Texas Department of Transportation
Technical Provisions

North Tarrant Express Project

Section 6 Attachments
Utility Adjustments

Form ROW-U-48
Rev. 12/2004
Replaces Form D-15-48
GSD-EPC

STATEMENT COVERING UTILITY CONSTRUCTION CONTRACT WORK

(AS APPEARING IN ESTIMATE)

U-No.

District:
County: ROW CSJ No.:
Federal Project No.: Highway No.:

I, , a duly authorized and qualified representative of , hereinafter referred to as **Owner**, am fully cognizant of the facts and make the following statements in respect to work which will or may be done on a contract basis as appears in the estimate to which this statement is attached.

It is more economical and/or expedient for **Owner** to contract this adjustment, or **Owner** is not adequately staffed or equipped to perform the necessary work on this project with its own forces to the extent as indicate on the estimate.

Procedure to be Used in Contracting Work

☐ A. Solicitation for bids is to be accomplished through open advertising and contract is to be awarded to the lowest qualified bidder who submits a proposal in conformity with the requirements and specifications for the work to be performed.

☐ B. Solicitation for bids is to be accomplished by circulating to a list of pre-qualified contractors or known qualified contractors and such contract is to be awarded to the lowest qualified bidder who submits a proposal in conformity with the requirements and specifications for the work to be performed. Such presently known contractors are listed below:

1.
2.
3.
4.
5.

☐ C. The work is to be performed under an existing continuing contract under which certain work is regularly performed for **Owner** and under which the lowest available costs are developed. (If only part of the contract work is to be done under an existing contract, give detailed information by attachment hereto.)

☐ D. The utility proposes to contract outside the foregoing requirements and therefore evidence in support of its proposal is attached to the estimate in order to obtain the concurrence of the State, and the Federal Highway Administration Division Engineer where applicable, prior to taking action thereon (approval of the agreement shall be considered as approval of such proposal).

☐ E. The utility plans and specifications, with the consent of the State, will be included in the construction contract awarded by the State.

Signature Date

Title

CDA Roadway/Utilities Engineer
Utility No Conflict Sign-Off Form

CDA Roadway/Utilities Engineer: _____
Date plans received: _____
Utility Company: _____
Assembly "U" number: _____
Type of Utilities: _____
Date on Utility's plans: _____ No. of sheets in Utility's plans: _____

We, the design engineer on behalf of the Developer ( ) certify that a review of the above referenced Utility plans concerning the proposed interim and ultimate highway improvements on (project name) has been completed and has not identified any conflicts between the Utility's proposed relocation and any design features.

Design features include but are not limited to pavement structures, drainage facilities, bridges, retaining walls, traffic signals, illumination, signs, foundations, duct/conduit, ground boxes, erosion control facilities, water quality facilities and other Developer-Managed Utilities.

Any design changes to the (project name) roadway after the signing of this form will be coordinated through the Developer's Utility Coordination firm and the Utility Owner affected.

☐ Check box if there are any areas of concern and insert comments below:

Print Name:
(Developer Design) _____ Date: _____

Developer Design Engineer

Sign Name:
(Developer Design) _____ Date: _____

Utility Coordination
Firm Name: _____

This form must be completed/signed and included in each Utility Assembly submitted to the Texas Department of Transportation

County:
ROW CSJ No.:

Const. CSJ No.:

Highway:
Limits:
Fed. Proj. No.:

MASTER UTILITY ADJUSTMENT AGREEMENT
(Owner Managed)
Agreement No.: -U-_____

THIS AGREEMENT, by and between _____, hereinafter identified as the **"Developer"**, and _____, hereinafter identified as the **"Owner"**, is as follows:

WITNESSETH

WHEREAS, the STATE OF TEXAS, acting by and through the Texas Department of Transportation, hereinafter identified as "TxDOT" or the "Department", is authorized to design, construct, operate, maintain, and improve turnpike projects as part of the state highway system throughout the State of Texas, all in conformance with the provisions of Chapter 203, Texas Transportation Code, as amended; and

WHEREAS, the Department proposes to construct a turnpike project identified as the North Tarrant Express Project (the "Facility"); and

WHEREAS, pursuant to that certain Comprehensive Development Agreement by and between the Department and the Developer with respect to the Facility (the "CDA"), the Developer has undertaken the obligation to design and construct the Facility; and

WHEREAS, the Developer's duties pursuant to the CDA include causing the removal, relocation, or other necessary adjustment of existing utilities impacted by the Facility (collectively, "Adjustment"); and

WHEREAS, the Facility may receive Federal funding, financing and/or credit assistance; and

WHEREAS, the Developer has notified the Owner that certain of its facilities and appurtenances (the "Owner Utilities") are in locational conflict with the Facility, and has requested that the Owner undertake the Adjustment of the Owner Utilities as necessary to accommodate the Facility (and the "Ultimate Configuration" as hereinafter defined); and

WHEREAS, the Owner Utilities and the proposed Adjustment of the Owner Utilities are described as follows *[insert below a description of the affected facilities (by type, size and location) as well as a brief description of the nature of the Adjustment work to be performed (e.g., "adjust 12" waterline from approximately Highway Station 100+00 to approximately Highway Station 200+00")]:*
_____; and

WHEREAS, the Owner recognizes that time is of the essence in completing the work contemplated herein; and

WHEREAS, the Developer and the Owner desire to implement the Adjustment of the Owner Utilities by entering into this Agreement.

AGREEMENT

NOW, THEREFORE, in consideration of these premises and of the mutual covenants and agreements of the parties hereto and other good and valuable consideration, the receipt and sufficiency of which being hereby acknowledged, the Developer and the Owner agree as follows:

1. **Preparation of Plans.** *[Check one box that applies:]*

☐ The Developer has hired engineering firm(s) acceptable to the Owner to perform all engineering services needed for the preparation of plans, required specifications, and cost estimates, attached hereto as Exhibit A (collectively, the "Plans"), for the proposed Adjustment of the Owner Utilities. The Developer represents and warrants that the Plans conform to the most recent Utility Accommodation Rules issued by the Texas Department of Transportation ("TxDOT"), set forth in 43 Tex. Admin. Code, Part 1, Chapter 21, Subchapter C, *et seq*. (the "UAR"). By its execution of this Agreement or by the signing of the Plans, Owner hereby approves the Plans and confirms that the Plans are in compliance with Owner's "standards" described in Paragraph 3(d).

☐ The Owner has provided plans, required specifications and cost estimates, attached hereto as Exhibit A (collectively, the "Plans"), for the proposed Adjustment of the Owner Utilities. The Owner represents and warrants that the Plans conform to the UAR. By its execution of this Agreement, Developer hereby approves the Plans. The Owner also has provided to the Developer a utility plan view map illustrating the location of existing and proposed utility facilities on the Developer's right of way map of the Facility. With regard to its preparation of the Plans, Owner represents as follows *[check one box that applies]*:

☐ The Owner's employees were utilized to prepare the Plans, and the charges therefore do not exceed the Owner's typical costs for such work.

☐ The Owner utilized consulting engineers to prepare the Plans, and the fees for such work are not based upon a percentage of construction costs. Further, such fees encompass only the work necessary to prepare the Plans for Adjustment of the Owner Utilities described herein, and do not include fees for work done on any other project. The fees of the consulting engineers are reasonable and are comparable to the fees typically charged by consulting engineers in the locale of the Facility for comparable work for the Owner.

2. **Review by the Department.** The parties hereto acknowledge and agree as follows:

(a) Upon execution of this Agreement by both the Developer and the Owner, pursuant to the CDA the Developer will submit this Agreement, together with the attached Plans, to the Department for its review and approval as part of a package referred to as a "Utility Assembly". The parties agree to cooperate in good faith to modify this Agreement and/or the Plans, as necessary and mutually acceptable to both parties, to respond to any comments made by the Department thereon. Without limiting the generality of the foregoing, (i) the Owner agrees to respond (with comment and/or acceptance) to any

modified Plans and/or Agreement prepared by the Developer in response to Department comments within **fourteen (14) business days** after receipt of such modifications; and (ii) if the Owner originally prepared the Plans, the Owner agrees to modify the Plans in response to Department comments and to submit such modified Plans to the Developer for its comment and/or approval (and re-submittal to the Department for its comment and/or approval) within **fourteen (14) business days** after receipt of the Department's comments. The Owner's failure to timely respond to any modified Plans submitted by the Developer pursuant to this paragraph shall be deemed the Owner's approval of same. If the Owner fails to timely prepare modified Plans which are its responsibility hereunder, then the Developer shall have the right to modify the Plans for the Owner's approval as if the Developer had originally prepared the Plans. The process set forth in this paragraph will be repeated until the Owner, the Developer, and the Department have all approved this Agreement and the Plans.

(b) The parties hereto acknowledge and agree that the Department's review, comments, and/or approval of a Utility Assembly or any component thereof is solely for the purpose of ascertaining matters of particular concern to the Department, and the Department has, and by its review, comments and/or approval of such Utility Assembly or any component thereof undertakes, no duty to review the Utility Assembly or its components for their quality or for the adequacy of Adjusted facilities (as designed) for the purposes for which they are intended to be used or for compliance with law or applicable standards (other than Department requirements).

3. **Design and Construction Standards.** All design and construction performed for the Adjustment work which is the subject of this Agreement shall comply with and conform to the following:

(a) All applicable local and state laws, regulations, decrees, ordinances and policies, including the UAR, the Utility Manual issued by TxDOT (to the extent its requirements are mandatory for Utility Adjustments necessitated by the Facility, as stated in the CDA and communicated to the Owner by the Developer or TxDOT), the requirements of the CDA, and the policies of TxDOT;

(b) All Federal laws, regulations, decrees, ordinances and policies applicable to projects receiving Federal funding, financing and/or credit assistance (including without limitation 23 CFR 645 Subparts A and B, incorporated herein by this reference and the FHWA Program Guide: Utility Relocation and Accommodation on Federal-Aid Highway Projects);

(c) The terms of all governmental permits or other approvals, as well as any private approvals of third parties necessary for such work; and

(d) The standard specifications, standards of practice, and construction methods (collectively, "standards") which the Owner customarily applies to facilities comparable to the Owner Utilities that are constructed by the Owner or for the Owner by its contractors at the Owner's expense, which standards are current at the time this Agreement is signed by the Owner, and which the Owner has submitted to the Developer in writing.

Such design and construction also shall be consistent and compatible with (i) the Developer's current design and construction of the Facility, (ii) the "Ultimate Configuration" for the Facility (as that term is defined and used in the CDA), and (iii) any other utilities being installed in the same vicinity. The Owner acknowledges receipt from the Developer of Facility plans and Ultimate Configuration documents as necessary to comply with the foregoing. In case of any

inconsistency among any of the standards referenced in this Agreement, the most stringent standard shall apply.

4. **Construction by the Owner; Scheduling.**

(a) The Owner hereby agrees to perform the construction necessary to Adjust the Owner Utilities. All construction work hereunder shall be performed in a good and workmanlike manner, and in accordance with the Plans (except as modified pursuant to Paragraph 17). The Owner agrees that during the Adjustment of the Owner Utilities, the Owner and its contractors will coordinate their work with the Developer so as not to interfere with the performance of work on the Facility by the Developer or by any other party. "Interfere" means any action or inaction that interrupts, interferes, delays or damages Facility work.

(b) The Owner may utilize its own employees or may retain such contractor or contractors as are necessary to Adjust the Owner Utilities, through the procedures set forth in Form TxDOT-U-48 "Statement Covering Contract Work" attached hereto as Exhibit C. If the Owner utilizes its own employees for the Adjustment of the Owner Utilities, a Form TxDOT-U-48 is not required. If the Adjustment of the Owner Utilities is undertaken by the Owner's contractor under a competitive bidding process, all bidding and contracting shall be conducted in accordance with all federal and state laws and regulations applicable to the Owner and the Facility.

