. PARTNERING AND DISPUTE RESOLUTION

16.1 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 Maintenance Services.

16.2 Partnering

16.2.1 Schedule; Participation

As soon as possible after issuance of Maintenance NTP1, TxDOT and Maintenance Contractor shall jointly select a third-party facilitator to conduct the partnering meetings. The cost of the facilitator shall be shared equally by TxDOT and Maintenance Contractor. 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.

16.2.2 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.

16.3 Dispute Resolution Procedures

16.3.1 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 16.3 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 CMA documents.

(b) The provisions of this Section 16.3 are intended to accord with Section 201.112 of the Code and the DRP Rules promulgated thereunder.

(c) As used in this Section 16.3, the phrase "the procedures established in this Section 16.3" includes the procedures established in this Section 16.3, the Disputes Board Agreement, the DRP Rules, the Code, and the Texas Government Code.

(d) All Disputes arising under the CMA 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 Maintenance Contractor under Section 16.3.1.1; and

(ii) Ineligible Matters.

(e) Any disagreement between the Parties as to whether the Informal Resolution Procedures and/or the Dispute Resolution Procedures apply to a particular Dispute shall be treated as a Dispute for resolution in accordance with this Section 16.3.

(f) With respect to any Dispute for resolution in accordance with the procedures established in this Section 16.3, 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.

16.3.1.1 Jurisdiction of Travis County, Texas District Courts

TxDOT may invoke the jurisdiction of the district courts of Travis County, Texas to petition for equitable relief against Maintenance Contractor, including temporary restraining orders, injunctions, other interim or final declaratory relief or the appointment of a receiver, to the extent allowed by Law

16.3.1.2 Matters Ineligible for Dispute Resolution Procedures

The Dispute Resolution Procedures shall not apply to the following (collectively, "Ineligible Matters"):

(a) Any matters that the CMA documents expressly state are final, binding or not subject to dispute resolution;

(b) Any claim or dispute that does not arise under the CMA documents;

(c) Any claim that is not actionable against TxDOT by Maintenance Contractor on its own behalf or on behalf of its Subcontractors in accordance with Section 16.4;

(d) Any claim for indemnity under Section 15;

(e) Any claim for injunctive relief;

(f) Any claim against an insurance company, including any Subcontractor Dispute that is covered by insurance;

(g) Any claim arising solely in tort or that is covered by the

Texas Tort Claims Act;

(h) Any claim arising out of or relating to any Utility Adjustment where the Utility Owner is a necessary party (unless, and only to the extent that, the applicable Utility Agreement provides for resolution of claims as set forth in this Section 16);

(i) Any claim or dispute that is the subject of litigation in a lawsuit filed in court to which the procedures established in this Section 16.3 do not apply, including any effort to interplead a Party into such a lawsuit in order to make the procedures established in this Section 16.3 applicable;

(j) Any claim for, or dispute based on, remedies expressly created by statute; and

(k) Any Dispute that is actionable only against a Surety.

16.3.2 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 16.3.3 other than Section 16.3.3.3 (collectively, the "Informal Resolution Procedures"). Time limitations set forth for the Informal Resolution Procedures may be changed by mutual written agreement of the Parties. Changes to the time limitations for the Informal Resolution Procedures agreed upon by the Parties shall pertain to the particular Dispute only and shall not affect the time limitations for the Informal Resolution Procedures applicable to any subsequently arising Disputes.

16.3.3 Informal Resolution Procedures

16.3.3.1 Notice of Dispute to Designated Agent

(a) A Party desiring to pursue a Dispute against the other Party shall initiate the Informal Resolution Procedures by serving a written notice on the responding Party's designated agent. Unless otherwise indicated by written notice from one Party to the other Party, each Party's designated agent shall be its Authorized Representative. The notice shall contain a concise statement describing:

(i) If the Parties have mutually agreed that the Dispute is a Fast-Track Dispute;

(ii) The date of the act, inaction or omission giving rise to the Dispute;

(iii) An explanation of the Dispute, including a description of its nature, circumstances and cause;

(iv) A reference to any pertinent provision(s) from the CMA 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 Facility Schedule and Milestone Schedule 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 Milestone Schedule Deadlines);

(vii) If applicable, the claiming Party's plan for mitigating the amount claimed and the delay claimed;

(viii) The claiming Party's desired resolution of the Dispute; and

(ix) Any other information the claiming Party considers relevant.

(b) The notice shall be signed by the designated representative of the Party asserting the Dispute, and shall constitute a certification by the Party asserting the Dispute that:

(i) The notice of Dispute is served in good faith; and

(ii) To the then current knowledge of such Party, except as to matters stated in the notice of Dispute as being unknown or subject to discovery, (1) all supporting information is reasonably believed by the Party asserting the Dispute to be accurate and complete and (2) the Dispute accurately reflects the amount of money or other right, remedy or relief to which the Party asserting the Dispute reasonably believes it is entitled; and

(iii) The designated representative is duly authorized to execute and deliver the notice and such certification on behalf of the claiming Party.

(c) If the responding Party agrees with the claiming Party's position and desired resolution of the Dispute, it shall so state in a written response. The notice of the Dispute and such response shall suffice to evidence the Parties' resolution of the subject Dispute unless either Party requests further documentation. Upon either Party's request, within five Business Days after the claiming Party's receipt of the responding Party's response in agreement, the Parties' designated representatives shall state the resolution of the Dispute in writing as appropriate, including execution of Change Orders or other documentation as needed, and thereafter each Party shall then promptly perform its respective obligations in accordance with the agreed resolution of the Dispute.

(d) The Party asserting the Dispute shall not be prejudiced by its initial statement of the Dispute and shall have the ability at any time during the Informal Resolution Procedures and Dispute Resolution Procedures to modify its statement of the Dispute and/or the amount of money or other right, remedy or relief sought.

16.3.3.2 Fast-Track Disputes

With respect to any Dispute that the Parties mutually designate as a Fast-Track Dispute, the Informal Resolution Procedures shall be abbreviated in that the procedure contemplated in Section 16.3.3.3 shall not be required.

