CAPITAL MAINTENANCE AGREEMENT

FOR THE

SOUTHERN GATEWAY PROJECT

By and Between

The Texas Department of Transportation

and

[_____]

Dated as of: [_____], 20[__]

CAPITAL MAINTENANCE AGREEMENT

THE SOUTHERN GATEWAY PROJECT

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CAPITAL MAINTENANCE AGREEMENT

THE SOUTHERN GATEWAY PROJECT

This **CAPITAL MAINTENANCE AGREEMENT** ("**Capital Maintenance Agreement**") is made and entered into as of _____, 20[__] by and between the **TEXAS DEPARTMENT OF TRANSPORTATION** ("**TxDOT**") and [_____], a [_____] ("**DB Contractor**").

RECITALS

A. The State of Texas desires to facilitate private sector participation in the development of the State's transportation system via public-private partnership agreements, and to accomplish this purpose, the Texas Legislature has enacted Transportation Code, Chapter 223, Subchapter F (the "**Code**"), and TxDOT has adopted subchapter I in Chapter 9 of Title 43, Texas Administrative Code, relating to design-build contracts (the "**Rules**").

B. TxDOT wishes to enter into agreements with a private sector entity to design, construct and, at TxDOT's sole option, maintain non-tolled express lanes and associated facilities along an approximately 5.1-mile section of Interstate Highway 35E ("**I-35E**") from Colorado Boulevard to south of the I-35E/U.S. Highway ("**US**") 67 interchange (with transition work extending north to approximately Reunion Boulevard) and an approximately 4.9-mile section of US 67 from the I-35E/US 67 interchange to Interstate Highway 20 ("**I-20**") in Dallas County and a portion of the Local Enhancements (the "**Project**").

C. Pursuant to the Code and the Rules, TxDOT issued a Request for Qualifications (as amended, the "**RFQ**") on May 13, 2016.

D. TxDOT received five qualification statements for the design, construction and potential maintenance of the Project on June 30, 2016 and subsequently shortlisted three proposers.

E. On November 10, 2016, TxDOT issued to the shortlisted proposers a Request for Proposals (as subsequently amended by addenda, the "**RFP**") to design, construct and, at TxDOT's discretion, maintain the Project.

F. On [_____], 2017, TxDOT received [___] responses to the RFP, including the response of DB Contractor (the "**Proposal**").

G. An RFP evaluation committee comprised of TxDOT personnel determined that DB Contractor was the proposer which best met the selection

criteria contained in the RFP and that the Proposal was the one that provided the best value to the State of Texas.

H. On [_____], 2017, the Texas Transportation Commission accepted the recommendation of the Executive Director and the RFP evaluation committee and authorized TxDOT staff to negotiate a Design-Build Agreement and this Capital Maintenance Agreement.

I. Concurrently herewith TxDOT and DB Contractor are entering into a Design-Build Agreement providing for the development, design and construction of the Project (the "**Design-Build Agreement**").

J. This Capital Maintenance Agreement, the Design-Build Agreement and the other CMA Documents collectively constitute a design-build contract, as contemplated under the Code and the Rules, and are entered into in accordance with the provisions of the RFP.

K. The Executive Director of TxDOT has been authorized to enter into this Capital Maintenance Agreement pursuant to the Code, the Rules and the Texas Transportation Commission Minute Order [_____], dated [_____], 2017.

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

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

1.1 Definitions

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

1.2 CMA Documents; Order of Precedence

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

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

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

(b) this Capital Maintenance Agreement (including all exhibits, except Exhibits 2 and 3);

(c) portions of the Design-Build Agreement included by reference in accordance with Section 1.2.5;

(d) Change Orders and all other amendments to Exhibit 2 (Maintenance Specification) or to any attachments thereto;

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

(f) portions of the Technical Provisions included by reference in accordance with Section 1.2.5; and

(g) DB Contractor's Proposal Commitments as set forth in Exhibit 3.

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

1.2.4 Notwithstanding the order of precedence among CMA Documents set forth in Section 1.2.2, if a CMA Document contains differing provisions on the same subject matter than another CMA Document, the provisions that establish the higher quality, manner or method of performing the Maintenance Services or use more stringent standards will prevail. Further, in the event of a

conflict among any standards, criteria, requirements, conditions, procedures, specifications or other provisions applicable to the Project or Maintenance Services established by reference to a described manual or publication within a CMA Document or set of CMA Documents, the standard, criterion, requirement, condition, procedure, specification or other provision offering higher quality or better performance will apply, unless TxDOT, in its discretion, approves otherwise in writing. If either Party becomes aware of any such conflict, it shall promptly notify the other Party of the conflict. TxDOT shall issue a written determination respecting which of the conflicting items is to apply promptly after it becomes aware of any such conflict.

1.2.5 Portions of the Design-Build Agreement and Technical Provisions are referenced in the CMA Documents for the purpose of defining requirements for Maintenance Services. The Design-Build Agreement and Technical Provisions shall be deemed incorporated in the CMA Documents to the extent that they are so referenced, with the order of priority shown in Section 1.2.2.

1.2.6 The Reference Information Documents are listed in Exhibit 14. Portions of the Reference Information Documents are explicitly referenced in the CMA Documents for the purpose of defining requirements of the CMA Documents. The Reference Information Documents shall be deemed incorporated in the CMA Documents solely to the extent that they are so referenced, with the same order of priority as the CMA Document in which the reference occurs.

1.3 Interpretation of CMA Documents

1.3.1 In the CMA Documents:

(a) The singular includes the plural and vice versa;

(b) References to statutes or regulations include all statutory or regulatory provisions consolidating, amending or replacing the statute or regulation referred to;

(c) The words "including," "includes" and "include" shall be deemed to be followed by the words "without limitation" and shall not be considered to set forth an exhaustive list;

(d) Unless otherwise indicated, the words "Section," "subsection," "paragraph," "sentence," "clause," "sub-clause" and "Exhibit" mean and refer to the specified Section, subsection, paragraph, sentence, clause, sub-clause or Exhibit of, or to, this Capital Maintenance Agreement, and a reference to a subsection or clause "above" or "below" refers to the denoted subsection or clause within the Section in which the reference appears;

(e) The word "discretion" with respect to any Person means the sole and absolute discretion of such Person except as otherwise stated herein;

(f) The word "promptly" means as soon as reasonably practicable in light of then-prevailing circumstances;

(g) Words such as "herein," "hereby", "hereof", "hereto" and "hereunder" and words of similar import refer to the entire document in which they are contained and not to any particular provision or section;

(h) Words not otherwise defined that have well-known technical or construction industry meanings are used in accordance with such recognized meanings;

(i) References to Persons include their respective permitted successors and assigns and, in the case of Governmental Entities, Persons succeeding to their respective functions and capacities;

(j) Words of any gender used herein shall include each other gender where appropriate;

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

(l) The division of this Capital Maintenance Agreement into parts, sections and other subdivisions is for convenience of reference only and shall not affect the construction or interpretation of this Capital Maintenance Agreement, and the headings in this Capital Maintenance Agreement are not intended to be full or precise descriptions of the text to which they refer and shall not be considered part of this Capital Maintenance Agreement; and

(m) Whenever the CMA Documents require or provide for any notice, approval, consent, acceptance, determination, decision, certificate, order, response, waiver, explanation, policy, information or the like, the same and any request for any of the foregoing must be in writing (unless otherwise waived in writing by the other Party).

1.3.2 Unless otherwise specified, lists contained in the CMA Documents defining the Project or the Maintenance Services shall not be deemed all-inclusive.

1.3.3 DB Contractor acknowledges and agrees that it had the opportunity and obligation, prior to submission of its Proposal, to review the terms and conditions of the CMA Documents and to bring to the attention of TxDOT any conflicts or ambiguities contained therein. DB Contractor further acknowledges and agrees that it has independently reviewed the CMA Documents with legal counsel, and that it has the requisite experience and sophistication to understand, interpret and agree to the particular language of the provisions of the CMA Documents. Accordingly, if an ambiguity in, or there is a dispute regarding, the interpretation of the CMA Documents, they shall not be interpreted or construed against the Person that prepared them, and, instead, other rules of interpretation and construction shall be used.

1.3.4 TxDOT's interim or final answers to the questions posed during the Proposal process for this Capital Maintenance Agreement shall in no event be deemed part of the CMA Documents and shall not be relevant in interpreting the CMA Documents except to the extent they may clarify provisions otherwise considered ambiguous.

1.3.5 On plans, as-built drawings, working drawings, and standard plans, calculated or stated dimensions shall take precedence over scaled dimensions.

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

1.4 Referenced Standards and Specifications

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

1.4.2 In interpreting referenced standards, the following apply:

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

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

1.5 Reference Information Documents

1.5.1 TxDOT has provided and disclosed the Reference Information Documents to DB Contractor. Except as provided in Section 1.2.6, (a) the Reference Information Documents are not mandatory or binding on DB Contractor, and (b) DB Contractor is not entitled to rely on the Reference Information Documents as presenting design, engineering, operating or maintenance solutions or other direction, means or methods for complying with the requirements of the CMA Documents, Governmental Approvals or Law.

1.5.2 TxDOT shall not be responsible or liable in any respect for any causes of action, claims or Losses whatsoever suffered by any DB Contractor-Related Entity by reason of any use of information contained in, or any action or forbearance in reliance on, the Reference Information Documents or Capital Maintenance Agreement.

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

1.6 Explanations; Omissions and Mis-descriptions

DB Contractor shall not take advantage of or benefit from any apparent Error in the CMA Documents. Should it appear that the Maintenance Services to be done or any matter relative thereto is not sufficiently detailed or explained in the CMA Documents, DB Contractor shall request in writing such further written explanations from TxDOT as may be necessary and shall comply with the explanation provided. DB Contractor shall promptly notify TxDOT in writing of all Errors that it discovers in the CMA Documents, and shall obtain specific instructions in writing from TxDOT regarding any such Error before proceeding with the Maintenance Services affected thereby. The fact that the CMA Documents omit or mis-describe any details of any Maintenance Services that are necessary to carry out the intent of the CMA Documents or that are customarily performed shall not relieve DB Contractor from performing such omitted Maintenance Services (no matter how extensive) or mis-described details of the Maintenance Services, and they shall be performed as if fully and correctly set forth and described in the CMA

Documents, without entitlement to a Change Order hereunder except as specifically allowed under Section 10.

1.7 Computation of Periods

If the date to perform any act or give any notice specified in the CMA Documents (including the last date for performance or provision of notice "within" a specified time period) falls on a non-Business Day, such act or notice may be timely performed on the next succeeding day that is a Business Day. Notwithstanding the foregoing, requirements contained in the CMA Documents relating to actions to be taken in the event of an emergency, the mitigation of a hazard from a Category 1 Defect or other requirements for which it is evident that performance is intended to occur on a non-Business Day shall be required to be performed as specified, even though the date in question may fall on a non-Business Day.

1.8 Standard for Approvals

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

1.9 Professional Services Licensing Requirements

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

1.10 TxDOT Monetary Obligations

All TxDOT monetary obligations under the CMA Documents are subject to appropriation by the Texas Legislature. This Section 1.10 applies to all monetary obligations of TxDOT set forth in the CMA Documents, notwithstanding any

contrary provisions of the CMA Documents. The CMA Documents do not create a debt under the Texas Constitution.

SECTION 2. TXDOT'S OPTIONS; COMMENCEMENT OF MAINTENANCE PERIOD; TXDOT OPTION RIGHTS; FAILURE TO ISSUE MAINTENANCE NTPS

2.1 TxDOT's Options; Commencement of Maintenance Period

2.1.1 TxDOT, in its discretion, may elect to issue Maintenance NTP1. No later than 180 Days prior to the Initial Maintenance Term Commencement Date, TxDOT shall either (a) issue Maintenance NTP1 to DB Contractor or (b) be deemed to terminate this Capital Maintenance Agreement, as more particularly provided in Section 14.9.

2.1.2 For each Maintenance Term for which TxDOT has issued a Maintenance NTP, TxDOT, in its discretion, may also choose to exercise the option to have DB Contractor maintain Section 2A as a component of the Maintained Elements in accordance with the terms and conditions of the CMA Documents (the "**Section 2A Option**"). TxDOT must notify DB Contractor if it elects to exercise the Section 2A Option for the Initial Maintenance Term no later than 180 Days prior to the Initial Maintenance Term Commencement Date.

2.1.3 For each Maintenance Term for which TxDOT has issued a Maintenance NTP, TxDOT, in its discretion, may also choose to exercise the option to have DB Contractor maintain the Facility LE as a component of the Maintained Elements in accordance with the terms and conditions of the CMA Documents (the "**LE Option**"). TxDOT must notify DB Contractor if it elects to exercise the LE Option for the Initial Maintenance Term no later than 180 Days prior to the Initial Maintenance Term Commencement Date.

2.1.4 For the avoidance of doubt, TxDOT's decision with respect to exercising the Section 2A Option shall have no impact on its rights with respect to the LE Option and its decision with respect to exercising the LE Option shall have no impact on its rights with respect to the Section 2A Option.

2.2 TxDOT Options To Extend the Maintenance Term

After the Initial Maintenance Term, this CMA gives TxDOT the right to exercise, in its discretion, up to an additional two consecutive optional Maintenance Terms as described in Section 4, requiring DB Contractor to provide Maintenance Services for the Project in accordance with the terms and conditions of the CMA Documents.

2.3 Failure To Issue Maintenance NTPs or To Exercise the Section 2A Option or the LE Option

TxDOT shall have no liability to DB Contractor in the event that TXDOT elects, in its discretion, not to issue any Maintenance NTP under this Capital Maintenance Agreement or not to exercise the Section 2A Option or the LE Option at any time it is permitted to do so under this Capital Maintenance Agreement.

SECTION 3. SCOPE OF MAINTENANCE SERVICES

3.1 General

3.1.1 General Obligations

3.1.1.1 DB Contractor shall furnish all Maintenance Services within the Maintenance Limits throughout the Maintenance Period. DB Contractor must submit Maintenance Limits drawings for TxDOT approval as part of the MMP. All costs associated with providing the Maintenance Services are included in the Maintenance Price set forth in Exhibit 4, as such may be adjusted in accordance with Section 10.

3.1.1.2 DB Contractor shall provide all personnel, labor, materials, supplies, parts, equipment, public and employee safety devices, components, tools, utilities, and other items and services required to undertake and complete the Maintenance Services. DB Contractor shall bear the risk of loss, damage, theft and vandalism of such materials, supplies, parts, equipment, devices, components, tools, utilities and other items.

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

3.1.1.4 At all times during the Maintenance Period, DB Contractor shall carry out the Maintenance Services in accordance with (i) Good Industry Practice, (ii) the requirements, terms and conditions set forth in the CMA Documents, as the same may change from time to time in accordance with its terms, (iii) all Laws, (iv) the requirements, terms and conditions set forth in all Governmental Approvals, (v) the approved Maintenance Management Plan, and all approved updates and amendments thereof, (vi) safety compliance and Safety Standards, and (vii) all other applicable safety, environmental and other requirements, taking into account the Project ROW limits and other constraints affecting the Project. If DB Contractor encounters a contradiction between subsections (i) through (vii), DB Contractor shall advise TxDOT of the contradiction, and TxDOT shall instruct DB Contractor as to which subsection shall control in that instance. No such instruction shall be construed as a TxDOT-Directed Change. DB Contractor is responsible for keeping itself informed of and applying current Good Industry Practice.

3.1.1.5 DB Contractor acknowledges and agrees that, although certain provisions in the CMA Documents include Performance Requirements, such Performance Requirements shall not otherwise limit DB

Contractor's obligation to perform the Maintenance Services in a safe, reasonable, and prudent manner, and, in doing so, DB Contractor shall employ Good Industry Practice, and shall conduct its commercial affairs in a manner consistent with good faith and fair dealing.

3.1.1.6 DB Contractor shall, at all times, schedule and direct its activities to provide an orderly progression of the Maintenance Services to achieve completion within the specified time for completion, including furnishing such employees, materials, facilities and equipment and working such hours, including extra shifts, overtime operations, Sundays and holidays as may be necessary to achieve such goal, all at DB Contractor's sole cost, except as otherwise specifically provided in Section 10.

3.1.1.7 Whenever DB Contractor becomes aware of any damage to or Defect in the Project or of any maintenance activity that DB Contractor considers should be performed but with regard to which DB Contractor believes falls outside of its scope of responsibility for Maintenance Services, DB Contractor shall immediately notify TxDOT of such damage or Defect or maintenance activity.

3.1.1.8 DB Contractor shall remedy and repair the Project (excluding the Non-Maintained Elements) as necessary to meet the requirements of Exhibit 2 and the other CMA Documents.

3.1.1.9 Whenever an activity by DB Contractor disturbs, alters, removes or changes any Non-Maintained Element, DB Contractor shall restore the affected Non-Maintained Element to a condition no less favorable than its condition existing immediately before it was disturbed, altered, removed or changed.

3.1.1.10 At all times during the Maintenance Period, DB Contractor shall provide a Maintenance Manager approved by TxDOT who (i) will have full responsibility for the prosecution of the Maintenance Services, (ii) will act as agent and be a single point of contact in all matters on behalf of DB Contractor, and (iii) will be available to respond to TxDOT or TxDOT's Authorized Representatives.

3.1.1.11 DB Contractor, at its sole cost and expense unless expressly provided otherwise in this Capital Maintenance Agreement, shall comply with all provisions of the Maintenance Specification, including Safety Standards, during the Maintenance Period. DB Contractor's failure to comply with such requirements shall entitle TxDOT to all of the rights and remedies set forth in the CMA Documents, including assessment of Key Personnel Change Fees, deductions

from payments otherwise owed to DB Contractor, and termination for uncured DB Contractor Maintenance Default.

3.1.2 Deviations

DB Contractor may apply for TxDOT approval of Deviations from the Maintenance Specification regarding Maintenance Services. Where DB Contractor requests a Deviation as part of the submittal of a component plan of the Maintenance Management Plan, DB Contractor shall specifically identify and label the Deviation. TxDOT shall consider in its discretion, but have no obligation to approve, any such application, and DB Contractor shall bear the burden of persuading TxDOT that the Deviation sought constitutes sound and safe practices consistent with Good Industry Practice and achieves or substantially achieves TxDOT's applicable Safety Standards and criteria. No Deviation shall be deemed approved or be effective unless and until stated in a writing signed by TxDOT's Authorized Representative. TxDOT's affirmative written approval of a component plan of the Maintenance Management Plan shall constitute (i) approval of the Deviations expressly identified and labeled as Deviations therein, unless TxDOT takes exception to any such Deviation, and (ii) disapproval of any Deviations not expressly identified and labeled as Deviations therein. TxDOT's lack of issuance of a written Deviation within 14 days after DB Contractor applies therefor in writing shall be deemed a disapproval of such application. TxDOT's denial or disapproval of a requested Deviation shall be final and not subject to the dispute resolution procedures under Section 16. TxDOT may elect to process the application as a Request for Change Order under Section 10 rather than as an application for a Deviation.

3.1.3 Utility Accommodation

3.1.3.1 It is anticipated that, from time to time during the course of the Maintenance Period, Utility Owners will apply for additional utility permits to install new Utilities that would cross or longitudinally occupy the Maintenance Limits, or to modify, repair, upgrade, relocate or expand existing Utilities within the Maintenance Limits. In such circumstances and if requested by TxDOT, DB Contractor shall analyze the application and provide to TxDOT a recommendation (together with supporting analysis) as to whether the permit will have an impact on the Maintained Elements or DB Contractor's obligations hereunder, including the Maintenance Services. In addition, TxDOT shall make available to DB Contractor all utility permits issued after the Initial Maintenance Term Commencement Date. However, TxDOT shall have the right to issue Utility permits in its discretion. Applications for Utility permits and associated

coordination described in this Section 3.1.3.1 shall not be grounds for an adjustment in the Maintenance Price, a Change Order or any other Claim by DB Contractor.

3.1.4 Record Documents

Within 180 days after undertaking any Maintenance Services that result in a change to the Project design or construction, DB Contractor shall provide the Record Documents to reflect such work.

3.1.5 Access to Frontage Roads

TxDOT shall be solely responsible, at its expense, for handling requests and permitting for adjacent property access to frontage roads of the Project. If requested by TxDOT, DB Contractor shall analyze the permit request and provide to TxDOT a recommendation (together with supporting analysis) as to whether the permit will have an impact on the Maintained Elements or DB Contractor's obligations hereunder, including the Maintenance Services. Nothing in the CMA Documents shall restrict TxDOT from granting access permits or determining the terms and conditions of such permits. TxDOT will make available to DB Contractor access permits issued by TxDOT. DB Contractor shall have no claim for any increase in the Maintenance Price or other compensation by reason of TxDOT's grant of access permits, the terms and conditions thereof, or the actions of permit holders or their employees, agents, representatives and invitees. DB Contractor at its expense shall cooperate and coordinate with permit holders to enable them to safely construct, repair and maintain access improvements allowed under their access permits. Requests for permits and associated coordination described in this Section 3.1.5 shall not be grounds for an adjustment in the Maintenance Price, a Change Order or any other Claim by DB Contractor.

3.2 Policing, Security and Incident and Emergency Response

3.2.1 Police Services

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

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

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

3.2.2 Security and Incident and Emergency Response

3.2.2.1 DB Contractor is responsible for the safety and security of the Project, DB Contractor personnel and the general public during all maintenance activities under the control of any DB Contractor-Related Entity.

3.2.2.2 DB Contractor shall comply with all applicable Laws, as well as all rules, directives and guidance of the U.S. Department of Homeland Security or comparable State agency. DB Contractor shall coordinate and cooperate with all Governmental Entities providing security, first responder and other public emergency response services.

3.3 Capital Asset Replacement Work

3.3.1 General Requirements

3.3.1.1 DB Contractor shall diligently perform and complete Capital Asset Replacement Work when required by the CMA Documents. In addition, DB Contractor shall diligently perform and complete Capital Asset Replacement Work when a Performance Requirement is not met and the required level of performance cannot be achieved by means of routine maintenance. DB Contractor shall complete all Capital Asset Replacement Work required under this Section 3.3.1 at any time as needed to comply with Section 2 of Exhibit 2, and in any event:

(a) Prior to the expiration of the Maintenance Term; or

(b) If the Capital Maintenance Agreement is terminated for any reason prior to the expiration of the Maintenance Term, within 90 days after the effective date of termination.

If DB Contractor, despite diligent efforts, is unable to complete such Capital Asset Replacement Work prior to such period or TxDOT elects, in its discretion, to perform such Capital Asset Replacement Work, then, in lieu of DB Contractor's completion of such Capital Asset Replacement Work, DB Contractor shall reimburse TxDOT, within 10 days of delivery of an invoice therefor, for TxDOT's Recoverable Costs of completing such Capital Asset Replacement Work.

In lieu of reimbursement, TxDOT may elect, in its discretion, to deduct such amounts from any amounts payable to DB Contractor under this Capital Maintenance Agreement.

3.4 Traffic Control and Operations

DB Contractor shall perform the Maintenance Services in a manner that recognizes that the safety of the public, convenience of the traveling public and providing a safe work environment for all maintenance workers are of prime importance. DB Contractor shall perform its traffic control and operations in accordance with the CMA Documents, including this Section 3.4.

3.4.1 Traffic Management and Control Plans

3.4.1.1 DB Contractor shall be responsible for the safety of traffic and the public associated with the performance of the Maintenance Services, and shall perform all Maintenance Services that affect traffic operations in accordance with Section 5 of Exhibit 2.

3.4.2 Traffic Operation Restrictions

3.4.2.1 The requirements for and restrictions on Lane Closures are set forth in Exhibit 15.

3.4.2.2 Upon notification by TxDOT or if DB Contractor becomes aware of damage to a Maintained Element as a direct result of an Incident or Emergency, DB Contractor shall perform inspections in accordance with Section 1.4 of Exhibit 2 and shall report to TxDOT the nature of any damage and the scope of necessary repairs. If directed by TxDOT pursuant to a Directive Letter or an executed Change Order issued in accordance with Section 10, DB Contractor shall repair such damage subject to DB Contractor's right to a Change Order in accordance with Section 10.

3.4.2.3 Should Emergencies occur during DB Contractor's performance of traffic management, including vehicle accidents and structural failures, solely if directed by TxDOT pursuant to a Directive Letter or an executed Change Order issued in accordance with Section 10, DB Contractor shall take all actions necessary to open the roadway as soon as possible and shall, subject to DB Contractor's right to a Change Order in accordance with Section 10, repair any damage to the Maintained Elements.

3.4.2.4 TxDOT's approval rights with respect to traffic control plans and Lane Closure requests are set forth in Exhibit 15.

3.5 Requirements Applicable to Design and Construction Work

3.5.1 To the extent that DB Contractor performs any design or construction work, including for Capital Asset Replacement Work, Increased Capital Maintenance, or Change Orders, DB Contractor shall comply with the design and construction requirements set forth in the Technical Provisions applicable to the original design, installation or construction in accordance with Exhibit 2, except as otherwise approved in advance in writing by TxDOT, provided that the work shall be performed in accordance with then-current Good Industry Practice.

3.5.2 In connection with the performance by DB Contractor of any Increased Capital Maintenance or Change Orders, DB Contractor shall procure and maintain (a) the insurance deemed appropriate by TxDOT in its discretion (subject to Section 7.7.11) and (b) an increase in the amount of Maintenance Security equal to the full amount of the Increased Capital Maintenance or Change Order as determined by TxDOT in its discretion; provided, however, that, subject to applicable Law, TxDOT may, in its discretion, lower the level of Maintenance Security required. Any additional costs incurred as a result of actions taken by DB Contractor to comply with this Section 3.5.2 in connection with the performance by DB Contractor of (x) any Increased Capital Maintenance shall be borne solely by DB Contractor, and (y) any Change Orders may be included in the increased Maintenance Price as permitted in accordance with Section 10.

3.6 Coordination with Other Parties

3.6.1 DB Contractor shall fully cooperate with, and shall be solely responsible for coordinating its activities and maintenance work with the activities and work undertaken by the personnel and contractors of TxDOT, other Governmental Entities, Utility Owners and other third parties that will be performing work or activities at or adjacent to or in the vicinity of the Project, including maintenance activities for Non-Maintained Elements. TxDOT will provide reasonable notice to DB Contractor of permits issued by TxDOT that allow Governmental Entities, Utility Owners and other third parties to access the Project for the purpose of performing such work or activities.

3.6.2 DB Contractor shall schedule the Maintenance Services as reasonably necessary to accommodate the work or other activities of such third parties and shall not hinder or interfere with such work or activities.

3.6.3 Except as otherwise provided in Section 10, DB Contractor shall not be entitled to a Change Order arising out of the work or other activities (including any maintenance work) undertaken by the personnel and contractors of TxDOT, other Governmental Entities, Utility Owners or other third parties.

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

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

3.7 Transition Requirements

At the expiration of the Maintenance Period or any earlier termination of this Capital Maintenance Agreement, DB Contractor shall ensure and certify in writing that (a) the Maintained Elements can be safely used for their intended purpose and that the Maintenance Services have been performed in accordance with the terms of the CMA Documents, Governmental Approvals and applicable Law, (b) there are no DB Contractor Releases of Hazardous Materials within, on, in or under the Maintenance Limits, and (c) except as previously disclosed in writing to TxDOT, there is no litigation pending regarding the Maintenance Services or the Project by any DB Contractor-Related Entity. No later than 60 days prior to the end of the Maintenance Period or upon earlier termination of the CMA, DB Contractor shall prepare the Maintenance Transition Plan and deliver all final Record Documents relating to the Capital Asset Replacement Work performed under this Capital Maintenance Agreement in accordance with Section 4.7 of Exhibit 2.

3.8 Waste Disposal and Hazardous Materials

3.8.1 General Requirements

3.8.1.1 DB Contractor shall manage, store, contain, transport, and dispose of, or cause the disposal of, all waste, residue, construction debris, materials, Hazardous Materials, Recognized Environmental Conditions, and supplies that are produced, used or generated as a result of the activities of any DB Contractor-Related Entity in accordance with all applicable Laws and Governmental Approvals. The foregoing obligations also apply to DB Contractor

Releases of Hazardous Materials. DB Contractor's personnel handling Hazardous Materials shall be appropriately trained in Hazardous Materials handling and disposal. DB Contractor shall provide evidence of such personnel's training to TxDOT.

3.8.1.2 For any Hazardous Materials that are DB Contractor's responsibility under this Capital Maintenance Agreement, DB Contractor shall be solely responsible for all costs of Hazardous Materials Management and for restoring the real property affected thereby to its condition prior to the Release of Hazardous Materials, including, to the extent required, any grading and reinforcement necessary to restore the weight-bearing and functional capacity of the Project. If, within a reasonable time (as determined by TxDOT) after a Release of Hazardous Materials for which DB Contractor is responsible, DB Contractor has not taken action under Section 3.8.2, TxDOT may undertake such action itself. In such event, DB Contractor shall reimburse TxDOT for TxDOT's Recoverable Costs it incurs as a result of DB Contractor's failure, and shall do so within 10 Business Days of receipt of an invoice therefor. In lieu of reimbursement, TxDOT may elect, in its discretion, to deduct such amounts from any amounts payable to DB Contractor under this Capital Maintenance Agreement.

3.8.2 Procedures for Hazardous Materials Management

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

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

3.8.2.3 DB Contractor's rights to a Change Order with respect to costs and delays directly attributable to performance of Hazardous Materials Management are set forth in Section 10.8.2. Notwithstanding anything herein to the contrary, for any Hazardous Materials Management for which DB Contractor is not responsible under Section 3.8.1, DB Contractor shall only perform such Hazardous Materials Management pursuant to a Directive Letter or an executed Change Order issued by TxDOT in accordance with Section 10.

3.8.3 Hazardous Material Generator

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

3.8.3.2 As between DB Contractor and TxDOT, DB Contractor shall be considered the generator of and assume generator responsibility for DB Contractor Releases of Hazardous Materials.

3.8.3.3 TxDOT has exclusive decision-making authority regarding selection of the destination facility to which Hazardous Materials, other than DB Contractor Releases of Hazardous Materials, will be transported.

3.8.3.4 To the extent permitted by applicable Law, TxDOT shall defend, indemnify and hold harmless DB Contractor from third-party claims, causes of action and Losses arising out of or related to generator responsibility for Hazardous Material for which TxDOT is considered the generator pursuant to this Section 3.8.3.

3.8.4 Hazardous Material Generator Liability of DB Contractor

DB Contractor's liability as the generator of DB Contractor Releases of Hazardous Materials shall not be compensable to DB Contractor or entitle DB Contractor to schedule relief.

3.8.5 Hazardous Materials Brought to Project ROW by DB Contractor

DB Contractor shall be solely responsible for (a) compliance with all Laws and Governmental Approvals applicable to Hazardous Materials brought onto the Site by any DB Contractor-Related Entity, (b) use, containment, storage,

management, transport and disposal of such Hazardous Materials in accordance with the CMA Documents, and (c) payment of all Losses associated with, arising out of or related to such Hazardous Materials.

3.8.6 Governmental Approvals Relating to Hazardous Materials Management

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

3.9 Governmental Approvals

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

3.9.2 If any Governmental Approvals required to be obtained by DB Contractor must formally be issued in the name of TxDOT, TxDOT shall cooperate with DB Contractor, at DB Contractor's expense, to obtain such Governmental Approvals as may be reasonably requested by DB Contractor. DB Contractor shall be responsible for preparing all documentation necessary for any application for a Governmental Approval. Prior to submitting to a Governmental Entity any application for a Governmental Approval (or any proposed modification, renewal, extension or waiver of a Governmental Approval or provision thereof) that must be formally issued in the name of TxDOT, DB Contractor shall submit such application, together with any supporting environmental studies and analyses, to TxDOT for approval.

3.9.3 DB Contractor shall comply with all conditions imposed by and undertake all actions required by or necessary to maintain in full force and effect all Governmental Approvals, including performance of all environmental mitigation measures required by the CMA Documents or Governmental Approvals, except to the extent (if any) that responsibility for performance of such measures is expressly assigned to TxDOT in the CMA Documents.

3.10 Software Compatibility

3.10.1 Unless otherwise specifically stated in the CMA Documents, DB Contractor is responsible for assuring that all software it uses for any aspect of the Project is compatible with software used by TxDOT. "Compatible" for use in this Section 3.10 means that TxDOT is able to load or import all DB Contractor-provided electronic files using TxDOT's then-current software with no modifications, preparation or adjustments. Prior to using any software or version of software not then in use by TxDOT, DB Contractor must obtain written approval from TxDOT. In addition, DB Contractor shall provide to TxDOT staff, at DB Contractor's cost, working electronic copies of the software, any necessary licenses for TxDOT's use of the software, and any training reasonably necessary to assure that TxDOT is able to implement compatible usage of all software utilized by DB Contractor.

3.10.2 In addition to all other requirements set forth in the CMA Documents, DB Contractor shall submit all documents, correspondences and Submittals to TxDOT through TxDOT's dedicated SharePoint site for the Project unless otherwise directed by TxDOT. Nothing in this Section 3.10.2 overrides or otherwise alters or amends in any way any other provision regarding requirements for notice, correspondences, Submittals or other communications to TxDOT as set forth in the CMA Documents, including the requirements set forth in Section 19.10. For the avoidance of doubt, posting a document to SharePoint shall not qualify as receipt of such document by TxDOT for any purpose under the CMA Documents.

SECTION 4. MAINTENANCE TERM

The term of this Capital Maintenance Agreement includes a five-year initial optional term that TxDOT may extend by up to two additional five-year optional terms, in each case to be implemented at TxDOT's discretion. The maximum term of this Capital Maintenance Agreement, including all extensions thereof, is 15 years.

4.1 Initial Maintenance Term

4.1.1 The initial maintenance term shall commence on the Initial Maintenance Term Commencement Date, provided that TxDOT, in its discretion, has issued Maintenance NTP1 in accordance with Section 2.1.1, and shall continue for a period of five years, unless terminated earlier in accordance with the terms of this Capital Maintenance Agreement (the "**Initial Maintenance Term**").

4.1.2 Pre-CMA Transition and Condition Inspection

4.1.2.1 General Transition Requirements

After TxDOT issues Maintenance NTP1, DB Contractor shall coordinate with TxDOT to achieve a smooth transition of maintenance activities from TxDOT so that DB Contractor is mobilized and ready to commence the Maintenance Services upon the Initial Maintenance Term Commencement Date.

4.1.2.2 Inspections

Immediately following the issue of Maintenance NTP1, DB Contractor and TxDOT shall jointly perform a pre-condition inspection.

4.1.2.3 Updates to MMP

Following the pre-condition inspection, DB Contractor shall update the MMP as needed based on the pre-condition inspection in accordance with the procedures for updates to the MMP set forth in Section 5.5.3.

4.1.3 For the avoidance of doubt, during the period in which the warranties under the Design-Build Agreement are in effect, for any failures of any of the work that is the subject of such warranties, DB Contractor shall be required to correct such work pursuant to the Design-Build Agreement and shall bear the costs associated with correcting such warranted work under the Design-Build Agreement, and these costs are not included in the Maintenance Price set forth in Exhibit 4.

4.2 Additional Maintenance Terms

4.2.1 TxDOT, in its discretion, shall have the option to extend the term of this Capital Maintenance Agreement for up to two additional five-year terms for a maximum of 15 years. Each additional five-year term shall commence as of the expiration of the prior Maintenance Term and continue for a period of five years unless terminated earlier in accordance with the terms of this Capital Maintenance Agreement.

4.2.2 If TxDOT elects to exercise its option rights for an additional Maintenance Term, TxDOT shall issue the applicable Maintenance NTP on or before 90 days prior to the scheduled expiration of the prior Maintenance Term. If TxDOT does not issue Maintenance NTP2 or Maintenance NTP3 by the applicable deadline set forth in this Section 4.2.2, TxDOT shall be deemed to have terminated this Capital Maintenance Agreement as described in Section 14.9.

4.2.3 If TxDOT issues Maintenance NTP2 or Maintenance NTP3, TxDOT also may elect to exercise the Section 2A Option for the applicable additional Maintenance Term. Upon issuance of Maintenance NTP2 and Maintenance NTP3, as applicable, TxDOT shall notify DB Contractor regarding TxDOT's election to exercise the Section 2A Option for the applicable Maintenance Term. TxDOT may not exercise the Section 2A Option for a subsequent Maintenance Term if it did not exercise the Section 2A Option for the then-current Maintenance Term.

4.2.4 If TxDOT issues Maintenance NTP2 or Maintenance NTP3, TxDOT also may elect to exercise the LE Option for the applicable additional Maintenance Term. Upon issuance of Maintenance NTP2 and Maintenance NTP3, as applicable, TxDOT shall notify DB Contractor regarding TxDOT's election to exercise the LE Option for the applicable Maintenance Term. TxDOT may not exercise the LE Option for a subsequent Maintenance Term if it did not exercise the LE Option for the then-current Maintenance Term.

4.2.5 For the avoidance of doubt, TxDOT's decision with respect to exercising the Section 2A Option in connection with either Maintenance NTP2 or Maintenance NTP3 shall have no impact on its rights with respect to the LE Option and its decision with respect to exercising the LE Option in connection with either Maintenance NTP2 or Maintenance NTP3 shall have no impact on its rights with respect to the Section 2A Option.

SECTION 5. MANAGEMENT AND ADMINISTRATION

5.1 TxDOT Responsibility for Policy Decisions

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

5.2 Use of the Project

DB Contractor shall not use the Project, the Project ROW or any of the premises provided by TxDOT for any purpose other than the performance of Maintenance Services in accordance with the CMA Documents. At the discretion of TxDOT, DB Contractor may use the Project ROW for the temporary staging/storing of equipment for a reasonable period while DB Contractor is performing Maintenance Services. DB Contractor shall not be entitled to, and shall not purport to, grant the use of the Project or the Project ROW to anyone without the written approval of TxDOT. DB Contractor shall have no interest, right or title in or to the Project or the Project ROW.

5.3 Document Management Requirements

DB Contractor shall establish and maintain an electronic document control system in accordance with Section 3.5 of Exhibit 2.

5.4 Maintenance Manager; Qualifications of Employees

5.4.1 At all times during the Maintenance Period, DB Contractor shall provide (a) a Maintenance Manager approved by TxDOT who (i) has full responsibility for the prosecution of the Maintenance Services, (ii) acts as agent and shall be a single point of contact in all matters on behalf of DB Contractor, and (iii) is available to respond to TxDOT or TxDOT's Authorized Representatives; and (b) a Maintenance Safety Manager who will be responsible for all safety aspects of the Project during the Maintenance Period.

5.4.2 On or before 60 Days after TxDOT issues a Maintenance NTP, DB Contractor shall obtain TxDOT's prior approval for any change to the person then serving as the Maintenance Manager.

5.4.3 During the Maintenance Period, DB Contractor shall promptly notify TxDOT in writing of any proposed changes in the person serving as the Maintenance Manager. DB Contractor shall not change, or permit any change in, the person serving as the Maintenance Manager without the prior written consent of TxDOT. Before DB Contractor replaces the Maintenance Manager, TxDOT shall be given the opportunity to interview and approve or disapprove the

replacement candidate. DB Contractor's request to replace the Maintenance Manager shall include a proposed replacement, with equivalent or better qualifications, who shall be available within 30 Days after TxDOT's approval. Any request shall be submitted in sufficient time, taking into consideration TxDOT's interview and approval rights, for an approved replacement to be in position without a gap in continuity of the position.

5.4.4 All individuals performing Maintenance Services shall have the skill and experience and any licenses or certifications required to perform the Maintenance Services assigned to them. If TxDOT determines, in its discretion, that any Person employed by DB Contractor or any Subcontractor is not performing the Maintenance Services in a proper and skillful manner or is detrimental to the progress of the Maintenance Services and/or the Project, then, at the written request of TxDOT, DB Contractor shall remove such Person from the Project, and such Person shall not be reemployed on the Project without the prior written approval of TxDOT.

5.4.5 DB Contractor shall designate in writing one or more field representatives who shall have onsite field and office authority to represent and act for DB Contractor. A field representative shall be present within the Maintenance Limits at the job site at all times while Maintenance Services are in progress. DB Contractor shall provide to TxDOT phone, email addresses and pager numbers for the Maintenance Manager and all such field representatives. TxDOT requires the ability to contact the Maintenance Manager and all such field representatives 24 hours per Day, seven Days per week.

5.4.6 DB Contractor acknowledges and agrees that the award of this Capital Maintenance Agreement by TxDOT to DB Contractor was based, in large part, on the qualifications and experience of the personnel listed in the Proposal and DB Contractor's commitment that such individuals would be available to undertake and perform the Maintenance Services. DB Contractor represents, warrants and covenants that such individuals are available for and will fulfill the roles identified for them in the Proposal in connection with the Maintenance Services. Unless otherwise agreed to by TxDOT in writing, such individuals shall be available for the Maintenance Services and shall maintain active involvement in the prosecution and performance of the Maintenance Services in accordance with the approved Maintenance Management Plan.

5.4.7 If the approved individual filling the Maintenance Manager role is not available for the Maintenance Services and does not maintain active involvement in the prosecution and performance of the Maintenance Services because such individual has been replaced, DB Contractor acknowledges that

TxDOT, the Maintenance Services and the Project will suffer significant and substantial Losses and that it is impracticable and extremely difficult to ascertain and determine the actual Losses that would accrue to TxDOT in such event. Therefore, if such individual filling the role of Maintenance Manager is not available or not actively involved in the prosecution and performance of the Maintenance Services, as determined by TxDOT in its discretion, then, subject to Section 5.4.9, regardless of whether such individual has been replaced by an individual approved by TxDOT, DB Contractor agrees to pay TxDOT a Key Personnel Change Fee as follows as deemed compensation to TxDOT for such Losses:

POSITION	**KEY PERSONNEL CHANGE FEE**
Maintenance Manager	$50,000

5.4.8 In addition, if the individual filling the role of Maintenance Manager is not available for the Maintenance Services or does not maintain active involvement in the prosecution and performance of the Maintenance Services and such individual has not been replaced by an individual approved by TxDOT, DB Contractor acknowledges that TxDOT, the Maintenance Services and the Project will suffer significant and substantial additional Losses due to the unavailability of an approved individual to fill the Maintenance Manager role and that it is impracticable and extremely difficult to ascertain and determine the actual Losses that would accrue to TxDOT in such event. Therefore, subject to Section 5.4.9, for each day (x) beginning on, (i) if DB Contractor has not yet submitted a proposed replacement to TxDOT, (A) the date immediately following the 30-day period after the Maintenance Manager role is vacated due to death, retirement, injury or no longer being employed by the applicable DB Contractor-Related Entity (except where such employee is moved to an affiliated company) or (B) the date immediately following the 15-day period after the Maintenance Manager role is vacated for any other reason, as applicable, or (ii) if DB Contractor has submitted a proposed replacement to TxDOT, the date on which TxDOT rejects the proposed replacement for the vacated Maintenance Manager role, and (y) ending on (and excluding) the date on which such role has been filled by an individual approved by TxDOT, DB Contractor agrees to pay to TxDOT a Key Personnel Change Fee as follows as deemed compensation to TxDOT for such Losses:

POSITION	**KEY PERSONNEL CHANGE FEE**
Maintenance Manager	$5,000 per day

5.4.9 DB Contractor understands and agrees that any Key Personnel Change Fees payable in accordance with Sections 5.4.7 and 5.4.8 are in the nature of liquidated damages and not a penalty and that such sums are reasonable under the circumstances existing as of the Effective Date. DB Contactor shall pay to TxDOT within 10 Business Days after DB Contractor's receipt of an invoice therefor from TxDOT. In lieu of reimbursement, TxDOT, in its discretion, shall have the right to deduct such Key Personnel Change Fees from any amounts owed by TxDOT to DB Contractor or to collect such Key Personnel Change Fees from any bond, letter of credit or Guaranty furnished in accordance with this Capital Maintenance Agreement. Notwithstanding the foregoing, DB Contractor shall not be liable for Key Personnel Change Fees under Sections 5.4.7 and 5.4.8, if (a) DB Contractor removes or replaces such person at the direction of TxDOT, (b) such individual is unavailable due to death, retirement, injury or no longer being employed by the applicable DB Contractor-Related Entity (provided that moving to an affiliated company shall not be considered grounds for avoiding such damages) or (c) DB Contractor identifies the replacement for the Maintenance Manager within 60 Days after issuance of any Maintenance NTP; provided, however, in each case, DB Contractor shall promptly propose to TxDOT a replacement for such personnel, which individual shall be subject to TxDOT's prior written approval. Following any TxDOT-approved substitution or replacement of the Maintenance Manager pursuant to the terms hereof, the new individual shall be considered the Maintenance Manager for all purposes under this Capital Maintenance Agreement, including the provisions of this Section 5.4.9.

5.4.10 DB Contractor acknowledges and agrees that the Maintenance Manager position is of critical importance to TxDOT and the Project. In addition to the approval rights of TxDOT set forth in this Section 5.4 and the Key Personnel Change Fees set forth in Sections 5.4.7 and 5.4.8, if the individual in the Maintenance Manager position leaves that position for a reason other than as set forth in Section 5.4.9(a) through (c), TxDOT shall have the right to terminate this Capital Maintenance Agreement for default under Section 12, unless DB Contractor provides TxDOT a replacement acceptable to TxDOT within 30 Days after the earlier of (a) the date on which such individual has left his/her position; or (b) DB Contractor or TxDOT becomes aware that such individual intends to leave his/her position.

5.5 Maintenance Management Plan

5.5.1 DB Contractor shall submit the Maintenance Management Plan (MMP) to TxDOT for review and approval in its discretion no later than 60 days after issuance of Maintenance NTP1. DB Contractor may not commence Maintenance Services until TxDOT has approved the applicable MMP.

5.5.2 The MMP is an umbrella document that describes DB Contractor's managerial approach, strategy, and quality procedures to maintain the Maintained Elements and achieve all requirements of the CMA Documents. The MMP shall define the process for maintenance of the Maintained Elements throughout the Maintenance Period. Unless otherwise agreed or required by TxDOT, the MMP shall be consistent with the maintenance approach and MMP submitted with the Proposal.

5.5.3 TxDOT shall review the MMP and each update thereto and shall meet with DB Contractor within 30 days after DB Contractor submits the MMP to discuss any revisions, clarifications or points of disagreement. TxDOT will either approve the MMP or disapprove the MMP with comments or objections in writing within 15 days of such meeting. If TxDOT disapproves the MMP, DB Contractor shall, within 10 days of receiving such disapproval, submit to TxDOT a revised MMP or update thereto, as applicable.

5.5.4 As part of the MMP, DB Contractor shall submit a Maintenance Services Quality Management Plan in accordance with Section 1.2.2 of Exhibit 2.

5.6 Maintenance Services Report

For each monthly period during the Maintenance Period, DB Contractor shall submit to TxDOT a Maintenance Services Report meeting the requirements of Section 6.1 of Exhibit 2. The Maintenance Services Report shall be submitted to TxDOT on or before the 10th day of the month following the end of the monthly period.

5.7 Inspection and Testing

5.7.1 DB Contractor Inspection and Testing

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

5.7.1.2 DB Contractor shall carry out General Inspections, Specialist Inspections and Audit Inspections in accordance with Exhibit 2 and the MMP. DB Contractor shall use the results of General Inspections, Specialist Inspections and Audit Inspections to maintain asset condition and service levels, and to develop programs of maintenance and Capital Asset Replacement Work to minimize the effect of Maintenance Services on Users and other members of the public.

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

All materials and each part or detail of the Maintenance Services shall also be subject to oversight, inspection and owner verification testing by TxDOT and other Persons designated by TxDOT. At all points in performance of the Maintenance Services at which specific approvals by TxDOT are required by the CMA Documents, DB Contractor shall not proceed beyond that point until TxDOT has made such approval or waived its right in writing to approve. DB Contractor hereby consents to such oversight, inspection and owner verification testing. Upon request from TxDOT, DB Contractor shall furnish information to such Persons as are designated in such request and shall permit such Persons access to the Project and all parts of the Maintenance Services.

5.7.3 Obligation To Uncover Finished Construction Work

Whenever DB Contractor performs design work and construction work as part of the Maintenance Services, such work shall be governed by the requirements for Design Work and Construction Work (each as defined in the DBA) as set forth in the Design-Build Agreement and shall follow the procedures for design work and construction work set forth in the PMP. DB Contractor shall inform TxDOT in writing of any construction work to be performed under this Capital Maintenance Agreement that is to be covered to allow adequate opportunity to TxDOT to inspect and test such work. DB Contractor shall remove or uncover such portions of the finished work as directed by TxDOT. After examination by TxDOT and any other Persons designated by TxDOT, DB Contractor shall restore the work to the standard required by the CMA Documents. If the work exposed or examined is not in conformance with the requirements of the CMA Documents, then uncovering, removing and restoring such work and any delay occasioned thereby shall be at DB Contractor's cost. Furthermore, any construction work done or materials used without adequate notice to and opportunity for prior inspection by TxDOT or without inspection in accordance with CMA Documents may be ordered uncovered, removed or restored at DB Contractor's cost, even if such work proves acceptable and conforming after uncovering. Except with respect to the construction work done or materials used without providing TxDOT adequate notice as described in the foregoing sentence, if the work exposed or examined under this Section 5.7.3 is in conformance with the requirements of the CMA Documents, DB Contractor shall be entitled to recover the reasonable and documented cost of such efforts.

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

5.8.1 Oversight and Acceptance

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

5.8.2 No Estoppel

5.8.2.1 DB Contractor at all times shall have an independent duty and obligation to fulfill the requirements of the CMA Documents. DB Contractor shall not be relieved of its obligations to perform the Maintenance Services in accordance with the CMA Documents, or any of its Warranty or indemnity obligations, as the result of oversight, spot checks, audits, reviews, tests or inspections performed by any Persons, approvals or acceptances made by any Persons, or any failure of any Person to take such action. DB Contractor agrees and acknowledges that any such activity or failure to conduct any such activity by TxDOT:

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

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

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

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

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

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

5.8.2.2 TxDOT shall not be precluded or estopped, by any measurement, estimate or certificate made at any time, or by making any payment, from showing that any such measurement, estimate or certificate is incorrectly made or untrue, or from showing the true amount and character of the Maintenance Services performed and materials furnished by DB Contractor, or from showing that the Maintenance Services do not conform in fact to the requirements of the CMA Documents. Notwithstanding any such measurement, estimate or certificate, or payment made in accordance therewith, TxDOT shall not be precluded or estopped from recovering from DB Contractor and any of its Guarantors or Sureties such damages as TxDOT may sustain by reason of DB Contractor's failure to comply with the terms of the CMA Documents.

5.8.3 Release

To the maximum extent permitted by law, DB Contractor hereby releases and discharges TxDOT from any and all duty and obligation to cause DB Contractor's services and work to satisfy the standards and requirements of the CMA Documents.

5.9 Nonconforming Work

5.9.1 Correction of Nonconforming Work

5.9.1.1 Subject to Section 5.9.2, DB Contractor shall correct Nonconforming Work so as to conform to the requirements of the CMA Documents, at DB Contractor's cost. The fact that TxDOT may not have discovered the Nonconforming Work shall not relieve DB Contractor of its responsibilities to correct such Nonconforming Work.

5.9.1.2 Unless TxDOT agrees to permit Nonconforming Work in accordance with Section 5.9.2, Nonconforming Work shall be removed and replaced so as to conform to the requirements of the CMA Documents at DB Contractor's cost and without any adjustment to the Maintenance Price or any other relief, and DB Contractor shall promptly take all action necessary to prevent similar Nonconforming Work from occurring in the future. The fact that TxDOT may not have discovered the Nonconforming Work shall not constitute an acceptance of such Nonconforming Work. If DB Contractor fails to correct any Nonconforming Work within 10 days of receipt of notice from TxDOT requesting correction, or if such Nonconforming Work cannot be corrected within 10 days and

DB Contractor fails to (a) provide to TxDOT a schedule acceptable to TxDOT for correcting any such Nonconforming Work within such 10-day period, (b) commence such corrective Work within such 10-day period and (c) thereafter diligently prosecute such correction in accordance with such approved schedule to completion, then TxDOT may cause the Nonconforming Work to be remedied or removed and replaced and may deduct the cost of doing so from any moneys due or to become due DB Contractor or obtain reimbursement from DB Contractor for such cost.

5.9.2 Agreement To Allow Nonconforming Work To Remain Uncorrected

5.9.2.1 If TxDOT agrees to allow any Nonconforming Work to remain uncorrected, TxDOT shall be entitled to reimbursement of a portion of the Maintenance Price in an amount equal to the greatest of (a) the amount deemed appropriate by TxDOT to provide compensation for known impacts to all affected Persons (including TxDOT), such as future maintenance and other costs relating to the Nonconforming Work, (b) the amount of the Maintenance Price allocated to such Maintenance Services, (c) 100% of DB Contractor's cost savings associated with its failure to perform the Maintenance Services in accordance with the requirements of the CMA Documents or (d) all or a percentage, to be determined in TxDOT's discretion, of the cost to correct such Nonconforming Work. Such reimbursement shall be payable to TxDOT within 10 Days after delivery of an invoice therefor to DB Contractor. Alternatively, TxDOT, in its discretion, may deduct the amount of such costs and expenses from any sums TxDOT owes to DB Contractor pursuant to this Capital Maintenance Agreement.

5.9.2.2 DB Contractor acknowledges and agrees that TxDOT shall have discretion regarding the correction or non-correction of Nonconforming Work and shall have discretion with regard to the amount payable in connection therewith. Payment, reimbursement or deduction of the amounts owing to TxDOT under this Section 5.9.2 shall be a condition precedent to allow applicable Nonconforming Work to remain uncorrected.

5.9.2.3 Where such Nonconforming Work is allowed to remain uncorrected in accordance with this Section 5.9.2 and such Nonconforming Work requires that a Performance Requirement different to that set forth in the Performance and Measurement Table to this Capital Maintenance Agreement is necessary, TxDOT shall establish such different Performance Requirement for such Nonconforming Work.

SECTION 6. CONTRACTING AND LABOR PRACTICES

6.1 DBE Requirements

6.1.1 DB Contractor shall comply with the TxDOT Disadvantaged Business Enterprise (DBE) program in effect as of the date on which a Maintenance NTP is issued by TxDOT and shall undertake good faith efforts to encourage DBE participation in the Maintenance Services and maintaining and submitting documentation as required by the TxDOT DBE program. DB Contractor shall submit the documentation required under TxDOT's DBE program within 90 days following issuance of any Maintenance NTP. The purpose of the DBE Program is to ensure that DBEs and HUBs have an equal opportunity to participate in the performance of contracts financed in whole or in part with federal or State funds. In the event of any conflict between 49 CFR Part 26 and TxDOT DBE Rules, the former shall prevail.

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

6.2 Non-Discrimination; Equal Employment Opportunity

6.2.1 DB Contractor shall not, and shall cause the Subcontractors to not, discriminate on the basis of race, color, national origin or sex in the performance of the Maintenance Services under the CMA Documents. DB Contractor shall carry out, and shall cause the Subcontractors to carry out, applicable requirements of 49 CFR Part 26. Failure by DB Contractor to carry out these requirements is a material breach of this Capital Maintenance Agreement, which may result in the termination of this Capital Maintenance Agreement or such other remedy as TxDOT deems appropriate.

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

6.2.3 DB Contractor confirms for itself and all Subcontractors that DB Contractor and each Subcontractor each have an equal employment opportunity

policy ensuring equal employment opportunity without regard to race, color, national origin, sex, age, religion or handicap; and that DB Contractor and each Subcontractor each maintain no employee facilities segregated on the basis of race, color, religion or national origin. DB Contractor shall comply with all applicable Laws relating to equal employment opportunity and nondiscrimination and shall require its Subcontractors to comply with such Laws.

6.3 Subcontracts

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

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

6.3.3 The appointment of Subcontractors by DB Contractor will not relieve DB Contractor of its responsibility hereunder or for the quality of the Maintenance Services or materials provided by it. DB Contractor will at all times be held fully responsible to TxDOT for the actions, omissions, negligence, intentional misconduct, or breach of applicable Law or contract by its Subcontractors and persons employed by them, and no Subcontract entered into by DB Contractor will impose any obligation or liability upon TxDOT to any such Subcontractor or any of its employees. Nothing in this Capital Maintenance Agreement will create any contractual relationship between TxDOT and any Subcontractor of DB Contractor.

6.3.4 The following additional requirements shall apply to Key Subcontractors:

6.3.4.1 DB Contractor shall not terminate any Subcontract with a Key Subcontractor, or permit or suffer any substitution or replacement of a Key Subcontractor, unless the Key Subcontractor:

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

(b) voluntarily removes itself from DB Contractor's team; or

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

6.3.4.2 If DB Contractor makes changes to a Key Subcontractor in violation of Section 6.3.4.1, DB Contractor shall pay to TxDOT 100% of any cost savings resulting from the change.

6.3.5 Each Subcontract shall:

(a) Set forth a standard of professional responsibility or a standard for commercial practice equal to prudent industry standards for work of similar scope and scale and shall set forth effective procedures for claims and change orders.

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

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

(d) Be fully assignable without cost or modification to TxDOT, such assignability to include the benefit of all Subcontractor warranties, indemnities, guarantees and professional responsibility and include express requirements that (i) it will maintain usual and customary books and records for the type and scope of operations of business in which it is engaged (e.g., constructor, equipment supplier, designer, service provider), (ii) permit audit thereof by DB Contractor, and provide progress reports to DB Contractor appropriate for the type of work it is performing sufficient to enable DB Contractor to provide the reports it is required to furnish TxDOT under this Capital Maintenance Agreement; and (iii) allow TxDOT to assume the benefit of DB Contractor's rights with liability only for those remaining obligations of DB Contractor accruing after the date of assumption by TxDOT.

(e) Expressly include a covenant to recognize and attorn to TxDOT upon receipt of notice from TxDOT that it has exercised its rights under

this Capital Maintenance Agreement, without necessity for consent or approval from DB Contractor or to determine whether TxDOT validly exercised its rights, and DB Contractor's covenant to waive and release any claim or cause of action against the Subcontractor arising out of or relating to its recognition and attornment in reliance on any such notice.

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

(g) Expressly include requirements that the Subcontractor will (i) maintain usual and customary books and records for the type and scope of operations of business in which it is engaged, (ii) permit audit thereof with respect to the Project or Maintenance Services by each of DB Contractor and TxDOT pursuant to Section 17.4 and, (iii) provide progress reports to DB Contractor appropriate for the type of work it is performing sufficient to enable DB Contractor to provide the reports it is required to furnish TxDOT under this Capital Maintenance Agreement.

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

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

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

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

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

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

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

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

6.3.9 All Subcontracts with Affiliates shall be arm's-length, and on terms no less favorable to DB Contractor than those offered to non-affiliates.