(c) The Owner shall obtain all permits necessary for the construction to be performed by the Owner hereunder, and the Developer shall cooperate in that process as needed.

(d) The Owner shall commence its construction for Adjustment of each Owner Utility hereunder promptly after (i) receiving written notice to proceed therewith from the Developer, and (ii) any right of way necessary for such Adjustment has been acquired either by the Department (for Adjusted facilities to be located within the Facility right of way) or by the Owner (for Adjusted facilities to be located outside of the Facility right of way), or a right-of-entry permitting Owner's construction has been obtained from the landowner by the Developer or by the Owner with the Developer's prior approval. The Owner shall notify the Developer at least 72 hours prior to commencing construction for the Adjustment of each Owner Utility hereunder.

(e) The Owner shall expeditiously stake the survey of the proposed locations of the Owner Utilities being adjusted, on the basis of the final approved Plans. The Developer shall verify that the Owner Utilities, whether moving to a new location or remaining in place, clear the planned construction of the Facility as staked in the field as well as the Ultimate Configuration.

(f) The Owner shall complete all of the Utility reconstruction and relocation work, including final testing and acceptance thereof *[check one box that applies]*:

☐ on or before _____, 20___.

☐ a duration not to exceed _____ calendar days upon notice to proceed by the Developer.

(g) The amount of reimbursement due to the Owner pursuant to this Agreement for the affected Adjustment(s) shall be reduced by ten percent (10%) for each 30-day period (and by a pro rata amount of said ten percent (10%) for any portion of a 30-day period) by which the final completion and acceptance date for the affected Adjustment(s) exceeds

the applicable deadline. The provisions of this Paragraph 4(g) shall not limit any other remedy available to the Developer at law or in equity as a result of the Owner's failure to meet any deadline hereunder.

The above reduction applies except to the extent due to (i) Force Majeure as described in Paragraph 25(c), (ii) any act or omission of the Developer, if the Owner fails to meet any deadline established pursuant to Paragraph 4(f), or (iii) if the Developer and TxDOT determine, in their sole discretion, that a delay in the relocation work is the result of circumstances beyond the control of the Owner or Owner's contractor and the Developer will not reduce the reimbursement.

5. **Costs of the Work.**

(a) The Owner's costs for Adjustment of each Owner Utility shall be derived from (i) the accumulated total of costs incurred by the Owner for design and construction of such Adjustment, plus (ii) the Owner's other costs directly and necessarily incurred in connection with the Adjustment to the extent permitted pursuant to Paragraph 5(c) (including without limitation the eligible engineering costs incurred by the Owner for design prior to execution of this Agreement), plus (iii) the Owner's right of way acquisition costs, if any are reimbursable pursuant to Paragraph 16.

(b) The Owner's costs associated with Adjustment of the Owner Utilities shall be developed pursuant to the method checked and described below *[check only one box]*:

☐ (1) Actual costs accumulated in accordance with a work order accounting procedure prescribed by the applicable Federal or State regulatory body ("Actual Cost"); or

☐ (2) Actual costs accumulated in accordance with an established accounting procedure developed by the Owner and which the Owner uses in its regular operations ("Actual Cost"); or

☐ (3) The agreed sum of $ _____ ("Agreed Sum"), as supported by the analysis of estimated costs attached hereto as part of Exhibit A.

(c) Eligible Owner costs shall include only those authorized under 23 C.F.R. Part 645, Subpart A. The Owner agrees that costs referenced in 23 C.F.R. Section 645.117(d)(2) are not eligible for reimbursement. These regulations can be found at: http://www.access.gpogov/nara/cfr/waisidx_03/23cfr645_03.html.6. **Responsibility for Costs of Adjustment Work.** *[Allocate the costs of the Adjustment Work between the Owner and the Developer in accordance with Section 7.5.4.1 of the CDA. If the cost allocation is not the same for all Owner Utilities covered by this Agreement, specify the allocations on an addendum. Where one of the parties is responsible for all costs of Adjusting an Owner Utility, assign 100% to the responsible party.]*

The Agreed Sum or Actual Cost, as applicable, of all work to be performed pursuant to this Agreement shall be allocated between the Developer and the Owner as follows: _____ % to the Developer and _____ % to the Owner; provided, however, that any portion of an Agreed Sum or Actual Cost attributable to Betterment shall be allocated 100% to the Owner in accordance with Paragraph 10. All costs charged to the Developer by the Owner shall be reasonable and shall be computed using rates and schedules not exceeding those applicable to similar work performed by or for the Owner at the Owner's expense. Payment of the costs allocated to the Developer pursuant to this Agreement (if any) shall be full compensation to the Owner for all

costs incurred by the Owner in Adjusting the Owner Utilities (including without limitation costs of relinquishing and/or acquiring right of way), and the Department shall have no liability to the Owner for any such costs. Owner expressly acknowledges that it shall be entitled to compensation only from the Developer for any Adjustment costs for the Owner Utilities covered by this Agreement, including costs with respect to real property interests (either acquired or relinquished), and specifically acknowledges that it shall not be entitled to compensation or reimbursement from the Department or the State of Texas.

7. **Billing, Payment, Records and Audits: Actual Cost Method.** The following provisions apply if the Owner's costs are developed under procedure (1) or (2) described in Paragraph 5(b):

(a) After (i) completion of all Adjustment work to be performed pursuant to this Agreement, (ii) the Developer's final inspection of the Adjustment work by Owner hereunder (and resolution of any deficiencies found), and (iii) receipt of an invoice complying with the applicable requirements of Paragraph 9, the Developer shall pay to the Owner an amount equal to ninety percent (90%) of the Developer's share of the Owner's costs as shown in such final invoice (less amounts previously paid, and applicable credits). After completion of the Developer's audit referenced in Paragraph 7(c) and the parties' mutual determination of any necessary adjustment to the final invoice resulting therefrom, the Developer shall make any final payment due so that total payments will equal the total amount of the Developer's share reflected on such final invoice (as adjusted, if applicable).

(b) When requested by the Owner and properly invoiced in accordance with Paragraph 9, the Developer shall make intermediate payments to the Owner based upon the progress of the work completed at not more than monthly intervals, and such payments shall not exceed eighty percent (80%) of the Developer's share of the Owner's eligible costs as shown in each such invoice (less applicable credits). Intermediate payments shall not be construed as final payment for any items included in the intermediate payment.

(c) The Owner shall maintain complete and accurate cost records for all work performed pursuant to this Agreement, in accordance with the provisions of 23 C.F.R. Part 645, Subpart A. The Owner shall maintain such records for four (4) years after receipt of final payment hereunder. The Developer and its representatives shall be allowed to audit such records during the Owner's regular business hours. Unsupported charges will not be considered eligible for reimbursement. The parties shall mutually agree upon (and shall promptly implement by payment or refund, as applicable) any financial adjustment found necessary by the Developer's audit. The Department, the Federal Highway Administration, and their respective representatives also shall be allowed to audit such records upon reasonable notice to the Owner, during the Owner's regular business hours.

8. **Billing and Payment: Agreed Sum Method.** If the Owner's costs are developed under procedure (3) described in Paragraph 5(b), then the Developer shall pay its share of the Agreed Sum to the Owner after (a) completion of all Adjustment work to be performed pursuant to this Agreement, (b) the Developer's final inspection of the Adjustment work by Owner hereunder (and resolution of any deficiencies found), and (c) receipt of an invoice complying with the applicable requirements of Paragraph 9.

9. **Invoices.** Each invoice submitted by the Owner (i) shall be prepared in the form and manner prescribed by 23 C.F.R. Part 645, Subpart A, and (ii) if the Owner's costs are developed under procedure (1) or (2) described in Paragraph 5(b), shall be itemized in a format allowing for comparisons to the approved Estimates, including listing each of the services performed, the

amount of time spent and the date on which the service was performed, and shall include supporting documentation as reasonably requested by the Developer. The original and three (3) copies of each invoice shall be submitted to the Developer at the address for notices stated in Paragraph 23, unless otherwise directed by the Developer pursuant to Paragraph 23. The Owner shall make commercially reasonable efforts to submit final invoices not later than one hundred twenty (120) days after completion of work. The Owner hereby acknowledges and agrees that any of its costs not submitted to the Developer within eighteen months following completion of all Adjustment work to be performed by both parties pursuant to this Agreement shall be deemed to have been abandoned and waived. Each payment required from either party hereunder shall be due within thirty (30) days after satisfaction of all conditions to payment pursuant to Paragraph 7 or Paragraph 8, as applicable.

10. **Betterment.**

(a) For purposes of this Agreement, the term "Betterment" means any upgrading of an Owner Utility being Adjusted that is not attributable to the construction of the Facility and is made solely for the benefit of and at the election of the Owner, including but not limited to an increase in the capacity, capability, efficiency or function of the Adjusted Utility over that provided by the existing Utility facility or an expansion of the existing Utility facility; provided, however, that the following are not considered Betterments:

(i) any upgrading which is required for accommodation of the Facility;

(ii) replacement devices or materials that are of equivalent standards although not identical;

(iii) replacement of devices or materials no longer regularly manufactured with the next highest grade or size;

(iv) any upgrading required by applicable laws, regulations or ordinances;

(v) replacement devices or materials which are used for reasons of economy (e.g., non-stocked items may be uneconomical to purchase); or

(vi) any upgrading required by the Owner's written "standards" meeting the requirements of Paragraph 3(d).

[Include the following for fiber optic Owner Utilities only:] Extension of an Adjustment to the nearest splice boxes shall not be considered a Betterment if required by the Owner in order to maintain its written telephony standards.

Any upgrading required by the Owner's written "standards" meeting the requirements of Paragraph 3(d) shall be deemed to be of direct benefit to the Facility.

(b) It is understood and agreed that the Developer will not pay for any Betterments and that the Owner shall not be entitled to payment therefor. No Betterment may be performed in connection with the Adjustment of the Owner Utilities which is incompatible with the Facility or the Ultimate Configuration or which cannot be performed within the other constraints of applicable law, any applicable governmental approvals, and the requirements imposed on the Developer by the CDA, including without limitation the scheduling requirements thereunder. Accordingly, the parties agree as follows *[check the one box that applies, and complete if appropriate]*:

☐ (i) The Adjustment of the Owner Utilities pursuant to the Plans does not include any Betterment.

☐ The Adjustment of the Owner Utilities pursuant to the Plans includes Betterment to the Owner Utilities by reason of *[insert explanation, e.g. "replacing 12" pipe with 24" pipe]*: _____. The Owner has provided to the Developer comparative estimates for (i) all costs for work to be performed by the Owner pursuant to this Agreement, including work attributable to the Betterment, and (ii) the cost to perform such work without the Betterment, which estimates are hereby approved by the Developer. The estimated amount of the Owner's costs for work hereunder which is attributable to Betterment is $_____, calculated by subtracting (ii) from (i). The percentage of the total cost of the Owner's work hereunder which is attributable to Betterment is _____%, calculated by subtracting (ii) from (i), which remainder shall be divided by (i).

(c) If Paragraph 10(b) identifies Betterment, then the following shall apply:

(i) If the Owner's costs are developed under procedure (3) described in Paragraph 5(b), then the Agreed Sum stated in that Paragraph includes any credits due to the Developer on account of the identified Betterment, and no further adjustment shall be made on account of same.