16.3.3.3 CEO / Executive Director Meetings

Commencing within 10 Business Days after the notice of Dispute is served and concluding 10 Business Days thereafter, the Chief Executive Officer of Maintenance Contractor 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, Maintenance Contractor 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.

16.3.3.4 Failure to Resolve Dispute With Informal Resolution Procedures

If a Dispute is not timely resolved under the Informal Resolution Procedures, then within 15 days (seven days for Fast-Track Disputes) after the conclusion of the time periods for Informal Resolution Procedures, if such Dispute was not resolved to the Parties' satisfaction:

(i) The Parties may mutually agree to initiate mediation or other alternative dispute resolution process in accordance with Section 16.3.7; or

(ii) Either Party may refer the Dispute to the Disputes Board for resolution pursuant to Section 16.3.4.2.

16.3.4 Disputes Board; Finality of Disputes Board Decision

16.3.4.1 Disputes Board Agreement

(a) The Parties executed the Disputes Board Agreement on even date herewith. The Disputes Board Agreement governs all aspects of the Disputes Board, as well as all rights and responsibilities of the Parties with respect to the Disputes Board, that are not otherwise addressed in this Section 16.3, the DRP Rules and the Code.

(b) If the composition of either Party's Disputes Board Member Candidates' List has not been finalized prior to the Effective Date, that Party shall

promptly appoint the members in accordance with the requirements and procedures of the Disputes Board Agreement.

(c) The Disputes Board shall conduct proceedings and, upon completion of its proceedings, issue written findings of fact, written conclusions of law, and a written decision to TxDOT and Maintenance Contractor.

(d) The Disputes Board shall have the authority to resolve any Dispute other than Ineligible Matters and any actions for equitable relief in district court that TxDOT is permitted to bring against Maintenance Contractor under Section 16.3.1.1.

(e) The Disputes Board shall not have the authority to order that one Party compensate the other Party for attorneys' fees and expenses.

(f) If a Disputes Board Decision awards an amount payable by one Party to the other, such amount became or shall become due and payable on the date required for payment in accordance with the applicable DRP Governed Agreement. If the date of payment is not specified in a DRP Governed Agreement, the payment shall be due ten days after the date the Final Order Implementing Decision for such decision becomes final under Section 19.3.6 (or, if the tenth day is not a Business Day, the next Business Day).

(g) Except for those matters subject to Section 16.7, interest at LIBOR on an amount payable by one Party to the other shall accrue beginning on the date such amount was due and continuing until the date such amount is paid.

(h) If the notice of Dispute fails to meet the certification requirements under Section 16.3.3.1(b), on motion of the responding Party the Disputes Board shall suspend proceedings on the Dispute until a correct and complete written certification is delivered, and shall have the discretionary authority to dismiss the Dispute for lack of a correct certification if it is not delivered within a reasonable time as set by the Disputes Board. Prior to the entry by the Disputes Board of a final decision on a Dispute, the Disputes Board shall required a defective certification to be corrected.

16.3.4.2 Submission of Dispute to Disputes Board

(a) Within 15 days (seven days for Fast-Track Disputes) after the end of the last time period under the Informal Resolution Proceedings, either Party may refer a Dispute to the Disputes Board for resolution by serving written notice on the other Party. The notice shall include the same information as a notice of Dispute issued under Section 16.3.3.1(a). Within 15 days (seven days for Fast-Track Disputes) after a Party refers a Dispute to the Disputes Board, the responding Party shall serve a written response upon the claiming Party's designated agent. The response shall include the same information as the notice of Dispute issued under Section 16.3.3.1(a), to the extent applicable; shall be signed by the designated representative of the responding Party; and shall constitute a certification by the responding Party that:

(i) The response to the claiming Party's notice of Dispute is served in good faith;

(ii) All supporting information is reasonably believed by the responding Party to be accurate and, except as otherwise reasonably explained in the response, complete; and

(iii) The responding Party disputes the amount of money or other right, remedy or relief to which the claiming Party believes it is entitled.

(b) Neither Party may attempt to seek resolution of a Dispute by the Disputes Board or litigate the merits of any Dispute in court if such Dispute is not timely referred to the Disputes Board within the 15 day time period under Section 16.3.4.2(a) above, except for Ineligible Matters and Disputes for which TxDOT is entitled to seek relief in court.

(c) The responding Party shall also assert in its response any challenge it may then have to the Dispute Board's authority to resolve the Dispute if the responding Party then believes in good faith that the Dispute is an Ineligible Matter.

16.3.4.3 Finality of Disputes Board Decision

Upon completion of the remainder of the procedures required under the Code and the DRP Rules, each Disputes Board Decision shall be final, conclusive, binding upon and enforceable against the Parties.

16.3.5 SOAH Administrative Hearings and Final Orders

16.3.5.1 Appeal of Disputes Board Decision

(a) If, within 20 days after the Disputes Board's issuance of the Disputes Board Decision to TxDOT and Maintenance Contractor (the "Appeal Period"), either Party is dissatisfied with the Disputes Board Decision due to a good faith belief that Disputes Board Error occurred, (i) Maintenance Contractor may request the Executive Director to seek and/or (ii) TxDOT may seek a formal administrative hearing before SOAH pursuant to Texas Government Code, Chapter 2001, and Section 201.112 of the Code, solely on the grounds that Disputes Board Error occurred. Upon receipt of Maintenance Contractor'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 Maintenance Contractor's request.

(b) If Maintenance Contractor does not request, and TxDOT does not seek for itself, a formal administrative hearing before SOAH under Section 16.3.5.1(a) within the Appeal Period, then within ten Business Days after the expiration of the Appeal Period, the Executive Director shall issue the Final Order Implementing Decision as a purely ministerial act. If the Executive Director fails to issue the Final Order Implementing Decision within this ten Business Day time period, the Disputes Board Decision shall become effective as the Final Order Implementing Decision for all

purposes on the next Business Day.