6.4 Job Training Plan and Small Business Opportunity Plan

6.4.1 DB Contractor's "Job Training Plan" and "Small Business Opportunity Plan" applicable to the Maintenance Services are set forth in Exhibit 5. The purpose of the Job Training Plan and Small Business Opportunity Plan is to ensure that inexperienced and untrained workers have a reasonable opportunity to participate in the performance of the Maintenance Services through apprenticeships, training and similar measures to maintain and grow a diverse, skilled work force. DB Contractor shall perform and comply with all requirements set forth in of the Small Business Opportunity Plan. DB Contractor may elect to provide on-the-job training. If DB Contractor makes the election, it shall provide a written notice to the Contract Compliance Section of the Office of Civil Rights of the Texas Department of Transportation at 125 East 11th St., Austin, Texas 78701-2483, with a copy to TxDOT as provided in Section 19.10.3, and DB Contractor shall perform and comply with all requirements set forth in the Job Training Plan.

6.4.2 DB Contractor shall include provisions to effectuate the Job Training Plan (if the election is made) and Small Business Opportunity Plan in every Subcontract to which it is a party (including purchase orders and task orders for Maintenance Services), and shall require that they be included in all Subcontracts at lower tiers (including purchase orders and task orders for Maintenance Services) so that such provisions will be binding upon each Subcontractor.

6.5 State Use Program

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

6.5.2 DB Contractor will make a good faith effort to negotiate with CRPs and the Texas Industries for the Blind and Handicapped (TIBH) for subcontracts at a fair market price. TxDOT reserves the right to facilitate disputes involving subcontracts or potential subcontracts with CRPs and TIBH.

6.6 Prevailing Wages

6.6.1 DB Contractor shall pay or cause to be paid to all applicable workers employed by it or its Subcontractors to perform the Maintenance Services not less than the prevailing rates of wages, as provided in the statutes and regulations applicable to public work contracts, including Chapter 2258 of the Texas Government Code and the Davis-Bacon Act, and as provided in Exhibit 3 to the Design-Build Agreement; provided, however, that the minimum prevailing wages that DB Contractor shall be required to pay to all applicable workers for the Maintenance Services shall be the lesser of (i) the prevailing wages in effect on the commencement date of the Maintenance Term then in effect and (ii) the prevailing wages set forth in Exhibit 3 to the Design-Build Agreement as escalated based on changes in ENR CCI in accordance with the methodology set forth in Section 8.1.3. DB Contractor shall comply, and cause its Subcontractors to comply, with all Laws pertaining to prevailing wages. For the purpose of applying such Laws, the Project shall be treated as a public work paid for in whole or in part with public funds (regardless of whether public funds are actually used to pay for the Project). The foregoing shall not apply to Subcontracts at any tier with TxDOT or Governmental Entities.

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

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

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

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

6.7 E-Verify

Pursuant to Executive Order PR-80, DB Contractor certifies and ensures that for all contracts for services, DB Contractor shall, to the extent permitted by law, utilize the United States Department of Homeland Security's E-Verify system during the Maintenance Period to determine the eligibility of:

(a) All persons hired by DB Contractor during the Maintenance Period to perform duties within the State of Texas; and

(b) All persons, including Subcontractors, hired during the Maintenance Period and assigned by DB Contractor during the Maintenance Period to perform work pursuant to this Capital Maintenance Agreement.

Violation of this provision constitutes a material breach of this Capital Maintenance Agreement.

SECTION 7. MAINTENANCE SECURITY; AND INSURANCE

7.1 Maintenance Security

DB Contractor shall obtain and provide to TxDOT on or before 60 Days after issuance by TxDOT of Maintenance NTP1, and shall maintain at all times during the Maintenance Period in accordance with this Capital Maintenance Agreement, including during the Initial Maintenance Term and all subsequent Maintenance Terms for which a Maintenance NTP has been issued, adequate security securing DB Contractor's obligations hereunder in the form of either (i) the P&P Letter of Credit in accordance with Sections 7.2 and 7.3 or (ii) the Maintenance Performance Bond and Maintenance Payment Bond in accordance with Section 7.4 (the "**Maintenance Security**").

7.2 P&P Letter of Credit

As Maintenance Security, DB Contractor may elect to provide and maintain a letter of credit in the amount and pursuant to the requirements set forth in this Section 7.2 (the "**P&P Letter of Credit**").

7.2.1 If DB Contractor elects to provide the P&P Letter of Credit as Maintenance Security hereunder, DB Contractor shall obtain and deliver to TxDOT at the times required herein a P&P Letter of Credit in an amount not less than the amount of the P&P Bonds as calculated in accordance with Section 7.4.2 for the applicable Maintenance Term (as such amount shall be adjusted for each Maintenance Term for which a Maintenance NTP has been issued by TxDOT and as such amount may be increased by TxDOT in accordance with Sections 7.2.2 and 7.4.5).

7.2.1.1 The P&P Letter of Credit shall name TxDOT as beneficiary.

7.2.1.2 The P&P Letter of Credit shall comply with the provisions and requirements of Section 7.3 except as permitted or required otherwise under this Section 7.2. The P&P Letter of Credit shall be maintained (through extensions or replacements as provided in Sections 7.2.1.4 and 7.3.1.2), in full force and effect at all times from the date of delivery until at least one year and 90 Days after the end of the Maintenance Period and upon delivery to TxDOT of the final Record Documents in accordance with Section 3.7, unless the P&P Letter of Credit is replaced by P&P Bonds satisfying the requirements set forth in this Section 7, in which case the P&P Letter of Credit shall be returned to DB Contractor upon receipt of such P&P Bonds.

7.2.1.3 TxDOT has determined, as permitted by Section 223.205 of the Code, that the P&P Letter of Credit identified in this Section 7.2 constitutes security sufficient to ensure the proper performance of DB Contractor's obligations for maintaining the Project as required under the CMA Documents and to protect TxDOT and claimants with respect thereto.

7.2.1.4 After issuance by TxDOT of each of Maintenance NTP2 and Maintenance NTP3 pursuant to Section 4.2 and no later than 30 days prior to the commencement of the subsequent Maintenance Term, or if earlier, 30 days prior to the expiration of the then outstanding P&P Letter of Credit, DB Contractor shall deliver (i) a replacement P&P Letter of Credit meeting the requirements set forth in Sections 7.2 and 7.3, (ii) evidence of renewal, and, if applicable, an adjustment of the amount, of the then-outstanding P&P Letter of Credit or (iii) the P&P Bonds meeting the requirements set forth in Section 7.4. Furthermore, replacement Maintenance Security meeting the requirements of this Section 7 shall be delivered to TxDOT no later than 10 days after any P&P Letter of Credit fails to satisfy any of the requirements of a P&P Letter of Credit set forth herein (including any downgrade of the financial institution issuing the letter of credit below that set forth in Section 7.3.1.1(b)).

7.2.2 Increase in P&P Letter of Credit Amount

If TxDOT does not receive any certificate that amounts payable to any designers, consultants, Subcontractors and Suppliers for the completed Maintenance Services have been paid (including evidence of wages paid) as required by Exhibit 11, it may require DB Contractor to immediately increase the amount of the P&P Letter of Credit to such amount as TxDOT determines is appropriate to protect its interests and the Project, provided that the amount of any such increase shall not exceed the value of work for which TxDOT did not receive any such certificate.

7.2.3 Payment Claims Against P&P Letter of Credit

7.2.3.1 Payment claims against the P&P Letter of Credit shall be governed by this Section 7.2.3. To ensure that all potential claimants receive notice of the procedures set forth in this Section 7.2.3, DB Contractor shall require that Sections 7.2.3.2 through 7.2.3.7 be restated, with the blanks filled in, in each Subcontract that includes Maintenance Services during the Maintenance Period and in all Subcontracts thereunder (including contracts with Suppliers) that include Maintenance Services during the Maintenance Period. In addition, each such Subcontract shall include a provision requiring the Subcontractor to provide formal notice regarding the claims procedures under this Section 7.2.3 to each employee performing public work labor (as such term is defined in Texas

Government Code Section 2253.001) under the Subcontract, in the same manner in which equal opportunity notices are required to be given to employees.

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

7.2.3.3 All claims made pursuant to this Section 7.2.3 must:

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

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

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

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

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

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

(g) State the amount of any retainage that has not yet become due. A claim for retainage must include the amount of the contract, any amount paid, and the outstanding balance. However, to the extent that any prior claim made under this Section 7.2.3 included retainage, a separate subsequent claim for retainage need not be made.

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

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

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

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

7.2.4 Draws on the P&P Letter of Credit

7.2.4.1 The P&P Letter of Credit shall be subject to draw by TxDOT prior to expiration in accordance with Section 7.3.1.2.

7.2.4.2 The P&P Letter of Credit shall be subject to draw by TxDOT for the purpose of disbursement of funds owing to a Claimant under any one of the following circumstances:

(a) TxDOT has received a copy of a claim that complies on its face with Section 7.2.3.2, together with a proof of delivery thereof to the Prime Contractor, and TxDOT has not received from the Prime Contractor, within 30 days after service of the notice of claim, a sworn notice stating (i) that the Prime Contractor contests the claim, (ii) whether the claim is contested in whole or in part

and, if in part, the portion of the claim amount being contested, (iii) the grounds for contesting the claim and (iv) that the Prime Contractor is acting in good faith in contesting the claim;

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

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

(d) A claim has been made and notice thereof given in accordance with Section 7.2.3, and, at that time, or at any other time during the pendency of the claim, the P&P LC Obligor is or becomes, voluntarily or involuntarily, a debtor in any bankruptcy proceeding under applicable Law.

No beneficiary of a P&P Letter of Credit shall have any obligation to investigate, verify or ascertain the eligibility of the person making a claim as a Claimant, the validity of any claim, notice of contest of claim, settlement agreement or court order or whether the Claimant has timely provided notice of claim. Rather, for the purpose of determining whether the P&P Letter of Credit is subject to draw, the beneficiary may, without liability, conclusively assume eligibility of the person making a claim as a Claimant and timely notice of a claim, and may conclusively assume the truthfulness and validity of, and may rely on, the claim, notice of contest of claim, settlement agreement, court order or any other information submitted under this Section 7.2.

7.2.4.3 The P&P Letter of Credit shall be subject to draw by TxDOT due to the failure of DB Contractor to perform its obligations under the CMA Documents during the Maintenance Period. Any draw by TxDOT is subject to Section 12.3.

7.2.4.4 The P&P Letter of Credit shall also constitute security in favor of TxDOT for payment and performance of DB Contractor's obligation to defend and indemnify TxDOT under Section 15, and, accordingly, will be subject to draw by TxDOT as provided in Section 12.3.

7.3 Letters of Credit

7.3.1 General Provisions

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

7.3.1.1 The letter of credit shall:

(a) Be a standby letter of credit;

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

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

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

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

(f) Allow for multiple draws; and

(g) Name TxDOT as beneficiary.

7.3.1.2 TxDOT shall have the right to draw on the letter of credit as and when provided in Section 12 for draws under clause (i) below (subject to Section 7.2.3.2 with respect to claimants) and without prior notice to DB Contractor for draws under clauses (ii) and (iii) below, unless otherwise expressly provided in the CMA Documents with respect to the letter of credit, if (i) DB Contractor has failed to pay or perform when due the duty, obligation or liability under the CMA Documents for which the letter of credit is held, (ii) DB Contractor for any reason fails to deliver to TxDOT a new or replacement letter of credit, meeting the requirements of this Capital Maintenance Agreement, or at least a one-year extension of the expiration date of the existing letter of credit or by not later than 45 days before such expiration date, or (iii) with respect to the P&P Letter of Credit, DB Contractor for any reason fails to deliver to TxDOT replacement

Maintenance Security at the times and meeting the requirements set forth in Section 7.2.1.4, unless in any such case the applicable terms of the CMA Documents expressly require no further letter of credit or other Maintenance Security with respect to the duty, obligation or liability in question. For all draws conditioned on prior written notice from TxDOT to DB Contractor, no such notice shall be required if it would preclude draw before the expiration date of the letter of credit. Draw on the letter of credit shall not be conditioned on prior resort to any other security of DB Contractor unless otherwise stated in the CMA Documents. If TxDOT draws on the letter of credit under clause (i) above, TxDOT shall use and apply the proceeds as provided in the CMA Documents for such letter of credit. If TxDOT draws on the letter of credit under clause (ii) or (iii) above, TxDOT shall be entitled to draw on the full face amount of the letter of credit and shall retain such amount as cash security to secure the obligations under the letter of credit without payment of interest to DB Contractor.

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

7.3.1.4 DB Contractor's sole remedy in connection with the improper presentment or payment of sight drafts drawn under letters of credit shall be to obtain from TxDOT a refund of the proceeds that are misapplied, interest thereon, at a floating rate equal to the LIBOR in effect from time to time, plus 200 basis points, from the date of improper draw until repaid, and subject to Section 12.8, reimbursement of the reasonable costs DB Contractor incurs as a result of such misapplication, provided that, at the time of such refund, DB Contractor increases the amount of the letter of credit to the amount (if any) then required under applicable provisions of this Capital Maintenance Agreement. DB Contractor acknowledges that the presentment of sight drafts drawn upon a letter of credit could not under any circumstances cause DB Contractor injury that could not be remedied by an award of money damages, and that the recovery of money damages would be an adequate remedy. Accordingly, DB Contractor covenants (i) not to request or instruct the issuer of any letter of credit to refrain from paying any sight draft drawn under the letter of credit and (ii) not to commence or pursue any legal proceeding seeking, and DB Contractor irrevocably waives and relinquishes any right, to enjoin, restrain, prevent, stop or delay any draw on any letter of credit.

7.3.1.5 DB Contractor shall obtain and furnish all letters of credit and replacements thereof at its sole cost and expense, and shall pay all

charges imposed in connection with TxDOT's presentment of sight drafts and drawing against letters of credit or replacements thereof, subject to reimbursement under the circumstances described in Section 7.3.1.4.

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

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

7.3.2 Special Letter of Credit Provisions

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

7.4 Maintenance Payment and Performance Bonds

As Maintenance Security, DB Contractor may elect to provide and maintain payment and performance bonds in the amount and pursuant to the requirements set forth in this Section 7.4 (the "**P&P Bonds**").

7.4.1 If DB Contractor elects to provide P&P Bonds as Maintenance Security hereunder, DB Contractor shall obtain and provide to TxDOT at the times required herein, and shall maintain at all times, (a) a performance bond in the form attached as Exhibit 6 (the "**Maintenance Performance Bond**"), and (b) a payment bond, in the form attached as Exhibit 7 (the "**Maintenance Payment Bond**"), that shall guarantee the performance of the Maintenance Services and payment to Persons performing certain work for DB Contractor under this Capital Maintenance Agreement.

7.4.2 The Maintenance Performance Bond and the Maintenance Payment Bond shall each have a term equal to or greater than the then-current Maintenance Term. The initial amount of the Maintenance Performance Bond shall be required for the period of the Initial Maintenance Term and an adjusted amount required for each additional Maintenance Term for which a Maintenance NTP has been issued, based on the greater of the following calculations: (1) 0.75 times the

amount determined by calculating the sum of the five escalated annual Maintenance Price payments for each year in the Maintenance Term and (2) 100% of the greatest escalated annual Maintenance Price payment in the applicable Maintenance Term. For the purpose of determining the escalated Maintenance Price payments in the preceding sentence, the annual Maintenance Price payment amounts described in Section 8.1 and set forth in Exhibit 4 shall be escalated to the date that is 60 days prior to the date the Maintenance Security amount is required, using ENR CCI in the same manner applied to the Maintenance Price in Section 8.1.3 and then at an annual rate of 3% for each succeeding year.

7.4.3 TxDOT shall provide a release of each Maintenance Performance Bond on the date that is one year after the expiration of the Maintenance Period and upon such date thereafter that all of the following have occurred: (a) DB Contractor is not in default under this Capital Maintenance Agreement, (b) no event has occurred that, with the giving of notice or passage of time, would constitute a default by DB Contractor hereunder or under the CMA Documents; (c) all final Record Documents have been delivered to TxDOT in accordance with Section 3.7, and (d) no outstanding Claims are then pending against DB Contractor hereunder.

7.4.4 DB Contractor shall deliver to TxDOT a Maintenance Payment Bond in the same amount and at the same times as is required for the Maintenance Performance Bond pursuant to Section 7.4.2. TxDOT will release each Maintenance Payment Bond upon (a) receipt of (i) evidence satisfactory to TxDOT that all Persons eligible to file a claim against the Maintenance Payment Bond have been fully paid and (ii) unconditional releases of Liens and stop notices from all Subcontractors who filed a preliminary notice of a claim against the Maintenance Payment Bond (or evidence satisfactory to TxDOT that any such Liens and stop notices have been separately bonded around), or (b) expiration of the statutory period for Subcontractors to file a claim against the Maintenance Payment Bond if no claims have been filed.

7.4.5 Each bond required hereunder shall be issued by a Surety authorized to do business in the State with a rating of at least A minus (A-) or better and Class VIII or better by A.M. Best Company or rated in the top two categories by two nationally recognized rating agencies, or as otherwise approved by TxDOT in its discretion. If any bond provided becomes ineffective, or if the Surety providing a P&P Bond no longer meets the requirements hereof (or if multiple Sureties act as co-Sureties in providing a P&P Bond, none of such co-Sureties meets the requirements hereof), DB Contractor shall provide a replacement bond in the same form issued by a Surety meeting the foregoing requirements. If the Maintenance Price is increased in connection with a Change Order or Increased Capital

Maintenance, TxDOT may, in its discretion, require a corresponding proportionate increase in the amount of each bond or alternative security.

7.4.6 After issuance by TxDOT of each of Maintenance NTP2 and Maintenance NTP3 pursuant to Section 4.2 and no later than 30 days prior to the commencement of the subsequent Maintenance Term, or if earlier, 30 days prior to the expiration of the then-outstanding P&P Bonds, DB Contractor shall deliver (a) replacement P&P Bonds meeting the requirements set forth in this Section 7.4, (b) evidence of renewal, and, if applicable, an adjustment of the amount, of the then-outstanding P&P Bonds or (c) a P&P Letter of Credit meeting the requirements set forth in Sections 7.2 and 7.3. Furthermore, replacement Maintenance Security meeting the requirements of this Section 7 shall be delivered to TxDOT no later than 10 days after (i) any bond previously provided becomes ineffective or (ii) the Surety that provided such bond no longer meets the requirements hereof (or if multiple Sureties act as co-Sureties in providing such bond, none of such co-Sureties meets the requirements hereof).

7.4.7 If DB Contractor fails to timely provide replacement or renewal Maintenance Security meeting the requirements of this Section 7 as and when required under Section 7.4.6, TxDOT shall have the right to draw down on the Maintenance Performance Bond an amount that is equal to the lesser of (i) 20% of the amount of the Maintenance Performance Bond or (ii) $20,000,000 (escalated in accordance with the methodology set forth in Section 7.4.8) as cash collateral to secure the performance of DB Contractor under the CMA Documents as a result of DB Contractor's failure to satisfy the Maintenance Security obligations to which DB Contractor agreed upon in executing the CMA.

7.4.8 The dollar amounts described in Section 7.4.7 shall be escalated, commencing on the Effective Date to the date that is 60 days prior to the date the initial bond or each replacement bond, as applicable, is issued, based on changes in the ENR CCI in accordance with the methodology set forth in Section 8.1.3. DB Contractor agrees and acknowledges that such cash collateral is necessary to secure the performance of DB Contractor under the CMA Documents as a result of DB Contractor's failure to satisfy the Maintenance Security obligations under this CMA and may be used by TxDOT to compensate TxDOT for the damages incurred in connection therewith, including TxDOT's costs to procure a substitute DB Contractor and any amounts paid to such substitute DB Contractor in excess of the unpaid balance of the CMA. Any cash collateral not otherwise utilized by TxDOT with respect to DB Contractor's obligations under the CMA Documents shall be returned to DB Contractor upon the earlier of (i) delivery by DB Contractor of replacement P&P Bonds meeting the requirements of this Section 7.4 or the P&P

Letter of Credit in accordance with Sections 7.2 and 7.3 and (ii) one year after the end of the Maintenance Period.

7.5 No Relief of Liability

Performance by a Surety or a Guarantor of any of the obligations of DB Contractor that meets the requirements of the CMA Documents shall not relieve DB Contractor of any of its obligations hereunder, including the payment of Liquidated Damages.

7.6 Guaranty

7.6.1 ***[To be inserted if a Guaranty is provided in Proposal.]*** [_____] are the Guarantors guaranteeing DB Contractor's obligations under the CMA Documents. Such guaranty, in the form attached as Exhibit 9, shall guarantee performance of DB Contractor's obligations under the CMA Documents and shall be maintained in full force and effect throughout the Maintenance Period and for so long as any of DB Contractor's obligations under the CMA Documents remain outstanding (the "**Guaranty**").

7.6.2 DB Contractor shall report to TxDOT, on a quarterly basis during the Maintenance Period, the Tangible Net Worth of DB Contractor, its equity members, and any Guarantors. The report shall state the Tangible Net Worth and be certified by the chief financial officer of the entity reporting. The entity may mark the report "confidential."

7.6.3 If, at any time during the course of this Capital Maintenance Agreement, the total combined Tangible Net Worth of DB Contractor, its equity members and any Guarantors is less than $400,000,000, DB Contractor shall provide one or more guarantees so that the combined Tangible Net Worth of DB Contractor, its equity members and any Guarantors is at least $400,000,000. Each such guaranty shall be in the form attached as Exhibit 9, together with appropriate evidence of authorization, execution, delivery and validity thereof, and shall guarantee the Guaranteed Obligations. Each guaranty must be provided by (a) a parent corporation, affiliate, or a shareholder of DB Contractor, or (b) a parent corporation, affiliate, or a shareholder of an equity member of DB Contractor. The minimum Tangible Net Worth amount described above shall be adjusted annually based on changes in the ENR CCI in accordance with the methodology set forth in Section 8.1.3, commencing on the first anniversary of the Initial Maintenance Term Commencement Date and continuing annually thereafter during the Maintenance Period.

7.6.4 DB Contractor may replace an existing Guaranty with a new Guaranty upon prior approval by TxDOT. Any new Guaranty shall be provided in the applicable form attached as Exhibit 9, together with appropriate evidence of authorization, execution, delivery and validity thereof, and shall guarantee the Guaranteed Obligations. The Guaranty being replaced shall remain in effect until the approved replacement Guaranty becomes effective.

7.7 General Insurance Requirements

DB Contractor shall procure and keep in effect, or cause to be procured and kept in effect, with DB Contractor as a named insured, the insurance policies in accordance with the requirements in this Section 7.7 and Exhibit 10.

7.7.1 Qualified Insurers

Each of the insurance policies required hereunder shall be procured from an insurance carrier or company that, at the time coverage under the applicable policy commences, is (a) authorized to do business in the State and has a current policyholder's management and financial size category rating of not less that "A –, VII" according to A.M. Best's Insurance Reports Key Rating Guide or (b) otherwise approved in writing by TxDOT.

7.7.2 Premiums, Deductibles and Self-Insured Retentions

DB Contractor shall timely pay the premiums for all insurance policies required under this Capital Maintenance Agreement. Subject to Section 10, TxDOT shall have no liability for any deductibles, self-insured retentions and amounts in excess of the coverage provided. In the event that any required coverage is provided under a self-insured retention, the entity responsible for the self-insured retention shall have an authorized representative issue a letter to TxDOT, at the same time the insurance policy is to be procured, stating that it shall protect and defend TxDOT to the same extent as if a commercial insurer provided coverage for TxDOT.

7.7.3 Primary Coverage

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

7.7.4 Verification of Coverage

7.7.4.1 Within 10 Days of TxDOT issuing a Maintenance NTP and thereafter not later than 10 Days prior to the expiration date of each insurance policy, DB Contractor shall deliver to TxDOT a certificate of insurance evidencing that each required policy of insurance is in place (including all subcontractor certificates of insurance). The certificate shall be on the most recent ACORD form, without disclaimer. Each required certificate must meet the requirements of Texas Insurance Code Chapter 1811 and, to the extent permitted under applicable Laws, state the identity of all carriers, named insureds and additional insureds, state the type and limits of coverage, deductibles and termination provisions of the policy, include as attachments all additional insured, waiver of subrogation, and notice of termination endorsements, and be signed by an authorized representative of the insurance company shown on the certificate or its agent or broker. Each such certificate of insurance shall be accompanied by a letter signed by DB Contractor confirming that the insurances represented in the certificate of insurance fully comply with all provisions of this Section 7.7 and Exhibit 10.

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

7.7.4.3 Within 45 Days of the inception date of each insurance policy or modification, or renewal or replacement insurance policy, DB Contractor shall deliver to TxDOT (i) a complete certified copy of each such insurance policy or modification, or renewal or replacement insurance policy and all endorsements thereto, and (ii) satisfactory evidence of payment of the premium therefor.

7.7.4.4 If DB Contractor has not provided TxDOT with the foregoing proof of coverage and payment within five Days after TxDOT delivers to DB Contractor notice of an Event of Default under Section 12.3.1 and demand for the foregoing proof of coverage, TxDOT may, in addition to any other available remedy, without obligation or liability and without further inquiry as to whether such insurance is actually in force, (i) obtain such an insurance policy, and DB Contractor shall reimburse TxDOT for the cost thereof upon demand, and (ii) suspend all or any portion of Maintenance Services for cause or close the Project until TxDOT receives from DB Contractor such proofs of coverage in compliance

with this Section 7.7.4 (or until TxDOT obtains an insurance policy, if it elects to do so).

7.7.5 Subcontractor Insurance Requirements

7.7.5.1 DB Contractor's obligations regarding Subcontractor's insurance are set forth in Exhibit 10. DB Contractor shall cause each Subcontractor to provide such insurance in the manner and in the form consistent with the requirements contained in this Capital Maintenance Agreement and also including requirements to comply with the primary and non-contributory waiver of subrogation and notice of cancellation provisions of this Section 7.7.

7.7.5.2 If any Subcontractor fails to procure and keep in effect the insurance required of it under Exhibit 10 and TxDOT asserts the same as an Event of Default hereunder, DB Contractor may, within the applicable cure period, cure such Event of Default by (i) causing such Subcontractor to obtain the requisite insurance and providing to TxDOT proof of insurance, (ii) procuring the requisite insurance for such Subcontractor and providing to TxDOT proof of insurance, or (iii) terminating the Subcontractor and removing its personnel from the Site (provided that such termination is not an Event of Default).

7.7.6 Policies with Insureds in Addition to DB Contractor

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

7.7.6.1 The insurance policy shall be written or endorsed so that no acts or omissions of an insured shall vitiate coverage of the other insureds, provided that professional liability policies shall not be required to comply with this Section 7.7.6.1. Without limiting the foregoing, any failure on the part of a named insured to comply with reporting provisions or other conditions of the insurance policies, any breach of warranty, any action or inaction of a named insured or others, or any change in ownership of all or any portion of the Project shall not affect coverage provided to the other named insureds or additional insureds (and their respective members, directors, officers, employees, agents and, if applicable, TxDOT Consultants).

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

7.7.6.3 All endorsements adding additional insureds to the required insurance policies shall contain no limitations, conditions, restrictions or

exceptions to coverage in addition to those that apply under the insurance policy generally, and shall state that the interests and protections of each such additional insured shall not be affected by any misrepresentation, act or omission of a named insured or any breach by a named insured of any provision in the policy that would otherwise result in forfeiture or reduction of coverage. To the fullest extent of coverage allowed under Chapter 151 of the Texas Insurance Code, DB Contractor (if applicable) and TxDOT shall be included as additional insureds under the commercial general liability policy providing equivalent coverage, including products-completed operations. The commercial general liability insurance shall include completed operations liability coverage.

7.7.7 Additional Terms and Conditions

7.7.7.1 Each insurance policy shall be endorsed to state that coverage cannot be canceled, not renewed, voided, suspended, adversely modified, or reduced in coverage or in limits (including for nonpayment of premium) except after 30 Days' prior written notice (or 10 Days in the case of cancellation or nonrenewal for nonpayment of premium) by registered or certified mail, return receipt requested, has been given to TxDOT and each other insured or additional insured party. Such endorsement shall not include any limitation of liability of the insurer for failure to provide such notice.

7.7.7.2 The commercial general liability insurance policy shall cover liability arising out of the acts or omissions of DB Contractor's employees engaged in the Maintenance Services, as well as employees of Subcontractors if Subcontractors are covered by a DB Contractor-controlled insurance program. If any Subcontractor is not covered by such DB Contractor-controlled insurance program, then Subcontractor shall provide commercial general liability insurance and other insurances described in Exhibit 10 to cover liability arising out of the activities of Subcontractor's employees engaged in the Maintenance Services.

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

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

7.7.8 Waivers of Subrogation

TxDOT waives all rights against DB Contractor-Related Entities, and DB Contractor waives all rights against the Indemnified Parties, for any claims to the extent covered by insurance obtained pursuant to this Section 7, except such rights as they may have to the proceeds of such insurance. If DB Contractor is deemed to self-insure a claim or loss under Section 7.8.6, then DB Contractor's waiver shall apply as if it carried the required insurance. DB Contractor shall require all Subcontractors to provide similar waivers in writing, each in favor of all other Persons enumerated above. Subject to Section 7.7.11, each policy, including workers' compensation if permitted under the applicable worker's compensation insurance laws, shall include a waiver of any right of subrogation against the Indemnified Parties or the insurers consent to the insured's waiver of recovery in advance of loss.

7.7.9 No Recourse

There shall be no recourse against TxDOT for payment of premiums or other amounts with respect to the insurance required to be provided by DB Contractor or any of its Subcontractors hereunder, except to the extent such costs are recoverable under Section 7.7.12 or Section 10.

7.7.10 Support of Indemnifications

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

7.7.11 Inadequacy or Unavailability of Required Coverages

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

7.7.11.2 If DB Contractor demonstrates to TxDOT's reasonable satisfaction that it has used diligent efforts in the global insurance and reinsurance markets to maintain the insurance coverages it is required to provide hereunder (other than builder's risk policies), and if, despite such diligent efforts and through no fault of DB Contractor, any of such coverages (or any of the required terms of such coverages, including insurance policy limits) become unavailable

during the Maintenance Period, TxDOT will consider in good faith granting DB Contractor an interim written variance from such requirements under which DB Contractor shall obtain and maintain or cause to be obtained and maintained alternative insurance packages and programs that provide risk coverage as comparable to that contemplated in this Section 7 as is commercially reasonable under then-existing insurance market conditions.

7.7.11.3 DB Contractor shall not be entitled to any increase in the Maintenance Price for increased costs or any time extension resulting from the unavailability of coverage and the requirement to provide acceptable alternatives.

7.7.12 Defense Costs

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

7.7.13 Contesting Denial of Coverage

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

7.7.14 Umbrella and Excess Policies

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

7.8 Prosecution of Insurance Claims

7.8.1 Unless otherwise directed by TxDOT in writing with respect to TxDOT's insurance claims, DB Contractor shall be responsible for reporting and processing all potential claims by TxDOT or DB Contractor against the insurance policies required hereunder. DB Contractor agrees to report timely to the insurers under such insurance policies any and all matters that may give rise to an insurance claim by DB Contractor or TxDOT or another Indemnified Party and to

promptly and diligently pursue such insurance claims in accordance with the claims procedures specified in such insurance policies, whether for defense or indemnity or both. DB Contractor shall enforce all legal rights against the insurer under the applicable insurance policies and applicable Laws in order to collect thereon, including pursuing necessary litigation and enforcement of judgments, provided that DB Contractor shall be deemed to have satisfied this obligation if a judgment is not collectible through the exercise of lawful and diligent means.

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

7.8.3 TxDOT agrees to promptly notify DB Contractor of TxDOT's incidents, potential claims against TxDOT, and matters that may give rise to an insurance claim against TxDOT, to tender to the insurer TxDOT's defense of the claim under such insurance policies, and to cooperate with DB Contractor as necessary for DB Contractor to fulfill its duties hereunder. DB Contractor shall ensure that, to the extent covered by DB Contractor's insurance:

7.8.3.1 For claims and suits that DB Contractor's insurer reasonably estimates to be within the limits of its available coverage, DB Contractor or its insurer shall communicate and coordinate the defense strategy with TxDOT and the Texas Office of the Attorney General and shall ensure that the insurer does not agree to any settlement without first obtaining the concurrence of the Texas Office of the Attorney General. TxDOT and the Texas Office of the Attorney General shall not unreasonably withhold consent to the strategy and plan communicated by DB Contractor or its insurer to TxDOT and the Texas Office of the Attorney General, nor shall TxDOT and the Texas Office of the Attorney General unreasonably withhold consent to settlements and compromises proposed by DB Contractor or its insurers that fall within the limits of insurance provided by such insurers.

7.8.3.2 For claims and suits that DB Contractor's insurer reasonably estimates to be in excess of the available insurance provided by DB Contractor's insurers, and implicating the potential for damages that are the financial liability or responsibility of TxDOT or the State of Texas, DB Contractor shall ensure that the defense of the claim is coordinated by the insurer with TxDOT and the Texas Office of the Attorney General and shall ensure that DB Contractor's insurer does not agree to any settlement in excess of DB Contractor's insurer's limits of liability without first obtaining the concurrence of the Texas Office of the Attorney General.

7.8.4 If, in any instance, DB Contractor has not performed its obligations respecting insurance set forth in this Capital Maintenance Agreement or is unable to enforce and collect any such insurance for failure to assert claims in accordance with the terms of the insurance policies or to prosecute claims diligently, then, for purposes of determining DB Contractor's liability and the limits thereon or determining reductions in compensation due from TxDOT to DB Contractor on account of available insurance, DB Contractor shall be treated as if it has elected to self-insure up to the full amount of insurance coverage that would have been available had DB Contractor performed such obligations and not committed such failure. Nothing in the CMA Documents shall be construed to treat DB Contractor as electing to self-insure where DB Contractor is unable to collect due to the bankruptcy or insolvency of any insurer that, at the time the insurance policy is written meets the rating qualifications set forth in this Section 7.

7.8.5 If, in any instance, DB Contractor has not promptly performed its obligation to report to applicable insurers and process any potential insurance claim tendered by TxDOT or another Indemnified Party, then TxDOT or the other Indemnified Party may, but is not obligated to, (a) notify DB Contractor in writing of TxDOT's intent to report the claim directly with the insurer and thereafter process the claim, and (b) proceed with reporting and processing the claim if TxDOT or the other Indemnified Party does not receive from DB Contractor, within 10 Days after so notifying DB Contractor, written proof that DB Contractor has reported the claim directly to the insurer. TxDOT or the other Indemnified Party may dispense with such notice to DB Contractor if TxDOT or the other Indemnified Party has a good faith belief that more rapid reporting is needed to preserve the claim.

7.8.6 Unless otherwise directed by TxDOT in writing, DB Contractor shall be responsible for reporting and processing all potential claims by TxDOT or DB Contractor against the insurance required to be provided under Section 7.7. DB Contractor agrees to report to the insurers in a timely manner any and all matters that may give rise to an insurance claim and to promptly and diligently pursue any and all insurance claims on behalf of TxDOT, whether for defense or indemnity or both.

7.8.7 All insurance proceeds received by DB Contractor for any insured loss under the builder's risk policy required by this Capital Maintenance Agreement shall be paid into a separate insurance proceeds account and shall be held in trust for the purposes of, and to be applied in accordance with, this Capital Maintenance Agreement.

7.9 Insurance and Commencement of Maintenance Services

DB Contractor shall not commence the Maintenance Services under this Capital Maintenance Agreement until it has obtained the insurance required under Section 7.7, has furnished original certificates of insurance evidencing the required coverage as required under Section 7.7.4 and such insurance has been approved in writing by TxDOT, and DB Contractor shall not allow any Subcontractor (nor shall such Subcontractor be entitled) to commence work under its Subcontract until the insurance required of the Subcontractor pursuant to this Section 7 has been obtained and approved by DB Contractor. A delay in securing such certificates of insurance or approvals shall not provide DB Contractor any relief or entitlement to a Change Order.

7.10 TxDOT's Right To Remedy Breach by DB Contractor Regarding Insurance

If DB Contractor or any Subcontractor fails to provide insurance or proof of insurance as and when required herein, TxDOT shall have the rights set forth in Section 7.7.4.4. TxDOT's Recoverable Costs, at TxDOT's option, shall be deducted from amounts payable to DB Contractor or reimbursed by DB Contractor upon demand from TxDOT. Nothing herein shall preclude TxDOT from exercising its rights and remedies under Section 12 as a result of the failure of DB Contractor or any Subcontractor to satisfy its insurance obligations herein.

7.11 Disclaimer Regarding Insurance

DB Contractor and each Subcontractor have the responsibility to make sure that their insurance programs fit their particular needs, and it is their responsibility to arrange for and to secure any insurance coverage that they deem advisable, whether or not specified herein. TxDOT makes no representation that the limits of liability specified for any insurance policy to be carried pursuant to this Capital Maintenance Agreement or approved variances therefrom are adequate to protect DB Contractor against liabilities and risks associated with its undertakings under the CMA Documents.

7.12 Premiums

DB Contractor shall be responsible for the cost of insurance required to be provided during the Initial Maintenance Term, which premiums are included in the Maintenance Price for the Initial Maintenance Term. DB Contractor shall bear the full risk of any insurance premium increases from the Effective Date until the end of the Initial Maintenance Term, and shall not be entitled to any Claim for relief for such increases. Solely with respect to insurance policies required to be maintained

during subsequent Maintenance Terms under this Section 7 and Exhibit 10, DB Contractor shall be entitled to reimbursement for the costs of insurance premiums, as follows:

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

7.12.2 TxDOT shall be entitled to any return or retrospective premiums with respect to said insurance. DB Contractor shall deliver any such funds to TxDOT within 10 Days following DB Contractor's receipt thereof.

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

7.12.4 DB Contractor shall promptly notify TxDOT if it becomes apparent at any time during the Maintenance Term that required insurance policies are no longer available or if the premiums for renewals materially increase from the prior rates. In such event, DB Contractor shall work with TxDOT to find commercially reasonable alternatives to the required coverages that are acceptable to TxDOT.

7.13 Claims Against Third Parties

DB Contractor shall not have the authority or responsibility to assert and pursue any claims against any third party for damage to the Project, other than claims for third party damage that do not fall within the definition of Force Majeure Event. In the event DB Contractor receives any funds from third parties for damages caused to the Project, such funds shall be used first to repair the applicable damage to the Project and next for the purposes for which the funds were awarded or received. Upon request by TxDOT, DB Contractor shall provide reasonable assistance to, and shall reasonably cooperate with, TxDOT regarding claims against third parties for damage to the Project for which TxDOT is responsible.

SECTION 8. COMPENSATION

8.1 Payment for Maintenance Services

8.1.1 During the term of this Capital Maintenance Agreement, in full consideration for the performance by DB Contractor of its duties and obligations under the CMA Documents, TxDOT shall pay the amounts determined as set forth in Section 8.1.2, as adjusted in accordance with Section 8.1.3 (the "**Maintenance Price**"), subject only to Section 8.1.4 and to such additions to and deductions from the compensation as may be provided for pursuant to Section 10. The Maintenance Price shall be paid in accordance with this Section 8.1. The Maintenance Price (and the individual components thereof) shall be increased or decreased only by a Change Order issued in accordance with Section 10, by an amendment to this Capital Maintenance Agreement or as provided in Section 8.1.4. No portion of the Maintenance Price shall be payable on account of services provided (a) prior to the Initial Maintenance Term Commencement Date, except for those tasks expressly required by the CMA Documents to be performed and that are performed by DB Contractor, after issuance of Maintenance NTP1 and prior to the Initial Maintenance Term Commencement Date, or (b) after the expiration or earlier termination of this Capital Maintenance Agreement.

8.1.2 Subject to Sections 8.1.4 and 8.1.5, DB Contractor shall be paid for Maintenance Services provided under this Capital Maintenance Agreement, a monthly payment equivalent to one-twelfth (1/12) of the "yearly maintenance cost" for Section 1 for the applicable Maintenance Term year as set forth in Attachment 1 to Exhibit 4, plus one-twelfth (1/12) of the "yearly maintenance cost" for Section 2A for the applicable Maintenance Term year as set forth in Attachment 2 to Exhibit 4 if TxDOT exercised the Section 2A Option for such Maintenance Term, plus one-twelfth (1/12) of the "yearly maintenance cost" for each LE Maintenance Item for the applicable Maintenance Term year as set forth in Attachment 3 to Exhibit 4 if TxDOT exercised the LE Option for such Maintenance Term. Such amount shall be payable in arrears pursuant to Draw Requests submitted on the first day of each month of such Maintenance Term year.

8.1.3 The annual Maintenance Price (MP) will be escalated or reduced based on changes in ENR CCI commencing on the Initial Maintenance Term Commencement Date and continuing annually thereafter during the Maintenance Period. The escalation or reduction to the Maintenance Price will be based on the ratio (J) / (BI_{CCI}) in accordance with the definitions and methodology set forth in Exhibit 11.

8.1.4 During the last six months of the Maintenance Period, monthly payments of the Maintenance Price shall be calculated in accordance with

this Section 8.1.4. During months seven through eleven of the final twelve months of the Maintenance Period, DB Contractor shall be paid for Maintenance Services provided under this Capital Maintenance Agreement a monthly payment equal to 5% of the annual payments set forth in the Maintenance Price Payment Schedule in Exhibit 4, escalated in accordance with Section 8.1.3. During the final month of the Maintenance Period, DB Contractor shall be paid for Maintenance Services provided under this Capital Maintenance Agreement an amount equal to 25% of the annual payments set forth in the Maintenance Price Payment Schedule in Exhibit 4, escalated in accordance with Section 8.1.3,. Such amounts shall be payable in arrears pursuant to Draw Requests submitted on the first day of each month.

8.1.5 If DB Contractor fails to fulfill any requirement or obtain any TxDOT approval or third-party approval that the CMA Documents indicate is to be fulfilled or obtained prior to the Initial Maintenance Term Commencement Date, TxDOT shall have the right, in its discretion, to prohibit DB Contractor from commencing the Maintenance Services until the requirement or approval is obtained. In such case, DB Contractor (a) shall have no right to compensation allocable to the period of such delay in commencing Maintenance Services beyond the Initial Maintenance Term Commencement Date, and (b) shall pay to TxDOT, within 10 Days after receipt of written demand, the excess, if any, of TxDOT's Recoverable Costs of carrying out or providing for the carrying out of Maintenance Services during such period over the Maintenance Price TxDOT would have paid DB Contractor for such period had it commenced Maintenance Services on the Initial Maintenance Term Commencement Date. The foregoing is in addition to any other remedy available to TxDOT under this Capital Maintenance Agreement on account of such failure.

8.2 Invoicing and Payment

8.2.1 On or about the fifth Business Day of each month, DB Contractor shall submit to TxDOT five copies of a Draw Request in the form of Exhibit 11 for Maintenance Services performed for the preceding month and meeting all requirements specified herein. Each Draw Request shall be executed by DB Contractor's Authorized Representative and Maintenance Quality Manager. DB Contractor acknowledges that TxDOT may obtain funding for portions of the Maintenance Services from the federal government, local agencies and other third parties, and DB Contractor agrees to segregate Draw Requests for all such Maintenance Services in a format reasonably requested by TxDOT and with detail and information as reasonably requested by TxDOT. Each Draw Request shall be organized to account for applicable reimbursement requirements and to facilitate the reimbursement process. In addition, the Draw Request for a monthly payment must be accompanied by an attached report containing information that TxDOT can

use to verify the Draw Request and monthly payment and all components of the Liquidated Damages and Key Personnel Change Fees for the prior month. Such attached report shall include:

8.2.1.1 [Reserved];

8.2.1.2 A description of any other Liquidated Damages assessed against DB Contractor during the prior month in relation to the Maintenance Services, including the date and time of occurrence and a description of the events and duration of the events for which the Liquidated Damages were assessed;

8.2.1.3 Any adjustments to reflect previous overpayments or underpayments;

8.2.1.4 A detailed calculation of any interest payable in respect of any amounts owed; and

8.2.1.5 Any other amount due and payable from DB Contractor to TxDOT or from TxDOT to DB Contractor under this Capital Maintenance Agreement, including any retainage and any other deductions related to the Maintenance Services that TxDOT is entitled to make and any carry-over deductions or other adjustments from prior months not yet paid by DB Contractor.

8.2.2 Within 10 Business Days after TxDOT's receipt of a complete Draw Request, TxDOT will review the Draw Request and all attachments and certificates thereto, and shall notify DB Contractor of the amount approved for payment and the reason for disapproval of any remaining invoiced amounts or of any other information set forth in the Draw Request. DB Contractor may include such disapproved amounts in the next month's Draw Request after correction of the deficiencies noted by TxDOT and satisfaction of the requirements of the CMA Documents related thereto. Within 15 Business Days after TxDOT's receipt of a complete Draw Request meeting the requirements of this Capital Maintenance Agreement, TxDOT shall pay DB Contractor the amount of the Draw Request approved for payment less any amounts that TxDOT is otherwise entitled to withhold or deduct. No payment by TxDOT shall, at any time, preclude TxDOT from showing that such payment was incorrect, or from recovering any money paid in excess of those amounts due hereunder.

8.2.3 The annual payments payable for any partial month or payable for any partial year shall be prorated.

8.2.4 [Reserved]

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

(a) Any TxDOT or third-party Losses for which DB Contractor is responsible hereunder or any Liquidated Damages or Key Personnel Change Fees that have accrued as of the date of the application for payment;

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

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

(d) Any retainage under Section 8.4; and

(e) Any other sums that TxDOT is entitled to recover from DB Contractor under the terms of this Capital Maintenance Agreement.

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

8.3 Payment to Subcontractors

8.3.1 No later than 10 Days after receipt of payment from TxDOT, DB Contractor shall promptly pay each Subcontractor, out of the amount paid to DB Contractor on account of such Subcontractor's portion of the Maintenance Services, the amount to which such Subcontractor is entitled, less any retainage provided for in the Subcontract, and any other offsets and deductions provided in the Subcontract or by Law. No later than 10 Days after satisfactory completion of all Maintenance Services to be performed by a Subcontractor, including provision of appropriate releases, certificates and other evidence of the Subcontractor's compliance with its Subcontract and all applicable requirements of the CMA Documents, DB Contractor shall pay to the Subcontractor moneys withheld in retention from the Subcontractor. Such payment shall be made promptly following satisfaction of the foregoing requirements, even if the Maintenance Services to be performed by DB Contractor or other Subcontractors is not completed.

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

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

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

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

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

8.4 Retainage for Nonrenewal of P&P Bonds

In the event the P&P Bonds expire without renewal or otherwise are no longer in effect during the Maintenance Period, TxDOT shall withhold funds (the "**Retainage**") from each payment to be made to DB Contractor for the Maintenance Services until the earlier to occur of (a) the date on which replacement Maintenance Security satisfying the requirements hereunder is provided to TxDOT or (b) the date that is one year after the end of the Maintenance Period. The Retainage shall be an amount equal to 10% of the amount owing.

8.4.1 The Retainage, subject to reduction as specified in Section 8.4.2 below, shall be held by TxDOT until 60 Days after the expiration of the Warranties under this Capital Maintenance Agreement. At such time, and provided that DB Contractor is not in breach or default hereunder, TxDOT shall release to DB Contractor all Retainage withheld in connection with Maintenance Services other than amounts applied to the payment of Losses or that TxDOT deems advisable, in its discretion, to retain to cover any existing or threatened claims, Liens and stop notices relating to the Project, the cost of any uncompleted Maintenance Services, or the cost of repairing any Nonconforming Work. Final payment of such Retainage not applied to Losses shall be made upon DB Contractor's showing, to TxDOT's satisfaction, that all such matters have been resolved, including delivery to TxDOT of a certification representing and

warranting that there are no outstanding claims of Maintenance Services or any claims, Liens or stop notices of any Subcontractor or laborer with respect to the Maintenance Services.

8.4.2 TxDOT agrees to release up to 50% of the Retainage withheld in connection with payments for the Maintenance Services 60 Days after the end of the Maintenance Period, subject to the following terms and conditions. The amount to be released shall be reduced by any amounts that TxDOT deems advisable, in its discretion, to retain to cover any uncompleted Maintenance Services, including correction of Nonconforming Work, any Warranty work for which notice has been provided to DB Contractor, any Losses that TxDOT anticipates may be payable, and any existing or threatened claims, Liens or stop notices relating to the Project. In addition, no portion of the Retainage shall be released unless and until (a) DB Contractor shall have applied in writing for such release, and (b) such release shall have been approved in writing by any Guarantor.

8.5 Disputes

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

SECTION 9. WARRANTIES FOR MAINTENANCE SERVICES

9.1 Warranties for Maintenance Services

DB Contractor warrants that:

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

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

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

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

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

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

9.2 Warranty Period

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

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

9.3 Implementation of Warranty

9.3.1 Within seven Days of receipt by DB Contractor of notice from TxDOT specifying (a) a failure of the Maintenance Services to satisfy the Warranties, (b) the failure of any Subcontractor warranty, guarantee or obligation that DB Contractor is responsible to enforce, or (c) a misrepresentation by a Subcontractor regarding an obligation that DB Contractor is responsible to enforce, DB Contractor and TxDOT shall mutually agree when and how DB Contractor shall remedy such failure or misrepresentation; provided, however, that, in case of an Emergency requiring immediate curative action or a situation that poses a significant safety risk, DB Contractor shall implement such action as it deems necessary and shall immediately notify TxDOT in writing of the Emergency and the urgency of the decision. DB Contractor and TxDOT shall promptly meet in order to agree on a remedy. If DB Contractor does not use its best efforts to effectuate such remedy within the agreed time, or if DB Contractor and TxDOT fail to reach such an agreement within such seven-Day period (or immediately, in the case of emergency conditions), TxDOT shall have the right, but not the obligation, to perform or have performed by third parties the necessary remedy, and the costs thereof shall be borne by DB Contractor. Reimbursement for TxDOT's Recoverable Costs associated with such work shall be payable to TxDOT within 10 Days after DB Contractor's receipt of an invoice therefor. Alternatively, TxDOT, in its discretion, may deduct the amount of such costs and expenses from any sums owed by TxDOT to DB Contractor pursuant to this Capital Maintenance Agreement. TxDOT may agree to accept Nonconforming Work in accordance with Section 5.9.2.

9.3.2 DB Contractor shall be responsible for obtaining any required encroachment permits and required consents from any other Persons in connection with the performance of Maintenance Services required under this Section 9. DB Contractor shall bear all costs of such Maintenance Services, including additional testing and inspections.

9.4 Subcontractor and Extended Warranties

9.4.1 Without in any way derogating the Warranties and DB Contractor's own representations and warranties and other obligations with respect to the Maintenance Services, DB Contractor shall obtain from all Subcontractors and cause to be extended to TxDOT, for periods at least coterminous with the Warranties, appropriate representations, warranties, guarantees and obligations with respect to design, materials, workmanship, equipment, tools and supplies furnished by such Subcontractors to effectuate the provisions in this Section 9. All representations, warranties, guarantees and other obligations of Subcontractors (a) shall be written so as to survive all TxDOT inspections, tests and approvals, and (b)

shall run directly to and be enforceable by DB Contractor and TxDOT and their respective successors and assigns. DB Contractor assigns to TxDOT all of DB Contractor's rights and interests in and to all extended warranties for periods exceeding the applicable Warranty Period that are received by DB Contractor from any of its Subcontractors. To the extent that any Subcontractor warranty or guaranty would be voided by reason of DB Contractor's negligence or failure to comply with the CMA Documents in incorporating material or equipment into the work, DB Contractor shall be responsible for correcting such Defect.

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

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

9.5 Effect of TxDOT Activities on Warranties

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

9.6 No Limitation on Liability

Subject to Sections 12.7 and 12.8, the foregoing Warranties and Subcontractor warranties are in addition to all rights and remedies available under the CMA Documents or applicable Law or in equity, and shall not limit DB Contractor's liability or responsibility imposed by the CMA Documents or applicable Law or in equity with respect to the Maintenance Services, including liability for design Defects, latent construction Defects, strict liability, actions, omissions, negligence, intentional misconduct, or breach of applicable Law or contract by any DB Contractor-Related Entity; provided, however, that, upon expiration of the Warranties, DB Contractor shall have no further liability hereunder for patent construction Defects.

9.7 Damages for Breach of Warranty

9.7.1 DB Contractor shall pay or reimburse TxDOT for all its Losses caused by (a) a failure of the Maintenance Services to satisfy the Warranties, (b) the failure of any Subcontractor warranty, guarantee or obligation that DB Contractor is obligated to obtain from the Subcontractor pursuant to Section 9.4.1, or (c) a misrepresentation by any Subcontractor regarding any matter for which DB Contractor is obligated to obtain representations from the Subcontractor pursuant to Section 9.4.1. Such Losses shall include any costs incurred by TxDOT for independent quality assurance or quality control with respect to such Maintenance Services within 10 Days after DB Contractor's receipt of invoices therefor, and, subject to the limitations in Sections 12.7 and 12.8, any lost revenue arising from or relating to such Maintenance Services. Alternatively, TxDOT, in its discretion, may deduct the amount of such Losses from any sums owed by TxDOT to DB Contractor pursuant to this Capital Maintenance Agreement.

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

SECTION 10. CHANGES IN THE MAINTENANCE SERVICES

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

10.1 Circumstances Under Which Change Orders May Be Issued

10.1.1 Definition of and Requirements Relating to Change Orders

10.1.1.1 Definition of Change Order

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

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

(b) to revise the Maintenance Price; and

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

Upon TxDOT's approval of the matters set forth in the Change Order form (whether it is initiated by TxDOT or requested by DB Contractor), TxDOT shall sign such Change Order form indicating approval thereof. A Change Order may, at the discretion of TxDOT, direct DB Contractor to proceed with the Maintenance Services with the amount of any adjustment to the Maintenance Price to be determined in the future. All additions, deductions or

changes to the Maintenance Services as directed by Change Orders shall be executed under the conditions of the original CMA Documents.

10.1.1.2 Issuance of Directive Letter

TxDOT may at any time issue a Directive Letter to DB Contractor in the event of any desired change in the Maintenance Services, or in the event of any Claim or Dispute regarding the scope of the Maintenance Services. The Directive Letter will state that it is issued under this Section 10.1.1.2, will describe the Maintenance Services in question and will state the basis for determining compensation, if any. DB Contractor shall proceed immediately as directed in the Directive Letter, pending the execution of a formal Change Order (or, if the Directive Letter states that the Maintenance Services are within DB Contractor's original scope of Maintenance Services, DB Contractor shall proceed with the Maintenance Services as directed but shall have the right pursuant to Section 10.3 to request that TxDOT issue a Change Order with respect thereto).

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

(a) DB Contractor shall not be entitled to additional compensation for any such work performed prior to receipt of a Directive Letter or Change Order, except to the extent that Section 10.3.2.2 preserves DB Contractor's right to compensation for work performed following delivery of a Request for Partnering. DB Contractor acknowledges that it will be at risk if it elects to proceed with any such work, since TxDOT may later decide not to provide direction with regard to such work. In addition to provision of a PCO Notice and subsequent Change Order request pursuant to Section 10.3.2, receipt of a Directive Letter from TxDOT shall be a condition precedent to DB Contractor's right to make a Claim that a TxDOT-Directed Change has occurred.

(b) The fact that a Directive Letter was issued by TxDOT shall not be considered evidence that, in fact, a TxDOT-Directed Change occurred. The determination whether a TxDOT-Directed Change, in fact occurred shall be based on an analysis of the original requirements of the CMA Documents and a determination whether the Directive Letter, in fact, constituted a change in those requirements. The requirements of Section 10.1.1.2.1(a) shall not imply that a Directive Letter would be required in order for DB Contractor to have the right to receive compensation for Maintenance Services within its original scope for which additional compensation is specifically allowed under this Section 10.

10.1.2 Right of TxDOT To Issue Change Orders

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

10.2 TxDOT-Initiated Change Orders

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

10.2.1 Request for Change Proposal

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

10.2.1.2 Within 10 Business Days after DB Contractor's receipt of a Request for Change Proposal, or such longer period as may be mutually agreed to by TxDOT and DB Contractor, TxDOT and DB Contractor shall consult to define the proposed scope of the change. Within five Business Days after the initial consultation, or such longer period as may be mutually agreed to by TxDOT and DB Contractor, TxDOT and DB Contractor shall consult concerning the estimated cost impacts.

10.2.1.3 Within 10 Business Days after the second consultation and provision of any data described in Section 10.2.1.2, TxDOT shall notify DB Contractor whether TxDOT (a) wishes to issue a Change Order, (b) wishes to request DB Contractor to provide a Cost and Schedule Proposal, (c) wishes to request DB Contractor to prepare a modified work plan for the change and a Cost and Schedule Proposal based on the modified plan, or (d) no longer wishes to issue a Change Order.

10.2.1.4 If so requested, DB Contractor shall, within 10 Business Days after receipt of the notification described in Section 10.2.1.3, or such

longer period as may be mutually agreed to by TxDOT and DB Contractor, prepare and submit to TxDOT for review and approval by TxDOT a Cost and Schedule Proposal (in the format provided by TxDOT) for the requested change, complying with all applicable requirements of Section 10.4, and incorporating and fully reflecting all requests made by TxDOT. DB Contractor shall bear the cost of developing the Cost and Schedule Proposal, including any modifications thereto requested by TxDOT, except that costs of design and engineering work required for preparation of plans or exhibits necessary to the Cost and Schedule Proposal, as preauthorized by TxDOT, may be included in the Change Order as reimbursable items. If the Change Order is approved, such design and engineering costs will be included within the Change Order; otherwise they shall be separately reimbursed through a separate Change Order.

10.2.1.5 If DB Contractor and TxDOT agree that a change in the requirements relating to the Maintenance Services has occurred but disagree as to whether the change justifies additional compensation or time or disagree as to the amount of any change to be made to the Maintenance Price, TxDOT may, in its discretion, order DB Contractor to proceed with the performance of the Maintenance Services in question notwithstanding such disagreement and without waiver by either Party of its right to submit the Dispute for resolution through the Dispute Resolution Procedures. Such order may, at TxDOT's option, be in the form of (a) a Time and Materials Change Order as provided in Section 10.7 or (b) a Directive Letter under Section 10.1.1.2.

10.2.1.6 If it is not practicable, due to the nature or timing of the event giving rise to a proposed Change Order, for DB Contractor to provide a complete Cost and Schedule Proposal meeting all of the requirements of Section 10.4, DB Contractor shall provide an incomplete proposal that includes all information capable of being ascertained. Said incomplete proposal shall (a) include a list of those Change Order requirements that are not fulfilled, together with an explanation reasonably satisfactory to TxDOT stating why such requirements cannot be met, and (b) in all events include sufficient detail to ascertain the basis for the proposed Change Order and for any price increase associated therewith, to the extent such amount is then ascertainable. DB Contractor shall provide monthly updates to any incomplete Cost and Schedule Proposals in the same manner as updates to incomplete Requests for Change Order under Section 10.3.2.6.