(ii) If the Owner's costs are developed under procedure (1) or (2) described in Paragraph 5(b), the parties agree as follows *[If Paragraph 10(b) identifies Betterment <u>and</u> the Owner's costs are developed under procedure (1) or (2), check the <u>one</u> appropriate provision]*:

☐ The estimated cost stated in Paragraph 10(b) is the agreed and final amount due for Betterment hereunder. Accordingly, each intermediate invoice submitted pursuant to Paragraph 7(b) shall include a credit for an appropriate percentage of the agreed Betterment amount, proportionate to the percentage of completion reflected in such invoice. The final invoice submitted pursuant to Paragraph 7(a) shall reflect the full amount of the agreed Betterment credit. For each invoice described in this paragraph, the credit for Betterment shall be applied before calculating the Developer's share (pursuant to Paragraph 6) of the cost of the Adjustment work. No other adjustment (either up or down) shall be made based on actual Betterment costs.

☐ The Owner is responsible for the actual cost of the identified Betterment, determined by multiplying (a) the Betterment percentage stated in Paragraph 10(b), by (b) the actual cost of all work performed by the Owner pursuant to this Agreement (including work attributable to the Betterment), as invoiced by the Owner to the Developer. Accordingly, each invoice submitted pursuant to either Paragraph 7(a) or Paragraph 7(b) shall credit the Developer with an amount calculated by multiplying (x) the Betterment percentage stated in Paragraph 10(b), by (y) the amount billed on such invoice.

(d) The determinations and calculations of Betterment described in this Paragraph 10 shall exclude right of way acquisition costs. Betterment in connection with right-of-way acquisition is addressed in Paragraph 16.

11. **<u>Salvage.</u>** For any Adjustment from which the Owner recovers any materials and/or parts and retains or sells the same, after application of any applicable Betterment credit, the Developer is

entitled to a credit for the salvage value of such materials and/or parts, determined in accordance with 23 C.F.R. Section 645.105(j). If the Owner's costs are developed under procedure (1) or (2) described in Paragraph 5(b), then the final invoice submitted pursuant to Paragraph 7(a) shall credit the Developer with the full salvage value. If the Owner's costs are developed under procedure (3) described in Paragraph 5(b), then the Agreed Sum includes any credit due to the Developer on account of salvage.

12. **Utility Investigations.** At the Developer's request, the Owner shall assist the Developer in locating any Utilities (including appurtenances) which are owned and/or operated by Owner and may be impacted by the Facility. Without limiting the generality of the foregoing, in order to help assure that neither the Adjusted Owner Utilities nor existing, unadjusted utilities owned or operated by the Owner are damaged during construction of the Facility, the Owner shall mark in the field the location of all such utilities horizontally on the ground in advance of Facility construction in the immediate area of such utilities.

13. **Inspection and Ownership of Owner Utilities.**

(a) The Developer shall have the right, at its own expense, to inspect the Adjustment work performed by the Owner or its contractors, during and upon completion of construction. All inspections of work shall be completed and any comment provided within **five (5) business days** after request for inspection is received.

(b) The Owner shall accept full responsibility for all future repairs and maintenance of said Owner Utilities. In no event shall the Developer or the Department become responsible for making any repairs or maintenance, or for discharging the cost of same. The provisions of this Paragraph 13(b) shall not limit any rights which the Owner may have against the Developer if the Developer damages any Owner Utility as a result of its Facility activities.

14. **Design Changes.** The Developer will be responsible for additional Adjustment design and/or construction costs necessitated by design changes to the Facility made after approval of the Plans, upon the terms specified herein.

15. **Field Modifications.** The Owner shall provide the Developer with documentation of any field modifications, including Utility Adjustment Field Modifications as well as minor changes as described in Paragraph 17(b), occurring in the Adjustment of the Owner Utilities.

16. **Real Property Interests.**

(a) The Owner has provided, or upon execution of this Agreement shall promptly provide to the Developer, documentation acceptable to the Department indicating any right, title or interest in real property claimed by the Owner with respect to the Owner Utilities in their existing location(s). Such claims are subject to the Department's approval as part of its review of the Utility Assembly as described in Paragraph 2. Claims approved by the Department as to rights or interests are referred to herein as "Existing Interests".

(b) If acquisition of any new easement or other interest in real property ("New Interest") is necessary for the Adjustment of any Owner Utilities, then the Owner shall be responsible for undertaking such acquisition. The Owner shall implement each acquisition hereunder expeditiously so that related Adjustment construction can proceed in accordance with the Developer's Facility schedules. The Developer shall be responsible for its share (if any, as specified in Paragraph 6) of the actual and reasonable acquisition costs of any such

New Interest (including without limitation the Owner's reasonable overhead charges and legal costs as well as compensation paid to the landowner), excluding any costs attributable to Betterment as described in Paragraph 16(c), and subject to the provisions of Paragraph 16(e); provided, however, that all acquisition costs shall be subject to the Developer's prior written approval. Eligible acquisition costs shall be segregated from other costs on the Owner's estimates and invoices. Any such New Interest shall have a written valuation and shall be acquired in accordance with applicable law.

(c) A New Interest shall be substantially equivalent (e.g., in width and type) to the Existing Interest being replaced, unless a New Interest exceeding such standard (i) is required in order to accommodate the Facility or by compliance with applicable law, or (ii) is called for by the Developer in the interest of overall Facility project economy. Any New Interest that does not meet the requirements of the preceding sentence shall be considered a Betterment to the extent that it upgrades the Existing Interest which it replaces, or in its entirety if the related Owner Utility was not installed pursuant to an Existing Interest. Betterment costs shall be solely the Owner's responsibility.

(d) For each Existing Interest located within the final Facility right of way, upon completion of the related Adjustment work and its acceptance by the Owner, the Owner agrees to execute a quitclaim deed or other appropriate documentation relinquishing such Existing Interest to the Department, unless the affected Owner Utility is remaining in its original location or is being reinstalled in a new location within the area subject to such Existing Interest. All quitclaim deeds or other relinquishment documents shall be subject to the Department's approval as part of its review of the Utility Assembly as described in Paragraph 2. For each such Existing Interest relinquished by the Owner, the Developer shall do one of the following to compensate the Owner for such Existing Interest, as appropriate:

(i) If the Owner acquires a New Interest for the affected Owner Utility, the Developer shall reimburse the Owner for the Developer's share of the Owner's actual and reasonable acquisition costs in accordance with Paragraph 16(b); or

(ii) If the Owner does not acquire a New Interest for the affected Owner Utility, the Developer shall compensate the Owner for the Developer's share of the fair market value of such relinquished Existing Interest, as mutually agreed between the Owner and the Developer and supported by a written valuation.

The compensation provided to the Owner pursuant to either subparagraph (i) or subparagraph (ii) above shall constitute complete compensation to the Owner for the relinquished Existing Interest, and no further compensation shall be due to the Owner from either the Developer or the Department on account of such Existing Interest.

(e) The Owner shall execute a Utility Joint Use Acknowledgment (TxDOT-U-80A) for each Adjusted Owner Utility where required pursuant to TxDOT policies. All Utility Joint Use Acknowledgments shall be subject to TxDOT approval as part of its review of the Utility Assembly as described in Paragraph 2.

17. **Amendments and Modifications.** This Agreement may be amended or modified only by a written instrument executed by the parties hereto, in accordance with Paragraph 17(a) or Paragraph 17(b) below.

    (a) Except as otherwise provided in Paragraph 17(b), any amendment or modification to this Agreement or the Plans attached hereto shall be implemented by a Utility Adjustment Agreement Amendment ("UAAA") in the form of Exhibit B hereto (TxDOT-CDA-U-35A-OM). The UAAA form can be used for a new scope of work with concurrence of the Developer and TxDOT as long as the Design and Construction responsibilities have not changed. Each UAAA is subject to the review and approval of the Department, prior to its becoming effective for any purpose and prior to any work being initiated thereunder. The Owner agrees to keep and track costs for each UAAA separately from other work being performed.

    (b) For purposes of this Paragraph 17(b), "Utility Adjustment Field Modification" shall mean any horizontal or vertical design change from the Plans included in a Utility Assembly previously approved by the Department, due either to design of the Facility or to conditions not accurately reflected in the approved Utility Assembly (e.g., shifting the alignment of an 8 in. water line to miss a roadway drainage structure). A Utility Adjustment Field Modification agreed upon by the Developer and the Owner does not require a UAAA, provided that the modified Plans have been submitted to the Department for its review and comment, and the process for such review and comment has been completed as specified in the CDA. A minor change (e.g., an additional water valve, an added Utility marker at a ROW line, a change in vertical bend, etc.) will not be considered a Utility Adjustment Field Modification and will not require a UAAA, but shall be shown in the documentation required pursuant to Paragraph 15.

18. **Relationship of the Parties.** This Agreement does not in any way, and shall not be construed to, create a principal/agent or joint venture relationship between the parties hereto and under no circumstances shall the Owner or the Developer be considered as or represent itself to be an agent of the other.

19. **Entire Agreement.** This Agreement embodies the entire agreement between the parties and there are no oral or written agreements between the parties or any representations made which are not expressly set forth herein.

20. **Assignment; Binding Effect; Department as Third Party Beneficiary.** Neither the Owner nor the Developer may assign any of its rights or delegate any of its duties under this Agreement without the prior written consent of the other party and of the Department, which consent may not be unreasonably withheld or delayed; provided, however, that the Developer may assign any of its rights and/or delegate any of its duties to the Department or to any other entity with which the Department contracts to fulfill the Developer's obligations under the CDA, at any time without the prior consent of the Owner.

    This Agreement shall bind the Owner, the Developer, and their successors and permitted assigns, and nothing in this Agreement nor in any approval subsequently provided by either party hereto shall be construed as giving any benefits, rights, remedies, or claims to any other person, firm, corporation or other entity, including, without limitation, any contractor or other party retained for the Adjustment work or the public in general; provided, however, that the Owner and the Developer agree that although the Department is not a party to this Agreement, the Department is intended to be a third-party beneficiary to this Agreement.

21. **Breach by the Developer.** If the Owner claims that the Developer has breached any of its obligations under this Agreement, the Owner will notify the Developer and the Department in writing of such breach, and the Developer shall have 30 days following receipt of such notice in which to cure such breach, before the Owner may invoke any remedies which may be available to it as a result of such breach; provided, however, that both during and after such period the Department shall have the right, but not the obligation, to cure any breach by the Developer. Without limiting the generality of the foregoing, (a) the Department shall have no liability to the Owner for any act or omission committed by the Developer in connection with this Agreement, including without limitation any reimbursement owed to the Owner hereunder, and (b) in no event shall the Department be responsible for any repairs or maintenance to the Owner Utilities Adjusted pursuant to this Agreement.

22. **Traffic Control.** The Developer shall provide traffic control or shall reimburse the Owner for the Developer's share (if any, as specified in Paragraph 6) of the costs for traffic control made necessary by the Adjustment work performed by either the Developer or the Owner pursuant to this Agreement, in compliance with the requirements of the Texas Manual on Uniform Traffic Control Devices. Betterment percentages calculated in Paragraph 10 shall also apply to traffic control costs.

23. **Notices.** Except as otherwise expressly provided in this Agreement, all notices or communications pursuant to this Agreement shall be sent or delivered to the following:

The Owner:

Phone:
Fax:

The Developer:

Phone:
Fax:

A party sending a notice of default of this Agreement to the other party shall also send a copy of such notice to the Department at the following address:

TxDOT:

Phone:
Fax:

Any notice or demand required herein shall be given (a) personally, (b) by certified or registered mail, postage prepaid, return receipt requested, (c) by confirmed fax, or (d) by reliable messenger or overnight courier to the appropriate address set forth above. Any notice served personally shall be deemed delivered upon receipt, served by facsimile transmission shall be deem delivered on the date of receipt as shown on the received facsimile, and served by certified or registered mail or by reliable messenger or overnight courier shall be deemed delivered on the date of receipt as shown on the addressee's registry or certification of receipt or on the date receipt is refused as shown on the records or manifest of the U.S. Postal Service or such courier. Either

party may from time to time designate any other address for this purpose by written notice to the other party; the Department may designate another address by written notice to both parties.