(c) Neither Party may attempt to:

(i) Seek an administrative hearing before SOAH on any Dispute after the Appeal Period has expired without either Party seeking an administrative hearing before SOAH;

(ii) Seek rehearing in any forum of a Dispute that is the subject of a Disputes Board Decision after the Appeal Period has expired without either Party seeking an administrative hearing before SOAH; or

(iii) Resubmit to the Disputes Board or litigate in court any Dispute that was the subject of and resolved by a prior final Disputes Board Decision.

16.3.5.2 Appeal of Disputes Board Error to SOAH

"Disputes Board Error" means one or more of the following:

(a) The Disputes Board failed, in any material respect, to properly follow or apply the procedures for handling, hearing and deciding on the Dispute established under this Section 16.3 and such failure prejudiced the rights of a Party; or

(b) The Disputes Board Decision was procured by, or there was evident partiality among the Disputes Board Members due to, a Conflict of Interest, Misconduct, corruption or fraud.

16.3.5.3 SOAH Proceeding and ALJ Proposal For Decision

(a) Upon referral to SOAH of the question of whether Disputes Board Error occurred, the ALJ shall conduct a hearing solely on the question of whether Disputes Board Error occurred. The Disputes Board's written findings of fact, conclusions of law and Disputes Board Decision; any written dissenting findings, recommendations or opinions of a minority Disputes Board Member; and all submissions to the Disputes Board by the Parties shall be admissible in the SOAH proceeding, along with all other evidence the ALJ determines to be relevant. After timely closing of the record of the SOAH proceeding, the ALJ shall timely issue to the Executive Director and Maintenance Contractor the ALJ's written proposal for decision as to whether Disputes Board Error occurred.

(b) Each Party may file exceptions to the proposal for decision with the ALJ no later than seven days after issuance of the ALJ's proposal for decision and, in response to a Party's exceptions, the other Party may file a reply to the excepting Party's exceptions with the ALJ no later than 14 days after issuance of the proposal for decision. The ALJ shall review all exceptions and replies and notify TxDOT and Maintenance Contractor no later than 21 days after issuance of the proposal for decision whether the ALJ recommends any changes to the proposal for decision,

amends the proposal for decision in response to exceptions and replies to exceptions, and/or corrects any clerical errors in the proposal for decision. The ALJ shall reissue its written proposal for decision to the Executive Director and TxDOT, together with written findings of fact and conclusions of law, if revised from those previously furnished to the Parties.

(c) Unless a Party in good faith challenges the Disputes Board's authority to resolve the Dispute because the Dispute is an Ineligible Matter (1) in the proceedings before the Disputes Board, (2) as a Disputes Board Error during the Appeal Period, (3) in the SOAH proceeding or (4) in exceptions to the ALJ's proposal for decision timely filed under Section 16.3.5.3(b) above, any objection to the Disputes Board's authority to resolve the applicable Dispute shall be deemed waived by such Party.

16.3.5.4 Final Orders of Executive Director

(a) Within 28 days after receipt of the ALJ's proposal for decision:

(i) If, upon review of the ALJ's proposal for decision, the Executive Director concludes that Disputes Board Error occurred, the Executive Director shall issue a Final Order Vacating Decision. A "Final Order Vacating Decision" means an order of the Executive Director either adopting or rejecting the ALJ's proposal for decision, as applicable (and if the Executive Director rejects the ALJ's proposal for decision, accompanied by the written explanatory statement required under Section 201.112(c) of the Code); ruling that the Disputes Board Decision is invalid, void and of no force and effect; and remanding the Dispute to the Disputes Board for reconsideration. If the nature of the Disputes Board Error was a Conflict of Interest, Misconduct fraud or corruption of a Disputes Board Member, the remanded Dispute will be reconsidered by a reconstituted Disputes Board after removal of such Disputes Board Member; or

(ii) If, upon review of the ALJ's proposal for decision, the Executive Director concludes that no Disputes Board Error occurred, the Executive Director shall issue a Final Order Implementing Decision. A "Final Order Implementing Decision" means an order of the Executive Director either adopting or rejecting the ALJ's proposal for decision, as applicable (and if the Executive Director rejects the ALJ's proposal for decision, accompanied by the written explanatory statement required under Section 201.112(c) of the Code), and approving and fully implementing the Disputes Board Decision.

(b) The Parties agree and acknowledge that the Executive Director's issuance of either type of Final Order is a purely ministerial function of the Executive Director. If the Executive Director fails to issue one or the other type of Final Order within the foregoing 28 Day time period, then on the next Business Day:

(i) If the ALJ determined that Disputes Board Error occurred, a Final Order Vacating Decision shall be deemed to have been issued for all

purposes by the Executive Director which (1) adopted the ALJ's proposal for decision; (2) ruled that the Disputes Board Decision is invalid, void and of no force and effect; and (3) remanded the Dispute to the Disputes Board for reconsideration (or, if the nature of the Disputes Board Error was a Conflict of Interest or Misconduct of a Disputes Board Member, a reconstituted Disputes Board after removal of such Disputes Board Member) without Disputes Board Error; or

(ii) If the ALJ determined that no Disputes Board Error occurred, a Final Order Implementing Decision shall be deemed to have been issued for all purposes by the Executive Director which adopted the ALJ's proposal for decision and fully implemented the Disputes Board Decision.

16.3.6 Judicial Appeal of Final Orders Under Substantial Evidence Rule

Each issued or deemed issue Final Order Implementing Decision and Final Order Vacating Decisions shall be considered a final order for purposes of Maintenance Contractor's ability to seek judicial appeal thereof under Section 201.112(d) of the Code under the substantial evidence rule. TxDOT and Maintenance Contractor 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 Maintenance Contractor 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.

16.3.7 Mediation or Other Alternative Dispute Resolution

Maintenance Contractor 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. Maintenance Contractor and TxDOT shall share equally the expenses of the mediation or other alternative dispute resolution process. If any Dispute has been referred to mediation or other alternative dispute resolution process for resolution by mutual agreement of the Parties, but the Dispute is not resolved within the foregoing 30 day period, then either Party can, on or after the 31st day, cease participating in such mediation or other alternative dispute resolution process. A Party shall give written notice to the other Party that it will no longer participate. The deadlines in this Section 16.3 for processing a Dispute are tolled, day for day, during mediation or other alternative dispute resolution.