10.2.2 Unilateral Change Orders

TxDOT may issue a unilateral Time and Materials Change Order at any time, regardless of whether it has issued a Request for Change Proposal. DB Contractor shall be entitled to compensation in accordance with Section 10.7 for

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

10.3 DB Contractor-Requested Change Orders

10.3.1 Eligible Changes

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

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

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

(c) Additional costs directly attributable to uncovering, removing and restoring the work, to the extent provided in Section 5.7.3.

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

10.3.2 Procedures

The requirements set forth in this Section 10.3.2 constitute conditions precedent to DB Contractor's entitlement to request and receive a Change Order except those involving a Request for Change Proposal. DB Contractor understands that it shall be forever barred from recovering against TxDOT under this Section 10 if it fails to give notice of any act or omission by TxDOT or any of its representatives or the happening of any event, thing or occurrence pursuant to a proper PCO Notice, or fails to comply with the remaining requirements of this Section 10.3.

10.3.2.1 Delivery of Requests for Partnering and PCO Notices

DB Contractor acknowledges the importance of providing prompt notification to TxDOT upon the occurrence of any event or thing entitling DB Contractor to a Change Order under Section 10.3.1. Among other things, such notification serves the purpose of allowing TxDOT to take action to mitigate adverse impacts. Such notification must be delivered as promptly as possible after the occurrence of such event or situation, through either (a) a PCO Notice as described in Section 10.3.2.3, or (b) if permitted by Section 10.3.2.2, a Request for Partnering followed by a PCO Notice, if appropriate.

10.3.2.2 Requests for Partnering

The term "Request for Partnering" shall mean a notice delivered by DB Contractor requesting that TxDOT enter into partnering discussions with DB Contractor with regard to an event or situation that has occurred within the scope of Section 10.3.1.1. The Request for Partnering shall reference this Section 10.3.2.2 and shall describe the event or situation, as well as the action that DB Contractor would like to take with respect thereto. The Parties shall promptly meet and confer for the purpose of determining what action should be taken and also to determine whether the Parties are in agreement as to entitlement to a Change Order. Either Party may at any time terminate partnering discussions by delivery of written notice to the other, and partnering discussions shall automatically terminate 60 Days after delivery of the Request for Partnering unless both Parties agree in writing to an extension. Within five Business Days after termination of partnering discussions, if TxDOT has not issued either a Directive Letter or Change Order, DB Contractor must submit a PCO Notice in order to preserve its right to pursue a Change Order.

10.3.2.3 PCO Notices

The term "**PCO Notice**" shall mean a notice delivered by DB Contractor, meeting the requirements set forth below, stating that an event or situation has occurred within the scope of Section 10.3.1.1 and stating which subsection thereof is applicable. The first notice shall be labeled "PCO Notice No. 1," and subsequent notices shall be numbered sequentially.

10.3.2.3.1 The PCO Notice shall (a) state in detail the facts underlying the anticipated Request for Change Order, the reasons why DB Contractor believes additional compensation will or may be due, and the date of occurrence, (b) state the name, title, and activity of each DB Contractor representative and TxDOT representative knowledgeable of the facts underlying

the anticipated Request for Change Order, (c) identify any documents and the substance of any oral communication involved in the facts underlying the anticipated Request for Change Order, (d) state in detail the basis that the work is not required by this Capital Maintenance Agreement, if applicable, (e) identify particular elements of performance for which additional compensation may be sought under this Section 10.3.2, (f) identify any insurance available to DB Contractor, any deductible or self-insured retention associated with such insurance, and any insurance deemed to be self-insured by DB Contractor under Section 7.8.4, with respect to the event giving rise to the request for additional compensation, and (g) provide an estimate of the time within which a response to the notice is required to minimize cost, delay or disruption of performance.

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

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

10.3.2.4 Waiver

10.3.2.4.1 DB Contractor must deliver each PCO Notice as promptly as possible after the occurrence of the event or situation. If any PCO Notice is delivered later than 10 Days after DB Contractor first discovered (or should have discovered in the exercise of reasonable prudence) the occurrence described therein, DB Contractor shall be deemed to have waived the right to collect any costs incurred or accrued prior to the date of delivery of the Request for Partnering (if applicable) or PCO Notice (if no Request for Partnering was submitted or if the PCO Notice was not timely submitted following termination of partnering discussions). Furthermore, if any PCO Notice concerns any condition or material described in Section 10.8.2.1.3, DB Contractor shall be deemed to have waived the right to collect any and all costs incurred in connection therewith to the extent that TxDOT is not afforded the opportunity to inspect such material or condition before it is disturbed.

10.3.2.4.2 In addition to the limitations set forth in Section 10.3.2.4.1, DB Contractor's failure to provide a PCO Notice within 60 Days

after DB Contractor first discovered (or should have discovered in the exercise of reasonable prudence) the occurrence of a given event or situation shall preclude DB Contractor from any relief. For situations involving Requests for Partnering, the 60-day period shall be extended until two Business Days following termination of the partnering period.

10.3.2.5 Delivery of Request for Change Order

DB Contractor shall deliver a Request for Change Order under this Section 10.3.2.5 to TxDOT within 30 Days after delivery of the PCO Notice, or such longer period of time as may be allowed in writing by TxDOT. TxDOT may require design and construction costs to be covered by separate Requests for Change Order.

10.3.2.6 Incomplete Requests for Change Order

10.3.2.6.1 Each Request for Change Order provided under Section 10.3.2.5 shall meet all requirements set forth in Section 10.4, provided that, if any such requirements cannot be met due to the nature or timing of the occurrence, DB Contractor shall provide an incomplete Request for Change Order that fills in all information capable of being ascertained. Said incomplete Request for Change Order shall (a) include a list of those Change Order requirements that are not fulfilled, together with an explanation reasonably satisfactory to TxDOT stating why such requirements cannot be met, and (b) in all events include sufficient detail to ascertain the basis for the proposed Change Order and for any price increase associated therewith, to the extent such amount is then ascertainable.

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

10.3.2.7 Importance of Timely Notice

DB CONTRACTOR ACKNOWLEDGES AND AGREES THAT, DUE TO LIMITATIONS ON FUNDING FOR THE PROJECT AND HARM TO TXDOT THAT WILL RESULT FROM DELAY, TIMELY DELIVERY OF PCO NOTICES AND REQUESTS FOR CHANGE ORDERS AND UPDATES THERETO ARE OF VITAL IMPORTANCE TO TXDOT. TXDOT IS RELYING ON DB CONTRACTOR TO EVALUATE PROMPTLY UPON THE OCCURRENCE OF ANY EVENT OR SITUATION WHETHER THE EVENT OR SITUATION WILL AFFECT THE MAINTENANCE PRICE AND, IF SO, WHETHER DB CONTRACTOR BELIEVES A MAINTENANCE PRICE INCREASE IS REQUIRED HEREUNDER. ACCORDINGLY, DB CONTRACTOR HEREBY EXPRESSLY WAIVES ALL RIGHTS TO ASSERT ANY AND ALL CLAIMS BASED ON ANY CHANGE IN THE MAINTENANCE SERVICES OR THEIR COST, DELAY, DISRUPTION, SUSPENSION OR ACCELERATION (INCLUDING ANY CONSTRUCTIVE CHANGE, DELAY, DISRUPTION, SUSPENSION OR ACCELERATION) FOR WHICH DB CONTRACTOR FAILED TO PROVIDE PROPER AND TIMELY NOTICE, OR FAILED TO PROVIDE A TIMELY PCO NOTICE, TIMELY REQUEST FOR CHANGE ORDER OR TIMELY UPDATES THERETO.

10.3.2.8 Review of Subcontractor Request for Price Increase

Prior to submission by DB Contractor of any Request for Change Order that is based in whole or in part on a request by a Subcontractor to DB Contractor for a price increase under its Subcontract, DB Contractor shall have reviewed all invoices by the Subcontractor that constitute the basis for the Request for Change Order and determined in good faith that each such request is justified hereunder and that DB Contractor is acting reasonably in requesting an increase in the Maintenance Price in the amounts specified in the Request for Change Order. Each Request for Change Order involving Subcontractor-performed Maintenance Services, and each update to an incomplete Change Order request involving such Maintenance Services shall include a summary of DB Contractor's analysis of all Subcontractor invoice components and shall include a certification signed by the Maintenance Manager stating that DB Contractor has investigated the basis for the Subcontractor's request and has determined that such request is justified as to entitlement and amount of money requested, has reviewed and verified the adequacy of all back-up documentation to be placed in escrow pursuant to Section 17.2, and has no reason to believe and does not believe that the factual basis for the Subcontractor's request is falsely represented. Any Request for Change Order

involving Subcontractor-performed Maintenance Services that is not accompanied by such analysis and certification shall be considered incomplete.

10.3.3 Performance of Disputed Maintenance Services

If TxDOT refuses to issue a Change Order based on DB Contractor's request, DB Contractor shall nevertheless perform all work as specified by Directive Letter, and shall have the right to submit the issue to dispute resolution pursuant to Section 16. DB Contractor shall maintain and deliver to TxDOT, upon request, contemporaneous records, meeting the requirements of Section 10.9, for all work performed that DB Contractor believes constitutes extra work (including non-construction work), until all Claims and Disputes regarding entitlement or cost of such work are resolved.

10.4 Contents of Change Orders

10.4.1 Form of Change Order

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

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

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

10.4.2.1 Scope of Work

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

10.4.2.2 Cost Estimate

The cost estimate shall set out the estimated costs for the proposed Change Order in such a way that a fair evaluation can be made. It shall include a breakdown for labor, materials, equipment and markups for overhead and profit, unless TxDOT agrees otherwise. If the work is to be performed by Subcontractors and if the work is sufficiently defined to obtain Subcontractor quotes, DB Contractor shall obtain quotes (with breakdowns showing cost of labor, materials, equipment, and markups for overhead and profit) on the Subcontractor's

stationery and shall include such quotes as back-up for DB Contractor's estimate. No markup shall be allowed in excess of the amounts allowed under Section 10.6. DB Contractor shall identify all conditions with respect to prices or other aspects of the cost estimate, such as pricing contingent on firm orders being made by a certain date or the occurrence or nonoccurrence of an event.

10.4.2.3 Other Supporting Documentation

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

10.4.3 Justification

All Requests for Change Orders shall include an attachment containing a detailed narrative justification therefor, describing the circumstances underlying the proposed change, identifying the specific provisions of Section 10 that permit a Change Order to be issued, and describing the data and documents (including all data and reports required under Section 10.9) that establish the necessity and amount of such proposed change.

10.4.4 DB Contractor Representation

Each proposed Change Order shall be accompanied by a certification under penalty of perjury, in a form acceptable to TxDOT, executed by DB Contractor and stating that (a) the amount of compensation requested is justified as to entitlement and amount, (b) the amount of compensation requested includes all known and anticipated impacts or amounts that may be incurred as a result of the event or matter giving rise to such proposed change, and (c) the cost and pricing data forming the basis for the proposed Change Order is complete, accurate and current. Each proposed Change Order involving Maintenance Services by a Subcontractor for which pricing data is required to be provided under Section 17.2 shall include a statement that the Subcontractor pricing data has been provided and shall include a copy of the certification required to be provided by the Subcontractor under Section 17.2.

10.4.5 Effect of Change Order Under Design-Build Agreement

DB Contractor acknowledges that it has reviewed the Design-Build Agreement, including provisions affecting Change Orders requested by DB Contractor under this Capital Maintenance Agreement. DB Contractor expressly agrees to comply with and be bound by Section 13.4.5 of the Design-Build Agreement.

10.4.6 Changes in Scope of Project or Maintenance Services

If an event or situation occurs that may entitle DB Contractor to a Change Order increasing the Maintenance Price, TxDOT will evaluate the situation and shall have the right, in its discretion, to make changes to the definition of the Project or the scope of Maintenance Services so as to bring it within TxDOT's funding and time restraints.

10.4.7 Certificate of Interested Parties

DB Contractor must file a Form 1295, Certificate of Interested Parties ("**Form 1295**") with the Texas Ethics Commission as required by Section 2252.908 of the Texas Government Code and Chapter 46 of Title 1 of the Texas Administrative Code (collectively, the "**Form 1295 Laws**") in connection with each amendment to this Capital Maintenance Agreement, including any Change Order or Deviation. DB Contractor must indicate the CSJ for this Capital Maintenance Agreement and the applicable Change Order, Deviation or amendment number in the fields provided on Form 1295.

As a condition to TxDOT's execution of any amendment to this Capital Maintenance Agreement, including a Change Order or Deviation, DB Contractor must submit to TxDOT an executed and notarized Form 1295 complying with the requirements of the Form 1295 Laws at the same time it submits the executed amendment, including any Change Order or Deviation, for TxDOT's execution. TxDOT will not execute any Change Order or other amendment to this Capital Maintenance Agreement until it has received the Form 1295 completed in accordance with this Section 10.4.7 and the Form 1295 Laws, provided that DB Contractor's filing of a Form 1295 does not obligate TxDOT to execute a Change Order or any other amendment to this Capital Maintenance Agreement. TxDOT will acknowledge receipt of each Form 1295 submitted by DB Contractor in relation to each amendment to this Capital Maintenance Agreement executed by TxDOT; however, TxDOT's receipt of a Form 1295 shall not be construed as TxDOT's review, approval, consent or certification as to the contents of such Form 1295, for which DB Contractor is solely responsible.

Additional information regarding Form 1295 may be found at the Texas Ethics Commission website at https://www.ethics.state.tx.us/tec/1295-Info.htm.

10.5 Certain Limitations

10.5.1 Limitation on Maintenance Price Increases

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

10.5.2 Maintenance Services Performed Without Direction

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

10.6 Change Order Pricing for Negotiated Lump Sum Price or Unit Price Change Orders

The price of a Change Order under this Section 10.6 shall be a negotiated lump sum price or unit prices as provided below. Lump sum price or unit prices shall be based on the original allocations of the Maintenance Price to comparable activities, whenever possible. If reference to price allocations is not possible and if requested by TxDOT, negotiation for lump sum or unit price Change Orders shall be on an Open Book Basis and may be based on the pricing contained in the EPDs, as well as Subcontractors' bid prices.

10.6.1 Detailed Cost Proposal

DB Contractor may be required to submit a detailed cost proposal identifying all categories of costs in accordance with the requirements of Section 10.7 (a) showing all impacts on the CMA Documents from Maintenance Services additions, deletions and modifications shown in the proposed Change Order being priced, and (b) setting out the proposed costs in such a way that a fair evaluation can be made. When the Change Order adds or deletes Maintenance Services to DB

Contractor's scope, the detailed cost proposal shall be based on estimates or actual costs of labor, material and equipment in accordance with Section 10.6.4 or an estimate, including a bill of any material and a breakdown of labor and equipment costs in accordance with Section 10.6.5, as applicable. Markup for profit and overhead consistent with Section 10.7 shall apply to Maintenance Services added by Change Orders.

10.6.2 Identification of Conditions

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

10.6.3 Contents

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

10.6.4 Added Maintenance Services

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

10.6.5 Deleted Maintenance Services

When the Change Order deletes Maintenance Services from DB Contractor's scope, the amount of the reduction in the Maintenance Price shall be based upon DB Contractor's estimated price for such work included in the Proposal, including a bill of material and a breakdown of labor and equipment costs, plus variable overhead and profit associated with the deleted Maintenance Services. Estimated costs that DB Contractor applied to develop the original Maintenance Price, as well as markup for profit and variable overhead at the rates DB Contractor applied to develop the Maintenance Price, as reflected in the EPDs, shall

apply for determining the amount of the Maintenance Price reduction for Change Orders that delete Maintenance Services. The amount of risk associated with such Maintenance Services as of the Effective Date by DB Contractor shall be an additional factor in determining the amount of the Maintenance Price reduction. When a reduction is involved, documented cancellation and restocking charges may be included in costs and subtracted from the Maintenance Price reduction. Reimbursement will be made for actual work done and all costs incurred, including mobilization of materials, prior to the date of the Directive Letter or other notification by TxDOT eliminating the work.

10.6.6 Change Order Both Adding and Deleting Maintenance Services

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

(a) Net increase in cost, the change shall be treated as Maintenance Services added, and the provisions of Section 10.6.4 shall be used to determine markups for overhead and profit. Markups for overhead and profit will be allowed only for the net increase in cost in order to establish the amount to be added to the Maintenance Price.

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

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

10.6.7 Unit Priced Change Orders

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

10.6.8 All-Inclusive Change Orders

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

10.6.9 Insurance

Any increase to the Maintenance Price under any Change Order shall not include: (i) the amount of any insurance available to DB Contractor, (ii) any deductible or self insured retention associated with such insurance, or (iii) the amount of any insurance coverage required under this Agreement that is deemed to be self-insured by DB Contractor under Section 7.8.4. All of the foregoing shall be solely the responsibility of DB Contractor.

10.7 Time and Materials Change Orders

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

10.7.1 Labor Costs

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

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

(b) For non-construction-related labor (professional services), (1) the actual wages (i.e., the base wage paid to the employee exclusive of any fringe benefits), plus (2) a labor surcharge in the amount of 145%, which shall constitute

full compensation for all profit, overhead, and all State and federal payroll, unemployment and other taxes, insurance, fringe benefits and all other payments made to, or on behalf of, the workers, in excess of actual wages.

10.7.2 Material Costs

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

10.7.3 Equipment

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

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

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

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

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

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

10.7.4 Subcontracted Maintenance Services

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

10.7.5 Other Direct Costs

For any justified direct cost incurred for Change Order work not covered by the categories of costs contained in Sections 10.7.1 through 10.7.4, DB Contractor shall accept as full payment therefor an amount equal to the actual cost to DB Contractor for such direct cost item without additional markup. Back-up documentation supporting each cost item for this category shall be provided by DB Contractor and approved by TxDOT in writing prior to any payment authorization being granted.

10.7.6 Overhead Items

The markups specified herein constitute full and complete compensation for all overhead, tools or equipment having an individual replacement value of $1,000 (as escalated commencing on the latest Substantial Completion of a Facility and annually thereafter throughout the Maintenance Period by the percentage based on ENR CCI set forth in Section 8.1.3, provided that the comparison ENR CCI shall be that published for the month three months prior to the month in which the last Substantial Completion of a Facility occurs and three

months before each anniversary of such month thereafter) or less, consumables (items that are consumed in the performance of the Maintenance Services that are not a part of the finished product) and other indirect costs of the added or changed Maintenance Services, as well as for profit thereon, including any and all costs and expenses incurred due to any delay in connection with the added or changed Maintenance Services. DB Contractor's markup percentages shall be considered to include:

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

(b) Clerical or stenographic employees;

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

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

(e) Quality assurance and quality control; and

(f) Bond and insurance premiums.

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

10.7.7 Change Order Data

10.7.7.1 DB Contractor shall contemporaneously collect, record in writing, segregate and preserve (a) all data necessary to determine the costs described in this Section 10.7 with respect to all Maintenance Services that are the subject of a Time and Materials Change Order or a requested Change Order (excluding negotiated Change Orders previously executed and delivered), specifically including costs associated with design work, and (b) all data necessary to show the actual impact (if any) on the applicable deadlines with respect to all Maintenance Services that are the subject of a Change Order or a proposed Change Order. Such data shall be provided to TxDOT and any authorized representative of TxDOT reviewing any Claim or Dispute regarding compensation for such Maintenance Services. DB Contractor hereby waives the right to obtain compensation for any Maintenance Services for which cost data is required to be

provided hereunder if DB Contractor fails to maintain and timely provide to TxDOT cost data meeting the requirements of this Capital Maintenance Agreement.

10.7.7.2 In addition to the obligations under Section 17.3, DB Contractor shall maintain its records in such a manner as to provide a clear distinction between (a) the direct cost of Maintenance Services for which it is entitled (or for which it believes it is entitled) to an increase in the Maintenance Price and (b) the costs of other operations. DB Contractor shall furnish daily, on forms approved by TxDOT, reports of all costs described in the foregoing clause (a). The reports shall itemize all costs for labor, materials, and equipment rental and give totals of costs through the date of the report. For workers, the reports shall include hours worked, rates of pay, names and classifications. For equipment, the reports shall include size, type, identification number, rental rate and actual working hours of operation. All such records and reports shall be made immediately available to TxDOT upon its request. The cost of furnishing such reports are deemed to be included in DB Contractor's overhead and fee percentages.

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

10.8 Change Orders for Force Majeure Events and Hazardous Materials

10.8.1 Force Majeure Events

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

10.8.2 Hazardous Materials Management

10.8.2.1 Subject to the limitations contained in, and upon DB Contractor's fulfillment of all applicable requirements of, this Section 10, TxDOT shall issue Change Orders to compensate DB Contractor for additional costs directly attributable to Hazardous Materials Management, except Hazardous Materials Management costs arising out of or relating to Hazardous Materials for which DB Contractor is responsible pursuant to Section 3.8.1.1.

10.8.2.2 Limits on Compensation

10.8.2.2.1 If compensation is payable to DB Contractor with respect to Hazardous Materials Management, the amount of the Change Order shall either be a negotiated amount acceptable to the Parties, or 100% of the Reimbursable Hazardous Materials Costs for the work in question, subject to the limitations set forth in this Section 10.8.2. DB Contractor shall not be entitled to a Change Order for additional compensation with respect to the Hazardous Materials Management responsibilities set forth in Sections 3.8.1.1 and 3.8.1.2.

10.8.2.2.2 Entitlement to compensation shall be limited to work performed pursuant to DB Contractor's Hazardous Materials Management Plan, prepared and approved by TxDOT in accordance with Section 4.4.1 of Exhibit 2 to this Capital Maintenance Agreement and any Site Investigation Report or workplan for such Hazardous Materials as approved by TxDOT in writing. No compensation shall be allowed with respect to (a) immaterial quantities of Hazardous Materials, (b) any use of Hazardous Materials that could have been avoided by reasonable design modifications, maintenance procedures or construction techniques, (c) any costs that could have been avoided or (d) delay and disruption damages.

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

10.8.2.2.4 In cases involving reimbursement for Hazardous Materials Management under this Section 10.8.2, allowable costs shall be limited to the incremental costs actually incurred in performing Hazardous Materials Management after completion of the testing process to determine whether Hazardous Materials are present (deducting any avoided costs, such as the cost of disposal that would have been incurred had Hazardous Materials not been present). Investigating and characterizing are included in the Maintenance Price, and DB Contractor shall not be entitled to additional compensation therefor. DB Contractor

shall take all reasonable steps to minimize acts or omissions that cause DB Contractor to incur any such incremental costs.

10.8.2.2.5 Compensation shall be allowed only to the extent that DB Contractor demonstrates to TxDOT's satisfaction that (a) the Hazardous Materials Management could not have been avoided by reasonable design modifications, maintenance procedures or construction techniques and (b) DB Contractor's plan for the Hazardous Materials Management represents the approach that is most beneficial to the Project and the public.

10.8.2.2.6 DB Contractor shall provide TxDOT with such information, analyses and certificates as may be requested by TxDOT in order to enable a determination regarding eligibility for payment.

10.9 Change Order Records

DB Contractor shall maintain its records in such a manner as to provide a clear distinction between the direct costs of Maintenance Services for which it is entitled (or for which it believes it is entitled) to an increase in the Maintenance Price and the costs of other operations. DB Contractor shall contemporaneously collect, record in writing, segregate and preserve all data necessary to determine the costs of all Maintenance Services that are the subject of a Change Order or a requested Change Order, specifically including costs associated with design work. Such data shall be provided to any dispute resolvers, TxDOT and its Authorized Representatives as directed by TxDOT, on forms approved by TxDOT. The cost of furnishing such reports is included in DB Contractor's predetermined overhead and profit markups.

10.9.1 Daily Work Reports and Data Collection

DB Contractor shall furnish TxDOT completed daily work reports for each day's Maintenance Services that is to be paid for on a time-and-material basis. The daily time-and-material work reports shall be detailed as follows:

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

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

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

(d) Transportation of materials.

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

10.9.2 Supplier's Invoices

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

10.9.3 Execution of Reports

All daily time-and-material work reports shall be signed by the Maintenance Manager.

10.9.4 Adjustment

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

10.10 Matters Not Eligible for Maintenance Price Increase

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

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

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

(c) Changes arising out of the design or construction of the Project, the volume or characteristics of traffic using the Project, or the materials and supplies used with the construction;

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

(e) Costs to the extent they could be avoided through mitigation by DB Contractor or by resequencing, reallocating or redeploying workforces;

(f) Materials replacement, re-seeding and re-vegetation for erosion;

(g) Design or construction Errors;

(h) any costs covered by insurance available to DB Contractor, any deductible or self-insured retention associated with such insurance, or any costs that would have been covered by any insurance that is deemed to be self-insured by DB Contractor under Section 7.8.4;

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

(j) Groundwater levels or subsurface moisture content;

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

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

(m) Any situations (other than Force Majeure Events) that, while not within one of the categories delineated above, were or should have been anticipated, because such situations are referred to elsewhere in this Capital Maintenance Agreement or arise out of the nature of the Maintenance Services; and

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

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

10.10.3 DB CONTRACTOR HEREBY EXPRESSLY AGREES THAT IT SHALL NOT BE ENTITLED TO ANY COMPENSATION, DAMAGES OR TIME EXTENSION WHATSOEVER IN CONNECTION WITH THE MAINTENANCE SERVICES EXCEPT TO THE EXTENT THAT THE CMA DOCUMENTS EXPRESSLY SPECIFY THAT DB CONTRACTOR IS ENTITLED TO A CHANGE ORDER OR OTHER COMPENSATION, DAMAGES OR TIME EXTENSION.

10.11 Disputes

If TxDOT and DB Contractor agree that a request to increase the Maintenance Price by DB Contractor has merit but are unable to agree as to the amount of such Maintenance Price increase, TxDOT agrees to mark up the Request for Change Order or Cost and Schedule Proposal, as applicable, provided by DB Contractor to reduce the amount of the Maintenance Price increase as deemed appropriate by TxDOT. In such event, TxDOT will execute and deliver the marked-up Change Order to DB Contractor within a reasonable period after receipt of a request by DB Contractor to do so and thereafter will make payment based on such marked-up Change Order. The failure of TxDOT and DB Contractor to agree to any Change Order under this Section 10 (including agreement as to the amount of compensation allowed under a Time and Materials Change Order and the disputed

amount of the increase in the Maintenance Price in connection with a Change Order as described above) shall be a Dispute to be resolved pursuant to Section 16. Except as otherwise specified in the Change Order, execution of a Change Order by both Parties shall be deemed accord and satisfaction of all Claims by DB Contractor of any nature arising from or relating to the Maintenance Services covered by the Change Order. DB Contractor's Claim and any award by the Dispute resolver shall be limited to the incremental costs incurred by DB Contractor with respect to the Dispute (crediting TxDOT for any corresponding reduction in DB Contractor's other costs) and shall in no event exceed the amounts allowed by Section 10.7 with respect thereto.

10.12 Changes Not Requiring Change Order

Changes in the Maintenance Services or requirements in the CMA Documents that have no net cost effect on the Maintenance Price may be approved in writing by TxDOT as a Deviation and in such event shall not require a Change Order. Any other change in the requirements of the CMA Documents shall require either a Directive Letter or a Change Order. For purposes of this Section 10.12, the provisions regarding "Deviations" set forth in Section 2.1.2.4 of the Design-Build Agreement are incorporated herein by reference, *mutatis mutandis*.

10.13 No Release or Waiver

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

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

10.13.3 No course of conduct or dealings between the Parties nor express or implied acceptance of alterations or additions to the Maintenance

Services, and no claim that TxDOT has been unjustly enriched, shall be the basis for any claim, request for additional compensation or time extension. Further, DB Contractor shall undertake, at its risk, work included in any request, order or other authorization issued by a Person in excess of that Person's authority as provided herein, or included in any oral request. DB Contractor shall be deemed to have performed such work as a volunteer and at its sole risk and cost. In addition, TxDOT may require DB Contractor to remove or otherwise undo any such work, at DB Contractor's sole risk and cost.

SECTION 11. REPRESENTATIONS, WARRANTIES AND ACKNOWLEDGMENTS

11.1 Acknowledgments by DB Contractor

DB Contractor acknowledges and agrees that:

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

11.1.2 DB Contractor assumes, with respect to the Maintained Elements that are within the scope of the Maintenance Services as described in Exhibit 2, the risk of the design and construction of the Project; design defects, omissions, errors or inaccuracies; construction defects and flaws; the materials and supplies used in connection with the construction of the Project; the Work under the Design-Build Agreement; and the actions, omissions, negligence, intentional misconduct, or breach of applicable Law or contract by any member of the DB Contractor-Related Entities and acknowledges and agrees that it has incorporated into the Maintenance Price all costs associated with such risks.

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

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

11.1.5 TxDOT shall not be responsible or liable in any respect for any Losses suffered by any of the DB Contractor-Related Entities by reason of the

design and construction of the Project; design defects, omissions, errors or inaccuracies; construction defects or flaws; the materials and supplies used in connection with the construction of the Project; the Maintenance Services; or the actions, omissions, negligence, intentional misconduct, or breach of applicable Law or contract by any member of the DB Contractor-Related Entities.

11.2 Disclaimers by TxDOT

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

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

11.3 TxDOT Representations and Warranties

TxDOT represents and warrants to DB Contractor as follows:

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

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

11.3.3 There is no action, suit, proceeding, investigation or litigation pending and served on TxDOT that challenges TxDOT's authority to execute, deliver or perform, or the validity or enforceability of, the CMA Documents to which TxDOT is a Party, or that challenges the authority of the officials executing the CMA Documents.

11.4 DB Contractor Representations and Warranties

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

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

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

11.4.3 DB Contractor has, prior to executing this Capital Maintenance Agreement, in accordance with Good Industry Practice, reviewed and taken appropriate steps to verify the information included in the Reference Information Documents, inspected and, to the extent access was made available by TxDOT or was otherwise available to it, examined the Site and surrounding locations, performed appropriate field studies, and undertaken other activities sufficient to familiarize itself with existing Utilities, surface conditions and subsurface conditions affecting the Project to the extent DB Contractor deems necessary or advisable for performing its obligations under the CMA Documents, and, as a result of such review, inspection, examination and other activities, DB Contractor is familiar with and accepts the physical requirements of the

Maintenance Services. DB Contractor acknowledges and agrees that it has been afforded the opportunity to review information and documents and, to the extent access was made available by TxDOT or was otherwise available to it, to conduct inspections and tests of the Site and surrounding locations as described above. Before commencing any work on a particular portion or aspect of the Project, DB Contractor shall verify all governing dimensions of the Site and shall examine all adjoining work (including Adjacent Work) that may have an impact on such work. DB Contractor shall ensure that any design documents and construction documents furnished as part of the Maintenance Services accurately depict all governing and adjoining dimensions.

11.4.4 DB Contractor acknowledges and agrees that it has familiarized itself with the requirements of any and all applicable Laws and the conditions of any required Governmental Approvals prior to entering into this Capital Maintenance Agreement. DB Contractor shall comply with the foregoing at its sole cost and expense and without any increase in the Maintenance Price on account of such compliance, regardless of whether such compliance would require additional time for performance or additional labor, equipment or materials not expressly provided for in the CMA Documents. DB Contractor has no reason to believe that any Governmental Approval required to be obtained by DB Contractor will not be granted in due course and, thereafter, remain in effect in order to enable the Maintenance Services to proceed in accordance with the CMA Documents. If any Governmental Approvals required to be obtained by DB Contractor must formally be issued in the name of TxDOT, DB Contractor shall undertake all efforts to obtain such approvals subject to TxDOT's reasonable cooperation with DB Contractor, including execution and delivery of appropriate applications and other documentation prepared by DB Contractor in a form approved by TxDOT. DB Contractor shall assist TxDOT in obtaining any Government Approvals that TxDOT may be obligated to obtain, including providing information requested by TxDOT, preparing necessary supporting materials and participating in meetings regarding such approvals.

11.4.5 All Maintenance Services furnished by DB Contractor shall be performed by or under the supervision of Persons who hold all necessary and valid licenses to perform the Maintenance Services in the State, by personnel who are careful, skilled, experienced and competent in their respective trades or professions, who are professionally qualified to perform the Maintenance Services in accordance with the CMA Documents, and who shall assume professional responsibility for the accuracy and completeness of all design and construction documents prepared or checked by them.

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

11.4.7 DB Contractor is a [____], duly organized and validly existing under the Laws of Texas, with all requisite power and all required licenses to carry on its present and proposed obligations under the CMA Documents. DB Contractor is [____]. Each member of DB Contractor is duly qualified to do business, and is in good standing, in the State, and will remain in good standing throughout the Maintenance Period and for as long thereafter as any obligations remain outstanding under the CMA Documents. [Guarantor [____] is a [____], duly organized and validly existing under the Laws of [____], with all requisite power and authority to carry on their present and proposed obligations under the CMA Documents. Each Guarantor is duly qualified to do business, and is in good standing, in the State of [____] and will remain in good standing throughout the Maintenance Period and for so long thereafter as any obligations remain outstanding under the CMA Documents.]

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

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

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

been duly executed and delivered by Guarantor, and constitutes the legal, valid and binding obligation of the Guarantor, enforceable in accordance with its terms.

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

11.4.12 To the extent the Lead Maintenance Firm is not DB Contractor, DB Contractor represents and warrants, as of the effective date of the Subcontract with the Lead Maintenance Firm, as follows:

(a) The Lead Maintenance Firm is duly organized, validly existing and in good standing under the laws of the state of its organization and is duly qualified to do business, and is in good standing, in the State;

(b) The ownership interests of the Lead Maintenance Firm that is a single purpose entity formed for the Project (including options, warrants and other rights to acquire ownership interests) is owned by the Persons whom DB Contractor has set forth in a written certification delivered to TxDOT prior to the Effective Date;

(c) The Lead Maintenance Firm has the power and authority to do all acts and things and, execute and deliver all other documents as are required to be done, observed or performed by it in connection with its engagement by DB Contractor;

(d) The Lead Maintenance Firm has (i) obtained and will maintain all necessary or required registrations, permits, licenses and approvals required under applicable Law and (ii) expertise, qualifications, experience, competence, skills and know-how to perform the Maintenance Service in accordance with the CMA Documents;

(e) The Lead Maintenance Firm will comply with all health, safety and environmental Laws in the performance of any work activities for, or on behalf of, DB Contractor for the benefit of TxDOT; and

(f) The Lead Maintenance Firm is not in breach of any applicable Law that would have a material adverse effect on any aspect of the Maintenance Services.

SECTION 12. DEFAULT AND REMEDIES, DAMAGES, AND LIMITATION OF LIABILITY

12.1 DB Contractor Maintenance Defaults

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

(a) A DB Contractor Event of Default under the Design-Build Agreement;

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

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

(d) DB Contractor suspends, ceases, stops or abandons performance of the Maintenance Services or fails to continuously and diligently prosecute the Maintenance Services (exclusive of work stoppage (i) due to termination by TxDOT, or (ii) due to and during the continuance of a Force Majeure Event or suspension by TxDOT);

(e) DB Contractor fails to provide and maintain any of the insurance, bonds, letters of credit and guarantees required hereunder;

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

(g) DB Contractor fails, absent a valid dispute, to make payment when due for labor, equipment or materials in accordance with its agreements with Subcontractors or Suppliers and in accordance with applicable Laws, or shall have failed to comply with any Law or failed reasonably to comply with the instructions of TxDOT consistent with the CMA Documents, or fails to make payment to TxDOT when due of any amounts owing to TxDOT under this Capital Maintenance Agreement;

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

(i) DB Contractor fails to discharge or obtain a stay within 10 Days of any final judgment or order for the payment of money against it in excess of $100,000 in the aggregate arising out of the prosecution of the Maintenance Services (provided that, for purposes hereof, posting of a bond in the amount of 125% of such judgment or order shall be deemed an effective stay);

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

(k) Any final judgment is issued holding DB Contractor or any Guarantor liable for an amount in excess of $100,000 based on a finding of intentional or reckless misconduct or violation of a state or federal false claims act;

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

(m) DB Contractor commences a voluntary case seeking liquidation, reorganization, or other relief with respect to itself or its debts under any bankruptcy, insolvency, or other similar Law now or hereafter in effect; seeks the appointment of a trustee, receiver, liquidator, custodian or other similar official to protect a substantial part of DB Contractor's assets; becomes insolvent, or generally does not pay its debts as they become due; admits in writing its inability to pay its debts; makes an assignment for the benefit of creditors; takes any action to authorize any of the foregoing; or any of the foregoing acts or events shall occur with respect to any of DB Contractor's partners, members or joint venturers, or any Surety or Guarantor.

(n) An involuntary case is commenced against DB Contractor seeking liquidation, reorganization, dissolution, winding-up, composition or arrangement with creditors, readjustment of debts, or other relief with respect to DB Contractor or DB Contractor's debts under any bankruptcy, insolvency or other similar Law now or hereafter in effect; seeking the appointment of a trustee, receiver, liquidator, custodian or other similar official of DB Contractor or any substantial part of DB Contractor's assets; seeking the issuance of a writ of attachment, execution, or similar process; or seeking like relief, and such involuntary case shall not be contested by DB Contractor in good faith or shall remain undismissed and unstayed for a period of 60 Days; or any of the foregoing acts or events shall occur with

respect to any of DB Contractor's partners, members or joint venturers, or any Surety or Guarantor.

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

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

12.2 Notice and Opportunity To Cure

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

(a) Respecting a DB Contractor Maintenance Default under clause (a) of Section 12.1, the same cure period, if any, as is available under the Design-Build Agreement;

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

(c) [Reserved];

(d) [Reserved]; and

(e) For any DB Contractor Maintenance Default with a cure period of 10 Days as described in Section 12.2.1(a), if such DB Contractor Maintenance Default is capable of cure but, by its nature, cannot be cured within 10 Days, as determined by TxDOT, such additional period of time shall be allowed as may be reasonably necessary to cure the default so long as DB Contractor commences such cure within such 10-day period and thereafter diligently prosecutes such cure to completion; provided, however, that in no event shall such cure period exceed 60 Days in total.

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

12.3 TxDOT Remedies

12.3.1 If any DB Contractor Maintenance Default described in Section 12.1 is not subject to cure or is not cured within the period (if any) specified in Section 12.2, or if the circumstances described in Section 12.3.11.4 exist, TxDOT may declare that an "Event of Default" has occurred and notify DB Contractor to discontinue the Maintenance Services. The declaration of an Event of Default shall be in writing and given to DB Contractor, with a copy to Surety and any Guarantor. In addition to all other rights and remedies provided by Law or equity and such rights and remedies as are otherwise available under the CMA Documents, including the Maintenance Performance Bond, any letter of credit, and Guaranty, if an Event of Default shall occur, TxDOT shall have the following rights without further notice and without waiving or releasing DB Contractor from any obligations, and DB Contractor shall have the following obligations (as applicable):

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

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

(c) DB Contractor shall deliver to TxDOT possession of any or all design or construction documents and all other completed or partially completed drawings (including plans, elevations, sections, details and diagrams), specifications, records, information, schedules, samples, shop drawings, and other

documents and facilities related to the Project that TxDOT deems necessary in connection with Maintenance Services.

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

(e) TxDOT, in its discretion, may deduct from any amounts payable by TxDOT to DB Contractor such amounts (including interest thereon as permitted under this Capital Maintenance Agreement) payable by DB Contractor to TxDOT, including reimbursements owing, Liquidated Damages owing under Section 12.4, Key Personnel Change Fees owing under Section 5.4.7 or 5.4.8, and amounts TxDOT deems advisable to cover any existing or threatened claims, Liens and stop notices of Subcontractors, laborers or other Persons, amounts of any Losses that have accrued, the cost to complete or remediate uncompleted Maintenance Services or Nonconforming Work, or other damages or amounts that TxDOT has determined are or may be payable to TxDOT under the CMA Documents.

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

(g) TxDOT may appropriate any or all materials, supplies and equipment on the Site as may be suitable and acceptable and may direct the Surety (other than in the Event of Default under Section 12.1(e)) to complete this Capital Maintenance Agreement or may enter into an agreement for the completion of this Capital Maintenance Agreement according to the terms and provisions hereof with another contractor or the Surety, or use such other methods as may be required for the completion of the Maintenance Services and the requirements of the CMA Documents, including completion of the Maintenance Services by TxDOT.

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

12.3.2 If an Event of Default occurs, DB Contractor and each Guarantor shall be jointly and severally liable to TxDOT for all costs incurred by TxDOT or any Person acting on TxDOT's behalf in completing the Maintenance Services. Upon the occurrence of an Event of Default, TxDOT shall be entitled to withhold all or any portion of further payments to DB Contractor until such time as TxDOT is able to determine how much, if any, remains payable to DB Contractor and the amount payable by DB Contractor to TxDOT in connection with TxDOT's damages and claims against DB Contractor-Related Entities or as otherwise required by the CMA Documents. Promptly upon such determination, TxDOT shall notify DB Contractor in writing of the amount, if any, that DB Contractor shall pay TxDOT, or TxDOT shall pay DB Contractor the applicable amount. All costs and charges incurred by TxDOT, including attorneys', consultants', accountants' and expert witnesses' fees and costs, together with the cost of completing the Maintenance Services under the CMA Documents, will be deducted from any moneys due or that may become due DB Contractor or its Surety. If such expense exceeds the sum that would have been payable to DB Contractor under this Capital Maintenance Agreement, then DB Contractor and each Guarantor shall be liable and shall pay to TxDOT the amount of such excess. If DB Contractor or Guarantor fails to pay such amount immediately upon TxDOT's demand, then TxDOT shall be entitled to collect interest from DB Contractor or Guarantor at the rate set forth in Section 19.12 on the amounts TxDOT is required to pay in excess of the remaining balance of the Maintenance Price for the applicable Maintenance Term. The interest rate shall accrue on all amounts TxDOT has had to pay in excess of the remaining balance of the Maintenance Price for the applicable Maintenance Term from the date of TxDOT payment.

12.3.3 DB Contractor acknowledges that if a DB Contractor Maintenance Default under Section 12.1.1(m) or (n) occurs, such default could impair or frustrate DB Contractor's performance of the Maintenance Services. Accordingly, DB Contractor agrees that, upon the occurrence of any such default, TxDOT shall be entitled to request of DB Contractor or its successor-in-interest adequate assurance of future performance in accordance with the terms and conditions hereof. Failure to comply with such request within 10 Days of delivery of the request shall entitle TxDOT to terminate this Capital Maintenance Agreement and to the accompanying rights set forth above. Pending receipt of adequate assurance of performance and actual performance in accordance therewith, TxDOT shall be entitled to proceed with the Maintenance Services with its own forces or with other contractors on a time-and-material or other appropriate basis, the cost of which will be credited against and deducted from TxDOT's payment obligations hereunder. The foregoing shall be in addition to all other rights and remedies provided by law or equity and such rights and remedies as are otherwise available

under the CMA Documents, including the Maintenance Performance Bond, any letter of credit and any Guaranty.

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

12.3.5 If this Capital Maintenance Agreement is terminated for grounds that are later determined not to justify a termination for default, such termination shall be deemed to constitute a termination for convenience pursuant to Section 14.

12.3.6 The exercise or beginning of the exercise by TxDOT of any one or more rights or remedies under this Section 12.3 shall not preclude the simultaneous or later exercise by TxDOT of any or all other such rights or remedies, each of which shall be cumulative.

12.3.7 If TxDOT suffers damages as a result of any DB Contractor-Related Entity's breach, omission or failure to perform an obligation under the CMA Documents, then, subject to the limitation on liability contained in Sections 12.7 and 12.8, TxDOT shall be entitled to recovery of such damages from DB Contractor regardless of whether the breach, omission or failure that gives rise to the damages is declared an Event of Default.

12.3.8 DB Contractor and each Surety and Guarantor shall not be relieved of liability for continuing application of Liquidated Damages or other similar fees hereunder (including Key Personnel Change Fees) on account of a breach or default by DB Contractor hereunder or by TxDOT's declaration of an Event of Default, or by actions taken by TxDOT under this Section 12.3.

12.3.9 TxDOT's remedies with respect to Nonconforming Work shall include the right to allow such work to remain uncorrected and receive payment as provided in Section 5.9.2 in lieu of the remedies specified in this Section 12.

12.3.10 TxDOT Step-in Rights

Upon the occurrence of a DB Contractor Maintenance Default and expiration, without full and complete cure, of the cure period, if any, available to DB Contractor, and without waiving or releasing DB Contractor from any obligations,

TxDOT shall have the right, but not the obligation, for so long as such DB Contractor Maintenance Default remains uncured by TxDOT or DB Contractor, to pay any obligees of DB Contractor and perform all or any portion of DB Contractor's obligations and the Maintenance Services that are the subject of such DB Contractor Maintenance Defaults, as well as any other then-existing breaches or failures to perform for which DB Contractor received prior written notice from TxDOT but has not commenced diligent efforts to cure.

12.3.10.1 In connection with such action, TxDOT may, to the extent and only to the extent reasonably required for or incident to curing the DB Contractor Maintenance Default or such other breaches or failures to perform for which DB Contractor received prior written notice from TxDOT but has not commenced and continued diligent efforts to cure:

(a) Employ security guards and other safeguards to protect the Project;

(b) Spend such sums as are reasonably necessary to employ and pay such architects, engineers, consultants and contractors and to obtain materials and equipment as may be required, without obligation or liability to DB Contractor, Subcontractors or any other Persons for loss of opportunity to perform the same Maintenance Services or supply the same materials and equipment;

(c) Draw on and use proceeds from letters of credit, or make a claim against payment and performance bonds, guarantees and other performance security and use the proceeds to the extent available under the terms thereof to pay such sums;

(d) Execute all applications, certificates and other documents as may be required;

(e) Make decisions respecting, assume control over and continue the Maintenance Services as may be reasonably required;

(f) Meet with, coordinate with, direct and instruct Subcontractors and Suppliers, process invoices and applications for payment from Subcontractors and Suppliers, pay Subcontractors and Suppliers, and resolve claims of Subcontractors and Suppliers, and, for this purpose DB Contractor irrevocably appoints TxDOT as its attorney-in-fact with full power and authority to act for and bind DB Contractor in its place and stead;

(g) Take any and all other actions as may be reasonably required or incident to curing; and

(h) Prosecute and defend any action or proceeding incident to the Maintenance Services undertaken.

12.3.10.2 DB Contractor shall reimburse TxDOT, within 10 Days of receiving an invoice, for TxDOT's Recoverable Costs in connection with the performance of any act or Maintenance Services authorized by this Section 12.3.10. In lieu of reimbursement, TxDOT may elect, in its discretion, to deduct such amounts from any amounts payable to DB Contractor under this Capital Maintenance Agreement.

12.3.10.3 Neither TxDOT nor any of its Authorized Representatives, contractors, Subcontractors, vendors and employees shall be liable to DB Contractor in any manner for any inconvenience or disturbance arising out of its entry onto the Project or the Project ROW in order to perform under this Section 12.3.10, unless caused by the gross negligence, recklessness, intentional misconduct or bad faith of such Person. If any Person exercises any right to pay or perform under this Section 12.3.10, it nevertheless shall have no liability to DB Contractor for the sufficiency or adequacy of any such payment or performance, or for the manner or quality of design, construction, operation or maintenance, unless caused by the gross negligence, recklessness, intentional misconduct or bad faith of such Person.

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

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

12.4 Liquidated Damages for Failure to Meet Performance Requirements

12.4.1 DB Contractor acknowledges and agrees that (a) the Project is unique, (b) the Project is an essential part of the Texas highway system, and (c) the traveling public will be inconvenienced from any failure of DB Contractor to perform the Maintenance Services in an efficient and timely manner. DB Contractor acknowledges the difficulty in determining the actual Losses that would accrue to TxDOT and the public in the event of such failures. Consequently, DB Contractor agrees to pay TxDOT the following sums of money as deemed compensation to

TxDOT resulting from DB Contractor's failure to meet the Performance Requirements herein as evidenced by the failure to remedy or repair a Defect within the specified Defect Remedy Period. DB Contractor further acknowledges and agrees that such amounts are in the nature of liquidated damages and not a penalty and that such sums are reasonable under the circumstances existing as of the Effective Date.

12.4.2 DB Contractor shall pay to TxDOT a liquidated amount of:

(a) $12,000 for each instance of failure to mitigate the hazard to Users for a Category 1 Defect within the specified Defect Remedy Period as required by Section 1.3.4 of Exhibit 2.

(b) $12,000 for each instance of failure to permanently remedy a Category 1 Defect within the specified Defect Remedy Period as required by Section 1.3.3 of Exhibit 2.

(c) $6,000 for each instance of failure to permanently remedy a Category 2 Defect within the specified Defect Remedy Period as required by Section 1.3.3 of Exhibit 2.

12.4.3 In each case TxDOT shall be entitled to payment of the liquidated amount immediately upon expiry of the Defect Remedy Period and shall be entitled to payment of an additional amount equal to the first liquidated damage amount each day thereafter until such time as DB Contractor has successfully remedied or repaired the Defect. In lieu of reimbursement, TxDOT may elect, in its discretion, to deduct such amounts from any amounts payable to DB Contractor under this Capital Maintenance Agreement.

12.5 [Reserved]

12.6 Right To Stop Performance for Failure by TxDOT To Make Undisputed Payment

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

12.7 Limitation of DB Contractor's Liability

Notwithstanding any other provision of the CMA Documents, to the extent permitted by applicable Law, TxDOT will not seek indemnification and defense under Section 15 or to recover damages from DB Contractor relating to this Capital Maintenance Agreement (whether arising in contract, negligence or other tort, or any other theory of law) in excess of the sum of (a) all those costs reasonably incurred by TxDOT or any Person acting on TxDOT's behalf in completing or correcting the Maintenance Services or having the Maintenance Services completed or corrected by another Person, including the cost of the work required or arising under the Warranties, (b) an amount equal to $100,000,000 (which amount shall specifically include any Liquidated Damages paid pursuant to this Section 12), (c) any amounts paid by or on behalf of DB Contractor that are covered by insurance proceeds, and (d) all Losses incurred by any Indemnified Party relating to or arising out of any illegal activities, fraud, criminal conduct, gross negligence or intentional misconduct on the part of any DB Contractor-Related Entity.

12.8 Limitation on Consequential Damages

12.8.1 Notwithstanding any other provision of the CMA Documents, under no circumstances shall TxDOT be liable for punitive damages or indirect, incidental or consequential damages, whether arising out of breach of this Capital Maintenance Agreement, tort (including negligence) or any other theory of liability, and DB Contractor hereby releases TxDOT from any such liability.

12.8.2 Notwithstanding any other provision of the CMA Documents and except as set forth in this Section 12.8.2 and in Section 12.8.3, to the extent permitted by applicable Law, DB Contractor shall not be liable to TxDOT for punitive damages or indirect, incidental or consequential damages, whether arising out of breach of this Capital Maintenance Agreement, in tort (including negligence) or any other theory of liability, and TxDOT hereby releases DB Contractor from any such liability.

12.8.3 The foregoing limitation on DB Contractor's liability for punitive, indirect, incidental or consequential damages shall not apply to or limit any right of recovery TxDOT may have respecting the following:

(a) Losses (including defense costs) to the extent (i) covered by the proceeds of insurance required to be carried pursuant to Section 7, and (ii) covered by the proceeds of insurance actually carried by or insuring any DB Contractor-Related Entity under policies solely with respect to the Project and the Maintenance Services, regardless of whether required to be carried pursuant to Section 7, or (iii) DB Contractor is deemed to have self-insured the Loss pursuant to Section 7.8.4;

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

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

(d) DB Contractor's obligation to pay Key Personnel Change Fees owing under Section 5.4.7 or 5.4.8, or damages owing under any other provision of the CMA Documents;

(e) Losses arising out of DB Contractor Releases of Hazardous Materials; and

(f) Any other consequential damages arising from a breach of this Capital Maintenance Agreement by DB Contractor that occurs prior to the end of the Maintenance Period, subject to a cap in the amount of $1,000,000.

SECTION 13. SUSPENSION

13.1 Suspensions for Convenience

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

13.2 Suspensions for Cause

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

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

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

(c) Carry out orders of TxDOT;

(d) Deliver or maintain Maintenance Security or required insurance; or

(e) Comply with requirements for developing and implementing the MSQMP.

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

13.3 Responsibilities of DB Contractor During Suspension Periods

During periods that any Maintenance Services are suspended, DB Contractor shall continue to be responsible for the Maintenance Services that are not suspended, prevent damage or injury to the Maintained Elements, and erect necessary temporary structures, signs or other facilities required to maintain the Maintained Elements. Additionally, DB Contractor shall continue other Maintenance Services that have been or can be performed at the Site or off-site during the period that the Maintenance Services are suspended.

SECTION 14. TERMINATION

14.1 Termination for Convenience

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

14.2 Termination Closing

In addition to the performance by DB Contractor of the requirements set forth in the Maintenance Transition Plan, on the effective date of the termination of this Capital Maintenance Agreement, DB Contractor shall deliver to TxDOT:

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

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

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

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

After receipt of a Notice of Termination for Convenience or Notice of Partial Termination for Convenience, or of a notice of termination due to an Event of Default, and except as otherwise directed in writing by TxDOT, DB Contractor shall immediately proceed with the following obligations, regardless of any delay in determining or adjusting any amounts due:

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

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

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

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

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

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

(g) No later than 30 Days prior to the effective date of termination, unless extended in writing by TxDOT upon written request of DB Contractor within this 30-day period, (a) provide TxDOT with an inventory list of all materials, supplies and equipment previously produced, purchased or ordered from Suppliers for use in performing the Maintenance Services and not yet used, including its storage location, as well as any documentation or other property required to be delivered hereunder that is either in the process of development or previously completed but not yet delivered to TxDOT, and such other information as TxDOT may request; and (b) transfer title and deliver to TxDOT through bills of sale or other documents of title, as directed by TxDOT, (i) work in process, completed work, supplies, equipment and other material produced or acquired for the Maintenance Services terminated, and (ii) all design and construction documents related to the Project or the Maintenance Services and all other completed or partially completed drawings (including plans, elevations, sections, details and diagrams), specifications, records, samples, information and other property that would have been required to be furnished to TxDOT if the Maintenance Services had been completed;

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

(i) Take all action that may be necessary, or that TxDOT may direct, for the protection and preservation of (i) the public, including public and private vehicular movement, (ii) the Maintenance Services, and (iii) the equipment, machinery, materials and property related to the Project that is in the possession of DB Contractor and in which TxDOT has or may acquire an interest;

(j) As authorized by TxDOT in writing, use its best efforts to sell to third parties, at reasonable prices, any property of the types referred to in subsection (i) of clause (g); provided, however, that DB Contractor (i) is not required to extend credit to any purchaser, and (ii) may acquire the property itself under the conditions prescribed and at prices approved by TxDOT. The proceeds of any transfer or disposition will be applied to reduce any payments to be made by TxDOT under the CMA Documents or paid in any other manner directed by TxDOT;

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

(l) Take other actions directed by TxDOT.

14.4 Disposition of Subcontracts

14.4.1 Not later than 60 Days prior to the effective date of termination under Section 12.3.1(a) or 14.1, DB Contractor shall assemble at its offices in the State and make available for TxDOT's review at such offices, at any time or times during normal business hours, all Subcontracts that are in effect and pertain in any way to the performance of the Maintenance Services.

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

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

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

14.4.5 Provisions shall be included in each Subcontract (at all tiers) regarding terminations for convenience, allowing such termination rights and obligations to be passed through to the Subcontractors and establishing terms and conditions relating thereto, including procedures for determining the amount

payable to the Subcontractor upon a termination for convenience, consistent with this Section 14.

14.5 Settlement Proposal Upon Termination for Convenience

After receipt of a Notice of Termination for Convenience or Notice of Partial Termination for Convenience, DB Contractor shall submit a final termination settlement proposal to TxDOT in the form and with the certification prescribed by TxDOT, based on the measure of compensation described in Sections 14.7 and 14.8. DB Contractor shall submit the proposal promptly, but no later than 90 Days from the effective date of termination, unless DB Contractor has requested a time extension in writing within such 90-Day period and TxDOT has agreed in writing to such extension. DB Contractor's termination settlement proposal shall then be reviewed by TxDOT and acted upon, returned with comments, or rejected. If DB Contractor fails to submit the proposal within the time allowed, TxDOT may conclusively determine, on the basis of information available to it regarding the measure of compensation described in Sections 14.7 and 14.8, the amount, if any, due DB Contractor because of the termination and shall pay DB Contractor the amount so determined.

14.6 Amount of Negotiated Termination Settlement

Subject to the provisions of Section 14.5, and based on (and no more than) the measure of compensation described in Sections 14.7 and 14.8, DB Contractor and TxDOT may agree upon the amount to be paid to DB Contractor by reason of the total or partial Termination for Convenience pursuant to Section 14.1. Upon determination of the settlement amount, this Capital Maintenance Agreement will be amended accordingly, and DB Contractor will be paid the agreed amount. TxDOT's execution and delivery of any settlement agreement shall not affect any of its rights under the CMA Documents with respect to completed Maintenance Services, relieve DB Contractor from its obligations with respect thereto, including Warranties, or affect TxDOT's rights under the Maintenance Performance Bond, the Maintenance Payment Bond, any Guaranty, letter of credit or other security issued in addition to, or in lieu of, any security provided pursuant to this Capital Maintenance Agreement.

14.7 No Agreement as to Amount of Termination Settlement

If DB Contractor and TxDOT fail to agree upon either all or some portion of the amount to be paid DB Contractor by reason of a Termination for Convenience pursuant to Section 14.1, the amount payable shall be determined by TxDOT in accordance with the following, but without duplication of any items or of any amounts agreed upon in accordance with Section 14.6:

14.7.1 To the extent not previously paid, TxDOT will pay DB Contractor the sum of the following amounts for Maintenance Services performed prior to the effective date of the Notice of Termination for Convenience or Notice of Partial Termination for Convenience, subject to the limitations and deductions under Sections 14.7.2 and 14.8:

(a) DB Contractor's actual reasonable out-of-pocket cost, without profit, and including equipment costs only to the extent permitted under the CMA Documents for (i) all Maintenance Services performed but not yet paid by TxDOT as of the effective date of the Notice of Termination for Convenience or Notice of Partial Termination for Convenience, and (ii) demobilization and work done to secure the applicable portion of the Project for termination, including reasonable overhead and accounting for any refunds payable with respect to insurance premiums, deposits or similar items, as established to TxDOT's satisfaction. In determining the reasonable cost, deductions will be made for the cost of materials, supplies and equipment to be retained, at TxDOT's sole option, by DB Contractor, amounts realized by the sale of such items, and for other appropriate credits against the cost of the Maintenance Services, including those deductions that would be permitted in connection with Final Payment under this Capital Maintenance Agreement. When, in the opinion of TxDOT's Authorized Representative, the cost of a contract item of Maintenance Services is excessively high due to costs incurred to remedy or replace Nonconforming Work, the reasonable cost to be allowed will be the estimated reasonable cost of performing that Maintenance Service in compliance with the requirements of the CMA Documents, and the excessive actual cost shall be disallowed.