24. **Approvals.** Any acceptance, approval, or any other like action (collectively "Approval") required or permitted to be given by either the Developer, the Owner or the Department pursuant to this Agreement:

(a) Must be in writing to be effective (except if deemed granted pursuant hereto),

(b) Shall not be unreasonably withheld or delayed; and if Approval is withheld, such withholding shall be in writing and shall state with specificity the reason for withholding such Approval, and every effort shall be made to identify with as much detail as possible what changes are required for Approval, and

(c) Except for approvals by the Department, and except as may be specifically provided otherwise in this Agreement, shall be deemed granted if no response is provided to the party requesting an Approval within the time period prescribed by this Agreement (or if no time period is prescribed, then fourteen (14) calendar days), commencing upon actual receipt by the party from which an Approval is requested or required, of a request for Approval from the requesting party. All requests for Approval shall be sent out by the requesting party to the other party in accordance with Paragraph 23.

25. **Time; Force Majeure.**

(a) Time is of the essence in the performance of this Agreement.

(b) All references to "days" herein shall be construed to refer to calendar days, unless otherwise stated.

(c) Neither the Owner nor the Developer shall be liable to the other for any delay in performance under this Agreement from any cause beyond its control and without its fault or negligence ("Force Majeure"), such as acts of God, acts of civil or military authority, fire, earthquake, strike, unusually severe weather, floods or power blackouts. If any such event of Force Majeure occurs, the Owner agrees, if requested by the Developer, to accelerate its efforts hereunder if reasonably feasible in order to regain lost time, so long as the Developer agrees to reimburse the Owner for the reasonable and actual costs of such efforts.

26. **Department Review and Approval**. Notwithstanding any contrary provision of this Agreement, if this Agreement and the CDA call for different levels of review for any items submitted to the Department (e.g., "approval" as opposed to "review and comment"), then the level of review called for by the CDA will prevail for purposes of this Agreement.

27. **Continuing Performance.** In the event of a dispute, the Owner and the Developer agree to continue their respective performance hereunder to the extent feasible in light of the dispute, including paying billings, and such continuation of efforts and payment of billings shall not be construed as a waiver of any legal right.

28. **Equitable Relief**. The Developer and the Owner acknowledge and agree that delays in Adjustment of the Owner Utilities will impact the public convenience, safety and welfare, and that (without limiting the parties' remedies hereunder) monetary damages would be inadequate to compensate for delays in the construction of the Facility. Consequently, the parties hereto (and the Department as well, as a third party beneficiary) shall be entitled to specific performance or

other equitable relief in the event of any breach of this Agreement which threatens to delay construction of the Facility; provided, however, that the fact that specific performance or other equitable relief may be granted shall not prejudice any claims for payment or otherwise related to performance of the Adjustment work hereunder.

29. **Authority.** The Owner and the Developer each represents and warrants to the other party that the warranting party possesses the legal authority to enter into this Agreement and that it has taken all actions necessary to exercise that authority and to lawfully authorize its undersigned signatory to execute this Agreement and to bind such party to its terms. Each person executing this Agreement on behalf of a party warrants that he or she is duly authorized to enter into this Agreement on behalf of such party and to bind it to the terms hereof.

30. **Cooperation.** The parties acknowledge that the timely completion of the Facility will be influenced by the ability of the Owner (and its contractors) and the Developer to coordinate their activities, communicate with each other, and respond promptly to reasonable requests. Subject to the terms and conditions of this Agreement, the Owner and the Developer agree to take all steps reasonably required to coordinate their respective duties hereunder in a manner consistent with the Developer's current and future construction schedules for the Facility. The Owner further agrees to require its contractors to coordinate their respective work hereunder with the Developer.

31. **Termination.** If the Facility project is canceled or modified so as to eliminate the necessity of the Adjustment work described herein, then the Developer shall notify the Owner in writing and the Developer reserves the right to thereupon terminate this Agreement. Upon such termination, the parties shall negotiate in good faith an amendment that shall provide mutually acceptable terms and conditions for handling the respective rights and liabilities of the parties relating to such termination.

32. **Nondiscrimination**. Each party hereto agrees, with respect to the work performed by such party pursuant to this Agreement, that such party shall not discriminate on the grounds of race, color, sex, national origin or disability in the selection and/or retention of contractors and consultants, including procurement of materials and leases of equipment.

33. **Captions**. The captions and headings of the various paragraphs of this Agreement are for convenience and identification only, and shall not be deemed to limit or define the content of their respective paragraphs.

34. **Counterparts.** This Agreement may be executed in any number of counterparts. Each such counterpart hereof shall be deemed to be an original instrument but all such counterparts together shall constitute one and the same instrument.

35. **Effective Date.** Except for the provisions of Paragraph 2(a) (which shall become effective immediately upon execution of this Agreement by both the Owner and the Developer without regard to the Department's signature), this Agreement shall become effective upon the later of (a) the date of signing by the last party (either the Owner or the Developer) signing this Agreement, and (b) the date of the Department's approval as indicated by the signature of the Department's representative, below.

APPROVED BY:
TEXAS DEPARTMENT OF
TRANSPORTATION

By: _____
Authorized Signature

Printed
Name: _____

Title: _____

Date: _____

OWNER

_____
[Print Owner Name]

By: _____
Duly Authorized Representative

Printed
Name: _____

Title: _____

Date: _____

DEVELOPER

_____
[Print Developer Name]

By: _____
Duly Authorized Representative

Printed
Name: _____

Title: _____

Date: _____

County:
ROW CSJ No.:

Const. CSJ No.:

Highway:
Limits:
Fed. Proj. No.:

EXHIBIT A

PLANS, SPECIFICATIONS, COST ESTIMATES

County:
ROW CSJ No.:

Const. CSJ No.:

Highway:
Limits:
Fed. Proj. No.:

EXHIBIT B

UTILITY ADJUSTMENT AGREEMENT AMENDMENT
(TxDOT-CDA-U-35A-OM)

County:
ROW CSJ No.:

Const. CSJ No.:

Highway:
Limits:
Fed. Proj. No.:

EXHIBIT C

STATEMENT COVERING CONTRACT WORK
(TxDOT-U-48)

MASTER UTILITY ADJUSTMENT AGREEMENT
(Developer Managed)

Agreement No.: -U-_____

THIS AGREEMENT, by and between _____, hereinafter identified as the "**Developer**", and _____, hereinafter identified as the "**Owner**", is as follows:

WITNESSETH

WHEREAS, the STATE OF TEXAS, acting by and through the Texas Department of Transportation, hereinafter identified as "TxDOT" or the "Department", is authorized to design, construct, operate, maintain, and improve turnpike projects as part of the state highway system throughout the State of Texas, all in conformance with the provisions of Chapter 203, Texas Transportation Code, as amended; and

WHEREAS, the Department proposes to construct a turnpike project identified as the North Tarrant Express Project (the "Facility"), *[insert brief description of the Facility]*; and

WHEREAS, pursuant to that certain Comprehensive Development Agreement by and between the Department and the Developer with respect to the Facility (the "CDA"), the Developer has undertaken the obligation to design and construct the Facility; and

WHEREAS, the Developer's duties pursuant to the CDA include causing the removal, relocation, or other necessary adjustment of existing utilities impacted by the Facility (collectively, "Adjustment"); and

WHEREAS, the Facility may receive Federal funding, financing and/or credit assistance; and

WHEREAS, the Developer has notified the Owner that certain of its facilities and appurtenances (the "Owner Utilities") are in locational conflict with the Facility, and the Owner has requested that the Developer undertake the Adjustment of the Owner Utilities as necessary to accommodate the Facility (and the "Ultimate Configuration" as hereinafter defined); and

WHEREAS, the Owner Utilities and the proposed Adjustment of the Owner Utilities are described as follows *[insert below a description of the affected facilities (by type, size and location) as well as a brief description of the nature of the Adjustment work to be performed (e.g., "adjust 12" waterline from approximately Highway Station 100+00 to approximately Highway Station 200+00")]:*
_____; and

WHEREAS, the Owner recognizes that time is of the essence in completing the work contemplated herein; and

WHEREAS, the Developer and the Owner desire to implement the Adjustment of the Owner Utilities by entering into this Agreement.

AGREEMENT

NOW, THEREFORE, in consideration of these premises and of the mutual covenants and agreements of the parties hereto and other good and valuable consideration, the receipt and sufficiency of which being hereby acknowledged, the Developer and the Owner agree as follows:

1. **Preparation of Plans.** *[Check one box that applies:]*

☐ The Developer has hired engineering firm(s) acceptable to the Owner to perform all engineering services needed for the preparation of plans, required specifications, and cost estimates, attached hereto as Exhibit A (collectively, the "Plans"), for the proposed Adjustment of the Owner Utilities. The Developer represents and warrants that the Plans conform to the most recent Utility Accommodation Rules issued by the Texas Department of Transportation ("TxDOT"), set forth in 43 Tex. Admin. Code Part 1, Chapter 21, Subchapter C *et seq.*, (the "UAR"). By its execution of this Agreement or by the signing of the Plans, the Owner hereby approves the Plans and confirms that the Plans are in compliance with Owner's "standards" described in Paragraph 3(d).

☐ The Owner has provided plans, required specifications and cost estimates, attached hereto as Exhibit A (collectively, the "Plans"), for the proposed Adjustment of the Owner Utilities. The Owner represents and warrants that the Plans conform to the UAR. By its execution of this Agreement, the Developer hereby approves the Plans. The Owner also has provided to the Developer a utility plan view map illustrating the location of existing and proposed utility facilities on the Developer's right of way map of the Facility. With regard to its preparation of the Plans, the Owner represents as follows *[check one box that applies]*:

☐ The Owner's employees were utilized to prepare the Plans, and the charges therefore do not exceed the Owner's typical costs for such work.

☐ The Owner utilized consulting engineers to prepare the Plans, and the fees for such work are not based upon a percentage of construction costs. Further, such fees encompass only the work necessary to prepare the Plans for Adjustment of the Owner Utilities described herein, and do not include fees for work done on any other project. The fees of the consulting engineers are reasonable and are comparable to the fees typically charged by consulting engineers in the locale of the Facility for comparable work for the Owner.

2. **Review by the Department.** The parties hereto acknowledge and agree as follows:

(a) Upon execution of this Agreement by both the Developer and the Owner, pursuant to the CDA the Developer will submit this Agreement, together with the attached Plans, to the Department for its review and approval as part of a package referred to as a "Utility Assembly". The parties agree to cooperate in good faith to modify this Agreement and/or the Plans, as necessary and mutually acceptable to both parties, to respond to any comments made by the Department thereon. Without limiting the generality of the foregoing, (i) the Owner agrees to respond (with comment and/or acceptance) to any modified Plans and/or Agreement prepared by the Developer in response to Department comments within **fourteen (14) business days** after receipt of such modifications; and (ii) if the Owner originally prepared the Plans, the Owner agrees to modify the Plans in response to Department comments and to submit such modified Plans to the Developer for its comment and/or approval (and re-submittal to the Department for its comment and/or approval) within **fourteen (14) business days** after receipt of the Department's comments. The Owner's failure to timely respond to any modified Plans submitted by the Developer pursuant to this paragraph shall be deemed the Owner's approval of same. If the Owner fails to timely prepare modified Plans which are its responsibility hereunder, then the Developer shall have the right to modify the Plans for the Owner's approval as if the Developer had originally prepared the Plans. The process set forth in this paragraph

will be repeated until the Owner, the Developer, and the Department have all approved this Agreement and accepted the Plans.