16.3.8 Confidential Information

16.3.8.1 All discussions, negotiations, and Informal Resolution Procedures between the Parties to resolve a Dispute, and all documents and other written materials furnished to a Party or exchanged between the Parties during any

such discussions, negotiations, or Informal Resolution Procedures, shall be considered confidential and not subject to disclosure by either Party.

16.3.8.2 With respect to all discussions, negotiations, testimony and evidence between the Parties and/or in a proceeding before the Disputes Board, an administrative hearing before an ALJ or a judicial proceeding in court:

(a) All information that has been deposited into Escrow pursuant to Section 4.3.2 of the ITP shall be treated as confidential by the Parties and the Disputes Board, the ALJ and the court, as applicable, and, further, shall be subject to a protective order issued by the Disputes Board, the ALJ or the court, as applicable, to protect such information from disclosure to third Persons.

(b) Either or both Parties may also request a protective order in any Disputes Board proceeding, SOAH administrative hearing or judicial proceeding to prohibit disclosure to third Persons of any other information that such Party or Parties believe(s) is confidential. Whether such a protective order will be issued by the Disputes Board, the ALJ or the court, as applicable, shall be determined under the standards set forth in the Texas Rules of Evidence, the Texas Rules of Civil Procedure, Section 223.204 of the Code and the Public Information Act.

16.4 Dispute Resolution: Additional Requirements for Subcontractor Disputes

For purposes of this Section 16, a "Subcontractor Dispute" shall include any Dispute by a Subcontractor, including also any pass-through claims by a lower tier Subcontractor, against Maintenance Contractor that is actionable by Maintenance Contractor against TxDOT and arises from the Maintenance Services, materials or other services provided or to be provided under the CMA Documents. If Maintenance Contractor determines to pursue a Dispute against TxDOT that includes a Subcontractor Dispute, the following additional conditions shall apply:

(a) Maintenance Contractor shall identify clearly in all submissions pursuant to this Section 16, that portion of the Dispute that involves a Subcontractor Dispute.

(b) Failure of Maintenance Contractor to assert a Subcontractor Dispute on behalf of any Subcontractor at the time of submission of a related demand by Maintenance Contractor, as provided hereunder, shall constitute a release and discharge of TxDOT by Maintenance Contractor on account of, and with respect to, such Subcontractor Dispute.

(c) Maintenance Contractor shall require in all Subcontracts that all Subcontractors of any tier: (a) agree to submit Subcontractor Disputes to Maintenance Contractor in a proper form and in sufficient time to allow processing by Maintenance Contractor in accordance with this Section 16; (b) agree to be bound by the terms of this Section 16 to the extent applicable to Subcontractor Disputes; (c) agree that, to the extent a Subcontractor Dispute is involved, completion of all steps required under

this Section 16 shall be a condition precedent to pursuit by the Subcontractor of any other remedies permitted by Law, including institution of a lawsuit against Maintenance Contractor; (d) agree that any Subcontractor Dispute brought against a Surety, that also is actionable against TxDOT through Maintenance Contractor, shall be stayed until completion of all steps required under this subsection; and (e) 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 Maintenance Contractor.

16.5 Subsequent Proceedings

16.5.1 Exclusive Jurisdiction and Venue

Maintenance Contractor agrees that the exclusive jurisdiction and venue for any legal action or proceeding, at law or in equity, arising out of or relating to the CMA Documents or the Project shall be the Travis County District Court. Maintenance Contractor waives all objections it might have to the jurisdiction or venue of such court and hereby consents to such court's jurisdiction, regardless of Maintenance Contractor's residence or domicile, for any such action or proceeding.

16.5.2 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.

16.6 Continuation of Maintenance Work

At all times during this dispute resolution process or any subsequent administrative, arbitration or court proceeding, Maintenance Contractor and all Subcontractors shall proceed with the Maintenance Services, without delay, in accordance with this Capital Maintenance Agreement, and as directed by TxDOT. Maintenance Contractor acknowledges that it shall be solely responsible for any Project delay that results from its actions or inactions during the dispute resolution process, even if Maintenance Contractor's position in connection with the Dispute ultimately prevails. In addition, all Parties shall continue to comply with all provisions of the CMA Documents, the Governmental Approvals and applicable Law.

16.7 Records Related to Claims and Disputes

Throughout the course of any Maintenance Services that are the subject of any Claim or Dispute, Maintenance Contractor shall keep separate and complete records as required by Section 17. These records shall be retained for a period of not less than five years from the date of resolution of the Claim or Dispute.

16.8 Interest

This Section 16.8 applies only to claims that are subject to the Texas Prompt Payment Act, Government Code, Chapter 2251.

In the event Maintenance Contractor elects to pursue a formal Dispute with TxDOT under this Section 16, TxDOT shall notify Maintenance Contractor 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 date TxDOT receives a contract claim pursuant to Texas Transportation Code, Section 201.112 and the dispute resolution procedures established thereunder. If the resolution of a disputed claim results in the award of an amount which is less than the amount requested in the original claim then the Maintenance Contractor 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.

16.9 Attorney Fees

This Section 16.9 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 16 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 17. DOCUMENTS AND RECORDS

17.1 Escrowed Proposal Documents

Prior to execution of this Capital Maintenance Agreement, Maintenance Contractor delivered into escrow one copy of all cost, unit pricing, price quote and other documentary information used in preparation of the Maintenance Price (the "EPDs"). Upon execution of this Capital Maintenance Agreement, the EPDs shall be transferred from escrow and held in locked fireproof cabinet(s) supplied by Maintenance Contractor and located in TxDOT's project office with the key held only by Maintenance Contractor. Concurrently with approval of each Change Order or amendment to any CMA Document, one copy of all documentary information used in preparation of the Change Order or amendment shall be added to the cabinet to be held with the other EPDs. The EPDs will be held in such cabinet or otherwise maintained until all of the following have occurred: (a) Maintenance Services Warranty Period and all required extensions have expired as required under Sections 9.2.1 and 9.2.2 of this Capital Maintenance Agreement; (b) all Claims or Disputes regarding the Maintenance Services have been settled; and (c) Final Payment has been made and accepted.