(b) The cost of settling and paying reasonable claims arising out of the termination of Maintenance Services under Subcontracts as provided in Section 14.3(f), without profit and exclusive of the amounts paid or payable on account of supplies or materials delivered or services furnished by the Subcontractor prior to the effective date of the Notice of Termination for Convenience or Notice of Partial Termination for Convenience, which amounts shall be included in the cost on account of which payment is made under clause (a) above.

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

Contractor's administrative costs in determining the amount payable due to termination of this Capital Maintenance Agreement.

14.7.2 DB Contractor acknowledges and agrees that it shall not be entitled to any compensation or recovery for items such as lost or anticipated profits, unabsorbed overhead, and opportunity costs of DB Contractor or its Subcontractors upon termination of this Capital Maintenance Agreement. The total amount to be paid to DB Contractor, exclusive of settlement costs, shall not exceed the Maintenance Price for the Maintenance Term in which the termination occurs, less the amount of payments previously made to DB Contractor during such Maintenance Term. In addition, any payments to DB Contractor during the Maintenance Period shall be reduced by the portions of the Maintenance Price related to Maintenance Services not terminated, if any. Furthermore, in the event that any refund is payable with respect to insurance or bond premiums, deposits or other items that were previously passed through to TxDOT by DB Contractor, such refund shall be paid directly to TxDOT or otherwise credited to TxDOT. Except for normal spoilage, and except to the extent that TxDOT will have otherwise expressly assumed the risk of loss, there will be excluded from the amounts payable to DB Contractor under Section 14.7.1, the fair value, as determined by TxDOT, of equipment, machinery, materials, supplies and property that is destroyed, lost, stolen, or damaged so as to become undeliverable to TxDOT, or sold pursuant to Section 14.3(j). Information contained in the EPDs may be a factor in determining the value of the Maintenance Services terminated. Upon determination of the amount of the termination payment, this Capital Maintenance Agreement shall be amended to reflect the agreed termination payment, DB Contractor shall be paid the agreed amount, and the Maintenance Price shall be reduced to reflect the reduced scope of Maintenance Services.

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

14.8 Reduction in Amount of Claim

The amount otherwise due DB Contractor by reason of a full or partial Termination for Convenience shall be reduced by (a) the amount of any claim that TxDOT may have against any DB Contractor-Related Entity in connection with this Capital Maintenance Agreement, (b) the agreed price for, or the proceeds of sale, of

property, materials, supplies, equipment or other things acquired by DB Contractor or sold, pursuant to the provisions of this Section 14, and not otherwise recovered by or credited to TxDOT, (c) all unliquidated advance or other payments made to or on behalf of DB Contractor applicable to the terminated portion of the Maintenance Services or Capital Maintenance Agreement, (d) amounts that TxDOT deems advisable, in its discretion, to retain to cover any existing or threatened claims, Liens and stop notices relating to the Project, including claims by Utility Owners, (e) the cost of repairing any Nonconforming Work (or, in TxDOT's discretion, the amount of the reimbursement to which TxDOT is entitled under Section 5.9.2, and (f) any amounts due or payable by DB Contractor to TxDOT.

14.9 Termination Based on Failure To Issue a Maintenance NTP

TxDOT's election not to issue any Maintenance NTP shall not be treated as a Termination for Convenience. Under no circumstances shall TxDOT be liable to DB Contractor-Related Entities for any amounts if this CMA terminates because TxDOT elects not to issue a Maintenance NTP.

14.10 Payment

TxDOT may from time to time, under such terms and conditions as it may prescribe and in its discretion, make partial payments for costs incurred by DB Contractor in connection with the terminated portion of this Capital Maintenance Agreement upon a Termination for Convenience, whenever, in the opinion of TxDOT the aggregate of such payments shall be within the amount to which DB Contractor will be entitled hereunder. If the total of such payments is in excess of the amount finally agreed or determined to be due under this Section 14, such excess shall be payable by DB Contractor to TxDOT upon demand.

14.11 No Consequential Damages

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

14.12 No Waiver

Notwithstanding anything contained in this Capital Maintenance Agreement to the contrary, a Termination for Convenience shall not waive any right or claim to damages that TxDOT may have, and TxDOT may pursue any cause of action that it may have at Law, in equity or under the CMA Documents.

14.13 Dispute Resolution

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

14.14 Allowability of Costs

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

SECTION 15. INDEMNIFICATION; RELEASES

15.1 Indemnification by DB Contractor

15.1.1 SUBJECT TO SECTION 15.2, DB CONTRACTOR SHALL RELEASE, DEFEND, INDEMNIFY AND HOLD HARMLESS EACH OF THE INDEMNIFIED PARTIES FROM AND AGAINST ANY AND ALL CLAIMS, CAUSES OF ACTION, SUITS, JUDGMENTS, INVESTIGATIONS, LEGAL OR ADMINISTRATIVE PROCEEDINGS, DEMANDS AND LOSSES, IN EACH CASE IF ASSERTED OR INCURRED BY OR AWARDED TO ANY THIRD PARTY, ARISING OUT OF, RELATING TO OR RESULTING FROM:

(A) THE BREACH OR ALLEGED BREACH OF ANY OF THE CMA DOCUMENTS BY ANY DB CONTRACTOR-RELATED ENTITY.

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

(C) ANY ALLEGED PATENT OR COPYRIGHT INFRINGEMENT OR OTHER ALLEGEDLY IMPROPER APPROPRIATION OR USE OF TRADE SECRETS, PATENTS, PROPRIETARY INFORMATION, KNOW-HOW, COPYRIGHT RIGHTS OR INVENTIONS IN PERFORMANCE OF THE MAINTENANCE SERVICES, OR ARISING OUT OF ANY USE IN CONNECTION WITH THE PROJECT OR ANY DEVELOPMENT OF METHODS, PROCESSES, DESIGNS, INFORMATION, OR OTHER ITEMS FURNISHED OR COMMUNICATED TO TXDOT OR ANOTHER INDEMNIFIED PARTY PURSUANT TO THIS CAPITAL MAINTENANCE AGREEMENT; PROVIDED THAT THIS INDEMNITY SHALL NOT APPLY TO ANY INFRINGEMENT RESULTING FROM TXDOT'S FAILURE TO COMPLY WITH SPECIFIC WRITTEN INSTRUCTIONS REGARDING USE PROVIDED TO TXDOT BY DB CONTRACTOR.

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

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

FOR THE MAINTENANCE SERVICES MADE TO OR EARNED BY ANY DB CONTRACTOR-RELATED ENTITY.

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

(G) ANY DB CONTRACTOR RELEASES OF HAZARDOUS MATERIALS.

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

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

(J) (i) ANY DB CONTRACTOR-RELATED ENTITY'S BREACH OF OR FAILURE TO PERFORM AN OBLIGATION THAT TXDOT OWES TO A THIRD PERSON, INCLUDING GOVERNMENTAL ENTITIES, UNDER LAW OR UNDER ANY AGREEMENT BETWEEN TXDOT AND A THIRD PERSON, WHERE TXDOT HAS DELEGATED PERFORMANCE OF THE OBLIGATION TO DB CONTRACTOR OR (ii) THE ACTS OR OMISSIONS OF ANY DB CONTRACTOR-RELATED ENTITY WHICH RENDER TXDOT UNABLE TO PERFORM OR ABIDE BY AN OBLIGATION THAT TXDOT OWES TO A THIRD PERSON, INCLUDING GOVERNMENTAL ENTITIES, UNDER ANY AGREEMENT BETWEEN TXDOT AND A THIRD PERSON, WHERE THE AGREEMENT IS PREVIOUSLY DISCLOSED OR KNOWN TO DB CONTRACTOR.

(K) INVERSE CONDEMNATION, TRESPASS, NUISANCE OR SIMILAR TAKING OF OR HARM TO REAL PROPERTY BY REASON OF (i) THE FAILURE OF ANY DB CONTRACTOR-RELATED ENTITY TO COMPLY WITH GOOD INDUSTRY PRACTICES OR REQUIREMENTS OF THE CMA DOCUMENTS, MAINTENANCE MANAGEMENT PLAN OR GOVERNMENTAL APPROVALS RESPECTING CONTROL AND MITIGATION OF CONSTRUCTION OR MAINTENANCE ACTIVITIES AND CONSTRUCTION OR MAINTENANCE IMPACTS, (ii) THE INTENTIONAL MISCONDUCT OR NEGLIGENCE OF ANY DB CONTRACTOR-RELATED ENTITY, OR (iii) THE ACTUAL PHYSICAL ENTRY ONTO OR ENCROACHMENT UPON ANOTHER'S PROPERTY BY ANY DB CONTRACTOR-RELATED ENTITY.

(L) THE FRAUD, BAD FAITH, ARBITRARY OR CAPRICIOUS ACTS, OR VIOLATION OF LAW BY ANY DB CONTRACTOR-RELATED ENTITY.

15.2 Restrictions

Subject to the releases and disclaimers herein, DB Contractor's indemnity obligations under Section 15.1 shall not extend to any Losses incurred by an Indemnified Party to the extent caused by:

(a) the negligence, reckless or intentional misconduct, bad faith or fraud of such Indemnified Party;

(b) TxDOT's material breach of any of its material obligations under the CMA Documents; or

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

15.3 Employee Claims

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

15.4 Right To Rely

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

15.5 CERCLA Agreement

The indemnities set forth in Section 15.1.1(g) are intended to operate as agreements pursuant to Section 107(e) of the Comprehensive Environmental Response, Compensation and Liability Act, 42 U.S.C. Section 9607(e), to insure, protect, hold harmless and indemnify the Indemnified Parties.

15.6 No Effect on Other Rights

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

15.7 No Relief from Responsibility

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

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

(b) Relieve DB Contractor of any of its obligations or liabilities under the CMA Documents;

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

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

15.8 Third Parties Definition

15.8.1 For purposes of this Section 15, "third party" means any person or entity other than an Indemnified Party and DB Contractor, except that a "third party" includes any Indemnified Party's employee, agent or contractor who asserts a claim against an Indemnified Party that is within the scope of the indemnities and is not covered by the Indemnified Party's workers' compensation program.

15.9 Defense and Indemnification Procedures

15.9.1 If any of the Indemnified Parties receives notice of a claim or otherwise has actual knowledge of a claim that it believes is within the scope of the indemnities under Section 15.1, or otherwise herein where DB Contractor is obligated to defend any of the Indemnified Parties, then TxDOT, on behalf of itself or any of the other Indemnified Parties, shall by writing as soon as practicable after receipt of the claim: (a) inform DB Contractor of the claim, (b) send to DB Contractor a copy of all written materials TxDOT has received asserting such claim and (c) notify DB Contractor that should no insurer accept defense of the claim, the Indemnified Party will conduct its own defense unless DB Contractor accepts the tender of the claim in accordance with Section 15.9.3. As soon as practicable after DB Contractor receives notice of a claim or otherwise has actual knowledge of a claim, it shall tender the claim in writing to the insurers under all potentially applicable insurance policies. TxDOT and other Indemnified Parties also shall have the right to tender such claims to such insurers.

15.9.2 Subject to Section 15.9.6, if the insurer under any applicable insurance policy accepts the tender of defense, TxDOT and DB Contractor shall cooperate in the defense as required by the insurance policy. If no insurer under potentially applicable insurance policies provides defense, then Section 15.9.3 shall apply.

15.9.3 If the defense is tendered to DB Contractor, then within 30 Days after receipt of the tender it shall notify the Indemnified Party whether it has tendered the matter to an insurer and (if not tendered to an insurer or if the insurer has rejected the tender) shall deliver a written notice stating that DB Contractor:

(a) Accepts the tender of defense and confirms that the claim is subject to full indemnification hereunder without any "reservation of rights" to deny or disclaim full indemnification thereafter;

(b) Accepts the tender of defense but with a "reservation of rights" in whole or in part; or

(c) Rejects the tender of defense based on a determination that it is not required to indemnify against the claim under the terms of this Capital Maintenance Agreement.

15.9.4 If DB Contractor accepts the tender of defense under Section 15.9.3(a), DB Contractor shall have the right to select legal counsel for the Indemnified Party, subject to reasonable approval by the Indemnified Party, and DB Contractor shall otherwise control the defense of such claim, including settlement, and bear the fees and costs of defending and settling such claim. During such defense:

(a) DB Contractor shall fully and regularly inform the Indemnified Party of the progress of the defense and of any settlement discussions; and

(b) The Indemnified Party shall fully cooperate in said defense, provide to DB Contractor all materials and access to personnel it requests as necessary for defense, preparation and trial and which or who are under the control of or reasonably available to the Indemnified Party, and, except as may be required pursuant to the Public Information Act, maintain the confidentiality of all communications between it and DB Contractor concerning such defense.

15.9.5 If DB Contractor responds to the tender of defense as specified in Section 15.9.3(b) or 15.9.3(c), the Indemnified Party shall be entitled to select its own legal counsel and otherwise control the defense of such claim, including settlement.

15.9.6 The Indemnified Party may assume its own defense by delivering to DB Contractor written notice of such election and the reasons therefor, if the Indemnified Party, at the time it gives notice of the claim or at any time thereafter, reasonably determines that:

(a) A conflict exists between it and DB Contractor that prevents or potentially prevents DB Contractor from presenting a full and effective defense;

(b) DB Contractor is otherwise not providing an effective defense in connection with the claim; or

(c) DB Contractor lacks the financial capacity to satisfy potential liability or to provide an effective defense.

15.9.7 If the Indemnified Party is entitled and elects to conduct its own defense pursuant hereto of a claim for which it is entitled to indemnification, DB Contractor shall reimburse on a current basis all reasonable costs and expenses

the Indemnified Party incurs in investigating and defending. In the event the Indemnified Party is entitled to and elects to conduct its own defense, then:

(a) In the case of a defense conducted under Section 15.9.3(a), it shall have the right to settle or compromise the claim with DB Contractor's prior written consent, which shall not be unreasonably withheld or delayed;

(b) In the case of a defense conducted under Section 15.9.3(b), it shall have the right to settle or compromise the claim with DB Contractor's prior written consent, which shall not be unreasonably withheld or delayed, or with approval of the court or other dispute resolver following reasonable notice to DB Contractor and opportunity to be heard and without prejudice to the Indemnified Party's rights to be indemnified by DB Contractor; and

(c) In the case of a defense conducted under Section 15.9.3(c), it shall have the right to settle or compromise the claim without DB Contractor's prior written consent and without prejudice to its rights to be indemnified by DB Contractor.

15.9.8 The Parties acknowledge that while Section 15.1, or otherwise pursuant to this Capital Maintenance Agreement, contemplates that DB Contractor will have responsibility for certain claims and liabilities arising out of its obligations to indemnify, circumstances may arise in which there may be shared liability of the Parties with respect to such claims and liabilities. In such case, where either Party believes a claim or liability may entail shared responsibility and that principles of comparative negligence and indemnity are applicable, it shall confer with the other Party on management of the claim or liability in question. If the Parties cannot agree on an approach to representation in the matter in question, each shall arrange to represent itself and to bear its own costs in connection therewith pending the outcome of such matter. Within 30 Days subsequent to the final, non-appealable resolution of the matter in question, whether by arbitration or by judicial proceedings, the Parties shall adjust the costs of defense, including reimbursement of reasonable attorneys' fees and other litigation and defense costs, in accordance with the indemnification arrangements of Section 15.9, and consistent with the outcome of such proceedings concerning the respective liabilities of the Parties on the third party claim.

15.9.9 In determining responsibilities and obligations for defending suits pursuant to this Section 15.9, specific consideration shall be given to the following factors: (a) the party performing the activity in question; (b) the location of the activity and incident; (c) contractual arrangements then governing the performance of the activity; and (d) allegations of respective fault contained in the claim.

15.10 Waiver and Release

DB Contractor hereby waives and releases any and all claims and causes of action it may now or hereafter have against TxDOT for adjustments in the Maintenance Price or for schedule relief arising out of or relating to any errors, omissions, inconsistencies or Defects in the work rendered under the Design-Build Agreement, regardless of whether such errors, omissions, inconsistencies or Defects were also included in the TxDOT Schematic Design or other Reference Information Documents.

SECTION 16. PARTNERING AND DISPUTE RESOLUTION

16.1 General Dispute Resolution Provisions

Partnering will be encouraged in preference to formal dispute resolution mechanisms. Partnering in this context is intended to be a voluntary, non-binding procedure available for use by the Parties to resolve any issues that may arise during performance of the Maintenance Services.

16.2 Partnering

16.2.1 Schedule; Participation

As soon as possible after issuance of Maintenance NTP1, TxDOT and DB Contractor shall jointly select a third-party facilitator to conduct the partnering meetings. The cost of the facilitator shall be shared equally by TxDOT and DB Contractor. Partnering meetings shall be conducted at the office of TxDOT or at such location as otherwise agreed upon by the Parties. Persons who should attend the partnering meetings include the Maintenance Manager and executives of the Parties.

16.2.2 Confidentiality

Subject to the requirements of the Public Information Act, any statements made or materials prepared during or relating to partnering meetings, including any statements made or documents prepared by the facilitator, shall not be admissible or discoverable in any judicial or other dispute resolution proceeding, unless such statements or materials are admissible or discoverable under applicable Law.

16.3 Dispute Resolution Procedures

16.3.1 Disputes Governed by These Procedures

(a) The Parties agree, in accordance with 43 Texas Administrative Code Section 9.6, to be bound by and subject to the procedures established in this Section 16.3 as an agreement regarding dispute resolution procedures that shall survive expiration or earlier termination of the Maintenance Term and thereafter for so long as either Party has any obligation originating under the CMA Documents.

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

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

(d) All Disputes arising under the CMA Documents shall be resolved pursuant to the Informal Resolution Procedures and, if not resolved thereby, the Dispute Resolution Procedures, except the following: (i) any equitable relief sought in Travis County, Texas District Court that TxDOT is permitted to bring against DB Contractor under Section 16.3.1.1; and (ii) Ineligible Matters.

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

(f) With respect to any Dispute for resolution in accordance with the procedures established in this Section 16.3, the Parties agree that (i) such Dispute must be asserted in writing to the other Party prior to the running of the applicable statute of limitations and (ii) provided that this is done, the applicable statute of limitations shall be tolled until the 30th day after conclusion of the last such procedure applicable to such Dispute.

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

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

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

(ii) Any claim or dispute that does not arise under the CMA Documents;

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

(iv) Any claim for indemnity under Section 15;

(v) Any claim for injunctive relief;

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

(vii) Any claim arising solely in tort or that is covered by the Texas Tort Claims Act;

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

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

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

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

16.3.2 Informal Resolution As Condition Precedent

As a condition precedent to the right to have any Dispute resolved pursuant to the Dispute Resolution Procedures or by a district court, the claiming Party must first attempt to resolve the Dispute directly with the responding Party through the informal resolution procedures described in Section 16.3.3 other than Section 16.3.3.3 (collectively, the "Informal Resolution Procedures"). Time limitations set forth for the Informal Resolution Procedures may be changed by mutual written agreement of the Parties. Changes to the time limitations for the Informal Resolution Procedures agreed upon by the Parties shall pertain to the particular Dispute only and shall not affect the time limitations for the Informal Resolution Procedures applicable to any subsequently arising Disputes.

16.3.3 Informal Resolution Procedures

16.3.3.1 Notice of Dispute to Designated Agent

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

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

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

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

(iv) A reference to any pertinent provision(s) from the CMA Documents;

(v) If applicable and then known, the estimated dollar amount of the Dispute, and how that estimate was determined (including any cost and revenue element that has been or may be affected);

(vi) If applicable, an analysis of the Project Schedule and Completion Deadlines showing any changes or disruptions (including an impacted delay analysis reflecting the disruption in the manner and sequence of performance that has been or will be caused, delivery schedules, staging, and adjusted Completion Deadlines);

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

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

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

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

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

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

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

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

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

16.3.3.2 Fast-Track Disputes

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

16.3.3.3 CEO / Executive Director Meetings

Commencing within 10 Business Days after the notice of Dispute is served and concluding 10 Business Days thereafter, the Chief Executive Officer of DB Contractor and the Executive Director or the assistant Executive Director, shall meet and confer, in good faith, to seek to resolve the Dispute raised in the claiming Party's notice of Dispute. If they succeed in resolving the Dispute, DB Contractor and TxDOT shall memorialize the resolution in writing, including execution of Change Orders or other documentation as appropriate, and thereafter each Party shall then promptly perform its respective obligations in accordance with the agreed resolution of the Dispute.

16.3.3.4 Failure to Resolve Dispute With Informal Resolution Procedures

If a Dispute is not timely resolved under the Informal Resolution Procedures, then within 15 days (seven days for Fast-Track Disputes) after the conclusion of the time periods for Informal Resolution Procedures, if such Dispute was not resolved to the Parties' satisfaction: (a) the Parties may mutually agree to initiate mediation in accordance with Section 16.3.7; or (b) either Party may refer the Dispute to the Disputes Board for resolution pursuant to Section 16.3.4.2.

16.3.4 Disputes Board; Finality of Disputes Board Decision

16.3.4.1 Disputes Board Agreement

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

(b) If the composition of either Party's Disputes Board Member Candidates List has not been finalized prior to the Effective Date, that Party shall promptly appoint the members in accordance with the requirements and procedures of the Disputes Board Agreement.

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

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

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

(f) If a Disputes Board Decision awards an amount payable by one Party to the other, such amount became or shall become due and payable on the date required for payment in accordance with the applicable DRP governed agreement. If the date of payment is not specified in a DRP governed agreement, the payment shall be due 10 days after the date the Final Order

Implementing Decision for such decision becomes final under Section 16.3.6 (or, if the tenth day is not a Business Day, the next Business Day).

(g) Except for those matters subject to Section 16.8, interest at LIBOR on an amount payable by one Party to the other shall accrue beginning on the date such amount was due and continuing until the date such amount is paid.

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

16.3.4.2 Submission of Dispute to Disputes Board

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

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

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

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

(b) Neither Party may attempt to seek resolution of a Dispute by the Disputes Board or litigate the merits of any Dispute in court if such

Dispute is not timely referred to the Disputes Board within the 15 day time period under Section 16.3.4.2(a) above, except for Ineligible Matters and Disputes for which TxDOT is entitled to seek relief in court.

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

16.3.4.3 Finality of Disputes Board Decision

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

16.3.5 SOAH Administrative Hearings and Final Orders

16.3.5.1 Appeal of Disputes Board Decision

(a) If, within 20 days after the Disputes Board's issuance of the Disputes Board Decision to TxDOT and DB Contractor (the "Appeal Period"), either Party is dissatisfied with the Disputes Board Decision due to a good faith belief that Disputes Board Error occurred, (i) DB Contractor may request the Executive Director to seek or (ii) TxDOT may seek a formal administrative hearing before SOAH pursuant to Texas Government Code, Chapter 2001, and Section 201.112 of the Code, solely on the grounds that Disputes Board Error occurred. Upon receipt of DB Contractor's request for a formal administrative hearing before SOAH, the Executive Director shall, as a purely ministerial act, refer the matter to SOAH within 10 Business Days after receipt of DB Contractor's request.

(b) If DB Contractor does not request, and TxDOT does not seek for itself, a formal administrative hearing before SOAH under Section 16.3.5.1(a) within the Appeal Period, then within 10 Business Days after the expiration of the Appeal Period, the Executive Director shall issue the Final Order Implementing Decision as a purely ministerial act. If the Executive Director fails to issue the Final Order Implementing Decision within this 10 Business Day time period, the Disputes Board Decision shall become effective as the Final Order Implementing Decision for all purposes on the next Business Day.

(c) Neither Party may attempt to:

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

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

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

16.3.5.2 Appeal of Disputes Board Error to SOAH

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

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

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

16.3.5.3 SOAH Proceeding and ALJ Proposal For Decision

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

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

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

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

16.3.5.4 Final Orders of Executive Director

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

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

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

(b) The Parties agree and acknowledge that the Executive Director's issuance of either type of Final Order is a purely ministerial function of the Executive Director. If the Executive Director fails to issue one or the other type

of Final Order within the foregoing 28 Day time period, then on the next Business Day:

(i) If the ALJ determined that Disputes Board Error occurred, a Final Order Vacating Decision shall be deemed to have been issued for all purposes by the Executive Director which (A) adopted the ALJ's proposal for decision; (B) ruled that the Disputes Board Decision is invalid, void and of no force and effect; and (C) remanded the Dispute to the Disputes Board for reconsideration (or, if the nature of the Disputes Board Error was a Conflict of Interest or Misconduct of a Disputes Board Member, a reconstituted Disputes Board after removal of such Disputes Board Member) without Disputes Board Error; or

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

16.3.6 Judicial Appeal of Final Orders Under Substantial Evidence Rule

Each issued or deemed issued Final Order Implementing Decision and Final Order Vacating Decision shall be considered a final order for purposes of DB Contractor's ability to seek judicial appeal thereof under Section 201.112(d) of the Code under the substantial evidence rule. TxDOT and DB Contractor hereby agree that (a) pursuant to Section 2001.144(a)(4) of the Texas Government Code, each Final Order Implementing Decision and Final Order Vacating Decision shall be final (and therefore eligible for appeal under Section 201.112(d) of the Code) on the date such final order is issued or deemed issued by the Executive Director and (b) pursuant to Section 2001.145 of the Texas Government Code, TxDOT and DB Contractor hereby agree that the filing of a motion for rehearing shall not be a prerequisite for appeal of such final orders under Section 201.112(d) of the Code.

16.3.7 Mediation

DB Contractor and TxDOT, by mutual agreement, may refer a Dispute (as well as any dispute with a Utility Owner relating to any Utility Adjustment) to mediation for resolution. The Parties shall use diligent efforts to convene and conclude any such mediation within 30 days after they agree to refer the Dispute to mediation. DB Contractor and TxDOT shall share equally the expenses of the mediation. If any Dispute has been referred to mediation by mutual agreement of the Parties, but the Dispute is not resolved within the foregoing 30 day period, then either Party can, on or after the 31st day, cease participating in such mediation. A Party shall give written notice to the other Party that it will no longer participate.

The deadlines in this Section 16.3 for processing a Dispute are tolled, day for day, during mediation.

16.3.8 Confidential Information

(a) Subject to the Public Information Act, all discussions, negotiations, and Informal Resolution Procedures between the Parties to resolve a Dispute, and all documents and other written materials furnished to a Party or exchanged between the Parties during any such discussions, negotiations, or Informal Resolution Procedures, shall, to the extent allowed by law, be considered confidential and not subject to disclosure by either Party.

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

(i) All information that has been deposited into Escrow pursuant to Section 5.12.3 of the ITP shall be treated as confidential to the extent allowed by law by the Parties and the Disputes Board, the ALJ and the court, as applicable, and, further, shall be subject to a protective order issued by the Disputes Board, the ALJ or the court, as applicable, to protect such information from disclosure to third Persons.

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

16.4 Dispute Resolution: Additional Requirements for Subcontractor Disputes

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

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

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

(c) DB Contractor shall require in all Subcontracts that all Subcontractors of any tier (a) agree to submit Subcontractor Disputes to DB Contractor in a proper form and in sufficient time to allow processing by DB Contractor in accordance with this Section 16; (b) agree to be bound by the terms of this Section 16 to the extent applicable to Subcontractor Disputes; (c) agree that, to the extent a Subcontractor Dispute is involved, completion of all steps required under this Section 16 shall be a condition precedent to pursuit by the Subcontractor of any other remedies permitted by Law, including institution of a lawsuit against DB Contractor; (d) agree that any Subcontractor Dispute brought against a Surety, that also is actionable against TxDOT through DB Contractor, shall be stayed until completion of all steps required under this subsection; and (e) agree that the existence of a dispute resolution process for Disputes involving Subcontractor Disputes shall not be deemed to create any claim, right or cause of action by any Subcontractor against TxDOT. Subcontractors shall, at all times, have rights and remedies only against DB Contractor.

16.5 [Reserved]

16.6 Subsequent Proceedings

16.6.1 Exclusive Jurisdiction and Venue

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

16.6.2 Admissibility of Disputes Resolution Proceedings

The admissibility, in any administrative or judicial proceeding subsequent to this dispute resolution process, of the Parties' submittals and any TxDOT determinations shall be in the discretion of the appropriate administrative officer or the court in accordance with applicable Law.

16.7 Continuation of Maintenance Services

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

16.8 Records Related to Claims and Disputes

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

16.9 Interest

16.9.1 This Section 16.9 applies only to claims that are subject to the Texas Prompt Payment Act, Government Code, Chapter 2251.

16.9.2 In the event DB Contractor elects to pursue a formal Dispute with TxDOT under this Section 16, TxDOT shall notify DB Contractor whether it will dispute the claim not later than the 21st day after the date TxDOT receives the claim. A payment becomes overdue and begins to accrue interest in accordance with the Prompt Payment Act, Government Code, Chapter 2251.

16.10 Attorneys' Fees

16.10.1 This Section 16.10 applies only to claims that are subject to the Texas Prompt Payment Act, Government Code, Chapter 2251.

16.10.2 A party shall pay the attorneys' fees of the other Party for Disputes brought pursuant to this Section 16 only if such payment is required pursuant to the Texas Prompt Payment Act and the payment of attorneys' fees is ordered in a TxDOT administrative order or in a judicial order.

SECTION 17. DOCUMENTS AND RECORDS

17.1 Escrowed Proposal Documents

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

17.1.1 Availability for Review

The EPDs shall be available during business hours for joint review by DB Contractor, TxDOT and any dispute resolver in accordance with Section 16, in connection with negotiation of Change Orders and resolution of Claims or Disputes under the CMA Documents, and also as described in Section 17.1.6. TxDOT shall be entitled to review all or any part of the EPDs in order to satisfy itself regarding the applicability of the individual documents to the matter at issue.

17.1.2 Proprietary Information

The EPDs are, and shall always remain, the property of DB Contractor and shall be considered to be in DB Contractor's possession, subject to TxDOT's right to review the EPDs as provided in this Section 17.1. DB Contractor will have and control the keys to the filing cabinet containing the EPDs. TxDOT acknowledges that DB Contractor may consider that the EPDs constitute trade secrets or proprietary information. TxDOT shall have the right to copy the EPDs for the purposes set forth in this Section 17.1, provided that the Parties execute a mutually agreeable confidentiality agreement with respect to EPDs that constitute trade secrets or proprietary information, which shall explicitly acknowledge that such confidentiality agreement is subject to applicable Law (including the Public Information Act).

17.1.3 Representation

DB Contractor represents and warrants that the EPDs constitute all documentary information used in the preparation of its Maintenance Price. DB Contractor agrees that no other price proposal preparation information will be considered in resolving Disputes or Claims. DB Contractor further agrees that the EPDs are not part of the CMA Documents and that nothing in the EPDs shall change or modify any CMA Document.

17.1.4 Contents of EPDs

The EPDs shall, inter alia, clearly detail how each cost or price included in the Proposal has been determined and shall show cost or price elements in sufficient detail as is adequate to enable TxDOT to understand how DB Contractor calculated the Maintenance Price. The EPDs provided in connection with quotations and Change Orders shall, inter alia, clearly detail how the total cost or price and individual components of that cost or price were determined. The EPDs shall itemize the estimated costs or price of performing the required work separated into usual and customary items and cost or price categories to present a detailed estimate of costs and price, such as direct labor, repair labor, equipment ownership and operation, expendable materials, permanent materials, supplies, Subcontract costs, plant and equipment, indirect costs, contingencies, markup, overhead and profit. The EPDs shall itemize the estimated annual costs of insurance premiums for each coverage required to be provided by DB Contractor under Section 7. The EPDs shall include all assumptions, detailed quantity takeoffs, price reductions and discounts, rates of production and progress calculations, and quotes from Subcontractors used by DB Contractor to arrive at the Maintenance Price, and any adjustments to the Maintenance Price under this Capital Maintenance Agreement.

17.1.5 Form of EPDs

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

17.1.6 Review by TxDOT

TxDOT may at any time conduct a review of the EPDs to determine whether they are complete. If TxDOT determines that any data is missing from an

EPD, DB Contractor shall provide such data within three Business Days after delivery of TxDOT's request for such data. At that time of its submission to TxDOT, such data will be date stamped, labeled to identify it as supplementary EPD information and added to the EPD. DB Contractor shall have no right to add documents to the EPDs except upon TxDOT's request. The EPDs associated with any Change Order or Maintenance Price adjustment under this Capital Maintenance Agreement shall be reviewed, organized and indexed in the same manner described in Section 5.12.3 of the ITP.

17.2 Subcontract Pricing Documents

DB Contractor shall require each Major Subcontractor to submit to DB Contractor a copy of all documentary information used in determining its Subcontract price (including the price for Subcontract work included in any Change Order), immediately prior to executing the Subcontract and each Subcontract change order, to be held in the same manner as the EPDs and which shall be accessible by TxDOT, DB Contractor and dispute resolvers, on terms substantially similar to those contained herein. Each such Subcontract shall include a representation and warranty from the Subcontractor, for the benefit of DB Contractor and TxDOT, stating that its submission in the EPDs, constitute all the documentary information used in establishing its Subcontract price, and agreeing to provide a sworn certification in favor of DB Contractor and TxDOT together with each supplemental set of EPDs, stating that the information contained therein is complete, accurate and current. Each Subcontract that is not subject to the foregoing requirement shall include a provision requiring the Subcontractor to preserve all documentary information used in establishing its Subcontract price and to provide such documentation to DB Contractor and TxDOT in connection with any claim made by such Subcontractor.

17.3 Reporting Requirements

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

17.3.2 DB Contractor shall furnish, or cause to be furnished, to TxDOT such information and statements as TxDOT may reasonably request from time to time for any purpose related to the Project, the Maintenance Services or the CMA Documents. In addition, DB Contractor shall deliver to TxDOT the following financial statements for each Guarantor, at the times specified below:

17.3.2.1 Within 60 Days after the end of each fiscal quarter, duplicate copies of the balance sheet and a consolidated statement of earnings of the

Guarantor and its consolidated subsidiaries for such quarter and for the period from the beginning of the then current fiscal year to the end of such quarter, setting forth in comparative form the figures for the corresponding periods during the previous fiscal year, all in reasonable detail and certified as complete and correct, subject to changes resulting from year-end adjustments, by the chief financial officer of the Guarantor.

17.3.2.2 Within 120 Days after the end of each fiscal year, duplicate copies of the financial statements (which shall include a balance sheet and a consolidated statement of financial condition of the Guarantor and its consolidated subsidiaries at the end of such year, and statements of earnings, changes in financial position of the Guarantor and its consolidated subsidiaries for such year, and all related notes to the financial statements, setting forth in each case in comparative form the figures for the previous fiscal year), all in reasonable detail and accompanied by an opinion thereon of an independent public accountant of recognized national standing selected by the Guarantor, which opinion shall state that such financial statements have been prepared in accordance with Generally Accepted Accounting Principles consistently applied, and that the examination of such accountants in connection with such financial statements has been made in accordance with generally accepted auditing standards, and accordingly, included such tests of the accounting records and such other auditing procedures as were considered necessary in the circumstances. If financial statements are prepared in accordance with principles other than U.S. GAAP, a letter from the certified public accountant of the applicable entity, discussing the areas of the financial statements that would be affected by a conversion to U.S. GAAP, is required.

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

17.3.3 DB Contractor shall cooperate and provide, and shall cause the Subcontractors to cooperate and provide, such information as determined necessary or desirable by TxDOT in connection with any Project financing. Without limiting the generality of the foregoing, DB Contractor shall provide such information deemed necessary or desirable by TxDOT for inclusion in TxDOT's securities disclosure documents and in order to comply with Securities and Exchange Commission Rule 15c2-12 regarding certain periodic information and notice of material events. DB Contractor shall provide customary representations

and warranties to TxDOT and the capital markets as to the correctness, completeness and accuracy of any information furnished.

17.3.4 DB Contractor shall cooperate and provide, and shall cause the Subcontractors to cooperate and provide, such information as is necessary or requested by TxDOT to assist or facilitate the submission by TxDOT of any documentation, reports or analysis required by the State, FHWA or any other Governmental Entity with jurisdiction over the Project.

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

17.4 Maintenance of, Access to and Audit of Records

17.4.1 Except for EPDs (which shall be maintained as set forth in Section 17.1), DB Contractor shall maintain at a location TxDOT approves in writing in its discretion, a complete set of all books and records prepared or received by DB Contractor in its management, scheduling, cost accounting and other activities related to the Maintenance Services and the Project, including copies of all original documents delivered to TxDOT, in accordance with the applicable provisions of the CMA Documents. DB Contractor shall grant to TxDOT such audit rights and shall allow TxDOT and its designated representatives such access to and the right to copy such books and records as TxDOT may request in connection with the issuance of Change Orders, the resolution of Claims and Disputes, and such other matters as TxDOT reasonably deems necessary for purposes of verifying compliance with the CMA Documents and applicable Law.

17.4.2 Where the payment method for any Maintenance Services is on a time and materials basis, such examination and audit rights shall include all books, records, documents and other evidence and accounting principles and practices sufficient to reflect properly all direct and indirect costs of whatever nature claimed to have been incurred and anticipated to be incurred for the performance of such Maintenance Services. If an audit indicates DB Contractor has been overpaid under a previous payment, the excess payment plus interest thereon at the rate set forth in Section 19.12 will be credited against current payments.

17.4.3 For cost and pricing data submitted in connection with pricing Change Orders, TxDOT and its representatives shall have the right to examine and copy all books, records, documents and other data of DB Contractor related to the negotiation of or performance of Maintenance Services under such Change Orders for the purpose of evaluating the accuracy, completeness and currency of the cost or pricing data submitted; provided, however, that the foregoing

shall not apply to pricing based on adequate price competition, established catalog or market prices of commercial items sold in substantial quantities to the public or prices set by Law, in each case, as determined by TxDOT. Such right of examination shall extend to all documents deemed necessary by TxDOT and its representative to permit adequate evaluation of the cost or pricing data submitted, along with the computations and projections used therein.

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

17.4.5 At a minimum, DB Contractor shall make the following documents available to the auditors:

1. Daily time sheets and supervisor's daily reports;
2. Union agreements;
3. Insurance, welfare, and benefits records;
4. Payroll registers;
5. Earnings records;
6. Payroll tax forms;
7. Material invoices and requisitions;
8. Material cost distribution work sheets;
9. Equipment records (list of company equipment, rates, etc.);
10. Subcontractors' (including Suppliers') invoices;

11. Subcontractors' and agents' payment certificates;

12. Canceled checks (payroll, Subcontractors and Suppliers);

13. Job cost reports;

14. Job payroll ledger;

15. General ledger;

16. Cash disbursements journal;

17. All documents that relate to each and every Claim or Dispute, together with all documents that support the amount of damages as to each Claim or Dispute; and

18. Work sheets used to prepare the Claim or Dispute establishing the cost components for items of the Claim or Dispute, including labor, benefits and insurance, materials, equipment, Subcontractors, all documents that establish the time periods, individuals involved, the hours for the individuals, and the rates for the individuals.

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

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

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

17.4.9 Nothing in the CMA Documents shall in any way limit the constitutional and statutory powers, duties and rights of elected State officials, including the independent rights of the State auditor, in carrying out his or her legal authority. DB Contractor understands and acknowledges that (a) the State auditor may conduct an audit or investigation of any Person receiving funds from the State directly under this Capital Maintenance Agreement or indirectly through a Subcontract, (b) acceptance of funds directly under this Capital Maintenance Agreement or indirectly through a Subcontract acts as acceptance of the authority

of the State auditor, under the direction of the legislative audit committee, to conduct an audit or investigation in connection with those funds, and (c) a Person that is the subject of an audit or investigation must provide the State auditor with access to any information the State Auditor considers relevant to the investigation or audit.

17.5 Retention of Records

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

17.6 Public Information Act

17.6.1 DB Contractor acknowledges and agrees that all records, documents, drawings, plans, specifications and other materials in TxDOT's possession, including materials submitted by DB Contractor, are subject to the provisions of the Public Information Act. To the extent that this Capital Maintenance Agreement involves the exchange or creation of "public information" as such term is defined by the Public Information Act, that TxDOT collects, assembles, or maintains or has a right of access to, and is not otherwise excepted from disclosure under the Public Information Act, DB Contractor is required to make any such information available (in PDF format), which is accessible by the public at no additional charge to the State. If DB Contractor believes information or materials submitted to TxDOT constitute trade secrets, proprietary information or

other information that is excepted from disclosure under the Public Information Act, DB Contractor shall be solely responsible for specifically and conspicuously designating that information by placing "CONFIDENTIAL" in the center header of each such page affected, as it determines to be appropriate. Any specific proprietary information, trade secrets or confidential commercial and financial information shall be clearly identified as such, and shall be accompanied by a concise statement of reasons supporting the claim. Nothing contained in this Section 17.6 shall modify or amend requirements and obligations imposed on TxDOT by the Public Information Act or other applicable Law, and the provisions of the Public Information Act or other Laws shall control in the event of a conflict between the procedures described above and the applicable Law. DB Contractor is advised to contact legal counsel concerning such Law and its application to DB Contractor.

17.6.2 If TxDOT receives a request for public disclosure of materials marked "CONFIDENTIAL," TxDOT will use reasonable efforts to notify DB Contractor of the request and give DB Contractor an opportunity to assert, in writing and at its sole expense, a claimed exception under the Public Information Act or other applicable Law within the time period specified in the notice issued by TxDOT and allowed under the Public Information Act. Under no circumstances, however, will TxDOT be responsible or liable to DB Contractor or any other Person for the disclosure of any such labeled materials, whether the disclosure is required by Law, or court order, or occurs through inadvertence, mistake or negligence on the part of TxDOT or its officers, employees, contractors or consultants.

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

17.7 Ownership and Use of Documents

All data, sketches, charts, calculations, plans, specifications, electronic files, correspondence and other documents created or collected under the terms of the

CMA Documents shall be considered "works made for hire," as defined under the U.S. Copyright Act, 17 U.S.C. §101, et seq., as amended, for which TxDOT owns the copyright. Design Documents shall become TxDOT's property upon preparation, Construction Documents shall become TxDOT's property upon delivery to TxDOT, and other documents prepared or obtained by DB Contractor in connection with the performance of its obligations under the CMA Documents, including studies, manuals, as-built drawings, technical and other reports and the like, shall become the property of TxDOT upon DB Contractor's preparation or receipt thereof. Copies of all Design Documents and Construction Documents shall be furnished to TxDOT upon preparation or receipt thereof by DB Contractor. DB Contractor shall maintain all other documents described in this Section 17.7 in accordance with the requirements of Section 17.4 and shall deliver copies to TxDOT as required by the CMA Documents or upon request if not otherwise required to be delivered, with an indexed set delivered to TxDOT as a condition to Final Payment.

SECTION 18. [RESERVED]

SECTION 19. MISCELLANEOUS PROVISIONS

19.1 Amendments

The CMA Documents may be amended only by a written instrument duly executed by the Parties or their respective successors or assigns, except to the extent expressly provided otherwise in this Capital Maintenance Agreement. Any amendment must be accompanied by a Certificate of Interested Parties completed by DB Contractor, as described in Section 10.4.7.

19.2 Waiver

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

19.2.2 The exercise by a Party of any right or remedy provided under the CMA Documents shall not waive or preclude any other or further exercise thereof or the exercise of any other right or remedy. No waiver by any Party of any right or remedy under the CMA Documents shall be deemed to be a waiver of any other or subsequent right or remedy under the CMA Documents. The consent by one Party to any act by the other Party requiring such consent shall not be deemed to render unnecessary the obtaining of consent to any subsequent act for which consent is required, regardless of whether similar to the act for which consent is given.

19.2.3 Except as provided otherwise in the CMA Documents, no act, delay or omission done, suffered or permitted by one Party or its agents shall be deemed to waive, exhaust or impair any right, remedy or power of such Party hereunder, or to relieve the other Party from the full performance of its obligations under the CMA Documents.

19.2.4 Either Party's waiver of any breach or failure to enforce any of the terms, covenants, conditions or other provisions of the CMA Documents at any time shall not in any way limit or waive that Party's right thereafter to enforce or compel strict compliance with every term, covenant, condition or other provision, any course of dealing or custom of the trade notwithstanding. Furthermore, if the Parties make and implement any interpretation of the CMA Documents without documenting such interpretation by an instrument in writing signed by both Parties, such interpretation and implementation thereof will not be binding in the event of any future Claims or Disputes.

19.3 Independent Contractor

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

19.3.2 Nothing in the CMA Documents is intended or shall be construed to create any partnership, joint venture or similar relationship between TxDOT and DB Contractor; and in no event shall either Party take a position in any tax return or other writing of any kind that a partnership, joint venture or similar relationship exists. While the term "public-private partnership" may be used on occasion to refer to contractual relationships of the type hereby created, the Parties do not thereby express any intention to form or hold themselves out as a *de jure* or *de facto* partnership, joint venture or similar relationship, to share net profits or net losses, or to give TxDOT control or joint control over DB Contractor's financial decisions or discretionary actions concerning the Project and the Maintenance Services.

19.3.3 In no event shall the relationship between TxDOT and DB Contractor be construed as creating any relationship whatsoever between TxDOT and DB Contractor's employees. Neither DB Contractor nor any of its employees is or shall be deemed to be an employee of TxDOT. Except as otherwise specified in the CMA Documents, DB Contractor has sole authority and responsibility to employ, discharge and otherwise control its employees and has complete and sole responsibility as a principal for its agents, for all Subcontractors and for all other Persons that DB Contractor or any Subcontractor hires to perform or assist in performing the Maintenance Services.

19.4 Successors and Assigns

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

19.4.2 TxDOT may transfer and assign all or any portion of its rights, title and interests in and to the CMA Documents, including rights with respect to the P&P Bonds, Guarantees, letters of credit (including the P&P Letter of Credit) and any other security for payment or performance:

(a) without DB Contractor's consent, to any public agency or public entity as permitted by Law;

(b) without DB Contractor's consent, to or other Person that succeeds to the governmental powers and authority of TxDOT; and

(c) to any other Person with the prior written approval of DB Contractor.

19.4.3 In the event of TxDOT's assignment of all of its rights, title and interests in the CMA Documents as permitted hereunder, DB Contractor shall have no further recourse to TxDOT under the CMA Documents or otherwise except as specifically provided by other contractual agreement or by statute.

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

19.5 Designation of Representatives; Cooperation with Representatives

19.5.1 TxDOT and DB Contractor shall each designate an individual or individuals who shall be authorized to make decisions and bind the Parties on matters relating to the CMA Documents ("**Authorized Representative**"). Exhibit 13 hereto provides the initial Authorized Representative designations. Such designations may be changed by a subsequent writing delivered to the other Party in accordance with Section 19.10. The Parties may also designate technical representatives who shall be authorized to investigate and report on matters relating to the Maintenance Services and negotiate on behalf of each of the Parties, but who do not have authority to bind TxDOT or DB Contractor.

19.5.2 DB Contractor shall cooperate with TxDOT and all representatives of TxDOT designated as described above.

19.6 Survival

DB Contractor's representations and warranties, the dispute resolution provisions contained in Section 16, the indemnifications and releases contained in Section 15, the express rights and obligations of the Parties following termination of this Capital Maintenance Agreement under Sections 1, 3.3, 3.7, 7.2.1.2, 7.4.3, 8.4.1, 9, 10.9.4, 12, 14, 17.4.4 and 17.5 and all other provisions that by their inherent character should survive termination of this Capital Maintenance Agreement or Final Payment, shall survive the termination of this Capital Maintenance Agreement and Final Payment.

19.7 Limitation on Third Party Beneficiaries

It is not intended by any of the provisions of the CMA Documents to create any third party beneficiary hereunder or to authorize anyone not a Party hereto to maintain a suit for personal injury or property damage pursuant to the terms or provisions hereof, except to the extent that specific provisions (such as the warranty and indemnity provisions) identify third parties and state that they are entitled to benefits hereunder. Except as otherwise provided in this Section 19.7, the duties, obligations and responsibilities of the Parties to the CMA Documents with respect to third parties shall remain as imposed by Law. The CMA Documents shall not be construed to create a contractual relationship of any kind between TxDOT and a Subcontractor or any Person other than DB Contractor.

19.8 Tort Liability; Personal Liability of TxDOT Employees

19.8.1 TxDOT's Authorized Representatives are acting solely as agents and representatives of TxDOT when carrying out the provisions of or exercising the power or authority granted to them under the CMA Documents. They shall not be, or deemed to be, liable to any DB Contractor-Related Entity either personally or as employees of TxDOT for actions in their ordinary course of employment.

19.8.2 No agent, consultant, officer or authorized employee of TxDOT nor any member of the Texas Transportation Commission, shall be, or deemed to be, personally responsible to any DB Contractor-Related Entity for any liability arising under the CMA Documents.

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

19.8.4 In no event shall TxDOT be, or deemed to be, liable to any Person for injury, damage, or death sustained by reason of a Defect or want of repair on or within the Site during the period DB Contractor has operation and control of the Site, nor shall TxDOT be liable for any injury, damage or death caused by the actions, omissions, negligence, intentional misconduct, or breach of applicable Law or contract by any DB Contractor-Related Entity. DB Contractor expressly acknowledges and agrees that TxDOT's rights in this Capital Maintenance Agreement to take any action with respect to the Project, including the right to review, comment on, disapprove or accept designs, plans, specifications, work plans, construction, installation, traffic management details, safety plan and the like, are

discretionary in nature and exist solely for the benefit and protection of TxDOT and do not create or impose upon TxDOT any standard or duty of care toward DB Contractor or any other Person, all of which are hereby expressly disclaimed.

19.9 Governing Law

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

19.10 Notices and Communications

19.10.1 Notices under the CMA Documents shall be in writing and: (a) delivered personally, (b) sent by certified mail, return receipt requested, (c) sent by a recognized overnight mail or courier service, with delivery receipt requested, or (d) sent by facsimile or email communication followed by a hard copy and with receipt confirmed by telephone, to the addresses set forth in Sections 19.10.2 and 19.10.3, as applicable (or to such other address as may from time to time be specified in writing by such Person).

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

[_____]
[_____]
Telephone: [_____]
Facsimile: [_____]
Email: [_____]

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

[_____]
[_____]
Telephone: [_____]
Facsimile: [_____]
Email: [_____]

and

[_____]
[_____]
Telephone: [_____]
Facsimile: [_____]
Email: [_____]

19.10.3 All notices, correspondence and other communications to TxDOT shall be marked as regarding The Southern Gateway Project and shall be delivered to the following address or as otherwise directed by TxDOT's Authorized Representative:

Texas Department of Transportation
Dallas District Office
4777 East Highway 80
Mesquite, Texas 75150
Attention: Kelly Selman, P.E.
Telephone: (214) 320-6189
Email: kelly.selman@txdot.gov

With a copy to:

Texas Department of Transportation
Project Finance, Debt & Strategic Contracts Division
125 East 11th Street
Austin, TX 78701
Attn: Mr. Benjamin Asher
Telephone: (512) 463-8611
Email: benjamin.asher@txdot.gov

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

Texas Department of Transportation
General Counsel Division
125 East 11th Street
Austin, Texas 78701
Attn: General Counsel Division
Telephone: (512) 463-8630
Email: jack.ingram@txdot.gov

All communications to TxDOT shall be clearly marked with the contract number to identify this Capital Maintenance Agreement and the Project name and location.

19.10.4 Notices shall be deemed received when actually received in the office of the addressee (or by the addressee if personally delivered) or when delivery is refused, as shown on the receipt of the U. S. Postal Service, private carrier or other Person making the delivery. Notwithstanding the foregoing, notices sent by telefacsimile after 4:00 p.m. Central Standard or Daylight Time (as applicable) and all other notices received after 5:00 p.m. shall be deemed received

on the first Business Day following delivery (that is, in order for a fax to be deemed received on the same day, at least the first page of the fax must have been received before 4:00 p.m.). Any technical or other communications pertaining to the Maintenance Services shall be conducted by DB Contractor's Authorized Representative and technical representatives designated by TxDOT.

19.11 Taxes

19.11.1 DB Contractor shall pay, prior to delinquency, all applicable taxes. DB Contractor shall have no right to an adjustment to the Maintenance Price or any other Claim, except as provided in Section 19.11.2, due to its misinterpretation of Laws respecting taxes or incorrect assumptions regarding applicability of taxes.

19.11.2 With respect to Expendable Materials any DB Contractor-Related Entity purchases, DB Contractor shall submit or cause the DB Contractor-Related Entity to submit a "Texas Sales and Use Tax Exemption Certification" to the seller of the Expendable Materials. In the event DB Contractor is thereafter required by the State Comptroller to pay sales tax on Expendable Materials, TxDOT shall reimburse DB Contractor for such sales tax. Reimbursement shall be due within 60 Days after TxDOT receives from DB Contractor written evidence of the State Comptroller's claim for sales tax, the amount of the sales tax paid, the date paid and the items purchased. DB Contractor agrees to cooperate with TxDOT in connection with the filing and prosecution of any request for refund of any sales tax paid with respect to Expendable Materials. If materials purchased for the Maintenance Services are not wholly used or expended on the Project, such that they do not qualify as Expendable Materials, DB Contractor will be responsible to pay applicable sales taxes.

19.12 Interest on Amounts Due and Owing

Except as expressly provided otherwise in Section 16.9 or in the case of TxDOT's Recoverable Costs, all amounts to which a Party is entitled to assess, collect, demand or recover under this Capital Maintenance Agreement shall earn interest from the date on which such amount is due and owing at the lesser of (i) 12% per annum or (ii) the maximum rate allowable under applicable Law.

19.13 Further Assurances

DB Contractor shall promptly execute and deliver to TxDOT all such instruments and other documents and assurances as are reasonably requested by TxDOT to further evidence the obligations of DB Contractor hereunder, including

assurances regarding the validity of (a) the assignments of Subcontracts contained herein and (b) any instruments securing performance hereof.

19.14 Severability

If any clause, provision, section or part of the CMA Documents is ruled invalid under Section 16 or otherwise by a court having proper jurisdiction, then the Parties shall (a) promptly meet and negotiate a substitute for such clause, provision, section or part, which shall, to the greatest extent legally permissible, effect the original intent of the Parties, including an equitable adjustment to the Maintenance Price to account for any change in the Maintenance Services resulting from such invalidated portion, and (b) if necessary or desirable, apply to the court or other decision maker (as applicable) which declared such invalidity for an interpretation of the invalidated portion to guide the negotiations. The invalidity or unenforceability of any such clause, provision, section or part shall not affect the validity or enforceability of the balance of the CMA Documents, which shall be construed and enforced as if the CMA Documents did not contain such invalid or unenforceable clause, provision, section or part.

19.15 Headings

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

19.16 Entire Agreement

The CMA Documents together with those sections of the Design-Build Agreement, the RFP and those other documents and Laws, in whole or in part, expressly incorporated herein, or therein, by reference, collectively contain the entire understanding and agreement of the Parties with respect to the subject matter hereof and supersede all prior agreements, understandings, statements, representations and negotiations between the Parties with respect to its subject matter.

19.17 Counterparts

This instrument may be executed in two or more counterparts, each of which shall be deemed an original, but all of which together shall constitute one and the same instrument.

19.18 Joint and Several Liability

Each of [____, ____, and ____] agree that it is jointly and severally liable for the performance of DB Contractor's liabilities and obligations under this Agreement; and that such joint and several liability shall not in any way be reduced, diminished or released by any change to the constitution of Design-Build Contractor. If any other Party or replacement Party to this Agreement is or becomes a joint venture or a partnership, all members of such joint venture or partnership shall have joint and several liability for the obligations and liabilities of such Party under this Agreement, and such obligations and liabilities shall not in any way be reduced, diminished or released by any change in the constitution of such Party.

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

DB CONTRACTOR: **[_____]**

By: _____
Name: [_____]
Title: [_____]

TxDOT: **Texas Department of Transportation**

By: _____
Name: James M. Bass
Title: Executive Director

EXHIBIT 1

ABBREVIATIONS AND DEFINITIONS

Unless otherwise specified, wherever the following abbreviations or terms are used in the CMA Documents, they shall have the meanings set forth below:

AASHTO	American Association of State Highway and Transportation Officials
ALJ	Administrative Law Judge
AMRL	AASHTO Materials Reference Laboratory
ASTM	American Society of Testing and Materials
CADD	Computer Aided Drafting and Design
CERCLA	Comprehensive Environmental Response Compensation and Liability Act
CFR	Code of Federal Regulations
CMA	Capital Maintenance Agreement
CPR	Cardiopulmonary Resuscitation
CRP	Community Rehabilitation Programs
DBA	Design-Build Agreement
DBE	Disadvantaged Business Enterprise
DRP	Dispute Resolution Procedure
ECMP	Environmental Compliance and Mitigation Plan
ENR CCI	Engineering News Record Construction Cost Index
EPD	Escrowed Proposal Documents
FHWA	Federal Highway Administration
GAAP	Generally Accepted Accounting Principles
HMMP	Hazardous Materials Management Plan
HUB	Historically Underutilized Business
ISO	International Standards Organization
ITP	Instructions to Proposers
ITS	Intelligent Transportation System
MMP	Maintenance Management Plan

MP	Maintenance Price
MSQM	Maintenance Services Quality Manager
MSQMP	Maintenance Services Quality Management Plan
NBIS	National Bridge Inspection Standards
NTP	Notice to Proceed
OSHA	Occupational Safety and Health Administration
P2	Pollution Prevention
PCO	Potential Change Order
PICP	Public Information and Communications Plan
PMIS	Pavement Management Information System
PSQAF	Professional Services Quality Assurance Firm
PSQAM	Professional Services Quality Assurance Manager
PSQCM	Professional Services Quality Control Manager
RFP	Request for Proposals
RFQ	Request for Qualifications
ROW	Right of Way
SH	State Highway
SICP	Snow and Ice Control Plan
SWEP	Severe Weather Evacuation Plan
SW3P	Storm Water Pollution Prevention Plan
TCP	Traffic Control Plan
TDPES	Texas Pollutant Discharge Elimination System
TIBH	Texas Industries for the Blind and Handicapped
TMP	Traffic Management Plan
TMUTCD	Texas Manual on Uniform Traffic Control Devices
TRM	Texas Reference Marker
TxDMV	Texas Department of Motor Vehicles
TxDOT	Texas Department of Transportation
USFWS	United States Fish and Wildlife Service

Adjacent Work means any project, work, improvement or development to be planned, designed or constructed which could or does impact the Project or is adjacent to the Project. Examples of Adjacent Work include proposed subdivisions, other roads constructed by Governmental Entities, site grading and drainage and other development improvement plans and Utility projects.