(b) The parties hereto acknowledge and agree that the Department's review, comments, and/or approval of a Utility Assembly or any component thereof is solely for the purpose of ascertaining matters of particular concern to the Department, and the Department has, and by its review, comments and/or approval of such Utility Assembly or any component thereof undertakes, no duty to review the Utility Assembly or its components for their quality or for the adequacy of Adjusted facilities (as designed) for the purposes for which they are intended to be used or for compliance with law or applicable standards (other than Department requirements).

3. **Design and Construction Standards.** All design and construction performed for the Adjustment work which is the subject of this Agreement shall comply with and conform to the following:

(a) All applicable local and state laws, regulations, decrees, ordinances and policies, including the UAR, the Utility Manual issued by TxDOT (to the extent its requirements are mandatory for Utility Adjustments necessitated by the Facility, as stated in the CDA and communicated to the Owner by the Developer or TxDOT), the requirements of the CDA, and the policies of TxDOT;

(b) All Federal laws, regulations, decrees, ordinances and policies applicable to projects receiving Federal funding, financing and/or credit assistance (including without limitation 23 CFR 645 Subparts A and B, incorporated herein by this reference and the FHWA Program Guide: Utility Relocation and Accommodation on Federal-Aid Highway Projects);

(c) The terms of all governmental permits or other approvals, as well as any private approvals of third parties necessary for such work; and

(d) The standard specifications, standards of practice, and construction methods (collectively, "standards") which the Owner customarily applies to facilities comparable to the Owner Utilities that are constructed by the Owner or for the Owner by its contractors at the Owner's expense, which standards are current at the time this Agreement is signed by the Owner, and which the Owner has submitted to the Developer in writing.

Such design and construction also shall be consistent and compatible with (i) the Developer's current design and construction of the Facility, (ii) the "Ultimate Configuration" for the Facility (as that term is defined and used in the CDA), and (iii) any other utilities being installed in the same vicinity. The Owner acknowledges receipt from the Developer of Facility plans and Ultimate Configuration documents as necessary to comply with the foregoing. In case of any inconsistency among any of the standards referenced in this Agreement, the most stringent standard shall apply.

4. **Construction by the Developer.**

(a) The Owner hereby requests that the Developer perform the construction necessary to adjust the Owner Utilities and the Developer hereby agrees to perform such construction. All construction work hereunder shall be performed in a good and workmanlike manner, and in accordance with the Plans (except as modified pursuant to Paragraph 17).

(i) The Developer shall retain such contractor or contractors as are necessary to adjust the Owner Utilities, in accordance with the CDA.

(ii) The Developer shall obtain all permits necessary for the construction to be performed by the Developer hereunder, and the Owner shall cooperate in that process as needed.

5. **Costs of the Work**

(a) The costs for Adjustment of each Owner Utility shall be derived from (i) the accumulated total of costs incurred by the Developer for design and construction of such Adjustment ("direct costs"), plus (ii) the Owner's costs directly and necessarily incurred in connection with the Adjustment ("indirect co a sts"), including without limitation the engineering costs incurred by the Owner for design or design review prior to execution of this Agreement (to the extent permitted pursuant to Paragraph 5(d)), plus (iii) the Owner's right of way acquisition costs, if any are reimbursable pursuant to Paragraph 16.

(b) The Developer's costs associated with Adjustment of the Owner Utilities shall be developed pursuant to the method checked and described below *[check only one box]*:

☐ (1) Developer's "Actual Cost" for the Adjustment work shall be the sum of the actual, allocable and reasonable charges incurred by Developer for such work, developed in accordance with generally recognized accounting principles, including but not limited to: all labor, transportation, equipment, materials, permits, and indirect and overhead charges; or

☐ (2) The agreed sum of $ ("Agreed Sum") as supported by the analysis of the Developer's estimated costs attached hereto as part of Exhibit A; or

☐ (3) The Developer is responsible for 100% of the costs for the Adjustment work, and there is no Betterment. Accordingly, the Developer is not required to report such costs to the Owner.

(c) The Owner's indirect costs associated with Adjustment of the Owner Utilities shall be developed pursuant to the method checked and described below [check only one box]:

☐ (1) Actual related indirect costs accumulated in accordance with a work order accounting procedure prescribed by the applicable Federal or State regulatory body ("Actual Cost"); or

☐ (2) Actual related indirect costs accumulated in accordance with an established accounting procedure developed by the Owner and which the Owner uses in its regular operations ("Actual Cost"); or

☐ (3) The agreed sum of $_____ ("Agreed Sum") as supported by the analysis of the Owner's estimated costs attached hereto as part of Exhibit A.

(d) Eligible Owner costs shall include only those authorized under 23 C.F.R. Part 645, Subpart A. The Owner agrees that costs referenced in 23 C.F.R. Section 645.117(d)(2) are not eligible for reimbursement. These regulations can be found at: http://www.access.gpo.gov/nara/cfr/waisidx_03/23cfr645_03.html.

6. **Responsibility for Costs of Adjustment Work**. *[Allocate the costs of the Adjustment Work between the Owner and the Developer in accordance with Section 7.5.4.1 of the CDA. If the cost allocation is not the same for all Owner Utilities covered by this Agreement, specify the*

allocations on an addendum. Where one of the parties is responsible for all costs of Adjusting an Owner Utility, assign 100% to the responsible party.]

The Agreed Sum or Actual Cost, as applicable, of all work to be performed pursuant to this Agreement shall be allocated between the Developer and the Owner as follows: _____ % to the Developer and _____ % to the Owner; provided, however, that any portion of an Agreed Sum or Actual Cost attributable to Betterment shall be allocated 100% to the Owner in accordance with Paragraph 10. All costs charged to the Developer by the Owner shall be reasonable and shall be computed using rates and schedules not exceeding those applicable to similar work performed by or for the Owner at the Owner's expense. Developer's performance of the Adjustment work hereunder and payment of the Developer's share of the Owner's costs pursuant to this Agreement, if applicable, shall be full compensation to the Owner for all costs incurred by the Owner in Adjusting the Owner Utilities (including without limitation costs of relinquishing and/or acquiring right of way), and the Department shall have no liability to the Owner for any such costs. The Owner expressly acknowledges that it shall be entitled to compensation only from the Developer for any Adjustment costs for the Owner Utilities covered by this Agreement, including costs with respect to real property interests (either acquired or relinquished), and specifically acknowledges that it shall not be entitled to compensation or reimbursement from the Department or the State of Texas.

7. **Reimbursement of the Developer by the Owner**.

(a) *Billing, Payment, Records and Audits: Actual Cost Method.* The following provisions apply if the Developer's costs are developed under procedure (1) described in Paragraph 5(b):

(i) The Owner shall, upon completion of all the Adjustment work to be performed by the Developer pursuant to this Agreement, final inspection of the Developer's completed Adjustment work (and resolution of any deficiencies found), and receipt of a final invoice complying with the requirements of Paragraph 9, pay to the Developer the Owner's share of the Developer's eligible costs as shown in such final invoice (less amounts previously paid, and applicable credits). The final amount due shall be subject to adjustment either before or after payment is made, in accordance with subparagraph (iii) below.

(ii) When requested by the Developer and properly invoiced in accordance with Paragraph 9, the Owner shall make intermediate payments to the Developer based upon the progress of the work completed at not more than monthly intervals, and such payments shall not exceed eighty percent (80%) of the Owner's share of the Developer's eligible costs as shown in each such invoice (less applicable credits). Intermediate payments shall not be construed as final payment for any items included in the intermediate payment.

(iii) The Developer shall maintain complete and accurate cost records for all work it performs on an Actual Cost basis pursuant to this Agreement, and shall retain such records for four (4) years after receipt of final payment hereunder. The Owner and its representatives shall be allowed to audit such records during the Developer's regular business hours. Unsupported charges will not be considered eligible for reimbursement. The parties shall mutually agree upon (and shall promptly implement by payment or refund, as applicable) any financial adjustment found necessary by the Owner's audit.

(b) *Billing and Payment: Agreed Sum Method.* If the Developer's costs are developed under procedure (2) described in Paragraph 5(b), then the Owner shall, after completion of all the Adjustment work to be performed by Developer pursuant to this Agreement, final inspection of the Developer's completed Adjustment work (and resolution of any deficiencies found), and receipt of a final invoice complying with the requirements of Paragraph 9, pay to the Developer the Owner's share of the Agreed Sum specified in Paragraph 5(b).

8. **Reimbursement of the Owner by the Developer**.

(a) Billing, Payment, Records and Audits: Actual Cost Method. The following provisions apply if the Owner's costs are developed under procedure (1) or (2) described in Paragraph 5(c):

(i) The Developer shall, upon completion of all the Adjustment work to be performed pursuant to this Agreement, acceptance of the Adjustment work by the Owner, and receipt of a final invoice complying with the requirements of Paragraph 9, make payment in the amount of ninety percent (90%) of the Developer's share of the Owner's eligible costs as shown in such final invoice (less amounts previously paid, and applicable credits). After completion of the Developer's audit referenced in subparagraph (iii) below and the parties' mutual determination of any necessary adjustment to the final invoice resulting therefrom, the Developer shall make any final payment due so that total payments will equal the total amount of the Developer's share reflected on such final invoice (as adjusted, if applicable).

(ii) When requested by the Owner and properly invoiced in accordance with Paragraph 9, the Developer shall make intermediate payments to the Owner based upon the progress of the work completed at not more than monthly intervals, and such payments shall not exceed eighty percent (80%) of the Developer's share of the Owner's eligible costs as shown in each such invoice (less applicable credits). Intermediate payments shall not be construed as final payment for any items included in the intermediate payment.

(iii) The Owner shall maintain complete and accurate cost records for all work performed pursuant to this Agreement, in accordance with the provisions of 23 C.F.R. Part 645, Subpart A. The Owner shall maintain such records for four (4) years after receipt of final payment hereunder. The Developer and its representatives shall be allowed to audit such records during the Owner's regular business hours. Unsupported charges will not be considered eligible for reimbursement. The parties shall mutually agree upon (and shall promptly implement by payment or refund, as applicable) any financial adjustment found necessary by the Developer's audit. The Department, the Federal Highway Administration, and their respective representatives also shall be allowed to audit such records upon reasonable notice to the Owner, during the Owner's regular business hours.

(b) *Billing and Payment: Agreed Sum Method.* If the Owner's costs are developed under procedure (3) described in Paragraph 5(c), then the Developer shall, upon completion of all Adjustment work to be performed pursuant to this Agreement and upon receipt of an invoice complying with the applicable requirements of Paragraph 9, pay its share of the Agreed Sum specified in Paragraph 5(c) to the Owner.

9. **Invoices.** Each invoice submitted by the Owner shall be prepared in the form and manner prescribed by 23 C.FR. Part 645, Subpart A. On invoices prepared by either party, all costs developed using the "Actual Cost" method shall be itemized in a format allowing for comparisons to the approved Estimates, including listing each of the services performed, the amount of time spent and the date on which the service was performed, and shall include supporting documentation as reasonably requested by the other party. The original and three (3) copies of each invoice shall be submitted to the other party at the address for notices stated in Paragraph 23, unless otherwise directed pursuant to Paragraph 23. Each party shall make commercially reasonable efforts to submit final invoices not later than one hundred twenty (120) days after completion of work. Both parties hereby acknowledge and agree that any costs not submitted to the other party within eighteen months following completion of all Adjustment work to be performed by both parties pursuant to this Agreement shall be deemed to have been abandoned and waived. Each payment required from either party hereunder shall be due within thirty (30) days after satisfaction of all conditions to payment pursuant to Paragraph 7 or Paragraph 8, as applicable.