17.1.1 Availability for Review

The EPDs shall be available during business hours for joint review by Maintenance Contractor, TxDOT and any dispute resolver in accordance with Section 16, in connection with approval of the Project Schedule, negotiation of Change Orders and resolution of Claims or Disputes under the CMA Documents, and also as described in Section 17.1.6. 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.

17.1.2 Proprietary Information

The EPDs are, and shall always remain, the property of Maintenance Contractor and shall be considered to be in Maintenance Contractor's possession, subject to TxDOT's right to review the EPDs as provided in this Section 17.1. Maintenance Contractor will have and control the keys to the filing cabinet containing the EPDs. TxDOT acknowledges that Maintenance Contractor 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 17.1, provided that the Parties execute a mutually agreeable confidentiality agreement with respect to EPDs that constitute trade secrets or proprietary information.

17.1.3 Representation

Maintenance Contractor represents and warrants that the EPDs constitute all documentary information used in the preparation of its Maintenance Price. Maintenance Contractor agrees that no other price proposal preparation information will be considered in resolving Disputes or Claims. Maintenance Contractor further agrees

that the EPDs are not part of the CMA Documents and that nothing in the EPDs shall change or modify any CMA Document.

17.1.4 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 Maintenance Contractor calculated the Maintenance 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 Maintenance Contractor under Section 7. 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 Maintenance Contractor to arrive at the Maintenance Price, and any adjustments to the Maintenance Price under this Capital Maintenance Agreement.

17.1.5 Form of EPDs

Except as otherwise provided in the RFP, Maintenance Contractor shall submit the EPDs in such format as is used by Maintenance Contractor in connection with its Proposal. Maintenance Contractor represents and warrants that the EPDs provided with the Proposal were personally examined by an authorized officer of Maintenance Contractor prior to delivery, and that the EPDs meet the requirements of Section 17.1.4. Maintenance Contractor further represents and warrants that all EPDs provided were or will be personally examined prior to delivery by an authorized officer of Maintenance Contractor, and that they shall meet the requirements of Section 17.1.4.

17.1.6 Review by TxDOT

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, Maintenance Contractor 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. Maintenance Contractor shall have no right to add documents to the EPDs except upon TxDOT's request. The EPDs associated with any Change Order or Maintenance Price adjustment under this Capital Maintenance Agreement shall be reviewed, organized and indexed in the same manner described in Section 4.4 of the ITP.

17.2 Subcontract Pricing Documents

Maintenance Contractor shall require each Major Subcontractor to submit to Maintenance Contractor 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, Maintenance Contractor and dispute resolvers, on terms substantially similar to those contained herein. Each such Subcontract shall include a representation and warranty from the Subcontractor, for the benefit of Maintenance Contractor and TxDOT, stating that its EPDs constitute all the documentary information used in establishing its Subcontract price, and agreeing to provide a sworn certification in favor of Maintenance Contractor 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 Maintenance Contractor and/or TxDOT in connection with any claim made by such Subcontractor.

17.3 Reporting Requirements

17.3.1 Maintenance Contractor shall deliver to TxDOT financial and narrative reports, statements, certifications, budgets and information as and when required under the CMA Documents.

17.3.2 Maintenance Contractor 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 Maintenance Services or the CMA Documents. In addition, Maintenance Contractor shall deliver to TxDOT the following financial statements for each Guarantor, at the times specified below:

17.3.2.1 Within 60 days after the end of each fiscal quarter, duplicate copies of the balance sheet and a consolidated statement of earnings of the Guarantor and its consolidated subsidiaries for such quarter and for the period from the beginning of the then current fiscal year to the end of such quarter, setting forth in comparative form the figures for the corresponding periods during the previous fiscal year, all in reasonable detail and certified as complete and correct, subject to changes resulting from year-end adjustments, by the chief financial officer of the Guarantor;

17.3.2.2 Within 120 days after the end of each fiscal year, duplicate copies of the financial statements (which shall include a balance sheet and a consolidated statement of financial condition of the Guarantor and its consolidated subsidiaries at the end of such year, and statements of earnings, changes in financial position of the Guarantor and its consolidated subsidiaries for such year, and all related notes to the financial statements, setting forth in each case in comparative form the figures for the previous fiscal year), all in reasonable detail and accompanied by an opinion thereon of an independent public accountant of recognized national standing selected by the Guarantor, which opinion shall state that such financial statements have

been prepared in accordance with Generally Accepted Accounting Principles consistently applied, and that the examination of such accountants in connection with such financial statements has been made in accordance with generally accepted auditing standards, and accordingly, included such tests of the accounting records and such other auditing procedures as were considered necessary in the circumstances. If financial statements are prepared in accordance with principles other than U.S. GAAP, a letter from the certified public accountant of the applicable entity, discussing the areas of the financial statements that would be affected by a conversion to U.S. GAAP is required; and

17.3.2.3 Upon request of TxDOT for particular fiscal quarters, copies of all other financial statements and information reported by the Guarantor to its shareholders generally and of all reports filed by the Guarantor with the Securities Exchange Commission under Sections 13, 14 or 15(d) of the Exchange Act, to be provided to TxDOT as soon as practicable after furnishing such information to the Guarantor's shareholders or filing such reports with the Securities and Exchange Commission, as the case may be.

17.3.3 Maintenance Contractor 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, Maintenance Contractor 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. Maintenance Contractor shall provide customary representations and warranties to TxDOT and the capital markets as to the correctness, completeness and accuracy of any information furnished.

17.3.4 Maintenance Contractor 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, UST, FHWA and/or any other Governmental Entity with jurisdiction over the Project.