Affiliate means:

(a) any shareholder, member, partner or joint venture member of DB Contractor,

(b) any Person that directly or indirectly through one or more intermediaries controls, or is controlled by, or is under common control with, DB Contractor, or any of its respective shareholders, members, partners or joint venture members; and

(c) any Person for which 10 percent or more of the equity interest in such Person is held directly or indirectly, beneficially or of record by (i) DB Contractor, (ii) any of the shareholders, members, partners or joint venture members of DB Contractor; or (iii) any Affiliate of DB Contractor under clause (b) of this definition.

(d) For purposes of this definition, the term "control" means the possession, directly or indirectly, of the power to cause the direction of the management of a Person, whether through voting securities, by contract, by family relationship or otherwise.

Affiliated means having the status of an Affiliate.

Appeal Period has the meaning set forth in Section 16.3.5.1(a) of the Capital Maintenance Agreement.

Audit Inspection means a detailed inspection of the specified proportion of Performance Sections undertaken every 6 months by DB Contractor as part of the Maintenance Services in accordance with Section 1.4.2 of Exhibit 2 to the Capital Maintenance Agreement to establish a Maintained Element Asset Condition Score for each Maintained Element and Mean Asset Condition Score.

Authorized Representative has the meaning set forth in Section 18.5.1 of the Capital Maintenance Agreement.

Base Index has the meaning set forth in Section 8.1.3.1(a) of the Capital Maintenance Agreement.

Business Day means any day on which TxDOT is officially open for business.

Capital Asset Replacement Work means major maintenance, repair, reconstruction, rehabilitation, restoration, renewal or replacement of any Maintained Element of a type that is not normally included as an annually recurring cost in highway maintenance and repair budgets.

Capital Maintenance Agreement (CMA) means that certain Capital Maintenance Agreement executed by TxDOT and DB Contractor providing for DB Contractor to perform, at TxDOT's sole option, certain Maintenance Services for the Project, to which this Exhibit 1 is attached, including any and all amendments thereto.

Capital Maintenance Agreement Documents or **CMA Documents** has the meaning set forth in Section 1.2.1 of the Capital Maintenance Agreement.

Category 1 Defect has the meaning set forth in Section 1.3.2.3 of Exhibit 2 to the Capital Maintenance Agreement.

Category 2 Defect has the meaning set forth in Section 1.3.2.3 of Exhibit 2 to the Capital Maintenance Agreement.

Change in Law means:

(a) Enactment, adoption, modification, repeal or other change in any Law that occurs after the Proposal Due Date, including any change in the judicial or administrative interpretation of any Law; or

(b) Adoption of any new Law, which in each case is materially inconsistent with Laws in effect on the Proposal Due Date.

The term **"Change in Law"** excludes:

(i) Any such change in or new Law which was passed or adopted but not yet effective as of the Proposal Due Date; and

(ii) Any change in or new Law relating to DB Contractor's general business operations, including licensing and registration fees, income taxes, gross receipts taxes, social security, Medicare, unemployment and other payroll-related taxes.

Change Order means a written order issued by TxDOT to DB Contractor delineating changes in the Maintenance Services within the general scope of the Capital Maintenance Agreement Documents or in the terms and conditions of the

CMA Documents in accordance with Section 10 of the Capital Maintenance Agreement and establishing, if appropriate, an adjustment to the Maintenance Price or a time extension.

Claim means: (a) a demand by DB Contractor, which is or potentially could be disputed by TxDOT, for a time extension under the CMA Documents or payment of money or damages from TxDOT to DB Contractor or (b) a demand by TxDOT, which is or potentially could be disputed by DB Contractor, for payment of money or damages from DB Contractor to TxDOT.

Code means the Texas Transportation Code, including, specifically, Chapter 223.

Commercial Rules has the meaning set forth in the Disputes Board Agreement.

Conflict of Interest means, with respect to any individual who is or is proposed to be a Disputes Board Member, any one or more of the following:

(a) Such individual is currently or was in the past employed by any member of the Conflicts Group, except that service as a member of other disputes review boards on other contracts or retention as an independent consultant on other contracts does not create a Conflict of Interest so as to preclude an individual from serving as a Disputes Board Member;

(b) Such individual has or is reasonably likely to have a pecuniary interest in the outcome of the applicable Dispute or such individual has any (i) ownership interest in any member of the Conflicts Group, except a remote interest or (ii) financial interest in any of the CMA Documents or any Subcontract (except that such individual's interest in receiving, and receipt of, payment for service on the Disputes Board shall not be considered a financial interest for purposes of this definition), in either case except for a remote interest. An ownership interest is remote only if it is less than 0.5% of the issued and outstanding shares or other legal or beneficial ownership interest, or less than 0.5% of the issued and outstanding indebtedness, of a member of the Conflicts Group. Mere use of the Project shall not constitute a pecuniary, ownership or financial interest for purposes of this definition;

(c) Such individual has or had substantial prior involvement in any aspect of the Agreement, a Subcontract or the Project of a nature which could

reasonably be expected to affect his or her ability to impartially resolve Disputes;

(d) Such individual knows of any reason, including but not limited to the existence of any of the Conflicts of Interest as described in this definition, why he or she cannot be impartial in resolving Disputes; and

(e) In addition to the Conflicts of Interest described above, any other circumstance arising out of such individual's existing or past activities, business interests or contractual relationships with any member of the Conflicts Group such that such individual is or is reasonably likely to be unable to render a Disputes Board Decision impartially or such individual's objectivity in performing his or her role on the Disputes Board is or is reasonably likely to be impaired.

Conflicts Group means a Party, a Party's Affiliates and its and their agents, contractors, subcontractors or suppliers and any other Person that is a party to a Subcontract.

Construction General Permit means a permit under the Texas Pollutant Discharge Elimination System program for the management of storm water discharges from construction sites.

Construction Quality Control Manager (CQCM) has the meaning set forth in Exhibit 1 to the Design-Build Agreement

Contract Documents has the meaning set forth in Section 1.2 of the Design-Build Agreement.

Cost and Schedule Proposal means DB Contractor's proposal furnished to TxDOT pursuant to a Request for Change Proposal in accordance with Section 10.2.1 of the Capital Maintenance Agreement.

Customer Groups has the meaning set forth in Exhibit 1 to the Design-Build Agreement.

Day or **day** means calendar days unless otherwise expressly specified.

DB Contractor or **Design-Build Contractor** means [_____], together with its successors and assigns.

DB Contractor Maintenance Default has the meaning set forth in Section 12.1 of the Capital Maintenance Agreement.

DB Contractor Event of Default means Event of Default defined under the DBA.

DB Contractor Release of Hazardous Materials means (a) Releases of Hazardous Material, or the exacerbation of any such releases, attributable to the actions, omissions, negligence, intentional misconduct, or breach of applicable Law, contract or Governmental Approval by any DB Contractor-Related Entity; (b) Releases of Hazardous Materials caused to be present on, in or under the Site or elsewhere by any DB Contractor-Related Entity, regardless of whether those are the persons who actually caused the release and regardless of the cause; or (c) use, containment, storage, management, handling, transport and disposal of any Hazardous Materials by any DB Contractor-Related Entity in violation of the requirements of the CMA Documents or any applicable Law or Governmental Approval.

DB Contractor-Related Entities means (a) DB Contractor, (b) DB Contractor's shareholders, partners, joint venturers and members (as applicable), (c) Subcontractors to the DB Contractor (including the Lead Maintenance Firm and Suppliers), (d) any other Persons performing any of the Maintenance Services, (e) any other Persons for whom DB Contractor may be legally or contractually responsible, and (f) the employees, agents, officers, directors, shareholders, representatives, consultants, successors, assigns and invitees of any of the foregoing.

Defect means, in connection with the Maintenance Services, a deficiency in a Maintained Element, whether by design, construction, installation, repair, rehabilitation, reconstruction, operation, damage or wear, affecting the condition, use, functionality or operation of any Maintained Element, which would cause or have the potential to cause one or more of the following:

(a) A hazard, nuisance or other risk to public or worker health or safety, including the health and safety of Users of the Project;

(b) A structural deterioration of the affected Maintained Element or any other part of the Project affected by it;

(c) Damage to the property or equipment of TxDOT or a third party;

(d) Damage to the environment; or

(e) Failure of the Maintained Element to meet the Target for a measurement record as set forth in the columns headed "Target" and "Measurement Record" in the Performance and Measurement Table.

Defect Remedy Period means, for a particular Defect, the time period for rectifying such Defect as set forth in either (a) for a Category 1 Defect, the column headed "Category 1 Hazard Mitigation" or "Category 1 Permanent Remedy," or (b) for a Category 2 Defect, the column headed "Category 2 Permanent Repair" in the Performance and Measurement Table.

Defense and Indemnification Procedures has the meaning set forth in Section 15.9 of the Capital Maintenance Agreement.

Design-Build Agreement (DBA) has the meaning set forth in Recital I of the Capital Maintenance Agreement.

Design Documents means all drawings (including plans, profiles, cross-sections, notes, elevations, sections, details and diagrams), specifications, reports, studies, calculations, electronic files, records and submittals necessary for, or related to, the performance of design services required under the Capital Maintenance Agreement in accordance with the CMA Documents, the Governmental Approvals and applicable Law.

Deviation means a no-cost change in the Maintenance Services or other requirements of the CMA Documents issued in writing by TxDOT's Authorized Representative or his/her designee under Section 10.12 of the Capital Maintenance Agreement, including any no-cost change, deviation, modification, alteration or exception from Exhibit 2.

Directive Letter means the letter issued by TxDOT to DB Contractor in the event of any desired change in the Maintenance Services, or in the event of any Claim or Dispute regarding the scope of Maintenance Services as described in Section 10.1.1.2 of the Capital Maintenance Agreement.

Disadvantaged Business Enterprise (DBE) shall have the meaning set forth in Exhibit 6 to the Design-Build Agreement.

Disclosure Statements shall have the meaning set forth in the Disputes Board Agreement.

Dispute means any Claim, dispute, disagreement or controversy between TxDOT and DB Contractor concerning their respective rights and obligations under the CMA Documents, including concerning any alleged breach or failure to perform and remedies.

Dispute Resolution Procedures means collectively, the procedures established under Section 16.3.3 and 16.3.4 of the Capital Maintenance Agreement and in Section 5 of the Disputes Board Agreement and the applicable portions of

Section 201.112 of the Code and the DRP Rules. None of the Informal Resolution Procedures are included in the Dispute Resolution Procedures.

Disputes Board has the meaning set forth in the Disputes Board Agreement.

Disputes Board Agreement means the agreement in the form attached to the Agreement as Exhibit 8.

Disputes Board Chair has the meaning set forth in the Disputes Board Agreement.

Disputes Board Decision has the meaning set forth in the Disputes Board Agreement.

Disputes Board Error has the meaning set forth in Section 16.3.5.2 of the Capital Maintenance Agreement.

Disputes Board Member means an individual serving as one of the three members of the Disputes Board.

Disputes Board Member Candidate Evaluation Period has the meaning set forth in the Disputes Board Agreement.

Disputes Board Member Candidates List has the meaning set forth in the Disputes Board Agreement.

Disputes Board Member Joinder Agreement has the meaning set forth in the Disputes Board Agreement.

Disputes Board Member Qualifications has the meaning set forth in the Disputes Board Agreement.

Draw Request means a Draw Request and Certificate in the form of Exhibit 11 to the Capital Maintenance Agreement.

DRP Rules means, as of the Effective Date, the administrative rules promulgated in accordance with Section 201.112(a) of the Code, adopted by TxDOT in accordance with the Texas Administrative Procedure Act and effective under Rule §9.6 of Subchapter A, Chapter 9, Part 1, Title 43 of the Texas Administrative Code on or before the Effective Date regarding dispute resolution procedures applicable to the resolution of all claims and disputes of every kind or character arising under capital maintenance agreements such as and including the CMA Documents.

Effective Date means the date of the Capital Maintenance Agreement or such other date as shall be mutually agreed upon in writing by TxDOT and the DB Contractor.

Emergency means, in connection with the Maintenance Services, any unforeseen event affecting the Project, whether directly or indirectly, that occurs on or originates from the Project or Project ROW and: (a) causes or has the potential to cause disruption to the free flow of traffic on the Project or a threat to the safety of the public or workers; (b) is an immediate or imminent threat to the long term integrity of any part of the infrastructure of the Project, to the environment or to Adjacent Work; or (c) is recognized by the Texas Department of Public Safety as an emergency.

Engineer of Record has the meaning set forth in Exhibit 1 to the Design-Build Agreement.

ENR Construction Cost Index (ENR CCI) means the 12-month "Construction Cost Index" published by Engineering News-Record, Two Penn Plaza, 9th Floor, New York, NY 10121.

Environmental Approvals means all Governmental Approvals arising from or required by any Environmental Law in connection with the Project.

Environmental Compliance and Mitigation Plan means the plan DB Contractor must prepare and implement in accordance with Section 4.4 of Exhibit 2.

Environmental Laws means any Law applicable to the Project or the Maintenance Services regulating or imposing liability or standards of conduct that pertains to the environment, Hazardous Materials, contamination of any type whatsoever, or environmental health and safety matters, and any lawful requirements and standards that pertain to the environment, Hazardous Materials, contamination of any type whatsoever, or environmental health and safety matters, set forth in any Government Approvals, other permits, licenses, approvals, plans, rules, regulations or ordinances adopted, or other criteria and guidelines promulgated, pursuant to Laws applicable to the Project, DB Contractor or the Maintenance Services, as such have been or are amended, modified, or supplemented from time to time (including any present and future amendments thereto and reauthorizations thereof) including those relating to:

(a) The manufacture, processing, use, distribution, existence, treatment, storage, disposal, generation, and transportation of Hazardous Materials;

(b) Air, soil, surface and subsurface strata, stream sediments, surface water, and groundwater;

(c) Releases of Hazardous Materials;

(d) Protection of wildlife, Threatened or Endangered Species, sensitive species, wetlands, water courses and water bodies, historical, archeological, and paleontological resources, and natural resources;

(e) The operation and closure of underground storage tanks;

(f) Health and safety of employees and other persons; and

(g) Notification, documentation, and recordkeeping requirements relating to the foregoing.

Without limiting the above, the term "Environmental Laws" shall also include the following:

(i) The National Environmental Policy Act (42 U.S.C. §§ 4321 et seq.), as amended;

(ii) The Comprehensive Environmental Response, Compensation, and Liability Act (42 U.S.C. §§ 9601 et seq.), as amended;

(iii) The Solid Waste Disposal Act, as amended by the Resource Conservation and Recovery Act (42 U.S.C. §§ 6901 et seq.);

(iv) The Emergency Planning and Community Right to Know Act of 1986 (42 U.S.C. §§ 11001 et seq.), as amended;

(v) The Clean Air Act (42 U.S.C. §§ 7401 et seq.), as amended;

(vi) The Federal Water Pollution Control Act, as amended by the Clean Water Act (33 U.S.C. §§ 1251 et seq.);

(vii) The Resource Conservation and Recovery Act (42 U.S.C. §§ 6901, et seq.), as amended;

(viii) The Toxic Substances Control Act (15 U.S.C. §§ 2601 et seq.), as amended;

(ix) The Hazardous Materials Transportation Act (49 U.S.C. §§ 1801 et seq.), as amended;

(x) The Oil Pollution Act (33 U.S.C. §§ 2701, et seq.), as amended;

(xi) The Federal Insecticide, Fungicide and Rodenticide Act (7 U.S.C. §§ 136 et seq.), as amended;

(xii) The Federal Safe Drinking Water Act (42 U.S.C. §§ 300 et seq.), as amended;

(xiii) The Federal Radon and Indoor Air Quality Research Act (42 U.S.C. §§ 7401 et seq.), as amended;

(xiv) The Occupational Safety and Health Act (29 U.S.C. §§ 651 et seq.);

(xv) The Endangered Species Act (16 U.S.C. §§ 1531 et seq.), as amended;

(xvi) The Fish and Wildlife Coordination Act (16 U.S.C. §§ 661 et seq.), as amended;

(xvii) The National Historic Preservation Act (16 U.S.C. §§ 470 et seq.), as amended;

(xviii) The Coastal Zone Management Act (33 U.S.C. §§ 1451 et seq.), as amended;

(xix) The Texas Health and Safety Code, including Chapter 382 (the Clean Air Act), Chapter 383 (the Clean Air Financing Act), Chapter 361 (the Texas Solid Waste Disposal Act), Chapter 362 (the Solid Waste Resource Recovery Financing Act), Chapter 363 (the Municipal Solid Waste Act), Chapter 364 (the County Solid Waste Control Act), Chapter 370 (the Texas Toxic Chemical Release Reporting Act), Chapter 371 (the Texas Used Oil Collection, Management, and Recycling Act), Chapter 401 (the Texas Radioactive Materials and Other Sources of Radiation Act), Chapter 402 (the Texas Low-Level Radioactive Waste Disposal Authority Act), Chapter 502 (the Texas Hazard Communication Act), Chapter 505 (the Texas Manufacturing Project Community Right-To-Know-Act), Chapter 506 (the Texas Public Employer Community Right-To-Know-Act), and Chapter 507 (the Texas Non-manufacturing Facilities Community Right-To-Know-Act);

(xx) The Texas Natural Resources Code, including Chapter 40 (the Texas Oil Spill Prevention and Response Act of 1991);

(xxi) The Texas Water Code;

(xxii) The Texas Parks and Wildlife Code;

(xxiii) The Texas Agriculture Code, including Chapter 76 (Pesticide and Herbicide Regulation) and Chapter 125 (the Agricultural Hazard Communication Act);

(xxiv) The Texas Asbestos Health Protection Act (Chapter 1954, Texas Occupations Code); and

(xxv) The Texas Surface Coal Mining and Reclamation Act (Chapter 134, Texas Natural Resources Code).

Error means an error, omission, inconsistency, inaccuracy, deficiency, flaw or other defect.

Escrowed Proposal Documents (EPDs) has the meaning set forth in Section 17.1 of the Capital Maintenance Agreement.

Evaluating Party has the meaning set forth in the Disputes Board Agreement.

Event of Default has the meaning set forth in Section 12.3.1 of the Capital Maintenance Agreement.

Exchange Act means 15 U.S.C. § 78a et seq., as amended.

Executive Director means the Executive Director of TxDOT.

Expendable Materials means: (a) tangible personal property that loses its distinct and separate identity when incorporated into real property (examples include framing lumber, bricks, steel, re-bar, concrete) and (b) consumable items, defined as nondurable tangible personal property that is used to improve real property and that, after being used once for its intended purpose, is completely used or destroyed so that it has no salvage value (examples include non-reusable concrete forms, non-reusable drop cloths, barricade tape, natural gas, and electricity).

Facility has the meaning set forth in Exhibit 1 to the Design-Build Agreement.

Facility LE has the meaning set forth in Exhibit 1 to the Design-Build Agreement.

Fast-Track Dispute means a Dispute so designated by the Parties in respect of Section 16.3.3.2 of the Capital Maintenance Agreement.

Final Acceptance has the meaning set forth in Exhibit 1 to the Design-Build Agreement.

Final Acceptance Deadline has the meaning set forth in Exhibit 1 to the Design-Build Agreement.

Final Design Submittal has the meaning set forth in Exhibit 1 to the Design-Build Agreement.

Final Order means the order issued by the Executive Director pursuant to Section 16.3.5.1 or 16.3.5.4 of the Capital Maintenance Agreement.

Final Order Implementing Decision has the meaning set forth in Section 16.3.5.4(a)(ii) of the Capital Maintenance Agreement.

Final Order Vacating Decision has the meaning set forth in Section 16.3.5.4(a)(i) of the Capital Maintenance Agreement.

Final Payment means the last payment made under the Capital Maintenance Agreement.

Financial Proposal has the meaning set forth in the ITP.

Fiscal Year means the consecutive 12-month period starting on July 1 and ending on June 30.

Force Majeure Event means any of the events listed in clauses (a) through (i) below (and no other events, including those listed in clauses (i) through (v) below) that materially and adversely affects DB Contractor's obligations, provided such events are beyond the control of the DB Contractor-Related Entities and are not due to (1) an act, omission, negligence, recklessness, or willful misconduct of or (2) breach of contract or Law or violation of any Governmental Approval by, any DB Contractor-Related Entity, and further provided that such events (or the effects of such events) could not have been avoided by the exercise of caution, due diligence, or reasonable efforts by any DB Contractor-Related Entity:

(a) Any earthquake, tornado, hurricane (Category 3 and higher) or other natural disaster that (i) causes direct physical damage to the Project and (ii) has been proclaimed a disaster or state of emergency by the President of the United States, the Governor of the State of Texas, or the Federal Highway Administrator, unless such damage is caused by the DB Contractor's action or inaction or the DB Contractor's means and methods of construction;

(b) Any epidemic in the Dallas area;

(c) Any blockade, rebellion, war, riot, act of terrorism or act of sabotage or civil commotion that causes direct physical damage to the Project;

(d) Any Change in Law which (i) requires DB Contractor to obtain a new major State or federal environmental approval not previously required for the Project, (ii) results in an increase in DB Contractor's costs directly attributable to the Change in Law of at least $500,000, or (iii) specifically targets the Project or DB Contractor;

(e) Any spill of Hazardous Material by a third party that occurs after Maintenance NTP1 and is required to be reported to a Governmental Entity, and that renders use of the roadway or construction area unsafe absent assessment, containment or remediation, and does not result from DB Contractor's failure to exercise reasonable efforts to protect the Site from third parties;

(f) Issuance of a temporary restraining order or other form of injunction by a court that prohibits prosecution of a material portion of the Maintenance Services, except to the extent arising out of, related to or caused by, the delay, act, omission, negligence, willful misconduct, recklessness or breach of contract or Law by any member of the DB Contractor-Related Entities;

(g) Total failure of a bridge (other than any bridge constructed by a DB Contractor-Related Entity) such that it requires replacement, except to the extent arising out of, related to or caused by, the act, omission, negligence, willful misconduct, recklessness or breach of contract or Law by any DB Contractor-Related Entity;

(h) Malicious or other acts by a third party intended to cause loss or damage or other similar occurrence, including vandalism or theft that causes direct physical damage to the Project, except to the extent such event is covered by proceeds of insurance carried by DB Contractor hereunder or any available third-party insurance responsible for the loss/damage; and

(i) A collision (motor vehicle, aircraft or railroad train) by a third party that causes direct physical damage to the Project, except to the extent such event (a) arises out of, is related to or caused by, the act, omission, negligence, willful misconduct, recklessness or breach of contract or Law by any DB Contractor-Related Entity or (b) is covered by proceeds of insurance carried by DB Contractor hereunder or any available third-party insurance responsible for the loss/damage.

For the avoidance of doubt, the term **"Force Majeure Event"** shall be limited to the matters listed above and specifically excludes from its definition the following matters which might otherwise be considered a force majeure event:

(i) Any fire or other physical destruction or damage, or delay, to the Project which (A) occurs by action of the elements, including lightning, explosion, drought, rain, flood, snow, storm, except as specified in clause (a) above, or (B) is caused by third parties, except as specified in clause (c), (e), (g), or (i) above;

(ii) Any strike, labor dispute, work slowdown, work stoppage, secondary boycott, walkout or other similar occurrence;

(iii) The suspension, termination, interruption or denial of, failure to obtain, or the nonrenewal or change in any Governmental Approval, except for any such matter falling within the scope of clause (d) or clause (f) above;

(iv) Any delay or cost risk for which coverage is to be provided through insurance (including the amount of any insurance available to DB Contractor, any deductible or self-insured retention associated with such insurance, and the amount of any insurance coverage that is deemed to be self-insured by DB Contractor under Section 7.8.4 of the Capital Maintenance Agreement) required under the Capital Maintenance Agreement or by Law; and

(v) Any matters not caused by TxDOT or beyond the control of TxDOT and not listed in clauses (a) through (i) above.

Form 1295 shall have the meaning set forth in Section 10.4.7 of the Capital Maintenance Agreement.

Form 1295 Laws shall have the meaning set forth in Section 10.4.7 of the Capital Maintenance Agreement.

General Inspection means an inspection of Maintained Elements to identify Defects and assess asset condition as described in Section 1.4.1 of Exhibit 2 of the Capital Maintenance Agreement.

Generally Accepted Accounting Principles means such accepted accounting practice as, in the opinion of the accountant, conforms at the time to a body of generally accepted accounting principles.

Good Industry Practice means the exercise of the degree of skill, diligence, prudence, and foresight that would reasonably and ordinarily be expected from time to time from a skilled and experienced designer, engineer, constructor or maintenance contractor seeking in good faith to comply with its contractual obligations, complying with all applicable Laws and engaged in the same type of undertaking under circumstances and conditions similar to those within the same geographic area as the Project, as it evolves from time to time.

Governmental Approval means any permit, license, consent, concession, grant, franchise, authorization, valid waiver, valid exemption, variance or other approval, guidance, protocol, mitigation agreement or order, or memoranda of agreement/understanding, and any amendment or modification of any of them provided by Governmental Entities including State, local, or federal regulatory agencies, agents, or employees, or provided by TxDOT in its capacity as a regulatory agency for issuing state regulatory permits or approvals that authorize or pertain to the Maintenance Services or the Project, but excluding any such approvals given by or required from any Governmental Entity in its capacity as a Utility Owner.

Governmental Entity means any federal, State or local government and any political subdivision or any governmental, quasi-governmental, judicial, public or statutory instrumentality, administrative agency, authority, body or entity other than TxDOT, in each case having jurisdiction over the party, the Project or the Maintenance Services.

Guaranteed Obligations has the meaning set forth in the Guaranty.

Guarantor means each of the entities which provided a guarantee in the form of Exhibit 9 to the Capital Maintenance Agreement of some or all of the obligations of DB Contractor under the Capital Maintenance Agreement.

Guaranty means each guarantee executed by a Guarantor guaranteeing some or all of the obligations of DB Contractor under the Capital Maintenance Agreement.

Hazardous Materials means any element, chemical, compound, material or substance, whether solid, liquid or gaseous, which at any time is defined, listed, classified or otherwise regulated in any way under any Environmental Laws, or any other such substances or conditions (including mold and other mycotoxins or fungi) which may create any unsafe or hazardous condition or pose any threat to human health and safety. The term "**Hazardous Materials**" includes the following:

(a) Hazardous wastes, hazardous material, hazardous substances, hazardous constituents, and toxic substances or related materials,

whether solid, liquid, or gas, including substances defined as or included in the definition of "hazardous substance", "hazardous waste", "hazardous material", "extremely hazardous waste", "acutely hazardous waste", "radioactive waste", "radioactive materials", "bio-hazardous waste", "pollutant", "toxic pollutant", "contaminant", "restricted hazardous waste", "infectious waste", "toxic substance", "toxic waste", "toxic material", or any other term or expression intended to define, list or classify substances by reason of properties harmful to health, safety or the indoor or outdoor environment (including harmful properties such as ignitability, corrosivity, reactivity, carcinogenicity, toxicity, reproductive toxicity, "TCLP toxicity" or "EP toxicity" or words of similar import under any applicable Environmental Laws);

(b) Any petroleum, including crude oil and any fraction thereof, and including any refined petroleum product or any additive thereto or fraction thereof or other petroleum derived substance; and any waste oil or waste petroleum byproduct or fraction thereof or additive thereto;

(c) Any drilling fluids, produced waters and other wastes associated with the exploration, development or production of crude oil, natural gas or geothermal resources;

(d) Any flammable substances or explosives;

(e) Any radioactive materials;

(f) Any asbestos or asbestos-containing materials;

(g) Any lead and lead-based paint;

(h) Any radon or radon gas;

(i) Any methane gas or similar gaseous materials;

(j) Any urea formaldehyde foam insulation;

(k) Electrical equipment which contains any oil or dielectric fluid containing regulated levels of polychlorinated biphenyls;

(l) Pesticides;

(m) Any other chemical, material or substance, exposure to which is prohibited, limited or regulated by any Governmental Entity or which

may or could pose a hazard to the health and safety of the owners, operators, users or any Persons in the vicinity of the Project or to the indoor or outdoor environment; and

(n) Soil, or surface water or ground water, contaminated with Hazardous Materials as defined above.

Hazardous Materials Management means procedures, practices and activities to address and comply with Environmental Laws and Environmental Approvals with respect to Hazardous Materials encountered, impacted, caused by or occurring in connection with the Maintenance Services, as well as investigation and remediation of such Hazardous Materials. Hazardous Materials Management may include sampling, stock-piling, storage, backfilling in place, asphalt batching, recycling, treatment, clean-up, remediation, transportation or off-site disposal of Hazardous Materials, or a combination of the foregoing, whichever is the most cost-effective approach authorized under applicable Law.

Hazardous Materials Management Plan means the plan prepared by DB Contractor for Hazardous Materials Management both within and outside the Project ROW, as more particularly described in Section 4.4 of Exhibit 2 to the Capital Maintenance Agreement.

Hazardous Materials Manager has the meaning set forth in Exhibit 1 to the Design-Build Agreement.

Incident means a localized disruption to the free flow of traffic on or safety of users of the Project that is beyond the control of the DB Contractor and does not result from the actions or omissions of the DB Contractor.

Increased Capital Maintenance means Maintenance Services consisting of replacement or reconstruction of an asset that are materially greater than what DB Contractor anticipated carrying out during the Maintenance Period at the Proposal Due Date.

Indemnified Parties means TxDOT, the State, the Texas Transportation Commission, FHWA, and their respective successors, assigns, officeholders, officers, directors, agents, representatives, consultants and employees.

Independent Quality Firm has the meaning set forth in Exhibit 1 to the Design-Build Agreement.

Independent Quality Firm Manager has the meaning set forth in Exhibit 1 to the Design-Build Agreement.

Ineligible Matters shall have the meaning set forth in Section 16.3.1(h) of the Capital Maintenance Agreement.

Informal Resolution Procedures has the meaning set forth in Section 16.3.2 of the Capital Maintenance Agreement.

Initial Maintenance Term has the meaning set forth in Section 4.1 of the Capital Maintenance Agreement.

Initial Maintenance Term Commencement Date means the first anniversary of the date of Final Acceptance of the Project.

Instructions to Proposers (ITP) shall mean the Instructions to Proposers issued by TxDOT on November 10, 2016 as part of the RFP with respect to the Project, including all exhibits, forms and attachments thereto and any subsequent addenda.

Investigative Work Plan (IWP) means a plan prepared by DB Contractor addressing the methods, techniques, and analytical testing requirements to adequately characterize the extent of impacts by Hazardous Materials to an area of concern as described in Section 4.4.1 of Exhibit 2 to the Capital Maintenance Agreement.

Job Training Plan means the document entitled, "Job Training and Small Business Opportunity Plan" attached as part of Exhibit 5 to the Capital Maintenance Agreement.

Key Personnel Change Fees means the fees assessed in accordance with Sections 5.4.7 and 5.4.8 of the Capital Maintenance Agreement.

Key Subcontractor means any of the Subcontractors identified on Exhibit 22 to the Design-Build Agreement.

Lane Closure means full or partial closure of any travel lane or shoulder in any portion of the Project and for any duration, including main lanes, ramps, direct connectors, frontage roads and cross streets.

Lane Rental Charges means those charges assessed by TxDOT against the DB Contractor for certain Lane Closures during the Maintenance Period as set forth in Section 12.5.1 and Exhibit 15 of the Capital Maintenance Agreement.

Law means (a) any statute, law, code, regulation, ordinance, rule or common law, (b) any binding judgment (other than regarding a Claim or Dispute), (c) any binding judicial or administrative order or decree (other than regarding a Claim or Dispute), (d) any written directive, guideline, policy requirement or other

governmental restriction (including those resulting from the initiative or referendum process, but excluding those by TxDOT within the scope of its administration of the CMA Documents) or (e) any similar form of decision of or determination by, or any written interpretation or administration of any of the foregoing by, any Governmental Entity, in each case which is applicable to or has an impact on the Project or the Maintenance Services, whether taking effect before or after the Proposal Due Date, including Environmental Laws. "Law" or "Laws," however, exclude Governmental Approvals.

Lead Maintenance Firm means [_____] *[Insert name]*, a [_____] *[Insert entity type]*.

LE Maintenance Item means each of the LE Scope Items set forth in Appendix 3 to Exhibit 4 to the Capital Maintenance Agreement that are included in the LE Work Package finalized pursuant to Section 4.1.7 of the Design-Build Agreement. For the avoidance of doubt, any LE Scope Item set forth in Appendix 3 to Exhibit 4 that is not included in the LE Work Package shall be disregarded for all purposes of determining the Maintenance Price and for making payments to DB Contractor under the Capital Maintenance Agreement.

LE Maintenance Price means the price for Maintenance Services for the LE Maintenance Items set forth in Appendix 3 to Exhibit 4 to the Capital Maintenance Agreement.

LE Option has the meaning set forth in Section 2.1.3 of the Capital Maintenance Agreement.

LIBOR means the offered rate per annum (rounded up to the next highest one one-thousandth of one percent (0.001%)) for deposits in U.S. dollars for a one-month period which appears on the Telerate Page 3750 at approximately 11:00 A.M., London time, on the date of determination, or if such date is not a date on which dealings in U.S. dollars are transacted in the London interbank market, then on the next succeeding day on which such dealings were transacted in such market. All interest based on LIBOR shall be calculated on the basis of a 360-day year for the actual days elapsed.

Lien means any pledge, lien, security interest, mortgage, deed of trust or other charge or encumbrance of any kind, or any other type of preferential arrangement (including any agreement to give any of the foregoing, any conditional sale or other title retention agreement, any lease in the nature of a security instrument and the filing of or agreement to file any financing statement or similar notification under the Uniform Commercial Code or similar Law of any jurisdiction).

Liquidated Damages shall mean any liquidated damages specified in Section 12.4 of the Capital Maintenance Agreement.

Losses means any loss, damage, injury, liability, obligation, cost, response cost, expense (including attorneys', accountants' and expert witnesses' fees and expenses (including those incurred in connection with the enforcement of any indemnity or other provision of the Capital Maintenance Agreement)), fee, charge, judgment, penalty, fine or Third Party Claims. Losses include injury to or death of persons, damage or loss of property, and harm or damage to natural resources.

Maintained Elements means all elements of the Project within the Maintenance Limits except for Non-Maintained Elements.

Maintained Element Asset Condition Score has the meaning set forth in Section 1.5.2 of Exhibit 2 to the Capital Maintenance Agreement.

Maintained Element Category means any of the categories of Maintained Elements set forth in the "Maintained Element Category" column of the Performance and Measurement Table.

Maintenance Limits means the limits for the Maintenance Services for Section 1 and, during any Maintenance Term for which the Section 2A Option has been exercised, the limits for Maintenance Services for Section 2A, and, during any Maintenance Term for which the LE Option has been exercised, the limits for Maintenance Services for the LE Maintenance Items, each as shown in the document titled "CMA Maintenance Limits" in the RID, as such limits may be modified as described in Section 1.1.3 of Exhibit 2 to the Capital Maintenance Agreement.

Maintenance Management Plan means the plan prepared by DB Contractor and approved by TxDOT as set forth in Section 5.5 of the Capital Maintenance Agreement.

Maintenance Manager means the DB Contractor's manager who is responsible for overseeing and performing the Maintenance Services in accordance with the CMA, as described more fully in Section 1.2.3 of Exhibit 2 to the Capital Maintenance Agreement.

Maintenance NTP means Maintenance NTP1, Maintenance NTP2 and Maintenance NTP3, as applicable.

Maintenance NTP1 means a written notice issued by TxDOT to DB Contractor authorizing DB Contractor to proceed with the Maintenance Services for the Initial Maintenance Term.

Maintenance NTP2 means a written notice issued by TxDOT to DB Contractor authorizing DB Contractor to proceed with the Maintenance Services for the Second Maintenance Term.

Maintenance NTP3 means a written notice issued by TxDOT to DB Contractor authorizing DB Contractor to proceed with the Maintenance Services for the Third Maintenance Term.

Maintenance Payment Bond means the payment bond delivered by DB Contractor in the form attached to the Capital Maintenance Agreement as Exhibit 7 to the Capital Maintenance Agreement.

Maintenance Performance Bond means the performance bond delivered by DB Contractor in the form attached to the Capital Maintenance Agreement as Exhibit 6 to the Capital Maintenance Agreement.

Maintenance Period means the period starting at the commencement of the Initial Maintenance Term and ending at the end of the latest Maintenance Term for which a Maintenance NTP has been issued.

Maintenance Price (MP) has the meaning set forth in Section 8.1.1 of the Capital Maintenance Agreement.

Maintenance Records means all documents, data and records, written or electronic, in all media, in connection with maintenance of the Project including (a) all inspection and inventory records, whether generated by DB Contractor or a third party, (b) any communication to or from TxDOT, DB Contractor or a third party, (c) information contained in any information system (as may be introduced or amended by TxDOT from time to time) in connection with maintenance of the Project that TxDOT requires DB Contractor to use or operate, and (d) all books and records referred to in Section 17.5 of the CMA.

Maintenance Safety Manager means the DB Contractor's manager who is responsible for implementing the Maintenance Safety Plan and all safety-related activities in accordance with the CMA, as described more fully in Section 1.2.5 of Exhibit 2 to the Capital Maintenance Agreement.

Maintenance Safety Plan has the meaning set forth in Section 4.1 of Exhibit 2 to the Capital Maintenance Agreement.

Maintenance Security has the meaning set forth in Section 7.1 of the Capital Maintenance Agreement.

Maintenance Services means all of the services and obligations required to be performed by DB Contractor under the CMA Documents.

Maintenance Services Quality Management Plan has the meaning set forth in Section 1.2.2 of Exhibit 2 to the Capital Maintenance Agreement.

Maintenance Services Quality Manager (MSQM) has the meaning set forth in Section 1.2.4 of Exhibit 2 to the Capital Maintenance Agreement.

Maintenance Services Report has the meaning set forth in Section 6.1 to Exhibit 2 to the Capital Maintenance Agreement.

Maintenance Specification means Exhibit 2 to the Capital Maintenance Agreement.

Maintenance Term means the Initial Maintenance Term, Second Maintenance Term, and Third Maintenance Term, as applicable.

Maintenance Transition means the terms, conditions, requirements and procedures governing the conditions in which DB Contractor is to deliver the Project upon expiration or termination of the Capital Maintenance Agreement, as set forth in Section 4.7 of Exhibit 2 to the Capital Maintenance Agreement.

Maintenance Transition Plan means the plan to deliver the Project to TxDOT at the end of the Maintenance Period as set forth in Section 4.7 of Exhibit 2 to the Capital Maintenance Agreement.

Major Subcontract means a Subcontract in excess of $250,000.

Major Subcontractor means a Subcontractor whose contract with the DB Contractor is a Major Subcontract.

Mean Asset Condition Score has the meaning set forth in Section 1.5.2 of Exhibit 2 to the Capital Maintenance Agreement.

Misconduct means, with respect to any individual who is a Disputes Board Member, any one or more of the following:

(a) Any ex parte communication or discussion between any Disputes Board Member and either Party (or a member of the Conflicts Group on behalf of either Party) or other ex parte communication prohibited under R-10 of the Commercial Rules;

(b) Any offer, solicitation, discussion, agreement or understanding between any Disputes Board Member and any Party or any other

Person regarding (i) remuneration conditioned upon the nature or result of a certain Disputes Board Decision or (ii) employment of the Disputes Board Member by any member of the Conflicts Group following termination of such member's services on the Disputes Board, except for employment as a member of a subsequent Disputes Board or similar disputes board for a project other than the Project;

(c) The rendition of advice or consultative services to either Party or member of the Conflicts Group; or

(d) A material lack of the requisite experience under Section 4.1 of the Disputes Board Agreement that was not and could not reasonably have been discovered by the Nominating Party or the Evaluating Party at the time such individual was proposed and approved for inclusion on the Nominating Party's Disputes Board Member Candidates List, including, by way of example and not limitation, a situation where such individual has materially misrepresented his or her experience to the Parties.

Nominating Party has the meaning set forth in the Disputes Board Agreement.

Nonconforming Work means Maintenance Services that do not conform to the requirements of the CMA Documents, the Governmental Approvals or applicable Law.

Non-Maintained Element means any element not maintained by DB Contractor within or beyond the Maintenance Limits. These include the TxDOT-maintained Elements listed in Attachment 2 to Exhibit 2 to the Capital Maintenance Agreement.

Notice of Partial Termination for Convenience means written notice issued by TxDOT to DB Contractor terminating part of the Maintenance Services of DB Contractor for convenience under Section 14.1 of the Capital Maintenance Agreement.

Notice of Termination for Convenience means written notice issued by TxDOT to DB Contractor terminating the Maintenance Services of DB Contractor for convenience under Section 14.1 of the Capital Maintenance Agreement.

Open Book Basis means providing TxDOT all underlying assumptions and data associated with pricing or compensation (whether of DB Contractor or TxDOT) or adjustments thereto, including assumptions as to costs of the Maintenance Services, schedule, composition of equipment spreads, equipment rates, labor rates,

productivity, estimating factors, design and productivity allowance, contingency and indirect costs, risk pricing, discount rates, interest rates, and other items reasonably required by TxDOT to satisfy itself as to the reasonableness of the amount.

P&P Bonds has the meaning set forth in Section 7.4.4 of the Capital Maintenance Agreement.

P&P LC Obligor has the meaning set forth in Section 7.2.1 of the Capital Maintenance Agreement.

P&P Letter of Credit has the meaning set forth in Section 7.2 of the Capital Maintenance Agreement.

Party means DB Contractor or TxDOT, as the context may require, and "**Parties**" means DB Contractor and TxDOT, collectively.

PCO Notice has the meaning set forth in Section 10.3.2.3 of the Capital Maintenance Agreement.

Performance and Measurement Table means Attachment 1 to Exhibit 2 to the Capital Maintenance Agreement as may be modified in accordance with Section 1.3.5 of Exhibit 2 to the Capital Maintenance Agreement.

Performance Requirement means, for each Maintained Element in connection with the Maintenance Services, requirements set forth in the Performance and Measurement Table. A Performance Requirement is achieved if the Target is met or exceeded.

Performance Section means a defined section of the Project for the purpose of audit, inspection and measurement during performance of the Maintenance Services. A Performance Section includes all travel lanes including mainlanes, ramps and frontage roads of the roadway operating in one direction over a length of 0.1 miles in length, together with all Maintained Elements associated with such 0.1 mile length.

Person means any individual, corporation, joint venture, limited liability company, company, voluntary association, partnership, trust, unincorporated organization or Governmental Entity.

Plans means (only where capitalized) contract drawings, working drawings, supplemental drawings, detail sheets or exact reproductions thereof, which show the location, character, dimensions and details of the Maintenance Services to be done.

Pollution Prevention Plan means the plan DB Contractor must prepare and implement in accordance with Section 4.4.3 of Exhibit 2.

Prime Contractor has the meaning set forth in Section 7.2.3.2 of the Capital Maintenance Agreement.

Project has the meaning set forth in Recital B to the Capital Maintenance Agreement.

Project ROW means the real property (which term is inclusive of all estates and interests in real property) on or in which the Project is constructed under the Design-Build Agreement and other real property that is necessary for ownership and operation of the Project that is acquired for the Project. The term specifically excludes any temporary easements or other real property interests that may be necessary or advisable in connection with construction of the Project or utility adjustments, but are not necessary for ownership or operation of the Project.

Proposal means DB Contractor's response to the RFP.

Proposal Commitments has the meaning set forth in Exhibit 3 to the Capital Maintenance Agreement.

Proposal Due Date means [April 10, 2017], the deadline for submission of the Financial Proposal to TxDOT.

Protection in Place means any action taken to avoid damaging a Utility which does not involve removing or relocating that Utility, including staking the location of a Utility, exposing the Utility, avoidance of a Utility's location by construction equipment, installing steel plating or concrete slabs, encasement in concrete, temporarily de-energizing power lines, and installing physical barriers. The term includes both temporary measures and permanent installations meeting the foregoing definition.

Public Information Act means Texas Government Code Chapter 552, *et seq.*, as amended.

Public Information and Communications Plan means the plan setting forth procedures by which DB Contractor works with TxDOT to inform, coordinate with, educate and engage Customer Groups in accordance with the CMA Documents.

Recognized Environmental Condition has the meaning set forth in ASTM E-1527-13.

Record Documents means construction drawings and related documentation revised to show significant changes made during DB Contractor's construction processes; usually based on marked-up final design documents furnished by DB Contractor; also known as as-built plans.

Reference Information Documents means those documents listed in Exhibit 14 to the Capital Maintenance Agreement. Except as expressly provided in the CMA Documents, the Reference Information Documents are not considered CMA Documents and were provided to DB Contractor for informational purposes only and without representation or warranty by TxDOT.

Reimbursable Hazardous Materials Costs means DB Contractor's actual costs of performance of Hazardous Materials Management, determined in accordance with Section 10.8.2 of the Capital Maintenance Agreement, provided that the 25% and 145% mark-ups allowed under Section 10.7.1 of the Capital Maintenance Agreement shall be reduced to 12.5% and 130%, and the 15% mark-up allowed under Section 10.7.2 of the Capital Maintenance Agreement shall be reduced to 7.5%.

Release of Hazardous Materials means any spill, leak, emission, release, discharge, injection, escape, leaching, dumping or disposal of Hazardous Materials into the soil, air, water, groundwater or environment, including any exacerbation of an existing release or condition of Hazardous Materials contamination.

Replacement Utility Property Interest means any permanent right, title or interest in real property outside of the Project ROW (e.g., a fee or an easement) which is acquired for a Utility being reinstalled in a new location as a part of the Utility Adjustment. The term specifically excludes any statutory right of occupancy or permit granted by a Governmental Entity for occupancy of its real property by a Utility.

Request for Change Order means a written notice issued by DB Contractor to TxDOT under Section 10.3.2.5 of the Capital Maintenance Agreement, advising TxDOT that DB Contractor seeks a Change Order.

Request for Change Proposal means a written notice issued by TxDOT to DB Contractor under Section 10.2.1 of the Capital Maintenance Agreement, advising DB Contractor that TxDOT may issue a TxDOT-Directed Change or wishes to evaluate whether to initiate such a change pursuant to Section 10.2.1 of the Capital Maintenance Agreement.

Request for Partnering has the meaning set forth in Section 10.3.2.2 of the Capital Maintenance Agreement.

Request for Proposals (RFP) has the meaning set forth in Recital E of the Capital Maintenance Agreement.

Request for Qualification (RFQ) has the meaning set forth in Recital C of the Capital Maintenance Agreement.

Retainage means the amount withheld from DB Contractor in accordance with Section 8.4 of the CMA.

Rules means Chapter 9 of Title 43, Texas Administrative Code.

Safety Standards means those provisions of the Maintenance Specification that TxDOT indicates that it considers to be important measures to protect public safety, worker safety or the safety of property. As a matter of clarification, Performance Requirements specifying the Defect Remedy Period for a Category 1 Defect are Safety Standards; whereas, provisions of the Maintenance Specification primarily directed at durability of materials or equipment, where the durability is primarily a matter of life cycle cost rather than protecting public or worker safety, are not Safety Standards.

Second Maintenance Term means the second five-year term of Maintenance Services provided by DB Contractor that commences immediately upon the termination of the First Maintenance Term if TxDOT has issued Maintenance NTP2 in accordance with the Capital Maintenance Agreement.

Section 1 means the portion of the Project described as Section 1 in Section 1.2.1 of the Technical Provisions.

Section 1 Maintenance Price means the price for Maintenance Services related to Section 1 set forth in Appendix 1 to Exhibit 4 to the Capital Maintenance Agreement.

Section 2A means the portion of the Project described as Section 2A in Section 1.2.1 of the Technical Provisions.

Section 2A Maintenance Price means the price for Maintenance Services related to Section 2A set forth in Appendix 2 to Exhibit 4 to the Capital Maintenance Agreement.

Section 2A Option has the meaning set forth in Section 2.1.2 of the Capital Maintenance Agreement

Service Line means a utility line, up to and including the meter that connects to a main line and services individuals, businesses and other entities.

Site means Schematic ROW, Additional Properties, Replacement Utility Property Interests, and any temporary rights or interests that DB Contractor may acquire at its own cost and expense in connection with the Project.

Site Investigation Report means the report summarizing the DB Contractor's Hazardous Materials investigative work as required by Section 4.4.1 of Exhibit 2 to the Capital Maintenance Agreement.

Small Business Opportunity Plan means the document entitled, "Small Business Opportunity Plan" attached as part of Exhibit 5 to the Capital Maintenance Agreement.

Specialist Inspection means an inspection requiring specialist qualifications or equipment as specified in Section 1.4.4 of Exhibit 2.

State means the State of Texas.

Storm Water Pollution Prevention Plan (SW3P) means a plan that includes site maps, identifies site personnel and describes activities that could cause pollutants in the storm water as well as the measures or practices necessary for DB Contractor to control such pollutants.

Subcontract means any agreement by DB Contractor with any other Person, Subcontractor or Supplier to perform any part of the Maintenance Services or provide any materials, equipment or supplies for any part of the Maintenance Services, or any such agreement at a lower tier, between a Subcontractor and its lower tier Subcontractor or a Supplier and its lower tier Supplier, at all tiers.

Subcontractor means any Person with whom DB Contractor has entered into any Subcontract to perform any part of the Maintenance Services or provide any materials, equipment or supplies for the Project on behalf of DB Contractor (and any other Person with whom any Subcontractor has further subcontracted any part of the Maintenance Services), at all tiers.

Subcontractor Dispute shall have the meaning set forth in Section 16.4 of the Capital Maintenance Agreement.

Submittal means any document, work product or other written or electronic end product or item required under the CMA Documents to be delivered or submitted to TxDOT.

Supplier means any Person not performing work at or on the Project ROW which supplies machinery, equipment, materials, hardware, software, systems or any other appurtenance to the Project to DB Contractor or to any Subcontractor in

connection with the performance of the Maintenance Services. Persons who merely transport, pick up, deliver or carry materials, personnel, parts or equipment or any other items or persons to or from the Project ROW shall not be deemed to be performing Maintenance Services at the Project ROW.

Surety means each properly licensed surety company, insurance company or other Person approved by TxDOT, which has issued any Maintenance Payment Bond or Maintenance Performance Bond.

Tangible Net Worth means the difference between (the sum of paid-in capital stock plus preferred stock plus retained earnings) less (the sum of treasury stock plus minority interest plus intangible assets e.g., goodwill, patents, licenses), all determined in accordance with Generally Accepted Accounting Principles and as interpreted by the Securities and Exchange Commission in connection with financial statements filed pursuant to the Securities Exchange Act of 1934.

Target means the target value for the measurement record set forth in the column entitled "Target" of the Performance and Measurement Table.

Technical Provisions means the project-specific technical provisions entitled "Technical Provisions for the Southern Gateway Project" included in the Contract Documents, and all exhibits and attachments thereto, as such document may be supplemented, amended and restated or otherwise modified from time to time in accordance with the terms of the Design-Build Agreement.

Termination for Convenience means a termination pursuant to Section 14.1 of the Capital Maintenance Agreement.

Third Maintenance Term means the third five-year term of Maintenance Services provided by DB Contractor that commences immediately upon the termination of the Second Maintenance Term if TxDOT has issued Maintenance NTP3 in accordance with the Capital Maintenance Agreement.

Third Party Claims means any and all claims, disputes, disagreements, causes of action, demands, suits, actions, judgments, investigations or proceedings brought by a Person that is not a Party with respect to damages, injuries, liabilities, obligations, losses, costs, penalties, fines or expenses (including attorneys' fees and expenses) sustained or incurred by such Person.

Threatened or Endangered Species means any species listed by the USFWS as threatened or endangered pursuant to the Endangered Species Act, as amended, 16 U.S.C. §§ 1531, *et seq*. or any species listed as threatened or endangered pursuant to the State endangered species act.

Time and Materials Change Order means a Change Order issued in accordance with Section 10.7 of the Capital Maintenance Agreement.

Traffic Management Plan means the plan prepared by DB Contractor for the management of traffic as described in Section 5 of Exhibit 2 to the Capital Maintenance Agreement.

TxDOT means the Texas Department of Transportation, and any entity succeeding to the powers, authorities, and responsibilities of TxDOT invoked by or under the CMA Documents.

TxDOT-Directed Change means any change in the scope of the Maintenance Services or terms and conditions of the CMA Documents (including changes in the standards applicable to the Maintenance Services) that increase DB Contractor's costs by more than $10,000, and that TxDOT has directed DB Contractor to perform as described in Section 10.2 of the Capital Maintenance Agreement.

TxDOT's Recoverable Costs means:

(a) The costs of any assistance, action, activity or Maintenance Services undertaken by TxDOT which DB Contractor is liable for or is to reimburse under the terms of the CMA Documents, including the charges of third-party contractors and reasonably allocated wages, salaries, compensation and overhead of TXDOT staff and employees performing such action, activity or Maintenance Services; plus

(b) Third-party costs TxDOT incurs to publicly procure any such third-party contractors; plus

(c) Reasonable fees and costs of attorneys (including the reasonably allocable fees and costs of TxDOT's Office of General Counsel or the Texas Attorney General's Office), financial advisors, engineers, architects, insurance brokers and advisors, investigators, traffic and revenue consultants, risk management consultants, other consultants, and expert witnesses, as well as court costs and other litigation costs, in connection with any such assistance, action, activity or Maintenance Services, including in connection with defending claims by and resolving disputes with third-party contractors; plus

(d) Interest on all the foregoing sums at a floating rate equal to the LIBOR in effect from time to time plus 200 basis points, commencing on the date due under the applicable terms of the CMA Documents and continuing until paid.

TxDOT Schematic Design has the meaning set forth in Exhibit 1 to the Design-Build Agreement.

Useful Life means, for a Maintained Element, the period following its first installation, or following its last reconstruction, rehabilitation, restoration, renewal or replacement, until the Maintained Element will next require reconstruction, rehabilitation, restoration, renewal or replacement.

User means a member of the traveling public and any Person using the Project, whether by motorized or non-motorized vehicle or on foot.

Utility or **utility** means a public, private, cooperative, municipal or government line, facility or system used for the carriage, transmission or distribution of cable television, electric power, telephone, telegraph, water, salt water, gas, oil, petroleum products, steam, chemicals, hydrocarbons, telecommunications, sewage, storm water not connected with the drainage of the Project, and similar substances that directly or indirectly serve the public. The terms "Utility" and "utility" also include radio towers and transmission towers (including cellular). Oil and gas gathering lines and production supply lines are included in this definition and are classified as a Utility.

When used in the context of Utility Adjustments, the term specifically excludes:

(a) Storm water facilities providing drainage for the Project ROW, and

(b) TxDOT's or a Governmental Entity's lighting and electrical systems, traffic control systems, communications systems and irrigation systems serving street or highway purposes (including ITS and Intelligent Vehicle Highway System facilities).

The necessary appurtenances to each Utility facility shall be considered part of such Utility. Without limitation, any Service Line up to and including the meter, connecting directly to a Utility shall be considered an appurtenance to that Utility, regardless of the ownership of such Service Line.

Utility Accommodation Rules means the Utility Accommodation Rules issued by TxDOT, at 43 Tex. Admin. Code, Part 1, Chapter 21, Subchapter C, as the same may be amended, supplemented or replaced by TxDOT from time to time.

Utility Adjustment means each relocation (temporary or permanent), abandonment, Protection in Place, removal (of previously abandoned Utilities as well as of newly abandoned Utilities), replacement, reinstallation, or modification of existing Utilities necessary to accommodate construction, operation, maintenance or

use of the Project; provided, however, that the term "**Utility Adjustment**" shall not refer to any of the work associated with facilities owned by any railroad. For any Utility crossing the Project ROW, the foregoing disposition for each crossing of the Project ROW by that Utility shall be considered a separate Utility Adjustment. For any Utility installed longitudinally within the Project ROW, the foregoing disposition for each continuous segment of that Utility located within the Project ROW shall be considered a separate Utility Adjustment.

Utility Joint Use Agreement or **Utility Joint Use Acknowledgment** means an agreement between TxDOT and a Utility Owner that establishes the rights and obligations of TxDOT and the Utility Owner with respect to occupancy of the Project ROW by a Utility owned by such Utility Owner.

Utility Owner means the owner or operator of any Utility (including both privately held and publicly held entities, cooperative utilities, and municipalities and other governmental agencies).

Warranty has the meaning set forth in Section 9.1 of the Capital Maintenance Agreement.

Warranty Period has the meaning set forth in Section 9.2 of the Capital Maintenance Agreement.

EXHIBIT 2

MAINTENANCE SPECIFICATION

(Attached)

EXHIBIT 2

MAINTENANCE SPECIFICATION

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- Attachment 1 Performance and Measurement Table
- Attachment 2 Maintained Elements and Scope of Maintenance Services

1 GENERAL

1.1 Maintenance Obligations

1.1.1 General Requirements

Throughout the Maintenance Period, DB Contractor shall be responsible for and shall carry out Maintenance Services for the Maintained Elements within the Maintenance Limits. DB Contractor shall establish and maintain an organization that effectively manages all Maintenance Services in a manner set forth in the approved Maintenance Management Plan (MMP) and the requirements of the CMA Documents. DB Contractor shall:

(a) conduct inspections at the specified frequency within the Maintenance Limits, providing TxDOT the opportunity to attend;

(b) identify and record from inspections and all other available sources, conditions that are unsafe or have the potential to become unsafe or conditions that could adversely affect the Maintained Elements;

(c) develop, maintain and implement a maintenance management system to record the category, status, intended action and remedy for all Defects in Maintained Elements;

(d) facilitate access to such system by TxDOT to allow the notification and categorization by TxDOT of Defects that TxDOT identifies in the course of its maintenance inspections;

(e) mitigate hazards and permanently remedy or permanently repair all Defects, including those identified by TxDOT, DB Contractor and third parties within the specified remedy periods;

(f) minimize delay and inconvenience to Users when performing the Maintenance Services; and

(g) minimize the risk of damage, disturbance, or destruction of third-party property during the performance of Maintenance Services.

1.1.2 Scope of Maintenance Services and Interfaces with TxDOT and Third Parties

The Maintenance Services shall apply to the Maintained Elements as identified in Attachment 2 (Maintained Elements and Scope of Maintenance Services). TxDOT or applicable Governmental Entity retains maintenance responsibilities for Non-Maintained Elements.

Where TxDOT, other Governmental Entities or Utilities have maintenance jurisdiction within the Maintenance Limits or on adjacent facilities, DB Contractor shall coordinate its Traffic Management Plan with the traffic management to be performed by all such entities to minimize disruption to Users.

DB Contractor shall perform all necessary Maintenance Services to keep the Maintained Elements in compliance with the Performance Requirements.