10. **Betterment and Salvage.**

(a) For purposes of this Agreement, the term "Betterment" means any upgrading of an Owner Utility being Adjusted that is not attributable to the construction of the Facility and is made solely for the benefit of and at the election of the Owner, including but not limited to an increase in the capacity, capability, efficiency or function of the Adjusted Utility over that provided by the existing Utility facility or an expansion of the existing Utility facility; provided, however, that the following are not considered Betterments:

(i) any upgrading which is required for accommodation of the Facility;

(ii) replacement devices or materials that are of equivalent standards although not identical;

(iii) replacement of devices or materials no longer regularly manufactured with the next highest grade or size;

(iv) any upgrading required by applicable laws, regulations or ordinances;

(v) replacement devices or materials which are used for reasons of economy (e.g., non-stocked items may be uneconomical to purchase); or

(vi) any upgrading required by the Owner's written "standards" meeting the requirements of Paragraph 3(d).

[Include the following for fiber optic Owner Utilities only:] Extension of an Adjustment to the nearest splice boxes shall not be considered a Betterment if required by the Owner in order to maintain its written telephony standards.

Any upgrading required by the Owner's written "standards" meeting the requirements of Paragraph 3(d) shall be deemed to be of direct benefit to the Facility.

(b) It is understood and agreed that the Owner shall bear the full cost of any Betterments. No Betterment may be performed hereunder which is incompatible with the Facility or the Ultimate Configuration or which cannot be performed within the other constraints of applicable law, any applicable governmental approvals, and the requirements imposed on the Developer by the CDA, including without limitation the scheduling requirements thereunder.

Accordingly, the parties agree as follows *[check the one box that applies, and complete if appropriate]*:

☐ The Adjustment of the Owner Utilities pursuant to the Plans does not include any Betterment.

☐ The Adjustment of the Owner Utilities pursuant to the Plans includes Betterment to the Owner Utilities by reason of *[insert explanation, e.g. "replacing 12" pipe with 24" pipe]*:_____. The Developer has provided to the Owner comparative estimates for (i) all work to be performed by the Developer pursuant to this Agreement, including work attributable to the Betterment, and (ii) the cost to perform such work without the Betterment, which estimates are hereby approved by the Owner. The estimated cost of the Developer's work hereunder which is attributable to Betterment is $_____, calculated by subtracting (ii) from (i). The percentage of the total cost of the Developer's work hereunder which is attributable to Betterment is _____%, calculated by subtracting (ii) from (i), which remainder is divided by (i).

(c) If Paragraph 10(b) identifies Betterment, the Owner shall advance to the Developer, at least **fourteen (14) business days** prior to the date scheduled for commencement of construction for Adjustment of the Owner Utilities, the estimated cost attributable to Betterment as set forth in Paragraph 10(b). If the Owner fails to advance payment to the Developer on or before the foregoing deadline, the Developer shall have the option of commencing and completing (without delay) the Adjustment work without installation of the applicable Betterment. *[If Paragraph 10(b) identifies Betterment, check the one appropriate provision]*:

☐ The estimated cost stated in Paragraph 10(b) is the agreed and final amount due for Betterment hereunder, and accordingly no adjustment (either up or down) of such amount shall be made based on actual costs.

☐ The Owner is responsible for the Developer's actual cost for the identified Betterment. Accordingly, upon completion of all Adjustment work to be performed by both parties pursuant to this Agreement, (i) the Owner shall pay to the Developer the amount, if any, by which the actual cost of the Betterment (determined as provided below in this paragraph) exceeds the estimated cost advanced by the Owner, or (ii) the Developer shall refund to the Owner the amount, if any, by which such advance exceeds such actual cost, as applicable. Any additional payment by the Owner shall be due within **sixty (60) calendar days** after the Owner's receipt of the Developer's invoice therefor, together with supporting documentation; any refund shall be due within **sixty (60) calendar days** after completion of the Adjustment work hereunder. The actual cost of Betterment incurred by the Developer shall be calculated by multiplying (i) the Betterment percentage stated in Paragraph 10(b), by (ii) the actual cost of all work performed by the Developer pursuant to this Agreement (including work attributable to the Betterment), as invoiced by the Developer to the Owner.

(d) If Paragraph 10(b) identifies Betterment, the amount of Betterment in Owner's indirect costs shall be determined by applying the percentage of the Betterment calculated in Paragraph 10(b). The Owner's invoice to the Developer for the Developer's share of the Owner's indirect costs shall credit the Developer with any Betterment amount determined pursuant to this Paragraph 10(d).

(e) For any Adjustment from which the Owner recovers any materials and/or parts and retains or sells the same, after application of any applicable Betterment credit, the Owner's invoice to the Developer for its costs shall credit the Developer with the salvage value for such materials and/or parts, determined in accordance with 23 C.F.R. Section 645.105(j), or alternatively the Developer may invoice the Owner for such amount. Anticipated salvage values are indicated in the Estimates.

(f) The determinations and calculations of Betterment described in this Paragraph 10 shall exclude right of way acquisition costs. Betterment in connection with right-of-way acquisition is addressed in Paragraph 16.

11. **Management of the Adjustment Work.** The Developer will provide project management during the Adjustment of the Owner Utilities.

12. **Utility Investigations.** At the Developer's request, the Owner shall assist the Developer in locating any Utilities (including appurtenances) which are owned and/or operated by Owner and may be impacted by the Facility. Without limiting the generality of the foregoing, in order to help assure that neither the Adjusted Owner Utilities nor existing, unadjusted utilities owned or operated by the Owner are damaged during construction of the Facility, the Owner shall mark in the field the location of all such utilities horizontally on the ground in advance of Facility construction in the immediate area of such utilities.

13. **Inspection and Acceptance by the Owner.**

(a) Throughout the Adjustment construction hereunder, the Owner shall provide adequate inspectors for such construction. The work shall be inspected by the Owner's inspector(s) at least once each working day, and more often if such inspections are necessary for prudent installation. Further, upon request by the Developer or its contractors, the Owner shall furnish an inspector at any reasonable time in which construction is underway pursuant to this Agreement, including occasions when construction is underway in excess of the usual forty (40) hour work week and at such other times as reasonably required. The Owner agrees to promptly notify the Developer of any concerns resulting from any such inspection.

(b) The Owner shall perform a final inspection of the Adjusted Owner Utilities, including conducting any tests as are necessary or appropriate, within **five (5) business days** after completion of construction hereunder. The Owner shall accept such construction if it is consistent with the performance standards described in Paragraph 3, by giving written notice of such acceptance to the Developer within said **five (5) day** period. If the Owner does not accept the construction, then the Owner shall, not later than the expiration of said **five (5) day** period, notify the Developer in writing of its grounds for non-acceptance and suggestions for correcting the problem, and if the suggested corrections are justified, the Developer will comply. The Owner shall re-inspect any revised construction (and re-test if appropriate) and give notice of acceptance, not later than **five (5) business days** after completion of corrective work. The Owner's failure to inspect and/or to give any required notice of acceptance or non-acceptance within the specified time period shall be deemed acceptance.

(c) From and after the Owner's acceptance (or deemed acceptance) of an Adjusted Owner Utility, the Owner agrees to accept ownership of, and full operation and maintenance responsibility for, such Owner Utility.

14. **Design Changes.** The Developer will be responsible for additional Adjustment design and/or construction costs necessitated by design changes to the Facility made after approval of the Plans, upon the terms specified herein.

15. **Field Modifications.** The Developer shall provide the Owner with documentation of any field modifications, including Utility Adjustment Field Modifications as well as minor changes described in Paragraph 17(b), occurring in the Adjustment of the Owner Utilities.

16. **Real Property Interests.**

(a) The Owner has provided, or upon execution of this Agreement shall promptly provide to the Developer, documentation acceptable to the Department indicating any right, title or interest in real property claimed by the Owner with respect to the Owner Utilities in their existing location(s). Such claims are subject to the Department's approval as part of its review of the Utility Assembly as described in Paragraph 2. Claims approved by the Department as to rights or interests are referred to herein as "Existing Interests".

(b) If acquisition of any new easement or other interest in real property ("New Interest") is necessary for the Adjustment of any Owner Utilities, then the Owner shall be responsible for undertaking such acquisition. The Owner shall implement each acquisition hereunder expeditiously so that related Adjustment construction can proceed in accordance with the Developer's Facility schedules. The Developer shall be responsible for its share (as specified in Paragraph 6) of the actual and reasonable acquisition costs of any such New Interest (including without limitation the Owner's reasonable overhead charges and legal costs as well as compensation paid to the landowner), excluding any costs attributable to Betterment as described in Paragraph 16(c), and subject to the provisions of Paragraph 16(e); provided, however, that all acquisition costs shall be subject to the Developer's prior written approval. Eligible acquisition costs shall be segregated from other costs on the Owner's estimates and invoices. Any such New Interest shall have a written valuation and shall be acquired in accordance with applicable law.

(c) A New Interest shall be substantially equivalent (e.g., in width and type) to the Existing Interest being replaced, unless a New Interest exceeding such standard (i) is required in order to accommodate the Facility or by compliance with applicable law, or (ii) is called for by the Developer in the interest of overall Facility project economy. Any New Interest that does not meet the requirements of the preceding sentence shall be considered a Betterment to the extent that it upgrades the Existing Interest which it replaces, or in its entirety if the related Owner Utility was not installed pursuant to an Existing Interest. Betterment costs shall be solely the Owner's responsibility.

(d) For each Existing Interest located within the final Facility right of way, upon completion of the related Adjustment work and its acceptance by the Owner, the Owner agrees to execute a quitclaim deed or other appropriate documentation relinquishing such Existing Interest to the Department, unless the affected Owner Utility is remaining in its original location or is being reinstalled in a new location within the area subject to such Existing Interest. All quitclaim deeds or other relinquishment documents shall be subject to the Department's approval as part of its review of the Utility Assembly as described in Paragraph 2. For each such Existing Interest relinquished by the Owner, the Developer shall do one of the following to compensate the Owner for such Existing Interest, as appropriate:

(i) If the Owner acquires a New Interest for the affected Owner Utility, the Developer shall reimburse the Owner for the Developer's share of the Owner's actual and reasonable acquisition costs in accordance with Paragraph 16(b); or

(ii) If the Owner does not acquire a New Interest for the affected Owner Utility, the Developer shall compensate the Owner for the Developer's share of the fair market value of such relinquished Existing Interest, as mutually agreed between the Owner and the Developer and supported by a written valuation.

The compensation provided to the Owner pursuant to either subparagraph (i) or subparagraph (ii) above shall constitute complete compensation to the Owner for the relinquished Existing Interest, and no further compensation shall be due to the Owner from either the Developer or the Department on account of such Existing Interest.

(e) The Owner shall execute a Utility Joint Use Acknowledgment (TxDOT-U-80A) for each Adjusted Owner Utility where required pursuant to TxDOT policies. All Utility Joint Use Acknowledgments shall be subject to TxDOT approval as part of its review of the Utility Assembly as described in Paragraph 2.

17. **Amendments and Modifications.** This Agreement may be amended or modified only by a written instrument executed by the parties hereto, in accordance with Paragraph 17(a) or Paragraph 17(b) below.