17.3.5 All reports and information delivered by Maintenance Contractor under Sections 17.3.3 and 17.3.4 shall also be delivered electronically, to the extent electronic files exist, and be suitable for posting on the web.

17.4 Maintenance of, Access to and Audit of Records

17.4.1 Except for EPDs (which shall be maintained as set forth in Section 17.1), Maintenance Contractor shall maintain at a location TxDOT approves in writing in its sole discretion, a complete set of all books and records prepared or received by Maintenance Contractor in its management, scheduling, cost accounting and other activities related to the Maintenance Services and the Project in accordance with the applicable provisions of the CMA Documents. Maintenance Contractor shall grant to TxDOT such audit rights and shall allow TxDOT and its designated representatives

such access to and the right to copy such books and records as TxDOT may request in connection with the issuance of Change Orders, the resolution of Claims and Disputes, and such other matters as TxDOT reasonably deems necessary for purposes of verifying compliance with the CMA Documents and applicable Law.

17.4.2 Where the payment method for any Maintenance Services is on a time and materials basis, such examination and audit rights shall include all books, records, documents and other evidence and accounting principles and practices sufficient to reflect properly all direct and indirect costs of whatever nature claimed to have been incurred and anticipated to be incurred for the performance of such Maintenance Services. If an audit indicates Maintenance Contractor has been overpaid under a previous payment, the excess payment will be credited against current payments.

17.4.3 For cost and pricing data submitted in connection with pricing Change Orders, TxDOT and its representatives shall have the right to examine and copy all books, records, documents and other data of Maintenance Contractor related to the negotiation of or performance of Maintenance Services under such Change Orders for the purpose of evaluating the accuracy, completeness and currency of the cost or pricing data submitted; provided, however, that the foregoing shall not apply to pricing based on adequate price competition, established catalog or market prices of commercial items sold in substantial quantities to the public or prices set by Law, in each case, as determined by TxDOT. Such right of examination shall extend to all documents deemed necessary by TxDOT and its representative to permit adequate evaluation of the cost or pricing data submitted, along with the computations and projections used therein.

17.4.4 All Claims or Disputes filed against TxDOT shall be subject to audit at any time following the filing of the Claim or Dispute. The audit may be performed by employees of TxDOT or by an auditor under contract with TxDOT. No notice is required before commencing any audit within 60 days after termination of this Capital Maintenance Agreement. Thereafter, TxDOT shall provide 20 days notice to Maintenance Contractor, any Subcontractors or their respective agents before commencing an audit. Maintenance Contractor, Subcontractors or their agents shall provide adequate facilities, acceptable to TxDOT, for the audit during normal business hours. Maintenance Contractor, Subcontractors or their agents shall cooperate with the auditors. Failure of Maintenance Contractor, 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 Maintenance Contractor, Subcontractors or their agents shall constitute a waiver of the Claim or Dispute and shall bar any recovery thereunder.

17.4.5 At a minimum, the auditors shall have available to them the following documents:

1. Daily time sheets and supervisor's daily reports;

2. Union agreements;

3. Insurance, welfare, and benefits records;

4. Payroll registers;

5. Earnings records;

6. Payroll tax forms;

7. Material invoices and requisitions;

8. Material cost distribution work sheet;

9. Equipment records (list of company equipment, rates, etc.);

10. Subcontractors' (including Suppliers) invoices;

11. Subcontractors' and agents' payment certificates;

12. Canceled checks (payroll and Suppliers);

13. Job cost report;

14. Job payroll ledger;

15. General ledger;

16. Cash disbursements journal;

17. 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

18. 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.

17.4.6 Full compliance by Maintenance Contractor with the provisions of this Section 17.4 is a contractual condition precedent to Maintenance Contractor's right to seek relief under Section 16.

17.4.7 Maintenance Contractor represents and warrants the completeness and accuracy of all information it or its agents provides in connection with this Section 17.4, and shall cause all Subcontractors to warrant the completeness and accuracy of all information such Subcontractors or their agents provides in connection with this Section 17.4.

17.4.8 TxDOT's rights of audit include the right to observe the business operations of Maintenance Contractor and its Subcontractors to confirm the accuracy of books and records.

17.4.9 Nothing in the CMA 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. Maintenance Contractor 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 Capital Maintenance Agreement or indirectly through a Subcontract, (b) acceptance of funds directly under this Capital Maintenance 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.

17.5 Retention of Records

Except for EPDs (which shall be maintained as set forth in Section 17.1), Maintenance Contractor shall maintain all records and documents relating to the Maintenance Services, including copies of all original documents delivered to TxDOT, and the Project in Tarrant County, Texas until five years after termination of this Capital Maintenance Agreement. Maintenance Contractor shall notify TxDOT where such records and documents are kept. Notwithstanding the foregoing, all records which relate to Claims or Disputes being processed or actions brought under the dispute resolution provisions hereof shall be retained and made available until such Claims or Disputes have been finally resolved. Records to be retained include all books, electronic information and files and other evidence bearing on Maintenance Contractor's costs under the CMA Documents. Maintenance Contractor shall make these records and documents available for audit and inspection to TxDOT, at Maintenance Contractor's offices in Tarrant County, Texas, at all reasonable times, without charge, and shall allow such Persons to make copies of such documents, at no expense to Maintenance Contractor. If approved by TxDOT, photographs, microphotographs or other authentic reproductions may be maintained instead of original records and documents.

17.6 Public Information Act

17.6.1 Maintenance Contractor 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 Maintenance Contractor, are subject to the provisions of the Public Information Act. If Maintenance Contractor 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, Maintenance Contractor 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 17.6 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. Maintenance Contractor is advised to contact legal counsel concerning such Law and its application to Maintenance Contractor.

17.6.2 If TxDOT receives a request for public disclosure of materials marked "CONFIDENTIAL," TxDOT will use reasonable efforts to notify Maintenance Contractor of the request and give Maintenance Contractor 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 Maintenance Contractor 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.