Whenever an activity by DB Contractor disturbs, alters, removes or changes any Non-Maintained Element, DB Contractor shall restore the affected Non-Maintained Element to a condition no less favorable than its original condition before it was disturbed, altered, removed or changed. If the Maintenance Services associated with pavement repair requires removal of or causes damage to adjacent Non-Maintained Elements such as pavement markings, guardrail or signs, DB Contractor shall reinstate such Non-Maintained Elements to as-new condition.

No later than 24 hours after DB Contractor becomes aware of any of the following circumstances, DB Contractor shall notify TxDOT and provide information that will facilitate repair or other action by TxDOT:

(a) a Defect in a Maintained Element that DB Contractor considers it is not required to repair, with an explanation why DB Contractor considers such repair to be the responsibility of another party;

(b) any activity by TxDOT or a third party that DB Contractor considers may have adversely affected or has the potential to adversely affect a Maintained Element;

(c) any activity that DB Contractor considers should be performed by TxDOT, with an explanation of any adverse effect on a Maintained Element that may be avoided or mitigated by the maintenance activity; or

(d) any defect in a Non-Maintained Element that, in the opinion of DB Contractor, represents an immediate or imminent health or safety hazard to Users or road workers.

1.1.3 Maintenance Limits

The initial Maintenance Limits are provided in the document titled "CMA Maintenance Limits" included in the Reference Information Documents. DB Contractor shall prepare and submit updated Maintenance Limits drawings consistent with DB Contractor's Final Design Submittal as part of the MMP. The Maintenance Limits drawings shall be consistent with the principles and extents shown in the document titled "CMA Maintenance Limits" included in the Reference Information Documents. DB Contractor shall periodically validate that the Maintenance Limits are correctly and clearly identified by physical delineation and shall liaise with TxDOT and Governmental Entities at least annually to review the Maintenance Limits, identify any jurisdictional gaps or inefficiencies and recommend solutions.

1.2 Maintenance Management

1.2.1 Maintenance Management Plan

The MMP is an umbrella document that describes DB Contractor's managerial approach, strategy, and quality procedures for the Maintenance Services to achieve all requirements of the CMA Documents. The MMP shall be consistent with the general maintenance obligations described in Section 1.1 of this Exhibit 2.

In accordance with Section 5.5 of the CMA (Maintenance Management Plan), no later than 60 days after issuance of Maintenance NTP1, DB Contractor shall submit the MMP for TxDOT's approval in its discretion. DB Contractor shall update the MMP as required, or at least annually and shall submit for TxDOT's approval in its discretion no later than 60 days prior to each anniversary of the Initial Maintenance Term Commencement Date.

1.2.2 Maintenance Services Quality Management Plan

As part of the MMP, DB Contractor shall develop, implement and maintain a Maintenance Services Quality Management Plan (MSQMP) describing the system, policies, and procedures for the Maintenance Services, which shall be in effect until conclusion of the Warranty Period.

The MSQMP shall comply with the requirements for the QMP set forth in Section 2.2 of the Technical Provisions (Quality Management).

1.2.3 Maintenance Manager

DB Contractor shall assign a Maintenance Manager as the sole point of contact with TxDOT throughout the Maintenance Period who shall be responsible for:

(a) implementing the maintenance obligations in this Exhibit 2 and the MMP;

(b) causing the Maintenance Services to be performed in accordance with the CMA Documents;

(c) causing all maintenance personnel and resources performing Maintenance Services to be available and properly trained; and

(d) the health and safety of personnel delivering the Maintenance Services and the general public affected by the Project.

(i) The Maintenance Manager shall meet or exceed the qualifications and experience established in the Proposal Commitments (Exhibit 3 to the CMA).

The Maintenance Manager shall attend all General Inspections, monthly meetings and Audit Inspections and shall be available whenever any Capital Asset Replacement Work is undertaken.

1.2.4 Maintenance Services Quality Manager

DB Contractor shall employ a Maintenance Services Quality Manager (MSQM) throughout the Maintenance Period who shall be responsible for:

(a) independently overseeing and performing all quality responsibilities for the Maintenance Services in accordance with the MSQMP;

(b) ensuring that the methods and procedures contained in approved MSQMP are implemented and followed by DB Contractor and Subcontractors in the performance of the Maintenance Services; and

(c) the quality and accuracy of all Maintenance Records and Submittals.

The MSQM shall be functionally independent from DB Contractor's staff responsible for implementation of the work, and shall report directly to DB Contractor's principals, rather than to the Maintenance Manager.

(i) The MSQM shall meet or exceed the qualifications and experience established in the Proposal Commitments (Exhibit 3 to the CMA).

In addition to the MSQM, TxDOT may require the employment by DB Contractor of quality management personnel in connection with Capital Asset Replacement Work in accordance with Section 2.3 of the Technical Provisions to be responsible for design, construction and materials quality.

1.2.5 Maintenance Safety Manager

DB Contractor shall employ a Maintenance Safety Manager who shall be responsible for carrying out the Maintenance Safety Plan and all safety-related activities, including training and enforcement of safety operations.

The Maintenance Safety Manager shall be in attendance at the work site or located within the Maintenance Limits whenever required by the Maintenance Safety Plan and as needed to ensure the safety of the public and personnel employed by DB Contractor or TxDOT. The position may be fulfilled by another employee of DB Contractor upon TxDOT's approval, provided the employee meets all qualification requirements. The Maintenance Safety Manager

shall have the authority to stop the Maintenance Services. The minimum required qualifications and experience for the Maintenance Safety Manager are:

(a) roadway construction and safety enforcement experience;

(b) ten (10) years of progressive construction or operations and maintenance safety management experience;

(c) designation, at or before the Effective Date, as a Construction Health and Safety Technician® (CHST) by the Board of Certified Safety Professionals (BCSP), or designation as a Certified Safety & Health Official (CSHO), either of which may be substituted for two years of safety management experience;

(d) completion of the OSHA #500 course – Trainer Course in OSHA Standards for Construction;

(e) completion of training and current certification for CPR and first aid; and

(f) completion of the following training sponsored by an accredited agency:

- work zone traffic control; and
- flaggers in work zones.

1.3 Performance Requirements

1.3.1 Performance and Measurement Table

DB Contractor's performance of the Maintenance Services shall be governed by the Performance and Measurement Table as may be updated in accordance with Section 1.3.4. The Performance and Measurement Table shows for each Maintained Element:

(a) a performance objective;

(b) the Defect Remedy Periods for each category of Defect;

(c) inspection and measurement methods;

(d) measurement records; and

(e) targets.

For each measurement record DB Contractor is required to achieve the stated Target, otherwise a Defect exists that shall be remedied or repaired as further described in this Exhibit 2.

The Defect Remedy Period set forth in the Performance and Measurement Table shall commence upon the earlier of: (i) the date and time DB Contractor became aware of the Defect; or (ii) the date and time DB Contractor should have known of the Defect.

1.3.2 Defect Identification, Recording and Categorization

1.3.2.1 Definitions

In this Exhibit 2 and as shown on the Performance and Measurement Table:

(a) hazard mitigation is an action taken by DB Contractor to mitigate a hazard to Users or imminent risk of damage or deterioration to property or the environment such that the Category 1 Defect no longer exists;

(b) permanent remedy is an action taken by DB Contractor to restore the condition of a Maintained Element following hazard mitigation of a Category 1 Defect;

(c) permanent repair is an action taken by DB Contractor to restore the condition of a Maintained Element for which a Category 2 Defect has been recorded.

1.3.2.2 Sources of Defects and Status

DB Contractor shall identify and record Defects through inspections described in Section 1.4, notifications by TxDOT and reports or complaints by third parties. DB Contractor shall accurately record the status and categorization of Defects from all sources. Where multiple instances of Defects arise from the failure to achieve a given Target (for example simultaneous failure to achieve a ride quality Target in multiple locations), a separate Defect shall be recorded for each Performance Section within which the Target is not achieved.

1.3.2.3 Defects Identified by DB Contractor, TxDOT or Third Party

Whenever DB Contractor identifies, becomes aware of or is notified by TxDOT or a third party of a Defect, DB Contractor shall create a Maintenance Record containing details of the associated Maintained Element, the nature and categorization of the Defect and the proposed timing and details of hazard mitigation, permanent remedy and permanent repair of the Defect. TxDOT may provide notification of a Defect verbally, in writing, or during the course of a joint inspection.

DB Contractor shall categorize each Defect, based upon its determination as to whether:

(a) it represents an immediate or imminent health or safety hazard to Users or road workers;

(b) there is a risk of immediate or imminent structural failure or deterioration;

(c) there is an immediate or imminent risk of damage to a third party's property; or

(d) there is an immediate or imminent risk of damage to the environment.

Should a Defect meet any of the above criteria, DB Contractor shall record it as a Category 1 Defect. Any other Defect not meeting the foregoing criteria shall be assigned as a Category 2 Defect. DB Contractor shall provide training to all relevant personnel on the categorization of Defects. DB Contractor shall maintain a record of the circumstances of the Defect and how it was categorized. DB Contractor shall facilitate the review by TxDOT of Maintenance Records associated with DB Contractor-categorized Defects and shall enable TxDOT to flag any Defect where TxDOT disagrees with any attribute or categorization assigned by DB Contractor.

1.3.3 Permanent Remedy and Permanent Repair of Defects

Permanent remedy and permanent repair of Defects shall comply with the applicable requirements for Capital Asset Replacement Work as set forth in Section 2 (Capital Asset Replacement Work Requirements).

Where action is proposed to remedy or repair any Defect, DB Contractor shall promptly create a Maintenance Record that identifies the nature of the proposed remedy or repair and shall update the Maintenance Record with as-built details of the actual remedy or repair no later than 7 days after completion. DB Contractor shall include with the updated Maintenance Record verification that the remedy or repair meets the Performance Requirements. DB Contractor shall take necessary action to avoid any Category 2 Defect from becoming a Category 1 Defect. DB Contractor shall monitor Category 2 Defects to verify the condition of the affected Maintained Element prior to permanent repair and shall inform TxDOT immediately should any such Defect deteriorate to a Category 1 Defect.

For Category 2 Defects, DB Contractor shall undertake the permanent repair within the period specified in the column with the heading “Category 2 Permanent Repair” in the Performance and Measurement Table unless an earlier permanent repair is required to prevent deterioration to a Category 1 Defect.

The existence of a Defect Remedy Period for Category 2 Defects is the maximum period permitted for repair and shall not excuse DB Contractor from completing the repair of all Defects within the Maintenance Period. DB Contractor shall perform the Maintenance Services so that every Defect, including any Defect first identified within the final 6 months of the Maintenance Period, has been permanently repaired before the end of the Maintenance Period.

1.3.4 Hazard Mitigation of Category 1 Defects

DB Contractor shall immediately implement hazard mitigation of any Category 1 Defect in a Maintained Element of which it is aware through its own inspections, from a third party or through notification by TxDOT to DB Contractor that TxDOT requires DB Contractor to perform hazard mitigation for a Category 1 Defect.

For Category 1 Defects, DB Contractor shall take necessary action such that any hazard to Users is mitigated within the Defect Remedy Period specified in the column with the heading “Category 1 Hazard Mitigation” in the Performance and Measurement Table and shall permanently remedy the Defect within the period identified in the column with the heading “Category 1 Permanent Remedy” in the Performance and Measurement Table. DB Contractor shall continue hazard mitigation until a permanent remedy has been completed.

1.3.5 Performance and Measurement Table Update

DB Contractor shall propose changes to the Performance and Measurement Table for TxDOT approval. In its annual update of the MMP, DB Contractor shall propose for TxDOT’s approval such amendments to the “Inspection and Measurement Method” and “Measurement Record” as are necessary to cause these to comply with Good Industry Practice and this Exhibit 2. TxDOT may, at any time, require DB Contractor to adopt amendments to the columns with the headings “Measurement Record” and “Inspection and Measurement Method” in the Performance and Measurement Table where such updates are required to comply with then current Good Industry Practice.

TxDOT shall require the adoption of a new Inspection and Measurement Method or Measurement Record only when required because the current Inspection and Measurement Method or Measurement Record no longer complies with Good Industry Practice. In this case, the new Inspection and Measurement Method or Measurement Record shall be determined using the principle that it shall achieve no less than the standard of Maintenance Services that would have been achieved through DB Contractor’s compliance with the original “Inspection and Measurement Method”, “Measurement Record”, and Target.

DB Contractor shall provide updates to the Performance and Measurement Table to take into consideration specific attributes of the Final Design Submittal (for example, where the Final Design Submittal incorporates a feature that is not included as a Maintained Element in the Performance and Measurement Table). Within this Exhibit 2, reference to the Performance and Measurement Table means the latest approved version of the Performance and Measurement Table as included within DB Contractor’s MMP.

1.4 Inspections

1.4.1 General Inspections by DB Contractor

DB Contractor shall cause General Inspections of the Maintained Elements to be conducted by trained staff. The results of these inspections shall be used to:

(a) identify and categorize newly identified Defects;

(b) plan permanent remedy and permanent repair of Defects;

(c) develop programs of Capital Asset Replacement Work;

(d) update Maintenance Records to show condition and status of Maintained Elements; and

(e) confirm the adequacy of permanent remedy and permanent repair of previously identified Defects.

DB Contractor shall invite TxDOT to participate in all such inspections with a minimum of 7 days' notice and shall provide transportation and safety equipment for up to two TxDOT personnel.

DB Contractor shall cause personnel performing or attending inspections of road pavements and structures to be certified as inspectors and/or raters in accordance with TxDOT's PMIS program or applicable certifying agency for the type of inspection being performed, capable of accurately identifying, categorizing and recording Defects in accordance with the requirements of Section 1.3.

DB Contractor shall conduct General Inspections at least monthly. The type, frequency and level of detail of General Inspections shall be contained in an inspection plan which shall be submitted to TxDOT no later than 7 days before the inspection date. The inspection plan may be submitted as part of the monthly report if it meets this deadline. At a minimum, DB Contractor shall conduct road speed inspection of all Maintained Elements. DB Contractor shall include more detailed visual or hands-on inspection of selected Maintained Elements when any of the following occur:

(ii) deterioration trends such as an increase in pattern and frequency of previously identified Defects has been identified by either party;

(iii) Defects had been identified in a previous General Inspection or Audit Inspection that need to be monitored because there is a risk of their deterioration;

(iv) extreme weather events or Incidents have occurred and TxDOT has notified DB Contractor that these may have affected Maintained Elements; or

(v) reports or complaints have been received from a third party.

The type, frequency and level of detail of General Inspections shall be adjusted as necessary to take into consideration asset condition information from all sources. DB Contractor shall record details of the manner of inspection (e.g., center Lane Closure or shoulder), the weather conditions and any other unusual features of the inspection in Maintenance Records.

1.4.2 Audit Inspections

DB Contractor shall undertake Audit Inspections every 6 months on Performance Sections randomly selected by TxDOT. DB Contractor shall invite TxDOT to participate in all such inspections with a minimum of 7 days' notice and shall provide transportation and safety equipment for up to two TxDOT personnel.

Audit Inspections shall be conducted on a minimum of 10% of the available Performance Sections such that over a period of no more than 60 months the Audit Inspections provide coverage of 100% of the Project. DB Contractor shall assess the condition of each Maintained Element using the inspection and measurement methods set forth in the column entitled "Inspection and Measurement Method" in the Performance and Measurement Table.

DB Contractor shall conform at a minimum to the inspection standards set forth for the Maintained Element in the column entitled "Inspection and Measurement Method" in the Performance and Measurement Table.

DB Contractor shall cause personnel performing Audit Inspections of road pavements and structures to be certified as inspectors and/or raters in accordance with TxDOT's PMIS program or applicable certifying agency for the type of inspection being performed. Inspections, reviews, and testing conducted as part of Maintenance Services shall be performed only by personnel with appropriate training and qualifications, using appropriate equipment that is accurately calibrated and maintained in good operating condition at an AMRL (AASHTO R18, "Establishing and Implementing a Quality System for Construction Materials Testing Laboratories") accredited facility, or at a facility with comparable certification (e.g., ISO 17025, "General requirements for the competence of testing and Calibration laboratories").

DB Contractor shall record in the Audit Inspection all Defects identified during General Inspections undertaken over the 6 month period prior to the Audit Inspection, unless such Defects have been repaired. DB Contractor shall create a new Maintenance Record for each Maintained Element physically inspected during each Audit Inspection in accordance with the column entitled "Measurement Record" on the Performance and Measurement Table.

1.4.3 Construction Inspections by DB Contractor

DB Contractor shall cause all construction work and materials in connection with Capital Asset Replacement Work to be inspected at the frequencies required in compliance with Section 2 of the Technical Provisions.

1.4.4 Specialist Inspections

1.4.4.1 Types and Responsibility for Specialist Inspections

Specialist Inspections Maintained Element and the responsibility for performing them are shown in Table 1.

Table 1 – Specialist Inspections

Maintained Element	Specialist Inspection	Responsibility
Maintained Elements Ref. 1.1, 1.2 and 1.5 in the Maintained Element Category 'Pavement' in the Performance and Measurement Table	Annual survey of pavement condition for the entire Project, including main lanes, ramps, cross streets and frontage roads, undertaken using automated condition survey equipment to measure all necessary criteria including: ruts, skid resistance and ride quality according to the "Inspection and Measurement Method" set forth in the Performance and Measurement Table.	DB Contractor
Maintained Elements Ref. 2.1, 2.2, 2.4 in the Element Category	Biennial inspections of drainage Maintained Elements, including headwalls, wingwalls, junctions, manholes, energy dissipaters	DB Contractor

'Drainage' and Maintained Element Ref. 3.2 in the Maintained Element Category 'Structures' in the Performance and Measurement Table.	pipes and non-bridge class culverts in accordance with Good Industry Practice and FHWA's Culvert Inspection Manual.	
All Maintained Elements Ref. 3.1 and 3.3 in the Maintained Element Category 'Structures' in the Performance and Measurement Table	Routine biennial inspections, to the extent required, for all structures within the Maintenance Limits in compliance with the latest FHWA / NBIS and TxDOT requirements.	TxDOT

1.4.4.2 Requirements for DB Contractor-Performed Specialist Inspections

DB Contractor shall ensure that personnel performing inspections of road pavements and structures are certified as inspectors and/or raters in accordance with TxDOT's PMIS program or applicable certifying agency for the type of inspection being performed. Inspections, reviews, and testing shall only be performed by personnel with appropriate training and qualifications, using appropriate equipment that is accurately calibrated and maintained in good operating condition at an AMRL (AASHTO R18, "Establishing and Implementing a Quality System for Construction Materials Testing Laboratories") accredited facility, or at a facility with comparable certification (e.g., ISO 17025, "General requirements for the competence of testing and Calibration laboratories".)

Pavement automated condition surveys shall be subject to quality assurance by DB Contractor to verify the validity of all test data, either by causing the performance of independent testing on no less than 10% of the Performance Sections inspected or by validation against the results of the most recent annual automated condition inspections of the same type undertaken by TxDOT. TxDOT's annual automated condition survey results will be made available upon request by DB Contractor. DB Contractor shall submit all automated condition survey measurements and quality assurance results to TxDOT in electronic data files. Ride quality data shall use the format specified in TxDOT's Test Procedure for Operating Inertial Profilers and Evaluation Pavement Profiles (Tex-1001-S). DB Contractor's ride quality results will be acceptable provided that the International Roughness Index (IRI) difference between DB Contractor's inertial profiler measurements (average IRI measured within each Performance Section) as compared to the quality assurance measurements or TxDOT-provided measurements is 6.0 in/mile or less.

1.4.4.3 Use of Specialist Inspection Results

Upon receipt of Specialist Inspection results, DB Contractor shall:

(a) immediately identify all Defects within each Performance Section established by the inspections and record these Defects with the appropriate Defect Remedy Period;

(b) use the results of Specialist Inspections to prioritize Maintenance Services;

(c) identify any results of the Specialist Inspections that require further investigation and flag these for review within the next inspection plan;

(d) As part of the General Inspections, conduct a detailed visual or hands on inspection with TxDOT at the earliest opportunity to resolve any differences in interpretation of the Specialist Inspection results;

(e) use the routine biennial inspections and other available sources to determine the condition of all Maintained Elements of the structures within the Maintenance Limits and identify structural and non-structural deficiencies that require repair; and

(f) Use the most recent Audit Inspections, supplemented by the Specialist Inspections as a basis for the calculation of the Maintained Element Asset Condition Score.

1.5 Asset Condition Score

1.5.1 Performance Sections

As part of the MMP, DB Contractor shall prepare drawings identifying the Performance Sections and shall submit and update these plans with the applicable part of the MMP. The drawings shall identify the boundaries of each Performance Section and shall cross reference to an inventory describing each Maintained Element of the Project contained within each Performance Section.

DB Contractor shall implement the Texas Reference Marker (TRM) System used by TxDOT to establish Performance Sections. DB Contractor shall use the existing TRM System established on existing sections of the Project. DB Contractor shall coordinate with TxDOT prior to submittal of the MMP to establish the TRM System on newly constructed sections of roadway.

1.5.2 Asset Condition Score

Within ten days following each Audit Inspection, DB Contractor shall assess its achievement of the Performance Requirements by self-scoring against the Targets set forth in the Performance and Measurement Table.

DB Contractor shall report to TxDOT in the Maintenance Services Report a Maintained Element Asset Condition Score for each Maintained Element and a Mean Asset Condition Score for each Maintained Element Category, to include all of the Performance Sections inspected in the most recent Audit Inspection. DB Contractor shall calculate the Maintained Element Asset Condition Scores according to the measurement criteria set forth in Table 2.

Table 2 – Maintained Element Asset Condition Score Criteria

Score	Criteria
5	• Targets for individual Maintained Elements are almost entirely met (90% to 100% compliance with the relevant Targets for each Maintained Element within each Performance Section), and • Is fully functional and in nearly new condition, meeting or exceeding Performance Requirement.
4	• Targets for individual Maintained Elements are substantially met (less than 90% compliance and 80% or greater compliance with the relevant Targets for each Maintained Element within each Performance Section), and • Is functional and in good condition, meeting Performance Requirement.
3	• Targets for individual Maintained Elements are mostly met (less than 80% compliance and 70% or greater compliance with the relevant Targets for each Maintained Element within each Performance Section), and • Is in fair condition, but suggesting need for early replacement, renewal or

	repair of individual Maintained Element and/or maintenance or operation improvement action to meet Performance Requirement.
2	• Targets for individual Maintained Elements are barely met (less than 70% compliance and 60% or greater compliance with the relevant Targets for each Maintained Element within each Performance Section), or • In poor condition demonstrating need for immediate replacement, renewal or repair of individual Maintained Element and/or immediate change to MMP.
1	• Targets for individual Maintained Elements are not met (less than 60% compliance with the relevant Targets for each Maintained Element within each Performance Section), or • In very poor condition demonstrating need for immediate replacement, renewal or repair of individual Maintained Element and/or immediate change to MMP.

Notes to Table 2:

1. The calculation of Maintained Element Asset Condition Score for a Maintained Element is demonstrated by the following example:

   Assume there are 520 Performance Sections, of these 10%, or 52 are audited. There are four Targets to be assessed for Maintained Element "ride quality." There are therefore, 4 x 52 = 208 "Measurement Records" for ride quality. If 180 of these "Measurement Records" meet the Target, there would be 87% compliance and a Maintained Element Asset Condition Score of four assigned for that Maintained Element.

2. A Mean Asset Condition Score for each Maintained Element Category shall be calculated to 1 decimal point.

3. "Mean" in this context shall be the arithmetic mean of each of the Maintained Element Asset Conditions Scores within the Maintained Element Category.

4. Where a measurement record relates to a Maintained Element that is not represented in more than 25% of Performance Sections then the Maintained Element Asset Condition Score will be based on a measurement of overall Performance Sections and not a 10% random sample.

   a. The Maintained Element Asset Condition Score is a mechanism to benchmark the performance of the Project against the performance of other similar facilities and TxDOT may, during the Maintenance Period, alter the Maintained Element Asset Condition Score criteria to reflect Good Industry Practice.

Where specific measurement criteria are not provided in the Performance and Measurement Table, DB Contractor shall use Good Industry Practice to assess the Maintained Element Asset Condition Score against the general criteria stated in Table 2.

1.6 Maintenance Records

1.6.1 Storage of Maintenance Records

DB Contractor shall record and store all Maintenance Records for the duration of the Maintenance Period, including:

(a) asset inventory, description, location, condition, date of installation and repair history;

(b) description, date-time of identification and categorization of Defects;

(c) planned actions and date-time for the hazard mitigation and permanent remedy of Category 1 Defects;

(d) planned actions and date-time for the permanent repair of Category 2 Defects;

(e) details including date-time of actual repairs performed;

(f) date-time and types of inspections performed;

(g) complaints and reports received from TxDOT and third parties; and

(h) accidents and incidents relating to the Maintenance Services.

1.6.2 Maintenance Records Timeliness Requirements

When a Maintained Element is constructed, installed, maintained, inspected, modified, replaced or removed, DB Contractor shall create and store a Maintenance Record no later than three days after completion of such work. Category 1 Defects shall be recorded immediately upon DB Contractor becoming aware of the Defect either by DB Contractor's inspection personnel in the field or when Category 1 Defects are notified to DB Contractor by TxDOT or a third party. Category 2 Defects shall be recorded no later than 3 days after coming to the attention of DB Contractor. All other recording requirements shall be recorded within 15 days of completion or occurrence of the relevant activity.

2 CAPITAL ASSET REPLACMENT WORK REQUIREMENTS

2.1 Obligation to perform Capital Asset Replacement Work

DB Contractor shall promptly perform Capital Asset Replacement Work when:

(a) the condition of any Maintained Element is such that early replacement, rehabilitation or renewal is needed to enable Targets for each measurement record to be reliably achieved; or

(b) Defects have occurred or may be expected to occur on a frequent basis and there is a risk that DB Contractor will be unable to comply with its obligation to remedy and repair such Defects within the applicable Defect Remedy Period.

2.2 Technical Requirements for Capital Asset Replacement Work

All Capital Asset Replacement Work shall follow the design and construction requirements within the Technical Provisions applicable to the original design, installation or construction.

When a Maintained Element is renewed or replaced, and upon the first installation of the renewed or replaced Maintained Element into the Project, DB Contractor shall not have the benefit of any Defect Remedy Period and the Capital Asset Replacement Work shall not be considered complete until the Target for each affected Maintained Element is met or exceeded for each measurement record in the Performance and Measurement Table. Prior to the end of the Maintenance Period or earlier termination of the CMA, DB Contractor shall submit to TxDOT

a complete set of Record Documents and supporting calculations and details that accurately show all Capital Asset Replacement Work and any other changes to the Project during the performance of the Maintenance Services.

2.3 Quality Requirements for Capital Asset Replacement Work

Whenever Capital Asset Replacement Work is undertaken that requires design work or construction work, DB Contractor shall, unless otherwise approved by TxDOT, follow all the requirements of Section 2.2 of the Technical Provisions in connection with quality management. Depending upon the nature of the Capital Asset Replacement Work, TxDOT may waive any or all of the following requirements at its sole discretion:

(a) submittal of design in stages of development (Section 2.2.10.1 of the Technical Provisions);

(b) employment of one or more independent organization(s) complying with the requirements for the IQF and PSQAF in accordance with Section 2.2 of the Technical Provisions;

(c) employment of professional services personnel and staffing including the assignment of a PSQCM, Engineer of Record and a PSQAM (Section 2.2.6.2 of the Technical Provisions); or

(d) employment of construction services personnel and staffing including the assignment of a CQCM (Section 2.2.7.2 of the Technical Provisions).

2.4 Nonconforming Work

DB Contractor shall submit to TxDOT non-conformance reports within seven Days of issuance and shall notify TxDOT of Nonconforming Work within two Days of discovering the Nonconforming Work. TxDOT will issue a non-conformance report if TxDOT discovers any Nonconforming Work. DB Contractor's responsibility to correct Nonconforming Work is set forth in Section 5.9 of the CMA.

3 MAINTENANCE OBLIGATIONS

3.1 Maintenance Safety

DB Contractor shall provide the Maintenance Services in compliance with the Maintenance Safety Plan (Section 6 of the MMP) to preserve the safety of Users, adjacent communities and transportation workers.

3.2 Incident and Emergency Response

TxDOT will provide the response to Incidents and Emergencies. When instructed by TxDOT, DB Contractor shall repair any damage to Maintained Elements caused by an Incident or Emergency.

Where structural damage to structures is suspected, DB Contractor shall cause that a suitably qualified bridge engineer or specialist inspector is available to evaluate the structure and to advise on temporary repairs and shoring needed to provide safe clearance of the Incident or Emergency.

3.3 Snow and Ice Control Activities and Clean-up

TxDOT will carry out preventive actions and the clearance of snow and ice accumulations within the Maintenance Limits generally in accordance with TxDOT's Snow and Ice Control Operations Manual as may be modified by local practice. DB Contractor shall perform the Maintenance Services in a manner that does not adversely impact TxDOT's snow and ice control operations. Before a predicted snow and ice event, DB Contractor shall liaise with TxDOT to understand the activities that TxDOT intends to perform and shall cooperate with TxDOT to facilitate TxDOT's snow and ice activities. This shall include at a minimum temporarily vacating active work zones, deferring planned maintenance activities and providing TxDOT access to storage areas and material stockpiles. DB Contractor shall provide such other assistance as TxDOT may instruct. Following the weather event, DB Contractor shall at a minimum be responsible for the clearance of accumulations of winter maintenance materials such as abrasives applied by TxDOT to the roadway from ditches and other drainage elements and the performance of activities necessary to prevent such materials from causing adverse effects to Maintained Elements such as flushing of de-icing materials from joints and other locations as identified in the MMP Section 2.2 (Snow and Ice Control / Cleanup Plan).

3.4 Environmental Compliance

3.4.1 Hazardous Materials Management

DB Contractor shall handle Hazardous Materials encountered during the Maintenance Services in compliance with the requirements of Section 3.8 of the CMA. DB Contractor shall follow the requirements of Section 4.3.5 of the Technical Provisions for the preparation of Investigative Work Plans and Site Investigation Reports. Whenever DB Contractor is required to handle Hazardous Materials as part of the Maintenance Services, TxDOT shall be entitled to require, at its sole discretion, that DB Contractor employ a Hazardous Materials Manager complying with Section 4.4.7 of the Technical Provisions. Where Hazardous Materials need to be handled as a result of an Incident (for example the clean-up of a spill that affects a Maintained Element), DB Contractor shall promptly perform Hazardous Materials Management upon instruction from TxDOT and shall cooperate with TxDOT in the agreement of a Change Order.

DB Contractor shall require: all personnel of DB Contractor-Related Entities handling Hazardous Materials to be trained and certified to a level equal to or greater than that established under OSHA 1910.120 (HAZWOPER Training); and all on-Site workers to have received awareness and recognition training on Hazardous Materials to which they may be exposed.

DB Contractor shall provide personal protective equipment to workers and all other personnel who may be exposed to Hazardous Materials within the Maintenance Limits.

3.4.2 SW3P Implementation

DB Contractor shall perform Maintenance Services in compliance with the Texas Commission on Environmental Quality (TCEQ) Texas Pollutant Discharge Elimination System (TPDES) Construction General Permit, in accordance with the TxDOT Storm Water Management and Guidelines for Construction Activities Manual and in compliance with the SW3P requirements.

3.4.3 Pollution Prevention Implementation

DB Contractor shall perform Maintenance Services in compliance with the Texas Waste Reduction Policy Act and shall implement the Pollution Prevention (P2) Plan when applicable.

3.4.4 Environmental Compliance and Mitigation

DB Contractor shall meet the environmental requirements of Section 4 of the Technical Provisions during the performance of the Maintenance Services and shall implement the Environmental Compliance and Mitigation Plan (ECMP).

3.5 Maintenance Records

For all Maintenance Records, DB Contractor shall follow the document storage and retrieval requirements set forth in Section 2.2.7 of the Technical Provisions. DB Contractor's document management system shall be compatible with SharePoint ®.

DB Contractor shall cause all Maintenance Records and Project-related documents to be stored along with accurate information on the location consistent with reference markers in accordance with the TRM, so that all data and records can be retrieved by reference marker and Performance Section.

Maintenance Records shall be kept throughout the Maintenance Period and shall be provided to TxDOT at the time the Project is delivered to TxDOT, at either the expiration of the Maintenance Period or earlier termination of the CMA. All records obtained during the Warranty Periods shall be kept and provided to TxDOT at the end of the last Warranty Period.

Unless otherwise directed by TxDOT, record retention shall comply with the requirements of the Texas State Records Retention Schedule.

3.6 Maintenance Communications

During the Maintenance Period, DB Contractor shall implement the following requirements of the Technical Provisions: Section 3.2.9 (Lane Closure Notification) and Section 3.2.10 (Emergency Event Communication). DB Contractor shall implement the Public Information and Communications Plan (PICP).

3.7 Maintenance Transition

At least sixty (60) days prior to the end of the Maintenance Period, or upon earlier termination of the CMA, DB Contractor shall submit a comprehensive transition plan ("Maintenance Transition Plan") to TxDOT which includes the following items:

(a) Maintenance Transition punch list;

(b) list and status of Warranties;

(c) vendors' test reports;

(d) DB Contractor's test reports;

(e) Record Drawings for Capital Asset Replacement Work;

(f) Maintenance Records; and

(g) copies of Warranty and service contracts.

At sixty (60) days prior to the end of the Maintenance Period, DB Contractor shall submit to TxDOT a complete set of Record Drawings. The Record Drawings and documentation shall be an organized, complete record of drawings and supporting calculations and details that accurately represent what DB Contractor constructed. DB Contractor shall ensure that the Record Drawings reflect the actual condition of the Maintenance Services construction.

DB Contractor shall coordinate the identification of Maintenance Transition punch list items required to be completed by DB Contractor prior to maintenance transfer. Maintenance

Transition punch list shall include (a) estimated completion dates, (b) responsible Party(s), and (c) items that must be completed prior to maintenance transfer.

DB Contractor shall be responsible to prepare (in conjunction with TxDOT), administer and complete all items on the Maintenance Transition punch list to the satisfaction of TxDOT prior to the transfer of maintenance responsibilities to TxDOT.

4 TRAFFIC MANAGEMENT REQUIREMENTS

4.1 General Requirements

Throughout the Maintenance Period, DB Contractor shall conform with the requirements set forth in this Section 5 of Exhibit 2 to the CMA, and shall provide for the safe and efficient movement of people, goods, and services, through and around the Project, while minimizing negative impacts to Users, residents, and businesses.

While planning and carrying out Maintenance Services, DB Contractor shall take into account the requirements and restrictions set forth in Exhibit 15 to the CMA and shall coordinate its Traffic Management Plan (TMP) with the traffic management to be performed by others to minimize disruption to Users of the Project.

4.2 Traffic Control

During the Maintenance Period, DB Contractor shall implement the requirements of: Section 18.3.1 of the Technical Provisions (Traffic Control Plans), Section 18.3.2 of the Technical Provisions (Design Parameters for Traffic Control Plans), Section 18.4 of the Technical Provisions (Construction Requirements).

DB Contractor shall implement the TMP and the standards of the TMUTCD to develop traffic control plans for Lane Closures.

5 REPORTING REQUIREMENTS

5.1 Monthly Maintenance Services Report

The Maintenance Services Report shall be submitted monthly throughout the Maintenance Period in accordance with Section 5.6 of the CMA. The Maintenance Services Report shall identify all of the Maintenance Services for the reporting period, the actual Maintenance Services performed for the reporting period and confirmation that all Maintenance Services performed were in compliance with the MMP. DB Contractor shall organize the Maintenance Services Report using the report sections and section reporting requirements shown in Table 3.

Table 3 – Maintenance Services Report Sections

Report Sections	Reporting Requirements/Description
Project Status	Report a high-level summary of Project condition and operational status, which shall include at a minimum: i) summary of Maintained Element Asset Condition Score and Mean Asset Condition Score if available, ii) tracking log of accidents and Incidents for Maintenance Services, iii) tracking log of Lane Closures, iv) tracking log of public inquiries/complaints.
Operational	Report a summary of Project condition and operational status, which shall

Report Sections	Reporting Requirements/Description
Status	include at a minimum: i) Defects including the location, the nature and cause of the Defect and the steps that will be, or have been, taken to address the Defects per Section 1.3.1 of this Exhibit 2, ii) inspection results for General Inspections and Audit Inspections per Section 1.4 and Section 1.5.2 of this Exhibit 2, iii) Any differences between DB Contractor and TxDOT in Defect status and categorization as referred to in Section 1.3.2, and iv) workforce injuries and OSHA related accidents.
Organizational Status	Report a summary of DB Contractor's organizational status (or reference to the appropriate sections/attachments in the latest MMP for the information) for the items below. i) list of personnel, ii) log of all training activities undertaken and planned, iii) list of major equipment, and iv) Subcontractors.
Progress Report	Report a summary of DB Contractor's activity, which shall include at a minimum from the previous month: i) a tracking log of completed action items with start and end dates and documentation supporting resolution, ii) a summary of the Maintenance Services performed including Capital Asset Replacement Work, iii) a summary of quality control activities and results, iv) list of any Nonconforming Work with explanation of non-conformance and associated risks, and v) meetings/correspondence logs.
Planned Activities	Report a summary of DB Contractor's planned activity, which shall include at a minimum: i) a tracking log of action items in progress with start and projected end dates with a description of proposed solutions, ii) schedule of planned Maintenance Services for the upcoming month, iii) Details of the next General Inspection in accordance with Section 1.4.1, including any areas targeted for detailed visual or hands-on inspection, iv) future Lane Closures including location, duration and reason of each, v) a 3-month look ahead schedule of planned Maintenance Services, and vi) a 1-month look ahead for all future Submittals.

5.2 Annual Report

DB Contractor shall submit an annual report to TxDOT within 30 days after each anniversary of the Initial Maintenance Term Commencement Date. This annual report shall include the following elements:

- An assessment of the actual Maintenance Services achievements versus the planned goals established in the MMP, as well as corrective actions and measures to be taken in the ensuing year to ensure that any shortcomings are corrected.

- An assessment of compliance with the various traffic control requirements and limitations contained in Section 3.4 of the CMA and the traffic control plans developed in accordance with Section 4.2 of this Exhibit 2, as well as any corrective measures taken to correct any breach or violation of such requirements and limitations and any corrective measures necessary to prevent such future breach or violation of such requirement and limitations.
- A report of the inspections and tests performed as part of the MMP and as required by the Performance and Measurement Table, the results of such inspections and tests, and occurrences and the measures taken to correct Nonconforming Work.
- Any exceptions taken by DB Contractor to the results of Specialist Inspections undertaken by TxDOT, together with DB Contractor's plan for additional inspections to resolve any such differences.
- A report of the Capital Asset Replacement Work performed in the immediately preceding year. The report shall describe: (a) by location, the Maintained Element, and any other Project component for which work was performed; (b) the type of work performed; (c) each specific item replaced; (d) any warranty information associated with any replacement item; (e) the dates of commencement and completion of such Capital Asset Replacement Work; and (f) such other information as is reasonably requested by TxDOT.

5.3 Meetings

DB Contractor shall conduct regular status, progress and planning meetings with TxDOT at least once a month throughout the Maintenance Period. In addition, TxDOT and DB Contractor, through their respective authorized representatives, shall meet from time to time at the other Party's request to discuss and resolve matters relating to the Maintenance Services or Project. DB Contractor shall schedule all meetings with TxDOT at a date, time and place reasonably convenient to both Parties and, except in the case of urgency, shall provide TxDOT with written notice and a meeting agenda at least three Business Days in advance of each meeting.

6 ADDITIONAL REQUIREMENTS

6.1 Rail

Where the Project crosses a railroad right of way owned by an operating railroad, DB Contractor shall coordinate the Maintenance Services with the operating railroad and shall be responsible for obtaining the required approvals, permits, and agreements as required for the Maintenance Services, including any railroad related maintenance activities.

Whenever an agreement for construction, maintenance and use of railroad right-of-way between the operating railroad and TxDOT is required, DB Contractor shall prepare all the documentation required to obtain the agreement, including preparation of the agreement application on behalf of TxDOT, the drawings and specifications, making necessary modifications as required, and preparation of the agreement. DB Contractor shall submit the draft agreement to TxDOT for transmittal to the operating railroad. After all comments have been incorporated or satisfactorily resolved by DB Contractor, railroad or TxDOT, DB Contractor shall submit a complete and final agreement to TxDOT for execution. DB Contractor shall comply with all construction requirements and specifications set forth in the agreement.

DB Contractor shall arrange with the operating railroad for railroad flagging as required. DB Contractor shall comply with the operating railroad's requirements for contractor safety training prior to performing Maintenance Services or other activities on the operating railroad's property.

DB Contractor shall cooperate and coordinate with all operating railroads for access by the operating railroad and/or their agents to the rail right-of-way as necessary for rail maintenance and operations activities.

If any railroad impacted by the Project requires insurance in addition to that required by the CMA, DB Contractor shall procure such additional insurance at its own cost. DB Contractor shall be responsible for scheduling the work to be completed by operating railroad as well as the work to be completed by its own forces. DB Contractor shall be responsible for all costs associated with the railroad/transit force account work.

7 SUBMITTALS

All Submittals shall be in accordance with the schedule and for the purpose (approval, review and comment, for information) set forth on Table 4. Acceptable electronic formats include Microsoft Word, Microsoft Excel, or Adobe Acrobat files, unless otherwise required.

Table 4: Submittals to the Department

Submittal	Submittal Schedule	Department Action	Reference Section
MMP	No later than 60 days after issuance of Maintenance NTP1	Approval	CMA Ex 2 1.2.1
MMP Update	As required, or at least annually 60 Days prior to each anniversary of the Initial Maintenance Term Commencement Date	Approval	CMA Ex 2 1.2.1
General Inspection Plans	At least monthly, no later than 7 days prior to inspection date	For Information	CMA Ex 2 1.4.1
Notification of Nonconforming Work	Within two Days of discovering the Nonconforming Work	For Information	CMA Ex 2 2.4
Non-conformance Report	Within seven Days of notification issuance	Review and comment	CMA Ex 2 2.4
Maintenance Transition Plan	At least 60 Days prior to the end of the Maintenance Period, or upon termination of the CMA	For Information	CMA Ex 2 4.7

Table 4: Submittals to the Department

Submittal	Submittal Schedule	Department Action	Reference Section
Record Drawings	At least 60 Days prior to the end of the Maintenance Period	For Information	CMA Ex 2 4.7
Maintenance Services Report	As required, or at least monthly following the Initial Maintenance Term Commencement Date	For Information	CMA Ex 2 6.1
Annual Report	within 30 days after each anniversary of the Initial Maintenance Term Commencement Date.	For Information	CMA Ex 2 6.2

MAINTENANCE ELEMENT CATEGORY	REF	MAINTAINED ELEMENT	PERFORMANCE OBJECTIVE	DEFECT REMEDY PERIOD			INSPECTION AND MEASUREMENT METHOD	REF	MEASUREMENT RECORD	TARGET
				Cat 1	Cat 1	Cat 2				
				Hazard Mitigation	Permanent Remedy	Permanent Repair				
1) PAVEMENT										
							Unless stated otherwise, measurements shall be conducted using procedures, techniques, and measuring equipment consistent with TxDOT's Pavement Management Information System Rater's Manual. Unless otherwise stated, pavement performance measurement records relate to 0.1-mile sections as described in the Pavement Management Information System Rater's Manual.			
	1.1	Ruts	All roadways are free from surface depressions in wheel path exceeding measurement record thresholds.	24 hours	28 days	6 months	a. Depth as measured using an automated device in compliance with TxDOT Standards.	1.1.1	Percentage of wheel path length with ruts greater than 1/4" in depth in each Performance Section. • Mainlanes, shoulders, and ramps - less than or equal to 3% • Cross streets - less than or equal to 3% • Frontage roads - less than or equal to 10%	100%
							b. 10-ft straight edge used to measure rut depth for localized areas.	1.1.2	No depth of rut at any location greater than 1/2".	100%
	1.2	Ride quality	All roadways have a smooth surface course (including bridge deck approaches, covers, gratings, frames and boxes).	24 hours	28 days	6 months	a. Measurement of International Roughness Index (IRI) according to TxDOT standard Tex-1001-S, Operating Inertial Profilers and Evaluating Pavement Profiles.	1.2.1	For 100% of all Performance Sections measured excluding Performance Sections with bridge deck and/or bridge approach slab, average IRI is less than or equal to: • Mainlanes, ramps - 95" per mile • Cross Streets - 95" per mile • Frontage roads - 105" per mile	100%
							b. 10-ft straightedge used to measure discontinuities for localized areas.	1.2.2	For 100% of all Performance Sections measured in localized areas, excluding bridge decks and the 100' length of pavement on either side of the bridge decks, maximum 1/8" variation of the pavement surface from the testing edge of the straightedge between any two straightedge contact points with the pavement surface.	100%
								1.2.3	For 100% of all Performance Sections that include a bridge deck and/or bridge approach slab, maximum 1/4" variation of the pavement surface from the testing edge of the straightedge between any two straightedge contact points with the pavement surface, measured at any location within the 100 feet length of pavement on either side of the bridge deck. For clarification this measurement shall allow one contact point of the straightedge on the traveled surface supported by the structure and the other contact point on the pavement approach to the structure.	100%

1) PAVEMENT										
	1.2	Ride Quality					a. Measurement of International Roughness Index (IRI) according to TxDOT standard Tex-1001-S, Operating Inertial Profilers and Evaluating Pavement Profiles.	1.2.4	For 100% of all mainlane Performance Sections that include a bridge deck and/or bridge approach slab, excluding the IRI profile lengths on bridge deck and the 100 feet of pavement on either side of the bridge deck, average IRI for each Performance Section is less than or equal to 95" per mile.	100%
								1.2.5	For 100% of all Performance Sections, no localized roughness deviations calculated in accordance with the method set forth in Section 7 of TEX-1001-S exceeding 0.15" or less than -0.15" (positive deviations are bumps and negative deviations are dips).	100%
	1.3	Cracking	All roadways are free from cracking exceeding measurement record thresholds.	24 hours	28 days	6 months	Physical measurement	1.3.1	No unsealed longitudinal cracking and/or transverse cracking in any Performance Section with a width greater than 1/8" measured at any point throughout the width of the pavement.	100%
	1.4	Raveling	All roadways are free from raveling exceeding measurement record thresholds.	24 hours	28 days	6 months	Physical measurement	1.4.1	No areas of raveling exceeding 1% of pavement surface area in any Performance Section.	100%
	1.5	Flushing / bleeding	All roadways are free from flushing / bleeding exceeding measurement record thresholds.	24 hours	28 days	6 months	Physical measurement	1.5.1	No areas of flushing / bleeding exceeding 2% of wheel path surface area in any Performance Section.	100%
	1.6	Failures	All roadways are free from failures.	24 hours	28 days	N/A	Physical measurement	1.6.1	No failures exceeding the failure criteria set forth in the TxDOT PMIS Rater's Manual, including potholes, base failures, punchouts and jointed concrete pavement failures.	100%
	1.7	Edge drop-offs	All roadways are free from edge drop-offs exceeding measurement record thresholds.	24 hours	28 days	6 months	Physical measurement	1.7.1	No edge drop-off greater than 2".	100%
	1.8	Wet weather crash performance	All roadways have adequate wet weather crash performance.	24 hours	28 days	6 months	Number of crashes within 1.0 mile performance sections identified using Crash Record Information System (CRIS) data.	1.8.1	Perform a site investigation and corrective action as follows: Rural Roadway Section (population less than 5,000 as determined by the most current population estimates provided by the State Data Center) - three (3) or more wet surface crashes within any 1.0 mile performance section in the most current complete calendar year. Urban Roadway Section (population greater than or equal to 5,000 as determined by the most current population estimates provided by the State Data Center) - six (6) or more wet surface crashes within any 1.0 mile performance section in the most current complete calendar year.	100%
			Road users warned of potential skidding hazards.	24 hours	28 days	N/A	Visual inspection	1.8.2	Road Users warned of potential skidding hazard where a requirement for corrective action is identified.	100%

1) PAVEMENT										
	1.9	Joints in concrete	All joints exceeding measurement record thresholds in concrete paving are sealed.	24 hours	28 days	6 months	Physical measurement	1.9.1	No unsealed joints with width greater than 1/4".	100%
			No tied longitudinal joint separation exceeding measurement record thresholds.					1.9.2	No tied longitudinal joint width greater than 1/4"	100%
			No longitudinal or transverse joint discontinuity / faulting exceeding measurement record thresholds.					1.9.3	No individual longitudinal or transverse joint with discontinuity / faulting greater than 1/4" between two sides of any joint.	100%
			No expansion joint separation exceeding measurement record thresholds.					1.9.4	No expansion joint width greater than 1.0".	100%
2) DRAINAGE										
	2.1	Pipes, ditches, channels, catch basins, inlets, culverts, manholes and outfalls	Each element of the drainage system is maintained in its proper function by cleaning, clearing and/or emptying as appropriate including any vegetation, debris and silt from the point at which water drains from the travel way to the outfall or drainage way.	24 hours	28 days	6 months	Visual inspection	2.1.1	Performance objective met.	100%
	2.2	Drainage treatment devices	Drainage treatment and balancing systems, flow and spillage control devices function correctly, are free of silt and debris and their location and means of operation is recorded adequately to permit their correct operation in Emergency.	24 hours	28 days	3 months	Visual inspection	2.2.1	Performance objective met.	100%
	2.3	Travel way	The travel way is free from water to the extent that such water would represent a hazard because of its position or depth.	24 hours	28 days	6 months	Visual inspection	2.3.1	Performance objective met.	100%
	2.4	Discharge systems	Surface water discharge systems perform their proper function and discharge to groundwater and waterways complies with the relevant legislation and permits.	24 hours	28 days	3 months	Visual inspection	2.4.1	Performance objective met.	100%
	2.5	Protected species	Named species and habitats are protected.	24 hours	28 days	6 months	Visual inspection	2.5.1	Performance objective met.	100%
	2.6	Erosion	Address erosion greater than 12" deep along ditches, swales, ponds, and channels.	24 hours	28 days	3 months	Visual inspection	2.6.1	Performance objective met.	100%
	2.7	Channels and ditches – Permanent Erosion Control Measures	Where permanent erosion control measures such as rock or concrete riprap are utilized: no undermined or damaged erosion control measures.	24 hours	28 days	3 months	Visual inspection	2.7.1	Performance objective met.	100%

3) STRUCTURES										
	3.1	Structure components (Structures having an opening measured along the center of the roadway of more than 20 feet between faces of abutments or spring lines of arches or extreme ends of the openings for multiple box culverts or multiple pipes that are 60 inches or more in diameter and that have a clear distance between openings of less than half of the smallest pipe diameter)	(i) Substructures and superstructures are free of: • undesirable vegetation • debris and bird droppings • blocked drains, weep pipes, manholes and chambers • blocked drainage holes in structural components • defects in joint sealants • defects in pedestrian protection measure • scour damage • corrosion of rebar • paint system failures • impact damage (ii) Expansion joints free of: • dirt, debris and vegetation • defects in drainage system • loose nuts and bolts • defects in gaskets and/or seals (iii) The deck drainage system is free of all debris and operates as intended. (iv) Parapets free of: • loose nuts and bolts • blockages of hollow section drain holes • undesirable vegetation • impact damage v) Bearings and bearing seats are: • properly aligned horizontally and vertically • clean and in full contact with each other (vi) Sliding and roller surfaces are clean and greased to ensure satisfactory performance. Additional advice contained in bearing manufacturers' instructions in the structure maintenance manual is followed. (vii) Special finishes are clean and perform to the appropriate standards. (viii) All non-structural items such as hoists and electrical fixings, operate correctly, are clean and lubricated as appropriate, in accordance with the manufacturer's recommendations and certification of lifting devices is maintained.	24 hours	28 days	6 months	(a) The National Bridge Inspection Standards (NBIS) of the Code of Federal Regulations, 23 Highways – Part 650 (b) The TxDOT Bridge Inspection Manual (c) The Federal Highway Administration's Bridge Inspector's Reference Manual (d) Visual Inspection	3.1.1	Performance objective is met and records maintained as required in the TxDOT Bridge Inspection Manual.	100%
									3.1.2	Condition rating equal to or greater than seven (7) for any deck, superstructure or substructure.	100%
	3.2	Non-bridge class culverts and pipes	Non-bridge class culverts and pipes are free of: • vegetation, debris and silt • defects in sealant at movement joints • scour damage • corrosion of rebar • impact damage	24 hours	28 days	6 months	Visual inspection	3.2.1	Performance objective met.	100%

3) STRUCTURES										
	3.3	Load ratings	All structures maintain the design load capacity and no load restrictions for Texas legal loads (including legally permitted vehicles)	24 hours	28 days	6 months	a. Load rating calculations in accordance with the AASHTO Manual for Bridge Evaluation and the TxDOT Bridge Inspection Manual. b. Load restriction requirements as per the TxDOT Bridge Inspection Manual	3.3.1	Performance objective met.	100%
	3.4	Gantries and high-masts	Sign gantries, signal gantries and high masts are structurally sound and free of: • loose nuts and bolts • defects in surface protection systems	24 hours	28 days	6 months	Visual inspection	3.4.1	Performance objective met.	100%
	3.5	Access points	All hatches and points of access have fully operational and lockable entryways.	24 hours	28 days	6 months	Visual inspection	3.5.1	Performance objective met.	100%
	3.6	Retaining walls	Retaining walls are free of: • undesirable vegetation • defects in sealed joints • defects in pedestrian protection • scour damage • corrosion of rebar • paint system failure • concrete spalling • impact damage • 95% free of blocked weep holes	24 hours	28 days	6 months	Visual inspection	3.6.1	Performance objective met.	100%
			Parapets are free of: • loose nuts and bolts • blockage of drain holes • undesirable vegetation • impact damage • concrete spalling					3.6.2	Performance objective met.	100%
4) PAVEMENT MARKINGS, OBJECT MARKERS, BARRIER MARKERS AND DELINEATORS (NOT USED)										
5) CURBS, GUARDRAILS, SAFETY BARRIERS AND IMPACT ATTENUATORS (NOT USED)										
6) TRAFFIC SIGNS (NOT USED)										
7) TRAFFIC SIGNALS (NOT USED)										
8) LIGHTING (NOT USED)										
9) FENCES, WALLS AND SOUND ABATEMENT (NOT USED)										
10) ROADSIDE MANAGEMENT (NOT USED)										
11) REST AREAS AND PICNIC AREAS (NOT USED)										

12) EARTHWORKS, EMBANKMENTS AND CUTTINGS										
	12.1	Slope failure	All structural or natural failures of the embankment and cut slopes of the Project are repaired.	24 hours	28 days	6 months	Visual inspection	12.1.1	Performance objective met.	100%
	12.2	Slopes - General	Slopes are maintained in general conformance to the original graded cross-sections, the replacement of landscaping materials, reseeding and re-vegetation for erosion control purposes and removal and disposal of all eroded materials from the roadway and shoulders.	24 hours	28 days	6 months	Visual inspection	12.2.1	Performance objective met.	100%
	12.3	Slopes – Erosion	Slopes are maintained to prevent erosion leading to further deterioration.	24 hours	28 days	3 months	Visual inspection	12.3.1	No erosion greater than six inches deep.	100%
	12.4	Slopes - Permanent Erosion Control Measures	Where permanent erosion control measures such as rock or concrete riprap are utilized: repair undermined or damaged erosion control measures and keep concrete slope protection joints sealed and free from vegetation.	24 hours	28 days	3 months	Visual inspection	12.4.1	Performance objective met.	100%
13) ITS EQUIPMENT (NOT USED)										
14) TOLLING FACILITIES AND BUILDINGS (NOT USED)										
15) AMENITY (NOT USED)										
16) SNOW AND ICE CONTROL (NOT USED)										
17) INCIDENT RESPONSE (NOT USED)										
18) CUSTOMER RESPONSE (NOT USED)										
19) SWEEPING AND CLEANING (NOT USED)										

NOTES FOR PERFORMANCE AND MEASUREMENT TABLE DURING CONSTRUCTION

1. “Cat 1 Hazard Mitigation” shall be an action taken by DB Contractor to mitigate a hazard to Users or imminent risk of damage or deterioration to property or the environment.

2. “Cat 1 Permanent Remedy” shall be an action taken by DB Contractor to restore the condition of a Maintained Element following “Cat 1 Hazard Mitigation” of a Category 1 Defect: (a) to the standard required for new construction; or (b) to a condition such that the Target is achieved for each “Measurement Record”.

3. “Cat 2 Permanent Repair” shall be an action taken by DB Contractor to restore the condition of a Maintained Element for which a Category 2 Defect has been recorded: (a) to the standard required for new construction; or (b) to a condition such that the Target is achieved for each “Measurement Record”.