(a) Except as otherwise provided in Paragraph 17(b), any amendment or modification to this Agreement or the Plans attached hereto shall be implemented by a Utility Adjustment Agreement Amendment ("UAAA") in the form of Exhibit B hereto (TxDOT-CDA-U-35A-DM). The UAAA form can be used for a new scope of work with concurrence of the Developer and TxDOT as long as the Design and Construction responsibilities have not changed. Each UAAA is subject to the review and approval of the Department, prior to its becoming effective for any purpose and prior to any work being initiated thereunder. The Owner agrees to keep and track costs for each UAAA separately from other work being performed.

(b) For purposes of this Paragraph 17(b), "Utility Adjustment Field Modification" shall mean any horizontal or vertical design change from the Plans included in a Utility Assembly previously approved by the Department, due either to design of the Facility or to conditions not accurately reflected in the approved Utility Assembly (e.g., shifting the alignment of an 8 in. water line to miss a roadway drainage structure). A Utility Adjustment Field Modification agreed upon by the Developer and the Owner does not require a UAAA, provided that the modified Plans have been submitted to the Department for its review and comment, and the process for such review and comment has been completed as specified in the CDA. A minor change (e.g., an additional water valve, an added Utility marker at a ROW line, a change in vertical bend, etc.) will not be considered a Utility Adjustment Field Modification and will not require a UAAA, but shall be shown in the documentation required pursuant to Paragraph 15.

18. **Relationship of the Parties.** This Agreement does not in any way, and shall not be construed to, create a principal/agent or joint venture relationship between the parties hereto and under no circumstances shall the Owner or the Developer be considered as or represent itself to be an agent of the other.

19. **Entire Agreement.** This Agreement embodies the entire agreement between the parties and there are no oral or written agreements between the parties or any representations made which are not expressly set forth herein.

20. **Assignment; Binding Effect; Department as Third Party Beneficiary.** Neither the Owner nor the Developer may assign any of its rights or delegate any of its duties under this Agreement without the prior written consent of the other party and of the Department, which consent may not be unreasonably withheld or delayed; provided, however, that the Developer may assign any of its rights and/or delegate any of its duties to the Department or to any other entity with which the Department contracts to fulfill the Developer's obligations under the CDA, at any time without the prior consent of the Owner.

    This Agreement shall bind the Owner, the Developer, and their successors and permitted assigns, and nothing in this Agreement nor in any approval subsequently provided by either party hereto shall be construed as giving any benefits, rights, remedies, or claims to any other person, firm, corporation or other entity, including, without limitation, any contractor or other party retained for the Adjustment work or the public in general; provided, however, that the Owner and the Developer agree that although the Department is not a party to this Agreement, the Department is intended to be a third-party beneficiary to this Agreement.

21. **Breach by the Developer.** If the Owner claims that the Developer has breached any of its obligations under this Agreement, the Owner will notify the Developer and the Department in writing of such breach, and the Developer shall have 30 days following receipt of such notice in which to cure such breach, before the Owner may invoke any remedies which may be available to it as a result of such breach; provided, however, that both during and after such period the Department shall have the right, but not the obligation, to cure any breach by the Developer. Without limiting the generality of the foregoing, (a) the Department shall have no liability to the Owner for any act or omission committed by the Developer in connection with this Agreement, including without limitation any reimbursement owed to the Owner hereunder and any claimed defect in any design or construction work supplied by the Developer or by its contractors, and (b) in no event shall the Department be responsible for any repairs or maintenance to the Owner Utilities Adjusted pursuant to this Agreement.

22. **Traffic Control.** The Developer shall provide traffic control or shall reimburse the Owner for the Developer's share (if any, as specified in Paragraph 6) of the costs for traffic control made necessary by the Adjustment work performed by either the Developer or the Owner pursuant to this Agreement, in compliance with the requirements of the Texas Manual on Uniform Traffic Control Devices. Betterment percentages calculated in Paragraph 10 shall also apply to traffic control costs.

23. **Notices.** Except as otherwise expressly provided in this Agreement, all notices or communications pursuant to this Agreement shall be sent or delivered to the following:

    The Owner:

    Phone:
    Fax:

    The Developer:

Phone:
Fax:

A party sending a notice of default of this Agreement to the other party shall also send a copy of such notice to the Department at the following address:

TxDOT:

Phone:
Fax:

Any notice or demand required herein shall be given (a) personally, (b) by certified or registered mail, postage prepaid, return receipt requested, (c) by confirmed fax, or (d) by reliable messenger or overnight courier to the appropriate address set forth above. Any notice served personally shall be deemed delivered upon receipt, served by facsimile transmission shall be deem delivered on the date of receipt as shown on the received facsimile, and served by certified or registered mail or by reliable messenger or overnight courier shall be deemed delivered on the date of receipt as shown on the addressee's registry or certification of receipt or on the date receipt is refused as shown on the records or manifest of the U.S. Postal Service or such courier. Either party may from time to time designate any other address for this purpose by written notice to the other party; the Department may designate another address by written notice to both parties.

24. **Approvals.** Any acceptance, approval, or any other like action (collectively "Approval") required or permitted to be given by either the Developer, the Owner or the Department pursuant to this Agreement:

(a) Must be in writing to be effective (except if deemed granted pursuant hereto),

(b) Shall not be unreasonably withheld or delayed; and if Approval is withheld, such withholding shall be in writing and shall state with specificity the reason for withholding such Approval, and every effort shall be made to identify with as much detail as possible what changes are required for Approval, and

(c) Except for approvals by the Department, and except as may be specifically provided otherwise in this Agreement, shall be deemed granted if no response is provided to the party requesting an Approval within the time period prescribed by this Agreement (or if no time period is prescribed, then fourteen (14) calendar days), commencing upon actual receipt by the party from which an Approval is requested or required, of a request for Approval from the requesting party. All requests for Approval shall be sent out by the requesting party to the other party in accordance with Paragraph 23.

25. **Time.**

(a) Time is of the essence in the performance of this Agreement.

(b) All references to "days" herein shall be construed to refer to calendar days, unless otherwise stated.

(c) Neither the Owner nor the Developer shall be liable to the other for any delay in performance under this Agreement from any cause beyond its control and without its fault or negligence

("Force Majeure"), such as acts of God, acts of civil or military authority, fire, earthquake, strike, unusually severe weather, floods or power blackouts.

26. **Department Review and Approval**. Notwithstanding any contrary provision of this Agreement, if this Agreement and the CDA call for different levels of review for any items submitted to the Department (e.g., "approval" as opposed to "review and comment"), then the level of review called for by the CDA will prevail for purposes of this Agreement.

27. **Continuing Performance.** In the event of a dispute, the Owner and the Developer agree to continue their respective performance hereunder to the extent feasible in light of the dispute, including paying billings, and such continuation of efforts and payment of billings shall not be construed as a waiver of any legal right.

28. **Equitable Relief**. The Developer and the Owner acknowledge and agree that delays in Adjustment of the Owner Utilities will impact the public convenience, safety and welfare, and that (without limiting the parties' remedies hereunder) monetary damages would be inadequate to compensate for delays in the construction of the Facility. Consequently, the parties hereto (and the Department as well, as a third party beneficiary) shall be entitled to specific performance or other equitable relief in the event of any breach of this Agreement which threatens to delay construction of the Facility; provided, however, that the fact that specific performance or other equitable relief may be granted shall not prejudice any claims for payment or otherwise related to performance of the Adjustment work hereunder.

29. **Authority.** The Owner and the Developer each represents and warrants to the other party that the warranting party possesses the legal authority to enter into this Agreement and that it has taken all actions necessary to exercise that authority and to lawfully authorize its undersigned signatory to execute this Agreement and to bind such party to its terms. Each person executing this Agreement on behalf of a party warrants that he or she is duly authorized to enter into this Agreement on behalf of such party and to bind it to the terms hereof.

30. **Cooperation.** The parties acknowledge that the timely completion of the Facility will be influenced by the ability of the Owner and the Developer to coordinate their activities, communicate with each other, and respond promptly to reasonable requests. Subject to the terms and conditions of this Agreement, the Owner and the Developer agree to take all steps reasonably required to coordinate their respective duties hereunder in a manner consistent with the Developer's current and future construction schedules for the Facility.

31. **Termination.** If the Facility project is canceled or modified so as to eliminate the necessity of the Adjustment work described herein, then the Developer shall notify the Owner in writing and the Developer reserves the right to thereupon terminate this Agreement. Upon such termination, the parties shall negotiate in good faith an amendment that shall provide mutually acceptable terms and conditions for handling the respective rights and liabilities of the parties relating to such termination.

32. **Nondiscrimination**. Each party hereto agrees, with respect to the work performed by such party pursuant to this Agreement, that such party shall not discriminate on the grounds of race, color, sex, national origin or disability in the selection and/or retention of contractors and consultants, including procurement of materials and leases of equipment.

33. **Captions**. The captions and headings of the various paragraphs of this Agreement are for convenience and identification only, and shall not be deemed to limit or define the content of their respective paragraphs.

34. **Counterparts.** This Agreement may be executed in any number of counterparts. Each such counterpart hereof shall be deemed to be an original instrument but all such counterparts together shall constitute one and the same instrument.

35. **Effective Date.** Except for the provisions of Paragraph 2(a) (which shall become effective immediately upon execution of this Agreement by both the Owner and the Developer without regard to the Department's signature), this Agreement shall become effective upon the later of (a) the date of signing by the last party (either the Owner or the Developer) signing this Agreement, and (b) the date of the Department's approval as indicated by the signature of the Department's representative, below.

APPROVED BY:
TEXAS DEPARTMENT OF TRANSPORTATION

By: _____
Authorized Signature

Printed Name: _____

Title: _____

Date: _____

OWNER

_____
[Print Owner Name]

By: _____
Duly Authorized Representative

Printed Name: _____

Title: _____

Date: _____

DEVELOPER

_____
[Print Developer Name]

By: _____
Duly Authorized Representative

Printed Name: _____

Title: _____

Date: _____

County:
ROW CSJ No.:
Const. CSJ No.:
Highway:
Limits:
Fed. Proj. No.:

EXHIBIT A

PLANS, SPECIFICATIONS, COST ESTIMATES

County:
ROW CSJ No.:
Const. CSJ No.:
Highway:
Limits:
Fed. Proj. No.:

EXHIBIT B

UTILITY ADJUSTMENT AGREEMENT AMENDMENT
(TxDOT-CDA-U-35A-DM)

County:

Highway:
Limits:
Fed. Proj. No.:
ROW CSJ No.:
Const. CSJ No.:

UTILITY ADJUSTMENT AGREEMENT AMENDMENT (Developer Managed)

(Amendment No. to Agreement No.: -U-_____)

THIS AMENDMENT TO MASTER UTILITY ADJUSTMENT AGREEMENT (this "Amendment"), by and between _____, hereinafter identified as the "**Developer**", and _____, hereinafter identified as the "**Owner**", is as follows:

WITNESSETH

WHEREAS, the STATE of TEXAS, acting by and through the Texas Department of Transportation, hereinafter identified as the "Department", proposes to construct the turnpike project identified above (the "Facility", as more particularly described in the "Original Agreement", defined below); and

WHEREAS, pursuant to that certain Comprehensive Development Agreement ("CDA") by and between the Department and the Developer with respect to the Facility, the Developer has undertaken the obligation to design and construct the Facility, including causing the removal, relocation, or other necessary adjustment of existing Utilities impacted by the Facility; and

WHEREAS, the Owner and the Developer are parties to that certain Master Utility Adjustment Agreement with an effective date of _____, 20_____ and designated by the "Agreement No." indicated above, as amended by previous amendments, if any (the "Original Agreement"), which provides for the adjustment of certain Utilities owned and/or operated by the Owner; and

WHEREAS, the parties are required to utilize this Amendment form in order to modify the Original Agreement to add the adjustment of Owner facilities not covered by the Original Agreement; and

WHEREAS, the parties desire to amend the Original Agreement to add additional Owner facility(ies), on the terms and conditions hereinafter set forth.