17.6.3 In the event of any proceeding or litigation concerning the disclosure of any material submitted by Maintenance Contractor 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 Maintenance Contractor shall be fully responsible for otherwise prosecuting or defending any action concerning the materials at its sole cost and risk; provided, however, that TxDOT reserves the right, in its sole discretion, to intervene or participate in the litigation in such manner as it deems necessary or desirable. Except in the case of TxDOT's voluntary intervention or participation in litigation, Maintenance Contractor shall pay and reimburse TxDOT within 30 days after receipt of written demand and reasonable supporting documentation for all costs and fees, including attorneys' fees and costs, TxDOT incurs in connection with any litigation, proceeding or request for disclosure.

17.7 Ownership and Use of Documents

All data, sketches, charts, calculations, plans, specifications, electronic files, correspondence and other documents created or collected under the terms of the CMA 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 Maintenance Contractor in connection with the performance of its obligations under the CMA Documents, including studies, manuals, as-built drawings, technical and other reports and the like, shall become the property of TxDOT upon Maintenance Contractor's preparation or receipt thereof. Copies of all Design Documents and Construction Documents shall be furnished to TxDOT upon preparation or receipt thereof by Maintenance Contractor. Maintenance

Contractor shall maintain all other documents described in this Section 17.7 in accordance with the requirements of Section 17.4 and shall deliver copies to TxDOT as required by the CMA Documents or upon request if not otherwise required to be delivered, with an indexed set delivered to TxDOT as a condition to Final Payment.

SECTION 18. MISCELLANEOUS PROVISIONS

18.1 Amendments

The CMA 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 Capital Maintenance Agreement.

18.2 Waiver

18.2.1 No waiver of any term, covenant or condition of the CMA Documents shall be valid unless in writing and signed by the obligee Party.

18.2.2 The exercise by a Party of any right or remedy provided under the CMA 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 CMA Documents shall be deemed to be a waiver of any other or subsequent right or remedy under the CMA 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.

18.2.3 Except as provided otherwise in the CMA 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 CMA Documents.

18.2.4 Either Party's waiver of any breach or failure to enforce any of the terms, covenants, conditions or other provisions of the CMA 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 CMA Documents without documenting such interpretation by an instrument in writing signed by both Parties, such interpretation and implementation thereof will not be binding in the event of any future Claims or Disputes.

18.3 Independent Contractor

18.3.1 Maintenance Contractor is an independent contractor, and nothing contained in the CMA Documents shall be construed as constituting any relationship with TxDOT other than that of independent contractor.

18.3.2 Nothing in the CMA Documents is intended or shall be construed to create any partnership, joint venture or similar relationship between TxDOT and Maintenance Contractor; 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 "public-private partnership" 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 Maintenance Contractor's financial decisions or discretionary actions concerning the Project and the Maintenance Services.

18.3.3 In no event shall the relationship between TxDOT and Maintenance Contractor be construed as creating any relationship whatsoever between TxDOT and Maintenance Contractor's employees. Neither Maintenance Contractor nor any of its employees is or shall be deemed to be an employee of TxDOT. Except as otherwise specified in the CMA Documents, Maintenance Contractor 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 Maintenance Contractor or any Subcontractor hires to perform or assist in performing the Maintenance Services.

18.4 Successors and Assigns

18.4.1 The CMA Documents shall be binding upon and inure to the benefit of TxDOT and Maintenance Contractor and their permitted successors, assigns and legal representatives.

18.4.2 TxDOT may assign all or part of its right, title and interest in and to any CMA Documents, including rights with respect to the Payment Bond, Performance Bond, Letter of Credit and Guaranty: (a) without Maintenance Contractor's consent, to any other Person that succeeds to the governmental powers and authority of TxDOT, and (b), to any other Person with the prior written consent of Maintenance Contractor and Surety.

18.4.3 Maintenance Contractor may not, without the prior written consent of TxDOT in its sole discretion, voluntarily or involuntarily assign, convey, transfer, pledge, mortgage or otherwise encumber its rights or interests under the CMA Documents. No partner, joint venturer, member or shareholder of Maintenance Contractor may assign, convey, transfer, pledge, mortgage or otherwise encumber its ownership interest in Maintenance Contractor without the prior written consent of TxDOT, in TxDOT's sole discretion.

18.5 Designation of Representatives; Cooperation with Representatives

18.5.1 TxDOT and Maintenance Contractor shall each designate an individual or individuals who shall be authorized to make decisions and bind the Parties on matters relating to the CMA Documents ("Authorized Representative"). Exhibit 13 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 18.10. The Parties may also designate technical representatives who shall be authorized to investigate and report on matters relating to the Maintenance Services

and negotiate on behalf of each of the Parties, but who do not have authority to bind TxDOT or Maintenance Contractor.

18.5.2 Maintenance Contractor shall cooperate with TxDOT and all representatives of TxDOT designated as described above.

18.6 Survival

Maintenance Contractor's representations and warranties, the dispute resolution provisions contained in Section 16, the indemnifications and releases contained in Section 15, the express rights and obligations of the Parties following termination of this Capital Maintenance Agreement under Sections 12 and 14, and all other provisions which by their inherent character should survive termination of this Capital Maintenance Agreement and/or Final Payment, shall survive the termination of this Capital Maintenance Agreement and Final Payment.

18.7 Limitation on Third Party Beneficiaries

It is not intended by any of the provisions of the CMA 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 18.7, the duties, obligations and responsibilities of the Parties to the CMA Documents with respect to third parties shall remain as imposed by Law. The CMA Documents shall not be construed to create a contractual relationship of any kind between TxDOT and a Subcontractor or any Person other than Maintenance Contractor.

18.8 Tort Liability; Personal Liability of TxDOT Employees

18.8.1 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 CMA Documents. They shall not be liable to any Maintenance Contractor-Related Entity either personally or as employees of TxDOT for actions in their ordinary course of employment.

18.8.2 No agent, consultant, officer or authorized employee of TxDOT nor any member of the Commission, shall be personally responsible to any Maintenance Contractor-Related Entity or any liability arising under the CMA Documents.