ATTACHMENT 2: MAINTAINED ELEMENTS AND SCOPE OF MAINTENANCE SERVICES

ELEMENT	ELEMENT CATEGORY	RESPONSIBILITY[1]		
		Section 1	Section 2A[2]	Local Enhancements
1) PAVEMENT				
1.1	Ruts	DB	O	N/A
1.2	Ride Quality	DB	O	N/A
1.3	Cracking	DB	O	N/A
1.4	Raveling	DB	O	N/A
1.5	Bleeding	DB	O	N/A
1.6	Failures	DB	O	N/A
1.7	Edge drop-offs	DB	O	N/A
1.8	Skid resistance	DB	O	N/A
1.9	Joints in concrete	DB	O	N/A
2) DRAINAGE				
2.1	Pipes, ditches, and channels	DB	O	O
2.2	Drainage treatment devices	DB	O	N/A
2.3	Travel way	DB	O	N/A
2.4	Discharge systems	DB	O	N/A
2.5	Protected species	DB	O	N/A
2.6	Erosion	DB	O	N/A
2.7	Channels and ditches - Permanent Erosion Control Measures	DB	O	N/A
3) STRUCTURES				
3.1	Structure components	DB	O	O
3.2	Non-bridge class culverts	DB	O	N/A
3.3	Load Ratings	DB	O	O
3.4	Gantries and High-masts	DB	O	N/A
3.5	Access Points	DB	O	O
3.6	Retaining Walls	DB	O	O
4) PAVEMENT MARKINGS, OBJECT MARKERS, BARRIER MARKERS AND DELINEATORS				
4.1	Pavement markings	T*	T*	N/A
4.2	Raised Reflective Markings	T*	T*	N/A
4.3	Delineators and Markers	T*	T*	N/A
5) CURBS, GUARDRAILS, SAFETY BARRIERS AND IMPACT ATTENUATORS				
5.1	Curbs	T	T	N/A
5.2	Guardrails and Safety Barriers	T	T	N/A
5.3	Impact Attenuators	T	T	N/A
6) TRAFFIC SIGNS				
6.1	General - All signs	T	T	N/A
6.2	Warning and regulatory signs	T	T	N/A
7) TRAFFIC SIGNALS				
7.1	General	T	T	N/A
7.2	Soundness	T	T	N/A
7.3	Identification Marking	T	T	N/A
7.4	Pedestrian elements and vehicle detectors	T	T	N/A
n				
8.1	Roadway Lighting - General	T	T	N/A
8.2	Sign Lighting	T	T	N/A
8.3	Aesthetic Lighting	T	T	N/A
8.4	Electrical Supply	T	T	N/A
8.5	Access Panels	T	T	N/A
8.6	High Mast Lighting	T	T	N/A
9) FENCES, WALLS AND SOUND ABATEMENT				
9.1	Design and Location	T	T	N/A
9.2	Construction	T	T	N/A
9.3	Operation	T	T	N/A

ATTACHMENT 2: MAINTAINED ELEMENTS AND SCOPE OF MAINTENANCE SERVICES

ELEMENT	ELEMENT CATEGORY	RESPONSIBILITY[1]		
		Section 1	Section 2A[2]	Local Enhancements
10) ROADSIDE MANAGEMENT				
10.1	Vegetated Areas - Except landscaped areas - General	T	T	N/A
10.2	Landscaped Areas	T	T	N/A
10.3	Fire Hazards	T	T	N/A
10.4	Trees, Bushes and Ornamentals	T	T	N/A
10.5	Wetlands	T	T	N/A
10.6	Sidewalks and pedestrian curb ramps	T	T	N/A
11) REST AREAS AND PICNIC AREAS				
11.1	Rest areas and picnic areas	T	T	N/A
12) EARTHWORKS, EMBANKMENTS AND CUTTINGS				
12.1	Slope Failure	DB	O	N/A
12.2	Slopes - General	DB	O	N/A
12.3	Slopes – Erosion	DB	O	N/A
12.4	Slopes - Permanent Erosion Control Measures	DB	O	N/A
13) ITS EQUIPMENT				
13.1	ITS Equipment - Maintenance	T	T	N/A
13.2	Dynamic Message Sign Equipment	T	T	N/A
13.3	CCTV Equipment	T	T	N/A
13.4	Vehicle Detection Equipment	T	T	N/A
14) TOLLING FACITLITIES AND BUILDINGS				
15) AMENITY				
15.1	Graffiti	T	T	N/A
15.2	Animals	T	T	N/A
15.3	Abandoned vehicles and equipment	T	T	N/A
16) SNOW AND ICE CONTROL				
16.1	Travel lanes	T	T	N/A
17) INCIDENT RESPONSE				
17.1	General	T	T	N/A
17.2	Hazardous Materials	T	T	N/A
17.3	Structural Assessment	T	T	N/A
17.4	Temporary and permanent remedy	T	T	N/A
18) CUSTOMER RESPONSE				
18.1	Response to inquiries	T	T	N/A
18.2	Customer Contact Line	T	T	N/A
19) SWEEPING AND CLEANING				
19.1	Obstructions and debris	T	T	N/A
19.2	Sweeping	T	T	N/A
19.3	Litter	T	T	N/A

1. The Maintenance Limits delineate the limits of Section 1, Section 2A and the Local Enhancements.
2. If TxDOT elects to exercise the Section 2A Option, the pavement, drainagage, and structure elements to be mainteained includes that portion of Section 2A reconstructed or widened by DB Contractor pursuant to the Contract Documents (including Section 1.2.1 of the TPs).

* DB Contractor is responsible for replacement of striping and markers associated with their renewal of pavement.

"DB" indicates DB Contractor responsibility

"T" indicates TxDOT responsibility.

"O" indicates DB Contractor's responsibility solely to the extent TxDOT has elected to exercise the Section 2A Option or the LE Option, as applicable, otherwise TxDOT's responsibility.

"N/A" indicates that these elements are not applicable to this portion of the Maintenance Services.

EXHIBIT 3

DB CONTRACTOR'S PROPOSAL COMMITMENTS

[To be inserted from Proposal.]

Comment No.	Proposal Location	Proposal Commitment

EXHIBIT 4

MAINTENANCE PRICE

- Appendix 1: Section 1 Maintenance Price
- Appendix 2: Section 2A Maintenance Price
- Appendix 3: LE Maintenance Price

APPENDIX 1 TO EXHIBIT 4

SECTION 1 MAINTENANCE PRICE

(To be inserted from Proposal based on Form N-1.)

APPENDIX 2 TO EXHIBIT 4

SECTION 2A MAINTENANCE PRICE

(To be inserted from Proposal based on Form N-2.)

APPENDIX 3 TO EXHIBIT 4

LE MAINTENANCE PRICE

(To be inserted from Proposal based on Form N-3.)

EXHIBIT 5

JOB TRAINING PLAN AND SMALL BUSINESS OPPORTUNITY PLAN

(Attached)

EXHIBIT 6

FORM OF MAINTENANCE PERFORMANCE BOND

[To be replaced with actual Maintenance Performance Bond.]

THE SOUTHERN GATEWAY PROJECT

Bond No. _____

WHEREAS, the Texas Department of Transportation ("**Obligee**") has awarded to _____, a _____ ("**Principal**"), a Capital Maintenance Agreement for The Southern Gateway Project, duly executed and delivered as of _____, 2017 (the "**CMA**"), on the terms and conditions set forth therein; and

WHEREAS, on or before 60 Days after issuance by Obligee of Maintenance NTP1, Principal shall provide to Obligee and shall maintain at all times a bond (this "**Bond**") guaranteeing the faithful performance of its obligations related to the Maintenance Services under the CMA Documents.

NOW, THEREFORE, Principal and _____, a ("**Surety**") ")***[If multiple co-sureties will be used, TxDOT will revise this form of Bond to identify and refer to the Co-Sureties throughout and note that all such Co-Sureties are jointly and severally liable for all obligations under this Bond.]***, an admitted surety insurer in the State of Texas, are held and firmly bound unto Obligee in the amount of $[___] ***[amount calculated as set forth in Section 7.4.2 of the CMA]*** (the "**Bonded Sum**"), for payment of which sum Principal and Surety jointly and severally firmly bind themselves and their successors and assigns.

THE CONDITION OF THIS BOND IS SUCH THAT, if Principal shall promptly and faithfully perform all of its obligations under the CMA Documents, including any and all amendments and supplements thereto, then the obligations under this Bond shall be null and void; otherwise this Bond shall remain in full force and effect. Obligee shall release this Bond on the date that is one year after the end of the Maintenance Period and upon such date thereafter that all of the conditions to release set forth in Section 7.4.3 of the CMA have occurred.

The following terms and conditions shall apply with respect to this Bond:

1. The CMA Documents are incorporated by reference herein. Capitalized terms not separately defined herein have the meanings assigned such terms in the CMA.

2. Principal and the Surety hereby agree to pay to Obligee the lesser of (i) twenty percent (20%) of the Bonded Sum hereinabove set forth or (ii) the amount of $20,000,000 (escalated in accordance with the methodology set forth in Section 7.4.8 of the CMA), as cash collateral for the performance of Principal's obligations under the CMA Documents, upon occurrence of any of the following:

   a. failure of the Principal to provide (i) a replacement Maintenance Performance Bond or Maintenance Payment Bond, as applicable, in the adjusted amount required under Section 7.4.2 of the CMA and otherwise meeting the requirements set forth in Section 7.4 of the CMA, (ii) evidence of renewal of the then current Maintenance Performance Bond or Maintenance Payment Bond, in the adjusted amount as set forth in Section 7.4.2 of the CMA, or (iii) a replacement P&P Letter of Credit meeting the requirements of Sections 7.2 and 7.3 of the CMA at any of the following times:

      i. at least 30 days prior to the commencement of the ***[Second][Third]*** Maintenance Term, provided that a Maintenance NTP has been issued therefor; and

      ii. at least 30 days prior to the expiration of the then current Maintenance Performance Bond or Maintenance Payment Bond, as applicable; or ***[This Section 2.a is required for bonds issued for the period of the Initial Maintenance Term and the Second Maintenance Term only.]***

   b. failure of the Principal to provide replacement Maintenance Security meeting the requirements of Section 7 of the CMA within 10 days after any of the following: (i) this Bond becomes ineffective, (ii) the Maintenance Payment Bond becomes ineffective, (iii) the Surety no longer meets ***[If multiple co-sureties under this Bond, revise to read "all of the Co-Sureties no longer meet"]*** the requirements set forth in Section 7.4.5 of the CMA, or (iv) the surety under the Maintenance Payment Bond no longer meets the requirements set forth in Section 7.4.5 of the CMA (or if multiple sureties act as co-sureties under the Maintenance Payment Bond, no co-surety meets the requirements thereof). ***[This Section 2.b is required for bonds issued during each Maintenance Term,***

but may be conformed during the Third Maintenance Term to recognize deletion of Section 2.a. from the form of bond.]

Principal agrees and acknowledges that such cash collateral is to secure the performance of Principal under the CMA Documents as a result of Principal's failure to satisfy the Maintenance Security obligations under the CMA to which Principal agreed upon executing the CMA, and may be used to compensate TxDOT for the damages specified in Section 7 of this Bond, including TxDOT's costs to procure a substitute DB Contractor and any amounts paid to such substitute DB Contractor in excess of the unpaid balance of the CMA.

Any cash collateral not otherwise utilized by TxDOT as permitted herein shall be returned to the Principal (or in the case the Surety made payment under Section 2 of this Bond, to the Surety) upon the earlier of (i) delivery by Principal of replacement P&P Bonds meeting the requirements of Section 7.4 of the CMA or a P&P Letter of Credit meeting the requirements of Sections 7.2, 7.3 and 7.4 of the CMA or (ii) the date on which the P&P Bonds would otherwise be released in accordance with Section 7.4 of the CMA.

3. This Bond specifically guarantees the performance of each and every obligation of Principal under the CMA Documents, as they may be amended and supplemented, including but not limited to, its liability for payment in full of all Liquidated Damages, Key Personnel Change Fees and Lane Rental Charges as specified in the CMA Documents, but not to exceed the Bonded Sum.

4. The guarantees contained herein shall survive the expiration or termination of the Maintenance Period with respect to those obligations of Principal under the CMA Documents that survive such expiration or termination.

5. Whenever Principal shall be, and is declared by Obligee to be, in default under the CMA Documents (other than under the circumstances provided in Section 2 above), provided that Obligee is not then in material default thereunder, Surety shall promptly:

    a. arrange for the Principal to perform and complete the CMA; or

    b. complete the Maintenance Services in accordance with the terms and conditions of the CMA Documents then in effect, through its agents or through independent contractors; or

c. obtain bids or negotiated proposals from qualified contractors acceptable to the Obligee for a contract for performance and completion of the Maintenance Services, through a procurement process approved by the Obligee, arrange for a contract to be prepared for execution by the Obligee and the contractor selected with the Obligee's concurrence, to be secured with performance and payment bonds executed by a qualified surety equivalent to the bonds issued on the CMA, and pay to the Obligee the amount of damages as described in Paragraph 7 of this Bond in excess of the unpaid balance of the Maintenance Price for the Maintenance Period incurred by the Obligee resulting from the Principal's default; or

d. waive their right to perform and complete, arrange for completion, or obtain a new contractor and with reasonable promptness under the circumstances, (i) after investigation, determine the amount for which they may be liable to the Obligee and, as soon as practicable after the amount is determined, tender payment therefor to the Obligee, or (ii) deny liability in whole or in part and notify the Obligee citing reasons therefor.

6. If Surety does not proceed as provided in Paragraph 5 of this Bond with reasonable promptness, Surety shall be deemed to be in default on this Bond 15 days after receipt of an additional written notice from the Obligee to Surety demanding that Surety perform its obligations under this Bond, and the Obligee shall be entitled to enforce any remedy available to the Obligee. If Surety proceeds as provided in Subparagraph 5.d of this Bond, and the Obligee refuses the payment tendered or Sureties has denied liability, in whole or in part, without further notice, the Obligee shall be entitled to enforce any remedy available to the Obligee.

7. After the Obligee has terminated the Principal's right to complete the CMA, and if Surety elects to act under Subparagraph 5.a, 5.b, or 5.c above, then the responsibilities of Surety to the Obligee shall not be greater than those of the Principal under the CMA, and the responsibilities of the Obligee to Surety shall not be greater than those of the Obligee under the CMA. To the limit of the Bonded Sum, but subject to commitment of the unpaid balance of the Maintenance Price for the Maintenance Period to mitigation costs and damages on the CMA, Surety is obligated without duplication for:

a. the responsibilities of the Principal for correction of defective Maintenance Services and completion of the Maintenance Services;

b. actual damages, including additional legal, design, engineering, professional and delay costs resulting from Principal's default, and resulting from the actions or failure to act of Surety under Paragraph 5 of this Bond; and

c. all Liquidated Damages, Key Personnel Change Fees and Lane Rental Charges under the CMA Documents.

8. No alteration, modification or supplement to the CMA Documents or the nature of the Maintenance Services to be performed thereunder, including without limitation any extension of time for performance, shall in any way affect the obligations of Surety under this Bond. Surety waives notice of any alteration, modification, supplement or extension of time.

9. In no event shall the term of this bond be beyond the [ ]***[term of the bond may not be less than 5 years, except that a bond in the amount required for the last year after the Maintenance Period may be for a term not less than 1 year]*** anniversary of the execution date without the express written consent of the Surety. Surety will have no obligation to extend or replace this bond for additional periods of time. The occurrence of any of the events set forth in [Section 2.a or 2.b] of this Bond shall constitute an obligation of the Principal and Surety to pay to Obligee cash collateral in accordance with Section 2 above. ***[Bracketed language to be revised for the bond to be issued for the Third Maintenance Term in accordance with the note in Section 2 above]***

10. Correspondence or claims relating to this Bond should be sent to Surety at the following address:

_____

_____

_____

11. No right of action shall accrue on this Bond to or for the use of any entity other than Obligee or its successors and assigns.

IN WITNESS WHEREOF, Principal and Surety have caused this Bond to be executed and delivered as of _____, 201[__]

Principal: _____
By: _____
Its: _____
(Seal)

Surety: _____
By: _____
Its: _____
(Seal)

[ADD APPROPRIATE SURETY ACKNOWLEDGMENTS]

_____
or secretary attest

SURETY

By:_____
Name
Title:
Address:

EXHIBIT 7

FORM OF MAINTENANCE PAYMENT BOND

[To be replaced with actual Maintenance Payment Bond]

The Southern Gateway Project

Bond No. _____

WHEREAS, the Texas Department of Transportation ("Obligee"), has awarded to _____, a _____ ("Principal"), a Capital Maintenance Agreement for The Southern Gateway Project, duly executed and delivered as of _____, 20__ (the "CMA"), on the terms and conditions set forth therein; and

WHEREAS, on or before 60 days after issuance by Obligee of Maintenance NTP1, Principal is required to furnish a bond (this "Bond") guaranteeing payment in full to all Subcontractors and Suppliers.

NOW, THEREFORE, Principal and _____, a _____ ("Surety") ***[If multiple co-sureties will be used, TxDOT will revise this form of Bond to identify and refer to the Co-Sureties throughout and note that all such Co-Sureties are jointly and severally liable for all obligations under this Bond.]***, an admitted surety insurer in the State of Texas, are held and firmly bound unto Obligee in the amount of $[_____] ***[amount calculated as set forth in Section 7.4.4 of the CMA]*** (the "Bonded Sum"), for payment of which sum Principal and Surety jointly and severally firmly bind themselves and their successors and assigns.

THE CONDITION OF THIS BOND IS SUCH THAT, if Principal shall fail to pay any valid claims by Subcontractors and Suppliers with respect to the Maintenance Services, then Surety shall pay for the same in an amount in the aggregate of all Subcontracts not to exceed the Bonded Sum; otherwise this Bond shall be null and void upon the occurrence of all of the conditions to release set forth in Section 7.4.4 of the CMA.

The following terms and conditions shall apply with respect to this Bond:

1. The CMA Documents are incorporated by reference herein. Capitalized terms not separately defined herein have the meanings assigned such terms in the CMA.

2. No alteration, modification or supplement to the CMA Documents or the nature of the work to be performed thereunder, including without limitation any extension of time for performance, shall in any way affect the obligations

of Surety under this Bond. Surety waives notice of any alteration, modification, supplement or extension of time.

3. Correspondence or claims relating to this Bond should be sent to Surety at the following address:

_____

_____

4. This Bond shall inure to the benefit of Subcontractors and Suppliers with respect to the Maintenance Services so as to give a right of action to such persons and their assigns in any suit brought upon this Bond.

5. In no event shall the term of this bond be beyond the [__]***[term of the bond may not be less than 5 years, except that a bond in the amount required for the last year after the Maintenance Period may be for a term not less than 1 year.]*** anniversary of the execution date without the express written consent of the Surety. Surety will have no obligation to extend or replace this bond for additional periods of time. Failure of the Surety to extend this bond or failure of the Principal to file a replacement bond shall not constitute a default under this Bond.

IN WITNESS WHEREOF, Principal and Surety have caused this Bond to be executed and delivered as of _____, 201[ ].

Principal: _____

By: _____

Its: _____

(Seal)

Surety: _____

By: _____

Its: _____

(Seal)

[ADD APPROPRIATE SURETY ACKNOWLEDGMENTS]

SURETY

By:_____

Name

Title:

Address:

EXHIBIT 8

DISPUTES BOARD AGREEMENT

THIS DISPUTES BOARD AGREEMENT (this "**Agreement**") is made and entered into this ____ day of ____, 2017, (the "**Effective Date**") by and between the Texas Department of Transportation ("**TxDOT**"), and ("**DB Contractor**"). TxDOT and DB Contractor are sometimes referred to individually herein as a "**Party**" and collectively as the "**Parties**."

RECITALS

A. TxDOT and DB Contractor are parties to that certain Capital Maintenance Agreement for the Southern Gateway Project, dated as of the Effective Date (the "**CMA**") and the other CMA Documents.

B. Section 16.3 of the CMA, among other things, provides for the establishment and operation of a disputes review board (each such board being referred to herein as the "**Disputes Board**") to resolve each Dispute if, as and when, a Dispute arises under the CMA Documents.

NOW THEREFORE, in consideration of the terms, conditions, covenants and agreements contained herein and in the CMA Documents, the receipt and sufficiency of which the Parties hereby acknowledge, the Parties hereby agree as follows:

Section 1. Definitions and References.

1.1 Definitions. All capitalized terms used in this Agreement and not defined or modified herein shall have the same meaning as set forth in the CMA Documents.

1.2 Reference Section of CMA. Section 16.3 of the CMA, which, among other things, discusses the Disputes Board's role in resolving Disputes, is incorporated herein by reference.

1.3 Section References. Unless expressly indicated otherwise, all references in this Agreement to a "Section" mean the Section contained in this Agreement.

Section 2. Purpose and Role of the Disputes Board; Binding Disputes Board Decision.

The sole purpose of the Disputes Board is to fairly and impartially consider all Disputes brought to it and to resolve such Disputes in a Disputes Board Decision

(as defined in Section 5.5 below). The Disputes Board is not a supervisory, advisory, or facilitating body and has no role other than as expressly described in this Agreement and in Section 16.3 of the CMA. Notwithstanding that each Disputes Board Member will have been engaged by a Party under a Disputes Board Member Joinder Agreement (as defined in Section 3.1.2 below), none of the Disputes Board Members shall consider themselves an appointee, representative, agent or advocate of the Party who engaged him or her. Disputes Board Members are charged with discharging their responsibilities hereunder in an impartial, objective, independent and professional manner without regard to the particular interests of either Party. Upon completion of the remainder of procedures required under the Code and the DRP Rules, each Disputes Board Decision shall be final, conclusive, binding upon and enforceable against the Parties.

Section 3. Selection, Replacement and Removal of Disputes Board Members and Candidates.

3.1 Selection of Disputes Board Member Candidates and Disputes Board Members.

3.1.1 At all times, each Party shall endeavor to maintain a list of five candidates who satisfy the Disputes Board Member Qualifications (as defined in Section 4 below) and have been approved or deemed approved by the other Party to serve on the Disputes Board (each such list being a "**Disputes Board Member Candidates List**"). As of the Effective Date, (a) TxDOT accepts and consents to the final Disputes Board Member Candidates List of DB Contractor previously approved or deemed approved by TxDOT on or before the Effective Date and (b) DB Contractor accepts and consents to the Disputes Board Member Candidates List of TxDOT previously approved or deemed approved by DB Contractor on or before the Effective Date.

3.1.2 If at any time, pursuant to Section 16.3.4.2 of the CMA, a Dispute is referred by TxDOT or DB Contractor to the Disputes Board for resolution, each Party shall, within 15 days after notice of such referral is given or received, as applicable (or within 7 days after notice of a Fast-Track Dispute is given or received, as applicable), appoint and engage one of the preapproved candidates on its Disputes Board Member Candidates List to serve on the Disputes Board. The Disputes Board empanelled to resolve each Dispute shall consist of three individuals, except as otherwise provided for resolution of Small Claims under Section 5.3.3 or as the Parties may agree pursuant to Section 3.1.4 below, which shall consist of (a) one Disputes Board Member selected by TxDOT, (b) one Disputes Board Member selected by DB Contractor and (c) a third individual selected pursuant to Section 3.1.3 below. To set forth the terms and conditions of such

appointment and engagement, each Party and its appointed Disputes Board Member shall enter into a Disputes Board Member Joinder Agreement in the form attached hereto as Attachment 1 (each such agreement, upon execution, being referred to herein as a "**Disputes Board Member Joinder Agreement**" and incorporated herein by reference).

3.1.3 The two Disputes Board Members appointed to the Disputes Board shall, as their first duty following appointment shall, within 15 days after their appointment (or within 7 days after their appointment, if the Dispute for resolution by the Disputes Board is a Fast-Track Dispute), select the third Disputes Board Member (the **"Disputes Board Chair"**) from among the remaining candidates that appear on the Parties' Disputes Board Member Candidate Lists. If the two Disputes Board Members appointed by DB Contractor and TxDOT are unable to reach agreement on their selection of the Disputes Board Chair within such time period, then either DB Contractor or TxDOT or both shall request that the Chief Administrative Judge of the Travis County District Courts select the Disputes Board Chair from among the remaining candidates that appear on the Parties' Disputes Board Member Candidate Lists. Both Parties waive all rights to appeal the decision of the Chief Administrative Judge, except if the individual designated by such judge to serve as the Disputes Board Chair is not among the qualified and approved candidates remaining on the Parties' Disputes Board Member Candidate Lists. Within 15 days after the selection of the Disputes Board Chair by the two appointed Disputes Board Members or the Chief Administrative Judge (or within 7 days after such selection if the Dispute is a Fast-Track Dispute), the Party on whose list the Disputes Board Chair appears and the individual selected to serve as the Disputes Board Chair on the Disputes Board shall enter into a Disputes Board Member Joinder Agreement.

3.1.4 The Parties may mutually agree at any time prior to the Dispute Board's issuance of a Disputes Board Decision that the relevant Dispute shall be resolved by the Disputes Board Chair alone rather than by the three member Disputes Board, and any such agreement shall be irrevocable upon issuance of the joint written directive next described. If the Parties so agree, they shall issue a joint written directive to the Disputes Board (or to the two appointed Disputes Board Members or the Chief Administrative Judge of the Travis County District Courts, if such Disputes Board Members or Chief Administrative Judge are or is then in the process of selecting the Disputes Board Chair pursuant to Section 3.1.3 above) stating their mutual agreement that the Disputes Board Chair alone shall resolve the relevant Dispute. If the Parties issue such a joint written directive, the Disputes Board Chair rather than the Disputes Board shall resolve the relevant Dispute in accordance with the terms and conditions of this Agreement (except insofar as this Agreement contemplates resolution of a Dispute by a three member Disputes

Board) and, if the three member Disputes Board had been previously empanelled, the two Party-appointed Disputes Board Members shall be dismissed from any further service on the Disputes Board.

3.2 Replacing Candidates on a Party's Disputes Board Member Candidates List.

3.2.1 At any time, either Party may replace any of the individuals on its Disputes Board Member Candidates List that are not then serving on the Disputes Board, provided, however, that no such individual shall be added to the Disputes Board Member Candidates List of the proposing Party (the **"Nominating Party"**) until complete Disclosure Statements on such individual are furnished to the other Party (the **"Evaluating Party"**) and the Evaluating Party approves or is deemed to approve such individual for inclusion on the Nominating Party's Disputes Board Member Candidates List. **"Disclosure Statements"** shall consist of the proposed Disputes Board Member candidate's resume of experience and a discussion of the Disputes Board Member Qualifications as they apply to the proposed candidate. Within 30 days after receipt of a proposed candidate's Disclosure Statements by the Evaluating Party (the **"Disputes Board Member Candidate Evaluation Period"**), the Evaluating Party shall evaluate the proposed candidate's Disclosure Statements and notify the Nominating Party as to whether the candidate is approved by the Evaluating Party for inclusion on the Nominating Party's Disputes Board Member Candidates List.

3.2.2 During the Disputes Board Member Candidate Evaluation Period, the Evaluating Party (a) shall submit written inquiry to the Nominating Party if, in the Evaluating Party's reasonable judgment, the Disclosure Statements for the proposed candidate are incomplete such that, if they are not supplemented to the Evaluating Party's reasonable satisfaction, such incompleteness will comprise a basis for the Evaluating Party's disapproval of the proposed candidate and (b) may submit written inquiries to the Nominating Party if the Evaluating Party has questions or concerns about the proposed candidate's qualifications to serve on the Disputes Board in light of the Disputes Board Member Qualifications. Within fifteen days after the Nominating Party's receipt of any such written inquiry from the Evaluating Party, the Nominating Party shall (or shall cause the proposed candidate to) furnish a written response to the Evaluating Party's inquiry. The Evaluating Party may submit up to three such written inquiries. The Disputes Board Member Candidate Evaluation Period shall be extended a total of 30 days (including the 15 day inquiry response period) for each written inquiry made by the Evaluating Party. The submission of incomplete Disclosure Statements (following written inquiry from the Evaluating Party so that the Nominating Party has the opportunity to supplement any such incomplete Disclosure Statements) or failure by

the Nominating Party or its proposed candidate to fully respond to the Evaluating Party's written inquiry shall constitute a basis for the Evaluating Party to disapprove the proposed candidate during the Disputes Board Member Candidate Evaluation Period. If the Evaluating Party notifies the Nominating Party of its approval, or does not notify the Nominating Party of its disapproval, of a proposed candidate within the Disputes Board Member Candidate Evaluation Period, such candidate shall be approved or deemed approved by the Evaluating Party.

3.2.3 During the course of the Nominating Party replacing five consecutive potential candidates on its Disputes Board Member Candidates List on a cumulative basis over time, the Evaluating Party may, upon notice to the Nominating Party, disapprove up to two proposed candidates for any or no reason. The Evaluating Party may, upon notice to the Nominating Party, only disapprove all subsequently proposed candidates of the Nominating Party based on any such candidate's failure to satisfy the Disputes Board Member Qualifications (which failure shall be described in detail in the Evaluating Party's notice of disapproval).

3.2.4 In furtherance of the Parties' objective of having in place at all times two Disputes Board Member Candidate Lists comprised of five nominated and approved candidates meeting the Disputes Board Qualifications, but subject to the provisions of Section 3.2.3, if the Evaluating Party does not approve a proposed candidate for inclusion on the Nominating Party's Disputes Board Member Candidates List, the Nominating Party shall propose subsequent candidates in reasonably rapid succession, and the selection process shall continue until the Evaluating Party's approval is obtained or deemed obtained as to a proposed candidate's inclusion on the Nominating Party's Disputes Board Member Candidates List.

3.2.5 If the Evaluating Party disapproves a proposed candidate of the Nominating Party due to failure of such candidate to satisfy the Disputes Board Member Qualifications, but the Nominating Party disagrees that such candidate is not qualified or eligible for service, the Nominating Party may initiate Informal Resolution Procedures and then, if such disagreement is not resolved to the Nominating Party's satisfaction, Dispute Resolution Procedures in order to resolve such Dispute.

3.3 Removal of Disputes Board Member; Appointment of Replacement.

3.3.1 The appointment of a Disputes Board Member (including the Disputes Board Chair) to the Disputes Board may be terminated at any time by any of the Persons specified below in this Section 3.3.1 due to the occurrence of Misconduct or due to Conflict of Interest not previously waived under Section 4.3.1 (such termination constituting a termination "**For Cause**" hereunder), effective

upon service of such Person's notice of termination on the affected Disputes Board Member and, if the terminating Person is a Party, the other Party or, if the terminating Person is not a Party, the Parties. Following termination and removal of a Disputes Board Member For Cause or the death or resignation of a Disputes Board Member, the Disputes Board shall not proceed with the resolution of the applicable Dispute until a replacement Disputes Board Member has been appointed.

(a) Any two members of the Disputes Board may terminate the third Disputes Board Member's appointment For Cause;

(b) TxDOT and DB Contractor may, upon mutual agreement, terminate any Disputes Board Member's appointment For Cause or without cause; and

(c) TxDOT or DB Contractor may unilaterally terminate the appointment of any Disputes Board Member For Cause.

Provided, however, that if a Disputes Board Member's appointment is terminated For Cause and a Party disagrees that such Disputes Board Member should have been terminated For Cause, such Party may, within 5 Business Days after notice of the Disputes Board Member's termination of appointment is received, initiate Informal Resolution Procedures and then, if such disagreement is not resolved to the disagreeing Party's satisfaction, Dispute Resolution Procedures in order to resolve such Dispute. A Party may not unilaterally or by mutual agreement with the other Party terminate the appointment of any Disputes Board member For Cause and then dispute the proprietary of such termination.

3.3.2 In the event that one or more Disputes Board Members needs to be replaced due to removal, death or resignation of one or more Disputes Board Members, replacement Disputes Board Members shall be appointed in the same manner as the predecessor Disputes Board Members(s) until the Disputes Board is reconstituted as a three person board. The appointment of each replacement Disputes Board Member will begin as soon as notice of removal, death or resignation is given or received and shall be completed as soon as possible, but in no event more than 30 days thereafter.

Section 4. Qualifications and Conduct of Disputes Board Members.

"Disputes Board Member Qualifications," as they pertain to each Disputes Board Member or proposed candidate for inclusion on a Party's Disputes Board Member Candidate List, consist of the requisite experience described in

Section 4.1 below and the absence of grounds for disqualification as described in Section 4.2 below.

4.1 Requisite Experience. All Disputes Board Members shall be attorneys who (a) are retired judges with at least 10 years prior experience as a sitting judge or (b) are active members of the State Bar of Texas or any other state bar with at least 10 years prior experience acting as mediators, arbitrators or dispute board members for commercial disputes, in either case who have not been subject to disciplinary action within the past 10 years. Preference shall be given to attorneys who, in addition to meeting the foregoing qualifications, are also experienced in interpreting or adjudicating contract rights and claims involving financing, design, construction, operations and/or maintenance of public infrastructure projects.

4.2 Disqualification. No Disputes Board Member shall have a financial interest in the CMA, in any Subcontract or the Project or in the outcome of any Dispute decided hereunder, except for payments to that member for services on the Disputes Board.

4.3 Effect of Party's Prior Approval of Disputes Board Member.

4.3.1 An Evaluating Party's approval or deemed approval of a proposed candidate for inclusion on the Nominating Party's Disputes Board Member Candidates List shall constitute an irrevocable waiver of any subsequent objection to such individual's lack of qualifications under Section 4.1 (except if such individual's lack of qualifications constitutes Misconduct, as addressed in Section 4.3.2 below).

4.3.2 No approval or deemed approval by the Evaluating Party of a proposed candidate for inclusion on the Nominating Party's Disputes Board Member Candidates List shall constitute a waiver of any objection to a Conflict of Interest or Misconduct of such individual under Section 4.2, except that any matter fully disclosed in an individual's Disclosure Statements prior to inclusion of such individual on the Nominating Party's Disputes Board Member Candidates List with the approval or deemed approval of the Evaluating Party may not be subsequently asserted by the Evaluating Party as a Conflict of Interest or Misconduct constituting grounds for termination and removal of such individual from the Nominating Party's Disputes Board Member Candidates List or from service as a Disputes Board Member on the Disputes Board.

Section 5. Procedures and Scope of Work of the Disputes Board.

5.1 Procedures; Modification of Procedures. The Disputes Board shall conduct its proceedings to resolve a Dispute in accordance with the requirements specified or referenced herein; provided, however, that:

(a) The Parties may jointly modify the procedures applicable to the Disputes Board's proceedings to resolve a Dispute, effective upon the Disputes Board Chair's receipt of the Parties' written notice of the Parties' mutually agreed modification of such procedures describing such modification in detail (the foregoing being without limitation to any requirements applicable to the Parties' amendment of the CMA or any requirements applicable to modification of the DRP Rules or the Sections of the Code under which the DRP Rules are promulgated); and

(b) The Disputes Board may modify the procedures applicable to its proceedings to resolve a Dispute so as to be more responsive to the needs of the Parties, provided that (i) the Disputes Board Chair issues written notice to the Parties describing the proposed modification in detail and (ii) both Parties give their written consent thereto, effective upon the Disputes Board Chair's receipt of the Parties' written consent thereto.

5.2 Ineligible Matters. As a preliminary matter prior to consideration of the underlying matter, the Disputes Board shall hear, consider and render a Disputes Board Decision with respect to the responding Party's assertion that a particular claim, demand, dispute, disagreement or controversy is an Ineligible Matter. Resolution of whether a claim, demand, dispute, disagreement or controversy is a Dispute that the Disputes Board has authority to resolve or an Ineligible Matter shall be resolved as a preliminary matter by the Disputes Board, and the Disputes Board Decision shall reflect that the underlying matter is a Dispute eligible for resolution by the Disputes Board unless a majority of the Disputes Board determines with positive assurance that such a determination would not be correct.

5.3 Procedures for Disputes Board's Resolution of Disputes.

5.3.1 The Disputes Board shall conduct its proceedings in accordance with the Commercial Rules, including time periods in which actions by the Disputes Board shall occur. "**Commercial Rules**" means the dispute resolution proceedings set forth in Attachment 2 attached hereto. For Fast-Track Disputes, the time frames provided in the Commercial Rules for Expedited Procedures (as defined in Attachment 2) shall apply in accordance with the Commercial Rules.

5.3.2 Each Disputes Board Member, or the Disputes Board Chair on behalf of the Disputes Board, shall promptly notify the Parties if any circumstances has or is likely to arise that would prevent prompt resolution of the applicable Dispute in accordance with the Commercial Rules and this Agreement.

5.3.3 The following provisions pertain to Small Claims:

(a) A **"Small Claim"** is a Claim or related or similar Claims which arise fairly contemporaneously out of the same set of acts, events or circumstances that the Parties mutually agree to have resolved solely by the Disputes Board Chair. A non-binding example of a Small Claim is where the cumulative amount in controversy of a Claim or related or similar Claims is $100,000 or less.

(b) Once the Disputes Board Chair is appointed to resolve a Small Claim, the other two Disputes Board Members shall be released from further service. Thereafter, in the context of the Disputes Board Chair's resolution of a Small Claim hereunder, all references in the dispute resolution procedures established in Section 16.3 of the CMA to the "Disputes Board" or the "Disputes Board Members" shall mean and refer to the Disputes Board Chair. At any time prior to the close of the Disputes Board hearing under R-27 of the Commercial Rules, if, due to amendment of the Dispute as to the amount in controversy, aggregation of the Dispute with other Disputes or other changes that cause a Party to no longer consent to resolution of the Dispute as a Small Claim by the Dispute Board Chair, such Party may, upon notice to the Disputes Board Chair and the other Party, withdraw its assent to resolution of the Dispute as a Small Claim by the Disputes Board Chair and require that a full three-member Disputes Board be empanelled to resolve such Dispute.

(c) The Disputes Board Chair shall have no authority to award compensation or damages in a Disputes Board Decision regarding a Small Claim aggregating more than $100,000, and TxDOT or DB Contractor as the claiming Party, as the case may be, asserting a Small Claim hereby irrevocably waives any right, at law or in equity, to any damages or award arising out of such Small Claim in excess of $100,000; provided, however, that the amount of $100,000 as stated in this Section 5.3.3(c) shall be adjusted on every fifth anniversary of the Effective Date by the percentage increase (if any) in the CPI between the date the CPI was most recently published before the Effective Date and the date most recently published before the date of adjustment.

5.4 Aggregation of Disputes. Either Party shall be entitled to request the Disputes Board to aggregate the consideration of multiple Disputes for resolution by the Disputes Board where common questions of fact, Law and contract

interpretation and the efficiencies to be gained in conducting a single proceeding to resolve all such Disputes merit the aggregate consideration of all such Disputes. Upon receipt of such a request, the Disputes Board shall consider the aggregated Disputes in a single proceeding unless, as a preliminary matter, the Disputes Board determines (after considering any evidence presented by the Parties in support of, or in opposition to, the proposed aggregation of such Disputes for resolution in a single proceeding) that there are insufficient common questions of fact, Law and contract interpretation among the proposed aggregated Disputes and/or the efficiencies to be gained by conducting a single proceeding to resolve such Disputes are outweighed by the need for separate and independent resolution of some or all of the proposed aggregated Disputes (as specified in the Disputes Board Decision on this matter) by a separately empanelled Disputes Board in a separate proceeding. A Disputes Board Decision regarding whether Disputes will be aggregated for resolution in a single proceeding before the Disputes Board shall be final, binding and not subject to appeal.

5.5 Issuance of Disputes Board Decision and Any Minority Report. The Disputes Board should make every effort to reach a unanimous decision among the Disputes Board Members. If this proves infeasible, the dissenting Disputes Board Member may prepare a minority report. Within 20 days after the final hearing on an Dispute (other than a Fast-Track Dispute, in which case within 5 days after the final hearing the Fast-Track Dispute), the Disputes Board Chair shall issue the Dispute Board's written decision (each, a "**Disputes Board Decision**"), together with its written findings of fact and conclusions of law in support of the Disputes Board Decision, to the Parties.

5.6 Confidential Materials; Return or Destruction Thereof. "**Confidential Materials**" are all discussions, negotiations, testimony and evidence between the Parties and/or in a proceeding before the Disputes Board that are confidential pursuant to Section 16.3.8 of the CMA. Each Disputes Board Member shall maintain the privacy of Confidential Information pursuant to Section 16.3.8 of the CMA. Within 30 days after issuance of the Final Order Implementing Decision, the Disputes Board Chair shall furnish written notice to each Party listing the Confidential Materials in the Disputes Board's possession and, except for those Confidential Materials that a Party directs the Disputes Board to return to such Party in writing within 15 days after receipt of such notice, the Disputes Board Chair shall destroy all copies of all Confidential Materials in the Disputes Board's possession. Until the time for the Disputes Board Chair's issuance of the foregoing written notice, the Disputes Board shall hold all Confidential Materials in confidence other than making them available for production into evidence in subsequent proceedings.

5.7 Dissolution of Disputes Board. Once the Disputes Board Decision of the Disputes Board becomes final and the Executive Director has issued a Final Order Implementing Decision, the Disputes Board shall be dissolved and the Disputes Board Members serving on such Disputes Board shall be released from further service.

Section 6. Necessity of Submission of Dispute to Disputes Board.

A Party's submission of a Dispute to the Disputes Board for resolution and the Dispute Board's issuance of the Disputes Board Decision shall be conditions precedent to any subsequent proceeding concerning such Dispute, except as otherwise provided in Section 16.3 of the CMA.

Section 7. TxDOT and DB Contractor Responsibilities.

7.1 TxDOT Responsibilities. TxDOT shall serve upon each Disputes Board Member one copy of the CMA Documents. TxDOT shall also serve upon each Disputes Board Member (and concurrently upon DB Contractor) any other documents which are or may become pertinent to the activities of the Disputes Board, including but not limited to any Change Order, Directive Letter or other written direction, instruction, determination or decision of TxDOT.

7.2 DB Contractor Responsibilities. DB Contractor shall serve on each Disputes Board Member (and concurrently on TxDOT) one set of any documents which are or may become pertinent to the activities of the Disputes Board, except those documents furnished by TxDOT. Such documents may include, but shall not be limited to, any drawings or sketches, calculations, procedures, schedules, estimates or other documents and Submittals which are used in the performance of the Work or in justifying or substantiating DB Contractor's position.

7.3 Parties' Responsibilities for Costs and Expenses; Cooperation.

7.3.1 Each Party shall be responsible and make payment for its one-half share of all facilities fees, support services costs and other expenses of the Disputes Board's proceedings within 30 days after receipt of invoices for such costs and expenses. A Party that disputes an invoice for any such cost or expense relating to the Disputes Board's proceedings shall notify the other Party of such dispute promptly after receipt of such invoice. If either Party fails to pay its share of the amount owing under any invoice for such costs and expenses at the time require for payment, then, unless the non-paying Party is disputing the amount due, (a) the other Party may make payment in lieu of the non-paying Party and (b) the paying Party will be entitled to recover (or offset) the amount paid on behalf of the refusing

Party, with interest at the maximum rate permitted by Law, no matter which Party is the prevailing Party.

7.3.2 Each Party shall diligently cooperate with the Disputes Board and the other Party and shall perform such acts as may be necessary to obtain an efficient and expeditious resolution of the Dispute submitted to the Disputes Board. If either Party fails to diligently cooperate with the Disputes Board or the other Party (upon evidence of such failure presented to and evaluated by the Disputes Board) and the Disputes Board determines that such failure was egregious, the Disputes Board shall take into account such egregious failure to cooperate in its determination of the Disputes Board Decision; subject, however, to the limitations on the Disputes Board's authority set forth in Section 16.3.4.1 of the CMA.

Section 8. Term.

Consistent with the DRP Rules, the term of this Agreement shall commence on the Effective Date and continue in full force and effect for the Maintenance Term of the CMA and thereafter for so long as either Party has any obligation originating under the CMA Documents until the applicable statute of limitations on any Dispute in regard to such obligation has expired.

Section 9. Payment of Disputes Board Members' Fees, Costs and Expenses.

9.1 Payment for Services. Payment of fees for work performed and services rendered by each Disputes Board Member and for his or her direct out-of-pocket costs and expenses shall be calculated in accordance with the payment terms set forth for such Disputes Board Member in his or her respective Disputes Board Member Joinder Agreement. The personal services of the Disputes Board Member are a condition to receiving payments hereunder. Such payments shall be full compensation for work performed and services rendered by each respective Disputes Board Member, and for all labor, materials, supplies, equipment and incidentals necessary for such Disputes Board Member's participation in the operation of the Disputes Board.

9.2 Disputes Board Member Invoices. Each Disputes Board Member shall submit invoices on a monthly basis concurrently to TxDOT and DB Contractor for payment for such Disputes Board Member's work performed and services rendered in the prior month. Such invoices shall be in a format approved by TxDOT and DB Contractor, accompanied by an itemization of days and hours billed along with a description of activities performed during each day in that billing period, and an itemization of direct non-salary costs incurred supported by copies of the original bills, invoices, expense accounts and miscellaneous supporting data. The amount to be paid shall be established from the applicable billing rate set forth in each

Disputes Board Member's Disputes Board Member Joinder Agreement plus costs and expenses in accordance with such agreement.

9.3 Payment by Parties. Each Party shall be responsible and make payment for its one-half share of all fees, costs and expenses of the Disputes Board Members' service on the Disputes Board. Each Disputes Board Member will be paid within 30 days of the Parties' receipt and acceptance of invoices therefor. A Party that disputes a Disputes Board Member's invoice shall notify such member and the other Party of such dispute promptly after receipt of such invoice. If either Party fails to pay its share of the amount owing to any Disputes Board Member at the time required for payment, then, unless the non-paying Party is disputing the amount due, (a) the other Party may make payment in lieu of the non-paying Party and (b) the paying Party will be entitled to recover (or offset) the amount paid on behalf of the refusing Party, with interest at the maximum rate permitted by Law, no matter which Party is the prevailing Party.

9.4 Retention of Cost Records and Accounts. Disputes Board Members shall keep available for inspection by representatives of TxDOT and DB Contractor, for a period of five years after the final payment, the cost records and accounts pertaining to this Agreement and the performance of work and rendition of services as a member of the Disputes Board. If any claim arising out of, in connection with, or related to this Agreement is initiated before the expiration of the five year period, the cost records and accounts shall be retained until such claim involving the records is completed.

9.5 Parties to Bear Own Costs. Each Party shall bear its own costs arising out of or in connection with the Dispute Resolution Procedures.

9.6 Diligent Cooperation. The Parties shall diligently cooperate with one another and the Disputes Board, and shall perform such acts as may be necessary to obtain an efficient and expeditious resolution of Disputes submitted to the Disputes Board. If either Party refuses to diligently cooperate, and the other Party, after first giving notice setting forth the Party's basis for its contention of non-cooperation and requesting specific action, incurs additional costs or attorneys', accountants' and expert witness fees solely as a result of such failure to diligently cooperate, then the Disputes Board may award such additional costs and, accountants' and expert witness fees to the Party giving such notice, even if such Party is not the prevailing Party in the Dispute. The Party so entitled to such award shall have the right to pursue and enforce it in any subsequent proceedings.

Section 10. Nonassignability.

Disputes Board Members shall not assign or delegate any of the work or services to be rendered in connection with the Dispute Resolution Procedures without the prior written consent of both TxDOT and DB Contractor.

Section 11. Legal Relations.

11.1 Disputes Board Member as Independent Contractor. The Parties mutually understand and agree that any Disputes Board Member, in the performance of duties as a Disputes Board Member on the Disputes Board, is acting in the capacity of an independent contractor and not as an employee or agent of TxDOT or DB Contractor. No Disputes Board Member will be entitled to any employee benefits from either Party.

11.2 No Effect on Potential Liabilities Under the CMA Documents or by Law. Except for the payment, offset and reimbursement obligations agreed to by the Parties as set forth herein, nothing in this Agreement alters the potential liabilities of either Party as provided under the CMA Documents and, subject to the terms and conditions of the CMA Documents, by Law.

11.3 Damages Waiver. Neither TxDOT nor DB Contractor will hold any Disputes Board Member responsible for claims, damages, losses and expenses, including, but not limited to attorneys' fees and expenses, arising out of or resulting from the actions and recommendations of the Disputes Board, and the Parties expressly waive any right to the foregoing, except as a result of fraud, willful misconduct or criminal actions of the applicable Disputes Board Member.

Section 12. Applicable Law.

The Disputes for resolution by the Disputes Board shall be governed by and resolved under the Laws of the State of Texas, without regard to conflicts of law principles that would refer one to the Laws of another State.

Section 13. Amendment in Writing.

This Agreement may be altered, amended or revoked only by an instrument in writing signed by each Party. No verbal agreement or implied covenant or agreement shall be held to vary the terms hereof, any statute, law or custom to the contrary notwithstanding.

Section 14. Complementary Provisions; Order of Priority.

The Parties intend for the procedures established in Section 16.3 of the CMA and any other relevant provisions of the CMA Documents, and the terms and

conditions of this Agreement (except where this Agreement says they shall not apply), to be complementary. In the event of any conflict between this Agreement and Section 16.3 of the CMA or any other relevant provision of the CMA Documents, the CMA or other DRP governed agreement shall control.

Section 15. Notices.

Notices hereunder shall be sent as provided in Section 19.10 of the CMA. The address for each Disputes Board Member shall be set forth on the signature page of each Disputes Board Member Joinder Agreement.

Section 16. Entire Agreement

This Agreement, each executed Disputes Board Member Joinder Agreement, and the documents referenced herein, contain the entire understanding of the parties hereto with respect to the subject matter hereof and supersede all prior agreements, understandings, statements, representations and negotiations between the parties hereto with respect to its subject matter.

[signatures on following page]

IN WITNESS WHEREOF, the Parties, intending to be legally bound, have executed this Agreement as of the Effective Date.

DB Contractor:

[DB Contractor]

By_____
Name:_____
Title:_____

TEXAS DEPARTMENT OF TRANSPORTATION

By: _____
James M. Bass
Executive Director

ATTACHMENT 1 TO DISPUTES BOARD AGREEMENT

DISPUTES BOARD MEMBER JOINDER AGREEMENT

This DISPUTES BOARD MEMBER JOINDER AGREEMENT (this "Agreement") is entered into this _____ day of _____, _____ by and between _____ [Specify TxDOT or DB Contractor] (the "Appointing Party"), and _____, an individual (the "Disputes Board Member").

RECITALS

A. TxDOT and DB Contractor are parties to that certain Capital Maintenance Agreement for the Southern Gateway Project, dated as of the Effective Date (the "**CMA**") and the other CMA Documents.

B. Section 16.3 of the CMA, among other things, provides for the establishment and operation of a disputes review board (each such board being referred to herein as the "**Disputes Board**") to resolve each Dispute if, as and when, a Dispute arises under the CMA Documents.

C. The Appointing Party desires to appoint the Disputes Board Member to the Disputes Board to resolve such a dispute and the Disputes Board Member desires to accept such appointment, each on the terms and conditions set forth in Section 16.3 of the CMA, the Disputes Board Agreement and this Agreement, and for that purpose, the parties hereto have agreed to enter into this Agreement pursuant to Section 3.1.2 of the Disputes Board Agreement.

NOW THEREFORE, in consideration of the terms, conditions, covenants and agreements contained herein and in the Disputes Board Agreement, the receipt and sufficiency of which the parties hereto hereby acknowledge, the parties hereto hereby agree as follows:

Section 1. Definitions and References.

1.1 Definitions. All capitalized terms used in this Agreement and not defined or modified herein shall have the same meaning as set forth in the CMA Documents and, if not defined therein, in the Disputes Board Agreement.

1.2 Reference to Disputes Board Agreement and Section 16.3 of CMA. The Disputes Board Agreement and Section 16.3 of the CMA, which, among other things, discusses the Disputes Board's role in resolving Disputes, are incorporated herein by reference.

Section 2. Appointment.

2.1 Appointment. The Appointing Party appoints the Disputes Board Member to the Disputes Board to serve thereupon and resolve the applicable Dispute, and the Disputes Board Member accepts such appointment and agrees to perform such service, each in accordance with the terms and conditions of Section 16.3 of the CMA, the Disputes Board Agreement and this Agreement.

2.2 Term of Service. The Disputes Board Member shall serve on the Disputes Board through resolution of the Dispute before the Disputes Board and issuance of the Final Order Implementing Decision in respect thereto, except that (a) unless he or she is the Disputes Board Chair, he or she may be earlier dismissed from service pursuant to Section 5.3.3(b) of the Disputes Board Agreement because the dispute to be resolved is a Small Claim; (b) the Disputes Board Member may resign for health considerations or other reasons of disability; or (c) the Disputes Board Member shall resign if he or she discovers facts or circumstance that would, in such member's reasonable good faith judgment, prevent such member from discharging his or her duties in the resolution of a Dispute in the impartial and objective manner required under the Disputes Board Agreement or facts or circumstances that such member reasonably and in good faith believes would result in a Party terminating such member's appointment For Cause. The Disputes Board Member shall endeavor to give 30 days' notice prior to the effective date of his or resignation.

Section 3. Representations, Warranties and Covenants.

3.1 Representations and Warranties. The Disputes Board Member hereby represents and warrants to TxDOT and DB Contractor, under penalty of perjury, that such Disputes Board Member satisfies the Disputes Board Member Qualifications.

3.2 Covenants. The Disputes Board Member covenants to TxDOT and DB Contractor that he or she:

(a) Shall be bound by and perform such member's obligations with respect to the Dispute Resolution Procedures in accordance with the procedures established under Section 16.3 of the CMA;

(b) Shall not engage in any conduct, including, but not limited to, having any communications, dealings or interactions with either Party, the Conflicts Group or any other Person in any manner, that would be or result in a Disputes Board Error; and

(c) Shall preserve, maintain and protect the confidentiality of Confidential Materials in accordance with Section 16.3.8 of the CMA.

Section 4. Compensation.

4.1 Invoicing and Payment. The Disputes Board Member's hourly billing rate and costs and expenses for service on the Disputes Board or means for calculating same are attached hereto as Annex I. Invoicing and payment of fees, costs and expenses shall take place in accordance with Sections 9.1, 9.2 and 9.3 of the Disputes Board Agreement.

4.2 No Compensation After Termination. If the Disputes Board Member's appointment to the Disputes Board is terminated, whether For Cause or otherwise, the Disputes Board Member will not be entitled to receive payment for any services rendered or costs and expenses incurred after the date of termination of such appointment.

Section 5. General Provisions.

5.1 Third Party Beneficiary. Whichever of TxDOT or DB Contractor that is not the Appointing Party is an express third party beneficiary of this Agreement entitled to enforce the terms and conditions hereof against the Disputes Board Member.

5.2 Nonassignability. The Disputes Board Member shall not assign or delegate any of the work or services to be rendered in connection with the Dispute Resolution Procedures without the prior written consent of both TxDOT and DB Contractor.

5.3 Disputes Board Member as Independent Contractor. The Disputes Board Member is acting in the capacity of an independent contractor and not as an employee or agent of TxDOT or DB Contractor. The Disputes Board Member is not entitled to any employee benefits from either Party.

5.4 Consequential Damages Waiver. In no event shall TxDOT or DB Contractor have any liability to the Disputes Board Member other than for payment of the Disputes Board Member's fees, costs and expenses hereunder. Neither TxDOT nor DB Contractor shall be liable to the Disputes Board Member for any special, consequential, indirect, enhanced, punitive, or similar damages (including lost profits that are not direct damages), including but not limited to attorneys' fees and expenses, arising under or in connection with this Agreement, and the Disputes Board Member expressly waives any right to the foregoing.

5.5 Governing Law. This Agreement shall be governed by and construed in accordance with the Laws of the State of Texas, without regard to conflicts of law principles that would refer one to the Laws of another State.

5.6 Entire Agreement. This Agreement, and the documents referenced herein, contain the entire understanding of the parties hereto with respect to the subject matter hereof and supersede all prior agreements, understandings, statements, representations and negotiations between the parties hereto with respect to its subject matter.

5.7 Amendment in Writing. This Agreement may be altered, amended or revoked only by an instrument in writing signed by each Party. No verbal agreement or implied covenant or agreement shall be held to vary the terms hereof, any statute, law or custom to the contrary notwithstanding.

5.8 Survival. This Agreement shall automatically terminate upon expiration or termination of the Disputes Board Member's service hereunder, except that the provisions of this Section 5 shall survive termination of this Agreement.

5.9 Counterparts. This instrument may be executed in two or more counterparts, each of which shall be deemed an original, but all of which together shall constitute one and the same instrument.

[signatures on following page]

IN WITNESS WHEREOF, the parties hereto, intending to be legally bound, have executed this Agreement as of the day and year first set forth above.

Appointing Party:
[TxDOT or DB Contractor]

By_____
Name:_____
Title:_____

Disputes Board Member

By:_____
Name:_____
Address:
_____
_____
_____

Annex 1
to
Disputes Board Member Joinder Agreement

Fees, Costs, and Expenses

[*to be attached*]

ATTACHMENT 2 TO DISPUTES BOARD AGREEMENT

COMMERCIAL RULES

R-1. Agreement of The Parties

(a) The "Expedited Procedures" means the rules set forth in Sections E-1 through E-6 below. Unless the Parties determine otherwise, the Expedited Procedures shall apply to Fast-Track Disputes in addition to any other portion of these rules that is not in conflict with the Expedited Procedures.

(b) The "Procedures for Large, Complex Commercial Disputes" means the rules set forth in Sections L-1 through L-3 below. Unless the Parties agree otherwise, such procedures shall apply to all cases in which the Dispute is valued at $500,000 or more, exclusive of claimed interest, fees and costs. The Parties may also agree to use such procedures in cases involving non-monetary Disputes. Such procedures shall be applied in addition to any other portion of these rules that is not in conflict with the Procedures for Large, Complex Commercial Disputes.

(c) All other cases shall be administered in accordance with Sections R-2 through R-43 of these rules.

(d) If there is any inconsistency between these Commercial Rules and Section 16.3 of the CMA, Section 16.3 of the CMA shall control.

R-2. Disputes Board

The term "Disputes Board" in these Commercial Rules refers to the three member Disputes Board, constituted for a particular case, or to the Disputes Board Chair, as the context requires.

R-3. Assumed Objection

Unless the responding Party states otherwise in its response to the claiming Party's notice of referral of a Dispute to the Disputes Board, all aspects of the Dispute will be deemed to be denied by the other Party (other than any objection to the Disputes Board's authority to resolve the Dispute, which must be affirmatively asserted).

R-4. Changes of Claim

After notice of referral of a Dispute to the Disputes Board is given or received, if either Party desires to make any amended, new, or different claim or counterclaim, it shall be made in writing and filed with the Disputes Board. The Party asserting such an amended, new or different claim or counterclaim shall

provide a copy to the other Party, who shall have 15 days from the date of such transmission within which to file an answering statement with the Disputes Board.

R-5. Jurisdiction

(a) The Disputes Board shall have the power to rule on its own jurisdiction, i.e., to determine if an alleged Dispute is an Ineligible Matter.

(b) The Disputes Board shall rule on jurisdictional objections as a preliminary matter prior to proceeding with proceedings to resolve the underlying Dispute.

R-6. Administrative Conference

At the request of either Party or upon the Disputes Board's own initiative, the Disputes Board may conduct an administrative conference, in person or by telephone, with the Parties and/or their representatives. The conference may address such issues as the replacement of one or more Disputes Board Members, potential mediation of the Dispute, potential exchange of information, a timetable for hearings and any other administrative matters.

R-7. Appointment

Because the Disputes Board Agreement between the Parties specifies a method of appointing a Disputes Board, that designation or method shall be followed.

R-8. Disclosure

(a) Any person appointed or to be appointed as a Disputes Board Member shall disclose to the Parties any circumstance likely to give rise to justifiable doubt as to such Disputes Board Member's impartiality or independence, including any bias or any financial or personal interest in the result of the arbitration or any past or present relationship with the Parties or their representatives. Such obligation shall remain in effect throughout the period of such member's service on the Disputes Board.

(b) In order to encourage disclosure by Disputes Board Members and candidates, disclosure of information pursuant to this R-8 is not to be construed as an indication that the disclosing individual considers that the disclosed circumstance is likely to affect impartiality or independence.

R-9. Disqualification of Disputes Board Member

Each Disputes Board Member shall be impartial and independent and shall perform his or her duties with diligence and in good faith, and shall be subject to disqualification for:

(a) inability or refusal to perform his or her duties with diligence and in good faith, and

(b) any grounds for disqualification provided by applicable law, the Disputes Board Agreement or the CMA Documents.

R-10. No Ex Parte Communication with Disputes Board Members

(a) During the period that any Disputes Board Member is then serving on a Disputes Board, (i) neither Party, including its counsel or designated representatives, shall communicate ex parte with such Disputes Board Member and (ii) no Disputes Board Member shall communicate ex parte with any Person (other than other Disputes Board Members), including but not limited to, either Party, its counsel or designated representatives, regarding any aspect of the applicable Dispute.