NOW, THEREFORE, in consideration of the agreements contained herein, the parties hereto agree as follows:

1. **Amendment.** The Original Agreement is hereby amended as follows:

   (a) The description of the Owner Utilities and the proposed Adjustment of the Owner Utilities is hereby amended to add the following facility(ies) ("Additional Owner Utilities") and proposed Adjustment(s) :

   (b) The Plans, as defined in Paragraph 1 of the Original Agreement, are hereby amended to add thereto the plans, specifications and cost estimates attached hereto as Exhibit A.

(c) The Plans attached hereto as Exhibit A, along with this Amendment, shall be submitted upon execution to the Department in accordance with Paragraph 2 of the Original Agreement, and Paragraph 2 shall apply to this Amendment and the Plans attached hereto in the same manner as if this Amendment were the Original Agreement. If the Owner claims an Existing Interest for any of the Additional Owner Utilities, documentation with respect to such claim shall be submitted to the Department as part of a "Supplemental Utility Assembly" together with this Amendment and the attached Plans, in accordance with Paragraph 16(a) of the Original Agreement.

(d) The Developer's costs associated with Adjustment of the Additional Owner Utilities shall be developed pursuant to the method checked and described below, which for purposes of Paragraphs 6 through 10 of the Original Agreement, shall correspond to the procedures set forth as (1) through (3) in Paragraph 5(b) of the Original Agreement *[check only one box]*:

☐ (1) Developer's "Actual Cost" for the Adjustment work shall be the sum of the actual, allocable and reasonable charges incurred by Developer for such work, developed in accordance with generally recognized accounting principles, including but not limited to: all labor, transportation, equipment, materials, permits, and indirect and overhead charges; or

☐ (2) The agreed sum of $ ("Agreed Sum") as supported by the analysis of the Developer's estimated costs attached hereto as part of Exhibit A; or

☐ (3) The Developer is responsible for 100% of the costs for the Adjustment work, and there is no Betterment. Accordingly, the Developer is not required to report such costs to the Owner.

(e) The Owner's indirect costs associated with Adjustment of the Additional Owner Utilities shall be developed pursuant to the method checked and described below, which for purposes of Paragraphs 6 through 10 of the Original Agreement, shall correspond to the procedures set forth as (1) through (3) in Paragraph 5(c) of the Original Agreement *[check only one box]*:

☐ (1) Actual related indirect costs accumulated in accordance with a work order accounting procedure prescribed by the applicable Federal or State regulatory body ("Actual Cost"); or

☐ (2) Actual related indirect costs accumulated in accordance with an established accounting procedure developed by the Owner and which the Owner uses in its regular operations ("Actual Cost"); or

☐ (3) The agreed sum of $, ("Agreed Sum") as supported by the analysis of estimated costs attached hereto as part of Exhibit A.

(f) For purposes of Paragraph 6 of the Original Agreement, responsibility for the Agreed Sum or Actual Cost, as applicable, of all Adjustment work to be performed pursuant to this Amendment shall be allocated between the Developer and the Owner as follows: _____ % to the Developer and _____ % to the Owner; provided, however, that any portion of an Agreed Sum or Actual Cost attributable to Betterment shall be allocated 100% to the Owner in accordance with Paragraph 10 of the Original Agreement.

(g) Paragraph 10(b) of the Original Agreement is hereby amended to add the following *[Check the one box that applies, and complete if appropriate]*:

☐ The Adjustment of the Additional Owner Utilities, pursuant to the Plans as amended herein, does not include any Betterment.

☐ The Adjustment of the Additional Owner Utilities, pursuant to the Plans as amended herein, includes Betterment to the Additional Owner Utilities by reason of *[insert explanation, e.g. "replacing 12" pipe with 24" pipe]*: _____. The Developer has provided to the Owner comparative estimates for (i) all work to be performed by the Developer pursuant to this Amendment, including work attributable to the Betterment, and (ii) the cost to perform such work without the Betterment, which estimates are hereby approved by the Owner. The estimated cost of the Developer's work under this Amendment which is attributable to Betterment is $_____, calculated by subtracting (ii) from (i). The percentage of the total cost of the Developer's work under this Amendment which is attributable to Betterment is _____ %, calculated by subtracting (ii) from (i), which remainder is divided by (i).

(h) If Paragraph 1(g) identifies Betterment, the Owner shall advance to the Developer, at least **fourteen (14) days** prior to the date scheduled for commencement of construction for Adjustment of the Additional Owner Utilities, the estimated cost attributable to Betterment as set forth in Paragraph 1(g) of this Amendment. If the Owner fails to advance payment to the Developer on or before the foregoing deadline, the Developer shall have the option of commencing and completing (without delay) the Adjustment work without installation of the applicable Betterment. *[Check the one appropriate provision]*:

☐ The estimated cost stated in Paragraph 1(g) of this Amendment is the agreed and final amount due for Betterment under this Amendment, and accordingly no adjustment (either up or down) of such amount shall be made based on actual costs.

☐ The Owner is responsible for the Developer's actual cost for the identified Betterment. Accordingly, upon completion of all Adjustment work to be performed by both parties pursuant to this Amendment, (i) the Owner shall pay to the Developer the amount, if any, by which the actual cost of the Betterment (determined as provided below in this paragraph) exceeds the estimated cost advanced by the Owner, or (ii) the Developer shall refund to the Owner the amount, if any, by which such advance exceeds such actual cost, as applicable. Any additional payment by the Owner shall be due within **sixty (60) days** after the Owner's receipt of the Developer's invoice therefor, together with supporting documentation; any refund shall be due within **sixty (60) days** after completion of the Adjustment work under this Amendment. The actual cost of Betterment incurred by the Developer shall be calculated by multiplying (i) the Betterment percentage stated in Paragraph 1(g) of this Amendment, by (ii) the actual cost of all work performed by the Developer pursuant to this Amendment (including work attributable to the Betterment), as invoiced by the Developer to the Owner.

(i) The determinations and calculations of Betterment described in this Amendment shall exclude right of way acquisition costs. Betterment in connection with right-of-way acquisition is addressed in Paragraph 16 of the Original Agreement.

(j) Owner and Developer agree to refer to this Amendment, designated by the "Amendment No." and "Agreement Number" indicated on page 1 above, on all future correspondence regarding the Adjustment work that is the subject of this Amendment and to track separately all costs relating to this Amendment and the Adjustment work described herein.

(k) [*Include any other proposed amendments allowed by applicable law.*]

2. **General.**

(a) All capitalized terms used in this Amendment shall have the meanings assigned to them in the Original Agreement, except as otherwise stated herein.

(b) This Amendment may be executed in any number of counterparts. Each such counterpart hereof shall be deemed to be an original instrument but all such counterparts together shall constitute one and the same instrument.

(c) Except as amended hereby, the Original Agreement shall remain in full force and effect. In no event shall the responsibility, as between the Owner and the Developer, for the preparation of the Plans and the Adjustment of the Owner Utilities be deemed to be amended hereby.

(d) This Amendment shall become effective upon the later of (a) the date of signing by the last party (either the Owner or the Developer) signing this Amendment, and (b) the completion of the Department's review and approval as indicated by the signature of the Department's representative, below.

APPROVED BY:

TEXAS DEPARTMENT OF TRANSPORTATION

By: _____
Authorized Signature

Printed Name: _____

Title: _____

Date: _____

OWNER

_____
[Print Owner Name]

By: _____
Duly Authorized Representative

Printed Name: _____

Title: _____

Date: _____

DEVELOPER

_____
[Print Developer Name]

By: _____
Duly Authorized Representative

Printed Name: _____

Title: _____

Date: _____

County:
CSJ No.:
Highway:
Limits:

Fed. Proj. No.:
ROW Acct. No.:

AFFIDAVIT

Agreement No. TxDOT-U-

THE STATE OF TEXAS)
)
COUNTY OF)

WHEREAS, the State of Texas, acting by and through the Texas Turnpike Authority Division of the Texas Department of Transportation, herein called TxDOT, has deemed it necessary to make certain highway improvements on Highway in County, Texas, from to ; and,

WHEREAS, it is anticipated that the hereinabove mentioned improvements will affect the facilities of hereinafter called the **Owner**, at the following described locations:

and;

WHEREAS, the **TTA** has requested that the **Owner** furnish to the **TTA** information relative to interests that **Owner** hold in lands at each of the hereinabove referenced locations;

NOW THEREFORE, before me, the undersigned authority, this day personally appeared , who, after being by me duly sworn, did depose and say:

That he/she is of and, as such, has knowledge of the facts contained herein, and

That, to the best of his/her knowledge, said **Owner** is the owner of the following described interests in the hereinabove-indicated lands, copies of the instruments under which said **Owner** claims said interests being attached hereto and made a part hereof.

_____
Signature

_____
Title

_____
Company

Sworn to and subscribed before me this _____ day of _____, A.D. 20___.

_____
Notary Public, State of Texas

My Commission expires:
_____

Notice of Confidentiality Rights: If you are a natural person, you may remove or strike any of the following information from this instrument before it is filed for record in the public records: your Social Security Number or your Driver's License Number.

QUITCLAIM DEED

THE STATE OF TEXAS §
§
COUNTY OF § **KNOW ALL MEN BY THESE PRESENTS:**

That, of the County of , State of Texas, hereinafter referred to as Grantors, whether one or more, for and in consideration of the sum of Dollars ($) and other good and valuable consideration to Grantors in hand paid by the State of Texas, acting by and through the Texas Transportation Commission, the receipt of which is hereby acknowledged, and for which no lien is retained, either expressed or implied, have Quitclaimed and do by these presents Bargain, Sell, Release and forever Quitclaim unto the State of Texas all of Grantors' right, title, interest, claim and demand in and to that certain tract or parcel of land, situated in the County of , State of Texas, more particularly described in Exhibit "A," attached hereto and incorporated herein for any and all purposes.

Type in District description of acquisition here.

TO HAVE AND TO HOLD for said purposes together with all and singular the rights, privileges, and appurtenances thereto in any manner belonging unto the said State of Texas forever.

IN WITNESS WHEREOF, this instrument is executed on this the day of , .

_____ _____

_____ _____

_____ _____

Acknowledgement

State of Texas
County of

This instrument was acknowledged before me on _____

by_____.

_____
Notary Public's Signature

Corporate Acknowledgment

State of Texas
County of

This instrument was acknowledged before me on _____by

_____, _____

of _____, a _____

corporation, on behalf of said corporation.

_____
Notary Public's Signature

Attachment 6-2:
Utility Assembly and Tracking Report
As Of: <Current Date>

Utility Company	U Number	Point of Contact			Certified Notification Letter Sent	Type of Existing Facility	ROW or Private Esm't	Last Utility Contact Date	Possible Conflict	Location of Conflict	Conflicting Structure	Station Location of Conflict (s)		Estimated Quantity	Estimated Cost	Joint Bid		Utility Agreement				Utility Notice to Proceed	Utility Relocation			ROW Cleared	Comments	Additional Comments	Action Items
		Contact Name	Contact's Address/E-Mail	Phone Number								Start	End			Entity In agreement?	Plans Rec'd	Eligible for Reimbursmn't?	Agreement sent to utility owner	Agreement rec'd from utility owner	Agreement Executed		Req'd	Const Start	Const Complete				