18.8.3 The Parties agree to provide to each other's Authorized Representative written notice of any claim which such Party may receive from any third party relating in any way to the matters addressed in the CMA Documents, and shall otherwise provide notice in such form and within such period as is required by Law.

18.8.4 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

Maintenance Contractor 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 Maintenance Contractor-Related Entity. Maintenance Contractor expressly acknowledges and agrees that TxDOT's rights in this Capital Maintenance Agreement to take any action with respect to the Project, including the right to review, comment on, disapprove and/or accept designs, plans, specifications, work plans, construction, installation, traffic management details, safety plan and the like, are discretionary in nature and exist solely for the benefit and protection of TxDOT and do not create or impose upon TxDOT any standard or duty of care toward Maintenance Contractor or any other Person, all of which are hereby expressly disclaimed.

18.9 Consequential Damages

Under no circumstances shall TxDOT be liable 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 Maintenance Contractor hereby releases TxDOT from any such liability.

18.10 Governing Law

The CMA Documents shall be governed by and construed in accordance with the Laws of the State of Texas.

18.11 Notices and Communications

18.11.1 Notices under the CMA 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 18.10.2 and 18.10.3, as applicable (or to such other address as may from time to time be specified in writing by such Person).

18.11.2 All notices, correspondence and other communications to Maintenance Contractor shall be delivered to the following address or as otherwise directed by Maintenance Contractor's Authorized Representative:

NorthGate Constructors, J.V.
7651 Esters Boulevard
Building A, Suite 150
Irving, TX 75063
Telephone: (972) 536-8620
Facsimile: (972) 962-6727
E-mail: keith.sasich@northgateconstructors.com

In addition, copies of all notices to proceed and suspension, termination and default notices shall be delivered to the following Persons:

J. Samuel Gilmore
Kiewit Development Company
3555 Farnam
Omaha, NE 68131
Telephone: (402) 536-3617
Facsimile: (402) 271-2920
E-mail: sam.gilmore@kiewit.com

18.11.3 All notices, correspondence and other communications to TxDOT shall be marked as regarding the DFW Connector and shall be delivered to the following address or as otherwise directed by TxDOT's Authorized Representative:

Texas Department of Transportation
Texas Turnpike Authority Division
125 East 11th Street
Austin, Texas 78701
Attn: Edward P. Pensock, P.E.
Telephone: (512) 936-0980
Facsimile: (512) 936-0970

E-mail: epensoc@dot.state.tx.us

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

Texas Department of Transportation
Office of General Counsel
125 East 11th Street
Austin, Texas 78701
Attn: Office of General Counsel
Telephone: (512) 463-8630
Facsimile: (512) 475-3070
E-mail: jingram@dot.state.tx.us

18.11.4 Notices shall be deemed received when actually received in the office of the addressee (or by the addressee if personally delivered) or when delivery is refused, as shown on the receipt of the U. S. Postal Service, private carrier or other Person making the delivery. Notwithstanding the foregoing, notices sent by telefacsimile after 4:00 p.m. Central Standard or Daylight Time (as applicable) and all other notices received after 5:00 p.m. shall be deemed received on the first Business Day following delivery (that is, in order for a fax to be deemed received on the same day, at least the first page of the fax must have been received before 4:00 p.m.). Any technical or other communications pertaining to the Maintenance Services shall be conducted by Maintenance Contractor's Authorized Representative and technical representatives designated by TxDOT.

18.12 Taxes

18.12.1 Maintenance Contractor shall pay, prior to delinquency, all applicable taxes. Maintenance Contractor shall have no right to an adjustment to the Maintenance Price or any other Claim, except as provided in Section 18.12.2, due to its misinterpretation of Laws respecting taxes or incorrect assumptions regarding applicability of taxes.

18.12.2 With respect to Expendable Materials any Maintenance Contractor-Related Entity purchases, Maintenance Contractor shall submit or cause the Maintenance Contractor-Related Entity to submit a "Texas Sales and Use Tax Exemption Certification" to the seller of the Expendable Materials. In the event Maintenance Contractor is thereafter required by the State Comptroller to pay sales tax on Expendable Materials, TxDOT shall reimburse Maintenance Contractor for such sales tax. Reimbursement shall be due within 60 days after TxDOT receives from Maintenance Contractor 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. Maintenance Contractor 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 Maintenance Services are not wholly used or expended on the Project, such that they do not qualify as Expendable Materials, Maintenance Contractor will be responsible for applicable sales taxes.

18.13 Interest on Amounts Due and Owing

Unless expressly provided otherwise in this Capital Maintenance 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 Capital Maintenance Agreement shall earn interest from the date on which such amount is due and owing at the lesser of: (i) 12% per annum or (ii) the maximum rate allowable under applicable Law.

18.14 Further Assurances

Maintenance Contractor shall promptly execute and deliver to TxDOT all such instruments and other documents and assurances as are reasonably requested by TxDOT to further evidence the obligations of Maintenance Contractor hereunder, including assurances regarding the validity of: (a) the assignments of Subcontracts contained herein and (b) any instruments securing performance hereof.

18.15 Severability

If any clause, provision, section or part of the CMA Documents is ruled invalid under Section 16 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 Maintenance Price to account for any change in the Maintenance Services 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 CMA Documents, which shall be construed and enforced as if the CMA Documents did not contain such invalid or unenforceable clause, provision, section or part.

18.16 Headings

The captions of the sections of this Capital Maintenance Agreement are for convenience only and shall not be deemed part of this Capital Maintenance Agreement or considered in construing this Capital Maintenance Agreement.

18.17 Entire Agreement

The CMA 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.

18.18 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, the Parties, intending to be legally bound, have executed this Capital Maintenance Agreement on the date first written above.

MAINTENANCE CONTRACTOR: **NorthGate Constructors, J.V.**

By: Kiewit Texas Construction L.P,
Managing Partner

By: _____
Name: Keith Sasich
Title: President

By: Zachry Construction Corporation

By: _____
Name: Jean Abiassi
Title: Vice President

TxDOT: Texas Department of Transportation

By: _____
Name: Amadeo Saenz, Jr., P.E.
Title: Executive Director