(b) Each Party may communicate with individuals listed on its respective Disputes Board Member Candidates List for the purposes of (i) ascertaining their availability to serve on a particular Disputes Board and/or (ii) reconfirming such individuals' qualifications under the Disputes Board Member Qualifications and the absence of Conflicts of Interest and Misconduct, provided that the communicating Party simultaneously furnishes copies of all such written correspondence with such individuals to the other Party and gives the other Party advance notice and opportunity to participate in all verbal communication with such individuals. Ex parte communication regarding the substance of any Dispute between a Party and individuals listed on its respective Disputes Board Member Candidates List is prohibited.

R-11. Hearings After Filling of Vacancies

In the event of the appointment of a substitute Disputes Board Member, the panel of Disputes Board Members shall determine in its sole discretion whether it is necessary to repeat all or part of any prior hearings.

R-12. Preliminary Hearing

(a) At the request of either Party or at the discretion of the Disputes Board, the Disputes Board may schedule as soon as practicable a preliminary

hearing with the Parties and/or their representatives. The preliminary hearing may be conducted by telephone at the Disputes Board's discretion.

(b) During the preliminary hearing, the Parties and the Disputes Board should discuss the future conduct of the case, including clarification of the nature of the Dispute, a schedule for the hearings and any other preliminary matters.

R-13. Exchange of Information; Discovery

(a) At least five Business Days prior to the hearing, the Parties shall exchange (i) copies of all exhibits they intend to submit at the hearing and (ii) lists of witnesses anticipated to be called at the hearing, in each case except for witnesses or exhibits to be offered for the purpose of impeachment or rebuttal.

(b) The Disputes Board Chair is authorized to resolve any disputes concerning the exchange of information or the Parties' discovery.

R-14. Date, Time, and Place of Hearing

The Disputes Board Chair shall set the date, time, and place for each hearing at a neutral and reasonably cost-efficient location in Travis County, Texas that is reasonably convenient for the Parties. The Parties shall respond to requests for hearing dates in a timely manner, be cooperative in scheduling the earliest practicable date, and adhere to the established hearing schedule. The Disputes Board shall send a notice of hearing to the Parties at least 5 Business Days in advance of the hearing date, unless otherwise agreed by the Parties.

R-15. Attendance of Witnesses

Except for each Party's counsel and other authorized representative, upon the request of either Party or its own initiative, the Disputes Board shall have the power to require the exclusion of any witness or potential witness during the testimony of any other witness.

R-16. Representation

Each Party may be represented by counsel or other authorized representative. A Party intending to be so represented shall notify the other Party and the Disputes Board of the name and address of the representative at least three days prior to the date set for the hearing at which that person is first to appear. When such a representative initiates or responds for a Party in the course of the Dispute Resolution Procedures, notice is deemed to have been given by the Party represented by such representative.

R-17. Dispute Board Members' Certifications; Witness Oaths

Before proceeding with the first hearing, each Disputes Board Member shall have entered into a Disputes Board Member Joinder Agreement with a Party in which he or she certifies, under penalty of perjury as to his or her meeting the Disputes Board Member Qualification and the absence of Conflicts of Interest and Misconduct (and a covenant to not engage in Misconduct). The Disputes Board shall require witnesses to testify under oath.

R-18. Stenographic Record

Any Party desiring a stenographic record shall make arrangements directly with a stenographer and shall notify the other Party of these arrangements at least three days in advance of the hearing. The requesting Party shall pay the cost of the record. If the transcript is agreed by the Parties, or determined by the Disputes Board to be the official record of the proceeding, it must be provided to the Disputes Board and made available to the other Party for inspection, at a date, time, and place determined by the Disputes Board.

R-19. Interpreters

Any Party wishing an interpreter shall make all arrangements directly with the interpreter and shall assume the costs of the service.

R-20. Postponements

The Disputes Board may postpone any hearing upon agreement of the Parties, upon request of a Party for good cause shown, or upon the Disputes Board's own initiative for good cause shown.

R-21. Proceedings in the Absence of a Party or Representative

The Dispute Board's proceedings may proceed in the absence of either Party or representative who, after due notice, fails to be present or fails to obtain a postponement. An Disputes Board Decision shall not be made solely on the default of a Party. The Disputes Board shall require the Party who is present to submit such evidence as the Disputes Board may require for the making of a Disputes Board Decision.

R-22. Conduct of Proceedings

(a) The claimant Party shall present evidence to support its claim. The respondent Party shall then present evidence to support its defense. Witnesses for each Party shall also submit to questions from the Disputes Board and the adverse Party. The Disputes Board has the discretion to vary this procedure, provided that

the Parties are treated with equality and that each Party has the right to be heard and is given a fair opportunity to present its case.

(b) The Disputes Board, exercising is discretion, shall conduct the proceedings with a view to expediting the resolution of the Dispute and may direct the order of proof, bifurcate proceedings and direct the Parties to focus their presentations on issues the decision of which could dispose of all or part of the case.

(c) The Parties may agree to waive oral hearings in any case.

R-23. Evidence

(a) The Parties may offer such evidence as is relevant and material to the Dispute and shall produce such evidence as they or the Disputes Board deems relevant and necessary to an understanding and determination of the Dispute. Conformity to the Texas Rules of Evidence shall be required, except where these Commercial Rules contain a contrary rule. All evidence shall be taken in the presence of all of the Disputes Board Members and both of the Parties, except where a Party fails to attend the hearing or has waived the right to be present.

(b) Subject to the Texas Rules of Evidence, the Disputes Board shall determine the admissibility, relevance, and materiality of the evidence offered and may exclude evidence deemed by the Disputes Board to be cumulative or irrelevant.

(c) The Disputes Board shall take into account applicable principles of legal privilege, such as those involving the confidentiality of communications between a lawyer and client.

(d) Special discovery and evidentiary rules:

(i) The Disputes Board Chair shall, at the request of either Party, issue subpoenas for the attendance of witnesses or the production of books, records, documents or other evidence, whether for deposition or for hearing, in the manner provided by law for issuance of a subpoena in a civil action pending in a state district court. All provisions of the Texas Rules of Civil Procedure for service and response to subpoenas in a civil action pending in state district court shall apply to subpoenas issued pursuant hereto.

(ii) Each Party shall be entitled to take depositions of witnesses and to propound written discovery in the manner, and to the extent, provided by Law for discovery in a civil action pending in a state district court, consistent with Rule 190.3 of the Texas Rules of Civil Procedure. The Disputes Board Chair shall, at the request of either Party, or may, on his or her own initiative, adopt a discovery control plan as contemplated by Rule 190.4 of the Texas Rules of Civil Procedure.

(iii) The disclosure of expert witness information and the depositions of designated expert witnesses shall be conducted as provided by the Texas Rules of Civil Procedure for cases in state district court.

(iv) At the hearing, each Party shall have the right to be heard, to present evidence, including expert witness testimony, and to cross-examine witnesses.

R-24. No Evidence by Affidavit; Post-hearing Filing of Documents or Other Evidence

(a) The Disputes Board may not receive and consider the evidence of witnesses by declaration or affidavit.

(b) If the Parties agree or the Disputes Board directs that documents or other evidence be submitted to the Disputes Board after the hearing, the documents or other evidence shall be transmitted to each Disputes Board Member. Both Parties shall be afforded an opportunity to examine and respond to such documents or other evidence.

R-25. Inspection or Investigation

The Disputes Board may find it necessary to make an inspection or investigation in connection with its proceedings and, if so, shall so advise the Parties. The Disputes Board shall set the date and time of such inspection or investigation and notify the Parties thereof. Any Party who so desires may be present at such an inspection or investigation. In the event that one or both of the Parties are not present at the inspection or investigation, the Disputes Board shall make an oral or written report to the Parties on the result or findings from such inspection or investigation and afford them an opportunity to comment.

R-26. Interim Measures

(a) The Disputes Board may take whatever interim measures it deems necessary, including measures for the protection or conservation of property and disposition of perishable goods.

(b) Such interim measures may take the form of an interim Disputes Board Decision.

(c) A request for interim measures addressed by a Party to a Travis County, Texas district court shall not be deemed incompatible with the agreement to have the underlying Dispute resolved by the Disputes Board or a waiver of the right to have the underlying Dispute resolved by the Disputes Board.

R-27. Closing of Hearing

The Disputes Board shall specifically inquire of both Parties whether they have any further proofs to offer or witnesses to be heard. Upon receiving negative replies or if satisfied that the record is complete, the Disputes Board shall declare the hearing closed. If briefs are to be filed, the hearing shall be declared closed as of the final date set by the Disputes Board for the receipt of briefs. If documents are to be filed as provided in R-24 and the date set for their receipt is later than that set for the receipt of briefs, the later date shall be the closing date of the hearing. The time limit within which the Disputes Board is required to make the Disputes Board Decision shall commence, in the absence of other agreements by the Parties, upon the closing of the hearing.

R-28. Reopening of Hearing

The hearing may be reopened only upon application of a Party for good cause shown, as determined in the discretion of the Disputes Board, at any time before the Disputes Board Decision is issued. The Disputes Board may reopen the hearing and shall have 30 days from the closing of the reopened hearing within which to issue the Disputes Board Decision.

R-29. Waiver of Rules

Any Party who proceeds with the Disputes Board proceedings after knowledge that any provision or requirement of these rules has not been complied with and who fails to state an objection in writing to the other Party and the Disputes Board shall be deemed to have waived the right to object.

R-30. Extensions of Time

The Parties may modify any period of time in these rules by mutual agreement. The Disputes Board may for good cause extend any period of time established by these rules, except the time for issuance of the Disputes Board Decision. The Disputes Board shall notify the Parties of any extension.

R-31. Serving of Notice

(a) Any papers, notices, or process necessary or proper for the initiation or continuation of Disputes Board proceedings under these rules, for any court action in connection therewith, or for the entry of judgment on any Disputes Board Decision made under these rules shall be given in accordance with Section 19.10 of the CMA.

(b) Unless otherwise instructed by the Disputes Board, any documents submitted by either Party to the Disputes Board shall simultaneously be provided to the other Party.

R-32. Majority Decision

When the panel consists of more than one Disputes Board, a majority of the Disputes Board Members must make all decisions.

R-33. Time of Issuance of the Disputes Board Decision

The Disputes Board Decision shall be issued promptly by the Disputes Board and no later than 30 days from the date of closing the hearing, or, if oral hearings have been waived, from the date of the Parties' transmittal of the final statements and proofs to the Disputes Board.

R-34. Form of Disputes Board Decision

(a) Any Disputes Board Decision shall be in writing and signed by a majority of the Disputes Board Members.

(b) The Disputes Board shall also issue written findings of fact and conclusions of law to accompany the Disputes Board Decision.

R-35. Scope of Disputes Board Decision

(a) The Disputes Board may determine the occurrence of any event that is a prerequisite to a Party's claim for any remedy or relief in the Dispute, and grant any remedy or relief to resolve the Dispute, that the Disputes Board deems just and equitable and within the scope of the agreement of the Parties under Section 16.3 of the CMA, including, but not limited to, specific performance of any obligation under the CMA Documents.

(b) In addition to a final Disputes Board Decision, the Disputes Board may make other decisions, including interim, interlocutory, or partial rulings, orders, and decisions. In any interim, interlocutory, or partial Disputes Board Decision, the Disputes Board may assess and apportion the fees, expenses, and compensation related to such Disputes Board Decision as the Disputes Board determines is appropriate, subject, however, to the limitations of the Disputes Board's authority in Section 16.3.4.1(e) of the CMA.

(c) In the final Disputes Board Decision, the Disputes Board shall assess compensation amounts. The Disputes Board may apportion fees and expenses between the Parties in such amounts as the Disputes Board determines is

appropriate in its discretion, subject, however, to the limitations of the Disputes Board's authority under Section 16.3.4.1(e) of the CMA.

R-36. Disputes Board Decision upon Settlement

If the Parties settle the Dispute during the course of the Disputes Board proceedings and if the Parties so request, the Disputes Board may set forth the terms of the settlement in a "consent Disputes Board Decision."

R-37. Acceptance of Delivery of Disputes Board Decision

The Parties shall accept as notice and delivery of the written Disputes Board Decision, together with the written findings of fact and conclusions of law, addressed and provided to them in the manner provided under Section 19.10 of the CMA.

R-38. Correction of Errors in Disputes Board Decision

Within 5 Business Days after the transmittal of a Disputes Board Decision, either Party, upon notice to the other Party, may request the Disputes Board, through the Disputes Board Chair, to correct any clerical, typographical, or computational errors in the Disputes Board Decision. The Disputes Board is not empowered under this R-38 to redetermine the merits of any Dispute already decided. The other Party shall be given 5 Business Days to object to the request on the ground that there is no clerical, typographical, or computational error in the decision. The Disputes Board shall perform the request correction of errors within 10 Business Days after transmittal by the Disputes Board Chair of the request for correction of errors unless the other Party objects. Any unresolved disagreement between the Parties as to the existence of a clerical, typographical, or computational error in the Disputes Board Decision can be subsequently pursued, if at all, under R-28.

R-39. Release of Documents for Subsequent Proceedings

The Disputes Board shall, upon the written request of a Party, furnish to the Party, at the Party's expense, certified copies of any papers in the Disputes Board's possession that may be required in further administrative or judicial proceedings relating to resolution of the Dispute.

R-40. Applications to Court and Exclusion of Liability

(a) No judicial proceeding by a Party relating to a Dispute shall be deemed a waiver of the Party's right to have the Dispute resolved by Dispute Board proceedings.

(b) Neither any Disputes Board Member nor the Disputes Board in a proceeding under these rules is a necessary or proper Party in judicial proceedings relating to a Dispute.

R-41. Expenses

The expenses of witnesses for either side shall be paid by the Party producing such witnesses. All other expenses of the Dispute Board's proceedings, including required travel and other expenses of the Disputes Board, Disputes Board representatives, and any witness and the cost of any proof produced at the direct request of the Disputes Board, shall be borne equally by the Parties, unless they agree otherwise or unless the Disputes Board in the Disputes Board Decision assesses such expenses or any part thereof against any specified Party or The Parties (in the latter case subject, however, to the limitations of the Disputes Board's authority under Section 16.3.4.1(e) of the CMA).

R-42. Interpretation and Application of Rules

The Disputes Board shall interpret and apply these rules insofar as they relate to the Disputes Board's powers and duties to resolve the particular Dispute for which such Disputes Board was empanelled to resolve.

R-43. No Suspension for Nonpayment

If a Disputes Board Member's compensation or administrative charges have not been paid in full, such Disputes Board Member may so inform the Parties in order that one of them may advance the required payment. If such payments are not made, and the non-paying Party does not within 30 days after its receipt of the unpaid Disputes Board Member's invoice provide notice to such member and the other Party as to such Party's dispute of such member's invoice, the Disputes Board may order the suspension or termination of the proceedings. If a Party disputes a Disputes Board Member's invoice and provides such notice, no suspension or termination of the proceedings shall occur. Ex parte conversations to resolve a fee dispute between the Dispute Board Member whose invoice is disputed and the disputed Party are prohibited during the Dispute Board's resolution of the Dispute, and any such conversations shall be deferred until the Disputes Board Decision is final.

EXPEDITED PROCEDURES FOR FAST-TRACK DISPUTES

E-1. Serving of Notices

In addition to notice provided pursuant to Section 19.10 of the CMA, the Parties can agree in writing to also accept notice by telephone. If the Parties so

agree, a failure to confirm in writing any such oral notice, the proceeding shall nevertheless be valid if notice has, in fact, been given by telephone.

E-2. Exchange of Exhibits

At least two Business Days prior to the hearing, the Parties shall exchange copies of all exhibits they intend to submit at the hearing. The Disputes Board shall resolve disputes concerning the exchange of exhibits.

E-3. Proceedings on Documents

Where no Party's claim exceeds $10,000, exclusive of interest and arbitration costs, and other cases in which the Parties agree, the Dispute shall be resolved by submission of documents, unless either Party requests an oral hearing, or the Disputes Board determines that an oral hearing is necessary. The Disputes Board shall establish a fair and equitable procedure for the submission of documents.

E-4. Date, Time, and Place of Hearing

In cases in which a hearing is to be held, the Disputes Board shall set the date, time, and place of the hearing, to be scheduled to take place within 10 days after appointment of the Disputes Board Chair. The Disputes Board will notify the Parties in advance of the hearing date.

E-5. The Hearing

(a) Each Party shall have equal opportunity to submit its proofs and complete its case.

(b) The Disputes Board shall determine the order of the hearing and schedule and control its duration consistent with the objective of expedited resolution of the Fast-Track Dispute, and may require further submission of documents within two days after the hearing. For good cause shown, the Disputes Board may schedule additional hearings within seven Business Days after the initial hearing.

(c) Any Party desiring a stenographic record may arrange for one pursuant to the provisions of R-18.

E-6. Time of Award

Unless otherwise agreed by the Parties, the Disputes Board Decision shall be rendered not later than 14 days from the date of the closing of the hearing or, if oral hearings have been waived, from the date of the Parties' transmittal of the final statements and proofs to the Disputes Board.

PROCEDURES FOR LARGE, COMPLEX COMMERCIAL DISPUTES

L-1. Administrative Conference

Prior to the commencing proceedings to resolve a Dispute, the Disputes Board shall, unless the Parties agree otherwise, conduct an administrative conference with the Parties and/or their attorneys or other representatives by conference call within 7 days after the Disputes Board Chair is appointed. In the event the Parties are unable to agree on a mutually acceptable time for the administrative conference, the Dispute Board shall, upon three Business Days' advance notice, schedule the administrative conference for 9 a.m. (CST) on the fourth Business Day and such administrative conference shall take place at such date and time. Such administrative conference shall be conducted for the following purpose of obtaining additional information about the nature and magnitude of the Dispute and the anticipated length of hearing and scheduling and for such additional purposes as the Parties or the Disputes Board may deem appropriate.

L-2. Preliminary Hearing

As promptly as practicable after the appointment of the Disputes Board, a preliminary hearing shall be held among the Parties and/or their attorneys or other representatives and the Disputes Board. If the Parties agree, the preliminary hearing will be conducted by telephone conference call rather than in person. At the preliminary hearing the matters to be considered shall include, without limitation:

(a) service of a detailed statement of the Dispute, including damages and defenses, a statement of the issues asserted by each Party and positions with respect thereto, and any legal authorities the Parties may wish to bring to the attention of the Disputes Board;

(b) stipulations to uncontested facts;

(c) the extent to which discovery shall be conducted, in light of the special discovery and evidentiary rules set forth above in R-23(d);

(d) exchange and premarking of those documents which each Party believes may be offered at the hearing;

(e) the identification and availability of witnesses, including experts, and such matters with respect to witnesses including their biographies and expected testimony as may be appropriate;

(f) whether, and the extent to which, any sworn statements and/or depositions may be introduced;

(g) the extent to which hearings will proceed on consecutive days;

(h) whether a stenographic or other official record of the proceedings shall be maintained;

(i) the possibility of utilizing mediation or other non-adjudicative methods of dispute resolution; and

(j) the procedure for the issuance of subpoenas.

By agreement of the Parties and/or order of the Disputes Board Chair, the pre-hearing activities and the hearing procedures that will govern the Disputes Board's proceedings will be memorialized in a scheduling and procedure order (each, a "Scheduling and Procedure Order"). Nothing in any Schedule and Procedure Order shall conflict with the procedures established under Section 16.3 of the CMA.

L-3. Management of Proceedings

(a) The Disputes Board shall take such steps as they may deem necessary or desirable to avoid delay and to achieve a just, speedy and cost-effective resolution of Large, Complex Commercial Cases, provided, however, that no action by the Disputes Board under this L-3 shall conflict with the procedures established under Section 16.3 of the CMA.

(b) The Parties shall cooperate in the exchange of documents, exhibits and information within such Party's control if the Disputes Board(s) consider such production to be consistent with the goal of achieving a just, speedy and cost-effective resolution of a Large, Complex Commercial Case.

(c) The Parties may conduct discovery, subject to any limitations deemed appropriate and set forth in the discovery control plan and/or the Scheduling and Procedure Order. If the Parties cannot agree on production of documents and other information, the Disputes Board, consistent with the expedited nature of arbitration, may establish the extent of the discovery.

(d) The Parties shall exchange copies of all exhibits they intend to submit at the hearing 10 Business Days prior to the hearing unless the Disputes Board Chair determines otherwise.

(e) The exchange of information pursuant to this rule, as agreed by the Parties and/or directed by the Disputes Board Chair, shall be included within the Scheduling and Procedure Order.

(f) The Disputes Board is authorized to resolve any disputes concerning the exchange of information.

(g) Generally hearings will be scheduled on consecutive days or in blocks of consecutive days in order to maximize efficiency and minimize costs.

EXHIBIT 9

FORM OF GUARANTY

THIS GUARANTY (this "Guaranty") is made as of _____, 20__ by _____, a _____ ("Guarantor"), in favor of the TEXAS DEPARTMENT OF TRANSPORTATION, an agency of the State of Texas ("TxDOT").

RECITALS

A. _____, as design-build contractor ("DB Contractor"), and TxDOT are parties to that certain Capital Maintenance Agreement (the "Agreement") pursuant to which DB Contractor has agreed to maintain the Project. Initially capitalized terms used herein without definition will have the meaning given such term in the CMA Documents.

B. To induce TxDOT to (i) enter into the Agreement; and (ii) consummate the transactions contemplated thereby, Guarantor has agreed to enter into this Guaranty.

C. DB Contractor is a _____. The Guarantor is _____. The execution of the Agreement by TxDOT and the consummation of the transactions contemplated thereby will materially benefit Guarantor. Without this Guaranty, TxDOT would not have entered into the Agreement with DB Contractor. Therefore, in consideration of TxDOT's execution of the Agreement and consummation of the transactions contemplated thereby, Guarantor has agreed to execute this Guaranty.

NOW, THEREFORE, in consideration of the foregoing Recitals, and for other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, Guarantor agrees as follows:

1. **Guaranty**. Guarantor guarantees to TxDOT and its successors and assigns the full and prompt payment and performance when due of all of the obligations of DB Contractor arising out of, in connection with, under or related to the CMA Documents. The obligations guaranteed pursuant to this Guaranty are collectively referred to herein as the "Guaranteed Obligations."

2. **Unconditional Obligations**. This Guaranty is a guaranty of payment and performance and not of collection. Except as provided in Section 21, this Guaranty is an absolute, unconditional and irrevocable guarantee of the full and prompt payment and performance when due of all of the Guaranteed Obligations, whether or not from time to time reduced or extinguished or

hereafter increased or incurred, and whether or not enforceable against DB Contractor. If any payment made by DB Contractor or any other Person and applied to the Guaranteed Obligations is at any time annulled, set aside, rescinded, invalidated, declared to be fraudulent or preferential or otherwise required to be repaid or refunded, then, to the extent of such payment or repayment, the liability of Guarantor will be and remain in full force and effect as fully as if such payment had never been made. Guarantor covenants that this Guaranty will not be fulfilled or discharged, except by the complete payment and performance of the Guaranteed Obligations, whether by the primary obligor or Guarantor under this Guaranty. Without limiting the generality of the foregoing, Guarantor's obligations hereunder will not be released, discharged or otherwise affected by: (a) any change in the CMA Documents or the obligations thereunder, or any insolvency, bankruptcy or similar proceeding affecting DB Contractor, Guarantor or their respective assets, and (b) the existence of any claim or set-off which DB Contractor has or Guarantor may have against TxDOT, whether in connection with this Guaranty or any unrelated transaction, provided that nothing in this Guaranty will be deemed a waiver by Guarantor of any claim or prevent the assertion of any claim by separate suit. This Guaranty will in all respects be a continuing, absolute, and unconditional guaranty irrespective of the genuineness, validity, regularity or enforceability of the Guaranteed Obligations or any part thereof or any instrument or agreement evidencing any of the Guaranteed Obligations or relating thereto, or the existence, validity, enforceability, perfection, or extent of any collateral therefor or any other circumstances relating to the Guaranteed Obligations, except as provided in Section 21.

3. **Independent Obligations**. Guarantor agrees that the Guaranteed Obligations are independent of the obligations of DB Contractor and if any default occurs hereunder, a separate action or actions may be brought and prosecuted against Guarantor whether or not DB Contractor is joined therein. TxDOT may maintain successive actions for other defaults of Guarantor. TxDOT's rights hereunder will not be exhausted by the exercise of any of its rights or remedies or by any such action or by any number of successive actions until and unless all Guaranteed Obligations have been paid and fully performed.

a. Guarantor agrees that TxDOT may enforce this Guaranty, at any time and from time to time, without the necessity of resorting to or exhausting any security or collateral and without the necessity of proceeding against DB Contractor. Guarantor hereby waives the right to require TxDOT to proceed against DB Contractor, to exercise any

right or remedy under any of the CMA Documents or to pursue any other remedy or to enforce any other right.

b. Guarantor will continue to be subject to this Guaranty notwithstanding: (i) any modification, agreement or stipulation between DB Contractor and TxDOT or their respective successors and assigns, with respect to any of the CMA Documents or the Guaranteed Obligations; (ii) any waiver of or failure to enforce any of the terms, covenants or conditions contained in any of the CMA Documents or any modification thereof; (iii) any release of DB Contractor from any liability with respect to any of the CMA Documents; or (iv) any release or subordination of any collateral then held by TxDOT as security for the performance by DB Contractor of the Guaranteed Obligations.

c. The Guaranteed Obligations are not conditional or contingent upon the genuineness, validity, regularity or enforceability of any of the CMA Documents or the pursuit by TxDOT of any remedies which TxDOT either now has or may hereafter have with respect thereto under any of the CMA Documents.

d. Notwithstanding anything to the contrary contained elsewhere in this Guaranty, Guarantor's obligations and undertakings hereunder are derivative of, and not in excess of, the obligations of DB Contractor under the Agreement. Accordingly, in the event that DB Contractor's obligations have been changed by any modification, agreement or stipulation between DB Contractor and TxDOT or their respective successors or assigns, this Guaranty shall apply to the Guaranteed Obligations as so changed.

4. <u>Liability of Guarantor</u>.

a. TxDOT may enforce this Guaranty upon the occurrence of a breach by DB Contractor of any of the Guaranteed Obligations, notwithstanding the existence of any dispute between TxDOT and DB Contractor with respect to the existence of such a breach.

b. Guarantor's performance of some, but not all, of the Guaranteed Obligations will in no way limit, affect, modify or abridge Guarantor's liability for those Guaranteed Obligations that have not been performed.

c. TxDOT, upon such terms as it deems appropriate, without notice or demand and without affecting the validity or enforceability of this

Guaranty or giving rise to any reduction, limitation, impairment, discharge or termination of Guarantor's liability hereunder, from time to time may (i) with respect to the financial obligations of DB Contractor, if and as permitted by the Agreement, renew, extend, accelerate, increase the rate of interest on, or otherwise change the time, place, manner or terms of payment of financial obligations that are Guaranteed Obligations, and/or subordinate the payment of the same to the payment of any other obligations, (ii) settle, compromise, release or discharge, or accept or refuse any offer of performance with respect to, or substitutions for, the Guaranteed Obligations or any agreement relating thereto, (iii) request and accept other guarantees of the Guaranteed Obligations and take and hold security for the payment and performance of this Guaranty or the Guaranteed Obligations, (iv) release, surrender, exchange, substitute, compromise, settle, rescind, waive, alter, subordinate or modify, with or without consideration, any security for performance of the Guaranteed Obligations, any other guarantees of the Guaranteed Obligations, or any other obligation of any Person with respect to the Guaranteed Obligations, (v) enforce and apply any security hereafter held by or for the benefit of TxDOT in respect of this Guaranty or the Guaranteed Obligations and direct the order or manner of sale thereof, or exercise any other right or remedy that TxDOT may have against any such security, as TxDOT in its discretion may determine, and (vi) exercise any other rights available to it under the CMA Documents.

d. This Guaranty and the obligations of Guarantor hereunder will be valid and enforceable and will not be subject to any reduction, limitation, impairment, discharge or termination for any reason (other than indefeasible performance in full of the Guaranteed Obligations), including without limitation the occurrence of any of the following, whether or not Guarantor will have had notice or knowledge of any of them: (i) any failure or omission to assert or enforce or agreement or election not to assert or enforce, or the stay or enjoining, by order of court, by operation of law or otherwise, of the exercise or enforcement of, any claim or demand or any right, power or remedy (whether arising under the CMA Documents, at law, in equity or otherwise) with respect to the Guaranteed Obligations or any agreement or instrument relating thereto; (ii) any rescission, waiver, amendment or modification of, or any consent to departure from, any of the terms or provisions (including without limitation provisions relating to events of default) of the CMA Documents or any agreement or instrument executed

pursuant thereto; (iii) TxDOT's consent to the change, reorganization or termination of the corporate structure or existence of DB Contractor; (iv) any defenses, set-offs or counterclaims that DB Contractor may allege or assert against TxDOT in respect of the Guaranteed Obligations, except as provided in Section 21.

5. **Waivers**. To the fullest extent permitted by law, Guarantor hereby waives and agrees not to assert or take advantage of: (a) any right to require TxDOT to proceed against DB Contractor or any other Person or to proceed against or exhaust any security held by TxDOT at any time or to pursue any right or remedy under any of the CMA Documents or any other remedy in TxDOT's power before proceeding against Guarantor; (b) any defense that may arise by reason of the incapacity, lack of authority, death or disability of, or revocation hereby by Guarantor, DB Contractor or any other Person or the failure of TxDOT to file or enforce a claim against the estate (either in administration, bankruptcy or any other proceeding) of any such Person; (c) any defense that may arise by reason of any presentment, demand for payment or performance or otherwise, protest or notice of any other kind or lack thereof; (d) any right or defense arising out of an election of remedies by TxDOT even though the election of remedies, such as nonjudicial foreclosure with respect to any security for the Guaranteed Obligations, has destroyed the Guarantor's rights of subrogation and reimbursement against DB Contractor by the operation of law or otherwise; (e) all notices to Guarantor or to any other Person, including, but not limited to, notices of the acceptance of this Guaranty or the creation, renewal, extension, modification, accrual of any of the obligations of DB Contractor under any of the CMA Documents, or of default in the payment or performance of any such obligations, enforcement of any right or remedy with respect thereto or notice of any other matters relating thereto, except the notice required in Section 12.3.1 of the Agreement; (f) any defense based upon any act or omission of TxDOT which directly or indirectly results in or aids the discharge or release of DB Contractor, Guarantor or any security given or held by TxDOT in connection with the Guaranteed Obligations; and (g) any and all suretyship defenses under applicable law.

6. **Waiver of Subrogation and Rights of Reimbursement**. Until the Guaranteed Obligations have been indefeasibly paid in full, Guarantor waives any claim, right or remedy which it may now have or may hereafter acquire against DB Contractor that arises from the performance of Guarantor hereunder, including, without limitation, any claim, right or remedy of subrogation, reimbursement, exoneration, contribution, or indemnification, or participation in any claim, right or remedy of TxDOT against DB Contractor,

or any other security or collateral that TxDOT now has or hereafter acquires, whether or not such claim, right or remedy arises in equity, under contract, by statute, under common law or otherwise. All existing or future indebtedness of DB Contractor or any shareholders, partners, members, joint venturers of DB Contractor to Guarantor is subordinated to all of the Guaranteed Obligations. Whenever and for so long as DB Contractor shall be in default in the performance of a Guaranteed Obligation, no payments with respect to any such indebtedness shall be made by DB Contractor or any shareholders, partners, members, joint venturers of DB Contractor to Guarantor without the prior written consent of TxDOT. Any payment by DB Contractor or any shareholders, partners, members, joint venturers of DB Contractor to Guarantor in violation of this provision shall be deemed to have been received by Guarantor as trustee for TxDOT.

7. **Waivers by Guarantor if Real Property Security**. If the Guaranteed Obligations are or become secured by real property or an estate for years, Guarantor waives all rights and defenses that Guarantor may have because the Guaranteed Obligations are secured by real property. This means, among other things:

a. TxDOT may collect from Guarantor without first foreclosing on any real or personal property collateral pledged by DB Contractor.

b. If TxDOT forecloses on any real property collateral pledged by DB Contractor:

(1) The amount of the Guaranteed Obligation may be reduced only by the price for which that collateral is sold at the foreclosure sale, even if the collateral is worth more than the sale price.

(2) TxDOT may collect from Guarantor even if TxDOT, by foreclosing on the real property collateral, has destroyed any right Guarantor may have to collect from DB Contractor.

This is an unconditional and irrevocable waiver of any rights and defenses Guarantor may have because the Guaranteed Obligations are secured by real property.

8. **Cumulative Rights**. All rights, powers and remedies of TxDOT hereunder will be in addition to and not in lieu of all other rights, powers and remedies given to TxDOT, whether at law, in equity or otherwise.

9. **Representations and Warranties**. Guarantor represents and warrants that:

a. it is a [corporation][limited liability company] duly organized, validly existing, and in good standing under the laws of the State of Delaware and qualified to do business and is in good standing under the laws of the State of Texas;

b. it has all requisite corporate power and authority to execute, deliver and perform this Guaranty;

c. the execution, delivery, and performance by Guarantor of this Guaranty have been duly authorized by all necessary corporate action on the part of Guarantor and proof of such authorization will be provided with the execution of this Guaranty;

d. this Guaranty has been duly executed and delivered and constitutes the legal, valid and binding obligation of Guarantor, enforceable against Guarantor in accordance with its terms;

e. neither the execution nor delivery of this Guaranty nor compliance with or fulfillment of the terms, conditions, and provisions hereof, will conflict with, result in a material breach or violation of the terms, conditions, or provisions of, or constitute a material default, an event of default, or an event creating rights of acceleration, termination, or cancellation, or a loss of rights under: (1) the [certificate of incorporation or by-laws][certificate of formation or limited liability agreement] of Guarantor, (2) any judgment, decree, order, contract, agreement, indenture, instrument, note, mortgage, lease, governmental permit, or other authorization, right restriction, or obligation to which Guarantor is a party or any of its property is subject or by which Guarantor is bound, or (3) any federal, state, or local law, statute, ordinance, rule or regulation applicable to Guarantor;

f. it now has and will continue to have full and complete access to any and all information concerning the transactions contemplated by the CMA Documents or referred to therein, the financial status of DB Contractor and the ability of DB Contractor to pay and perform the Guaranteed Obligations;

g. it has reviewed and approved copies of the CMA Documents and is fully informed of the remedies TxDOT may pursue, with or without notice to DB Contractor or any other Person, in the event of default of any of the Guaranteed Obligations;

h. it has made and so long as the Guaranteed Obligations (or any portion thereof) remain unsatisfied, it will make its own credit analysis of DB Contractor and will keep itself fully informed as to all aspects of the financial condition of DB Contractor, the performance of the Guaranteed Obligations of all circumstances bearing upon the risk of nonpayment or nonperformance of the Guaranteed Obligations. Guarantor hereby waives and relinquishes any duty on the part of TxDOT to disclose any matter, fact or thing relating to the business, operations or conditions of DB Contractor now known or hereafter known by TxDOT;

i. no consent, authorization, approval, order, license, certificate, or permit or act of or from, or declaration or filing with, any governmental authority or any party to any contract, agreement, instrument, lease, or license to which Guarantor is a party or by which Guarantor is bound, is required for the execution, delivery, or compliance with the terms hereof by Guarantor, except as have been obtained prior to the date hereof; and

j. there is no pending or, to the best of its knowledge, threatened action, suit, proceeding, arbitration, litigation, or investigation of or before any Governmental Authority which challenges the validity or enforceability of this Guaranty.

10. **Governing Law; Jurisdiction; Venue**. The validity, interpretation and effect of this Guaranty are governed by and will be construed in accordance with the laws of the State of Texas applicable to contracts made and performed in such State and without regard to conflicts of law doctrines except to the extent that certain matters are preempted by Federal law. Guarantor consents to the jurisdiction of the State of Texas with regard to this Guaranty. The venue for any action regarding this Guaranty shall be Travis County, Texas.

11. **Entire Document**. This Guaranty contains the entire agreement of Guarantor with respect to the transactions contemplated hereby, and supersedes all negotiations, representations, warranties, commitments, offers, contracts and writings prior to the date hereof, written or oral, with respect to the subject matter hereof. No waiver, modification or amendment of any provision of this Guaranty is effective unless made in writing and duly signed by TxDOT referring specifically to this Guaranty, and then only to the specific purpose, extent and interest so provided.

12. **Severability**. If any provision of this Guaranty is determined to be unenforceable for any reason by a court of competent jurisdiction, it will be adjusted rather than voided, to achieve the intent of the parties and all of the provisions not deemed unenforceable will be deemed valid and enforceable to the greatest extent possible.

13. **Notices**. Any communication, notice or demand of any kind whatsoever under this Guaranty shall be in writing and delivered by personal service (including express or courier service), by electronic communication, whether by telex, telegram or telecopying (if confirmed in writing sent by registered or certified mail, postage prepaid, return receipt requested), or by registered or certified mail, postage prepaid, return receipt requested, addressed as follows:

If to TxDOT:

Texas Department of Transportation
4777 East Highway 80
Mesquite, Texas 75150
Attention: Kelly Selman, P.E.
Telephone: (214) 320-6189
E-mail: kelly.selman@txdot.gov

With copies to:

Texas Department of Transportation
Project Finance, Debt & Strategic Contracts Division
125 East 11th Street
Austin, TX 78701
Attn: Mr. Benjamin Asher
Telephone: (512) 463-8611
E-mail: benjamin.asher@txdot.gov

and

Texas Department of Transportation
General Counsel Division
125 East 11th Street
Austin, Texas 78701
Attention: General Counsel Division
Telephone: (512) 463-8630
E-mail: jack.ingram@txdot.gov

If to Guarantor: _____

_____

Attention:
Telephone:
Facsimile:

Either Guarantor or TxDOT may from time to time change its address for the purpose of notices by a similar notice specifying a new address, but no such change is effective until it is actually received by the party sought to be charged with its contents.

All notices and other communications required or permitted under this Guaranty which are addressed as provided in this Section 13 are effective upon delivery, if delivered personally or by overnight mail, and, are effective five days following deposit in the United States mail, postage prepaid if delivered by mail.

14. **Captions**. The captions of the various Sections of this Guaranty have been inserted only for convenience of reference and do not modify, explain, enlarge or restrict any of the provisions of this Guaranty.

15. **Assignability**. This Guaranty is binding upon and inures to the benefit of the successors and assigns of Guarantor and TxDOT, but is not assignable by Guarantor without the prior written consent of TxDOT, which consent may be granted or withheld in TxDOT's sole discretion. Any assignment by Guarantor effected in accordance with this Section 15 will not relieve Guarantor of its obligations and liabilities under this Guaranty.

16. **Construction of Agreement**. Ambiguities or uncertainties in the wording of this Guaranty will not be construed for or against any party, but will be construed in the manner that most accurately reflects the parties' intent as of the date hereof.

17. **No Waiver**. Any forbearance or failure to exercise, and any delay by TxDOT in exercising, any right, power or remedy hereunder will not impair any such right, power or remedy or be construed to be a waiver thereof, nor will it preclude the further exercise of any such right, power or remedy.

18. **Bankruptcy; Post-Petition Interest; Reinstatement of Guaranty**.

a. The obligations of Guarantor under this Guaranty will not be reduced, limited, impaired, discharged, deferred, suspended or terminated by any proceeding, voluntary or involuntary, involving the bankruptcy, insolvency, receivership, reorganization, liquidation or arrangement of

DB Contractor or by any defense which DB Contractor may have by reason of the order, decree or decision of any court or administrative body resulting from any such proceeding. TxDOT is not obligated to file any claim relating to the Guaranteed Obligations if DB Contractor becomes subject to a bankruptcy, reorganization, or similar proceeding, and the failure of TxDOT so to file will not affect Guarantor's obligations under this Guaranty.

b. Guarantor acknowledges and agrees that any interest on any portion of the Guaranteed Obligations which accrues after the commencement of any proceeding referred to in clause (a) above (or, if interest on any portion of the Guaranteed Obligations ceases to accrue by operation of law by reason of the commencement of said proceeding, such interest as would have accrued on such portion of the Guaranteed Obligations if said proceedings had not been commenced) will be included in the Guaranteed Obligations because it is the intention of Guarantor and TxDOT that the Guaranteed Obligations should be determined without regard to any rule of law or order which may relieve DB Contractor of any portion of such Guaranteed Obligations. Guarantor will permit any trustee in bankruptcy, receiver, debtor in possession, assignee for the benefit of creditors or any similar person to pay TxDOT, or allow the claim of TxDOT in respect of, any such interest accruing after the date on which such proceeding is commenced.

19. **Attorneys' Fees**. Guarantor agrees to pay to TxDOT without demand reasonable attorneys' fees and all costs and other expenses (including such fees and costs of litigation, arbitration and bankruptcy, and including appeals) incurred by TxDOT in enforcing, collecting or compromising any Guaranteed Obligation or enforcing or collecting this Guaranty against Guarantor or in attempting to do any or all of the foregoing.

20. **Joint and Several Liability**. If the Guarantor is comprised of more than one individual and/or entity, such individuals and/or entities, as applicable, shall be jointly and severally liable for the Guaranteed Obligations. If more than one guaranty is executed with respect to DB Contractor and the Project, each guarantor under such a guaranty shall be jointly and severally liable with the other guarantors with respect to the obligations guaranteed under such guaranties.

21. **Defenses**. Notwithstanding any other provision to the contrary, Guarantor shall be entitled to the benefit of all defenses available to DB Contractor under the Agreement except (a) those expressly waived in this Guaranty, (b)

failure of consideration, lack of authority of DB Contractor and any other defense to formation of the Agreement, and (c) defenses available to DB Contractor under any federal or state law respecting bankruptcy, arrangement, reorganization or similar relief of debtors. Action against Guarantor under this Guaranty shall be subject to no prior notice or demand except for the notice provided in Section 12.3.1 of the Agreement.

[*SIGNATURES ON NEXT PAGE*]

IN WITNESS WHEREOF, Guarantor has executed this Guaranty as of the date first written above.

_____
a _____

By: _____
Name:_____
Title:_____

By: _____
Name:_____
Title:_____

EXHIBIT 10

INSURANCE REQUIREMENTS

1. Builder's Risk Insurance

At all times during any period in which Maintenance Services by or on behalf of DB Contractor are in progress during the Maintenance Term, DB Contractor shall procure and keep in force a policy of builder's risk insurance as specified below.

(a) The policy shall provide coverage for "all risks" of direct physical loss or damage to the portions or elements of the Project under construction, excluding terrorism but including the perils of earthquake, earth movement, flood, storm, tempest, windstorm, hurricane, and tornado and subsidence; shall contain extensions of coverage that are typical for a project of the nature of the Project; and shall contain only those exclusions that are typical for a project of the nature of the Project.

(b) The policy shall cover (i) all property, roads, buildings, structures, fixtures, materials, supplies, foundations, pilings, machinery and equipment that are part of or related to the portions of the Project under construction, and the works of improvement, including permanent and temporary works and materials, and including goods intended for incorporation into the works located at the Site, in storage or in the course of inland transit on land to the Site, (ii) all existing property and improvements that are within the construction work zone or are or will be affected by the construction work, and (iii) valuable papers and restoration of data, plans and drawings.

(c) The policy shall provide coverage per occurrence up to the greater of the maximum probable loss amount as determined by DB Contractor's insurance advisor and reviewed and approved by TxDOT or $20,000,000, without risk of co-insurance; provided, however, that the policy must also insure against all of the following risks, which may be subject to the following sublimits (i) for earth movement and flood an amount of not less than $5,000,000 per occurrence and $10,000,000 aggregate, (ii) for existing property and improvements an amount of not less than $1,000,000, (iii) for building ordinance compliance an amount of not less than $2,000,000, (iv) for "soft cost expense" an amount acceptable to TxDOT, not less than $2,000,000, (v) for demolition, not less than $2,000,000, (vi) for debris removal, not less than $2,000,000, (vii) for professional fees, not less than $2,000,000, and (viii) for valuable papers and restoration of data, plans and drawings, not less than $500,000.

(d) The Indemnified Parties shall be named as additional insureds on the policy. The policy shall be written so that no act or omission of any insured shall vitiate coverage of the additional insureds.

(e) The policy shall include coverage for (i) foundations, including pilings, but excluding normal settling, shrinkage, or expansion, (ii) physical damage resulting from machinery accidents but excluding normal and natural wear and tear, corrosion, erosion, inherent vice or latent defect in the machinery, (iii) plans, blueprints and specifications, (iv) physical damage resulting from faulty work or faulty materials, but excluding the cost of making good such faulty work or faulty materials, (v) physical damage resulting from design error or omission but excluding the cost of making good such design error or omission, (vi) demolition and debris removal coverage, (vii) the increased replacement cost due to any change in applicable codes or other Laws, (viii) expense to reduce loss, (ix) building ordinance compliance, with the building ordinance exclusion deleted, and (x) "soft cost expense" (including costs of Governmental Approvals, mitigation costs, attorneys' fees, and other fees and costs associated with such damage or loss or replacement thereof).

(f) The policy shall provide a deductible or self-insured retention not exceeding $1,000,000 per occurrence. However, with regard to the perils of windstorm, flood and earthquake/earth movement, TxDOT will accept deductibles up to 5% of the policy limit.

2. Commercial General Liability Insurance

At all times during the performance of the Maintenance Services and during the Maintenance Term, DB Contractor shall procure and keep in force, or cause to be procured and kept in force, commercial general liability insurance as specified below.

a. The policy shall be in a form reasonably acceptable to TxDOT, and shall be an occurrence form. The policy shall contain extensions of coverage that are typical for a project of the nature of this Project, and shall contain only those exclusions that are typical for a project of the nature of this Project.

b. The policy shall insure against the legal liability of the insureds named in Section 2(d), relating to claims by third parties for accidental death, bodily injury or illness, property damage, personal injury and advertising injury, and shall include the following specific coverages:

(i) Contractual liability;

(ii) Premises/operations;

(iii) Independent contractors;

(iv) Products and completed operations (with acknowledgement that the Project constitutes the premises and not a product);

(v) Broad form property damage, providing the same coverage as ISO form CG 00 01 12 07 provides;

(vi) Hazards commonly referred to as "XCU", including explosion, collapse and underground property damage;

(vii) Fellow employee coverage for supervisory personnel;

(viii) Incidental medical malpractice;

(ix) No exclusion for work performed within 50 feet of a railroad;

(x) No exclusion for claims arising from professional services except for CG 22 80 or its equivalent;

(xi) Broad named insured endorsement; and

(xii) Non-owned automobile liability, unless covered by the automobile liability policy pursuant to Section 4 of this Exhibit 10.

c. The policy shall have limits of not less than $1,000,000 per occurrence and $2,000,000 in the general aggregate per policy period, with the general aggregate limit applicable on a per project basis. Such limits may be shared by all insured and additional insured parties and shall reinstate annually.

d. The policy shall name DB Contractor as a named insured. The Indemnified Parties shall be named as additional insureds, using ISO forms CG 20 10 04 13 and CG 20 37 04 13 or their equivalents. The policy shall be written so that no act or omission of a named insured shall vitiate coverage of the additional insureds. If requested by any railroad impacted by the Project, such railroad shall also be named as an additional insured in accordance with this clause (d) or otherwise in accordance with the requirements of such railroad.

e. The policy shall provide for a deductible or self-insured retention not exceeding $1,000,000 per occurrence.

3. Automobile Liability Insurance

At all times during the performance of the Maintenance Services and during the Maintenance Term, DB Contractor shall procure and keep in force

comprehensive, business, or commercial automobile liability insurance as specified below.

a. Each policy shall cover accidental death, bodily injury and property damage liability arising from the ownership, maintenance or use of all owned, non-owned and hired vehicles connected with performance of the Maintenance Services, including loading and unloading. The policy shall contain extensions of coverage that are typical for a project of the nature of the Project, and shall contain only those exclusions that are typical for a project of the nature of the Project.

b. DB Contractor shall be the named insured under its automobile liability policy.

c. DB Contractor's policy shall have a combined single limit per policy period of not less than $1,000,000 combined single.

d. Each policy shall provide a deductible or self-insured retention not exceeding $1,000,000 per occurrence.

e. The Indemnified Parties shall be named as additional insureds.

4. <u>Pollution Liability Insurance</u>

At all times during the performance of the Maintenance Services and during the Maintenance Term, DB Contractor shall procure and keep in force, or cause to be procured and kept in force, pollution liability insurance as specified below.

a. The policy shall cover sums that the insured becomes liable to pay to a third party or that are incurred by the order of a regulatory body consequent upon a pollution incident, subject to the policy terms and conditions, including bodily injury, property damage, clean-up and remediation costs and associated defense costs. Such policy shall cover claims related to pollution conditions to the extent such are caused by, arise out of or are otherwise related to the performance of the Maintenance Services provided on the Project. Coverage shall include, at a minimum, not only on-site activities, but also non-owned disposal sites and in transit exposures. If the policy is carried on a claims made basis, it shall include a five-year extended reporting period from the end of the policy period.

b. DB Contractor shall be named insured and the Indemnified Parties shall be the additional insureds under such policy. The policy shall be written so that no acts or omissions of a named insured shall vitiate coverage of the other additional insureds. The insured vs. insured exclusion shall be deleted, so that the policy will insure DB Contractor against, and respond to, pollution liability claims and actions of TxDOT against DB Contractor.

c. The policy shall have a limit of not less than $3,000,000 per occurrence and in the aggregate per policy period, unless applicable regulatory standards impose more stringent coverage requirements.

d. The policy shall provide a deductible or self-insured retention not exceeding $1,000,000 per occurrence.

5. Professional Liability Insurance

DB Contractor shall, if directly performing professional services, procure and keep in force, or, if others are performing such services, cause to be procured and kept in force, professional liability insurance, as specified in subparagraphs (a), (b) and (c) below, at all times during the performance of the Maintenance Services and during the Maintenance Term, that professional services are rendered respecting design and construction until five years after the professional services have concluded for the Project; provided, however, that the total term of such professional liability coverage need not extend beyond 10 years. As noted above, the policy shall insure DB Contractor if it is rendering the professional services. The policy shall insure the lead design firm if DB Contractor is not itself rendering the professional services.

DB Contractor may satisfy such insurance requirement by providing either a Project-specific professional liability policy or maintaining an annual "practice" professional liability insurance policy. Such coverage shall be carried at any time the party is performing professional services and for a period of five years after completion of such services. Coverage shall be provided for claims arising out of any negligent act, error or omission in the performance of professional services or activities for the Project, including coverage for bodily injury or property damage.

a. Each policy shall have a limit of not less than $5,000,000 per claim and in the aggregate. The aggregate limit need not reinstate annually if this requirement is met by providing a project-specific policy.

b. Each policy shall provide a deductible or self-insured retention not exceeding $1,000,000 per claim. If DB Contractor will satisfy this requirement through its annual "practice" professional liability insurance policy, then any deductible or self-insured retention exceeding $1,000,000 per claim must be pre-approved by TxDOT.

In addition, DB Contractor shall cause each other Subcontractor that provides professional services for the Project, other than the lead design firm, to procure and keep in force professional liability insurance, covering its professional services practice, of not less than $2,000,000 per claim and in the aggregate per

annual policy period where the estimated contract value exceeds $500,000, and $1,000,000 per claim and in the aggregate per annual policy period where the estimated contract value is equal to or less than $500,000. Such policy need not be Project-specific, but shall be maintained for a three-year period after completion of all professional services by such Subcontractor, and shall include a commercially reasonable deductible.

6. Workers' Compensation and Employer's Liability Insurance

At all times when work is being performed by any employee of DB Contractor under the Capital Maintenance Agreement, DB Contractor shall procure and keep in force, or cause to be procured and kept in force, a policy of workers' compensation and employer's liability insurance in conformance with applicable Law. DB Contractor shall be the named insured on these policies. Such policy need not be Project-specific. The workers' compensation and employer's liability insurance policy shall contain the following endorsements:

a. An endorsement extending the policy to cover the liability of the insureds under the Federal Employer's Liability Act, to the extent required under such Act;

b. A voluntary compensation endorsement;

c. An alternative employer endorsement;

d. An endorsement extending coverage to all states operations on an "if any" basis;

e. If any work is over or adjacent to navigable waters, coverage for any claims arising from the United States Longshore and Harbor Worker's Act and/or Jones Act;

f. Including employer's liability insurance with a minimum limit of $1,000,000 per accident and/or disease and in the aggregate; and

g. Such policy need not be Project-specific.

7. Umbrella/Excess Liability

In addition to the Commercial General Liability, Automobile Liability and Employer's Liability Insurance policies required hereby, DB Contractor shall also maintain at least $25 million of umbrella/excess liability on a following form basis in excess of each of the noted policies.

8. Railroad Protective Liability Insurance

DB Contractor shall procure and keep in force, or cause to be procured and kept in force, prior to performing any work under the Capital Maintenance Agreement across, under or adjacent to the railroad's tracks or railroad right-of-way, railroad protective liability insurance policy with limits and coverage terms and conditions as required by the operating railroad with the railroad as the named insured. DB Contractor shall submit a copy of the railroad protective liability insurance policy to TxDOT prior to any entry by DB Contractor upon operating railroad property.

9. Subcontractors' Insurance

(a) At all times during the performance of the Maintenance Services and during the Maintenance Term, DB Contractor shall cause each Subcontractor that performs work on the Site to provide:

(i) Commercial General Liability Insurance with limits of at least $600,000 per occurrence and in the aggregate with the general aggregate limit to apply on a per project basis.

(ii) Automobile Liability Insurance with a combined single limit of at least $600,000.

(iii) Worker's Compensation and Employer's Liability Insurance with statutory coverage for worker's compensation and a $500,000 limit per accident or disease for employer's liability. Policy should include, if work is over or next to navigable waters, coverage for U.S. Longshore and Harbor worker's Act and Jones Act claims.

(iv) Umbrella Liability Insurance, if the estimated total contract value of the subcontractor's work is greater than $5,000,000. Such umbrella liability insurance to be written on a following-form basis with a minimum limit of $4,000,000.

(b) Each subcontractor insurance policy (other than professional liability and workers' compensation) shall include TxDOT and each of the Indemnified Parties as additional insureds. Each such policy shall also be endorsed to provide that coverage is primary and non-contributory and that there is a waiver of subrogation in favor of TxDOT and the Indemnified Parties. Each policy shall also provide that 30 days' notice of non-renewal or cancellation (10 days for non-payment) shall be provided to TxDOT. Each such subcontractor insurance policy must be issued by an insurer authorized to conduct business in Texas and having a

minimum current policyholder's management and financial size category rating of not less than A-, VII according to A.M. Best's Insurance Reports Key Rating Guide. TxDOT shall have the right to contract the Subcontractors directly in order to verify the above coverage.

EXHIBIT 11

FORM OF MAINTENANCE DRAW REQUEST AND CERTIFICATE

Page 1 of 2

The Southern Gateway Project Maintenance Agreement
Texas Department of Transportation

Draw Request #	1	Date:	

month/day/year

Texas Department of Transportation
[Address]

Shaded Cells Require Entry, if applicable

Draw Request for Maintenance Services performed in the month of _____ [Month, Year]

A	Month #	(1-12)	Maintenance Year #	(1-15)	Escalated Monthly Maintenance Payment (from Page 4) 1	

B	Amount Earned this Month	$0.00
C	Total Change Order Amount Due (from Page 6)	$0.00
D	Total Key Personnel Change Fees	
E	Total Liquidated Damages	
F	Current Amount Due (B + C – D – E)	

FORM OF MAINTENANCE DRAW REQUEST AND CERTIFICATE

The Southern Gateway Project Capital Maintenance Agreement
Texas Department of Transportation

Draw Request #	1	Date:	

month/day/year

Request for Payment:

_____
DB Contractor Authorized Representative **Date**

_____

Review and Final Approval by TxDOT
Draw Request Approved for Payment: ☐ **Yes** ☐ **No**

_____
TxDOT Authorized Representative **Date**

MAINTENANCE FORM OF DRAW REQUEST AND CERTIFICATE

Page 1 of 1

The Southern Gateway Project Capital Maintenance Agreement
Texas Department of Transportation

MAINTENANCE DRAW REQUEST CHECKLIST

Enclosed with this cover sheet are the following:

☐ Draw Request Report for Monthly Payments (see Section 8.2.1 of the CMA)

☐ Draw Request data sheet(s) and documents that support and substantiate the amount requested.

NOTE - following for information only

With Draw Request, DB Contractor shall submit a certificate in a form approved by TxDOT and signed and sealed by the Maintenance Quality Manager, certifying that:

- Except as specifically noted in the certification, all Maintenance Services, including that of designers, Subcontractors and Suppliers, which are the subject of the Draw Request have been checked and/or inspected by the Maintenance Services Quality Manager;
- Except as specifically noted in the certification, all Maintenance Services which are the subject of the Draw Request conform to the requirements of the CMA Documents, the Governmental Approvals and applicable Law;
- All amounts payable to any designers, consultants, Subcontractors and Suppliers for completed Maintenance Services have been paid; and

The MSQMP procedures provided therein are functioning properly and are being followed.

MAINTENANCE FORM OF DRAW REQUEST AND CERTIFICATE

The Southern Gateway Project Capital Maintenance Agreement
Texas Department of Transportation

Draw Request # 1 Date: _____
month/day/year

Texas Department of Transportation

Enter Shaded Cells only if Applicable

Monthly Maintenance Payment and Escalation Calculations

Note: This form needs to be completed for the 1st month of each maintenance year.

Date of Final Acceptance of the Project:

_____ month/day/year

Days to End of Month = _____

Escalated Monthly Maintenance Payment (Year [X]) = (F)

Where,

Year [X] = Maintenance Term year X

(F) = Year [X] Monthly Maintenance Payment (Escalated)

For the Year 1, Month 1 Escalated Monthly Maintenance Payment will be paid pro-rata based on the days remaining in the month after the Initial Maintenance Term Commencement Date, subject to Section 8.1.4 of the CMA.

(F) = Year [X] Monthly Maintenance Payment (Escalated) = (G) /12

Where,

(G) = Year [X] Maintenance Payment = {(H) x (J)} / (BI_{CCI})

- (H) = Sum of the Year [X] Annual Maintenance Prices for Section 1, Section 2A (only if TxDOT has exercised the Section 2A Option for the current Maintenance Term) and each LE Maintenance Item (only if TxDOT has exercised the LE Option for the current Maintenance Term) in Appendix 1, Appendix 2 and Appendix 3 respectively to Exhibit 4 to the Capital Maintenance Agreement
- (J) = ENR CCI three months prior to the month in which Maintenance Term Year X commenced
- (BI_{CCI}) = ENR CCI CCI for the Proposal Due Date

MAINTENANCE FORM OF DRAW REQUEST AND CERTIFICATE

The Southern Gateway Capital Maintenance Agreement
Texas Department of Transportation

Draw Request # 1

Date: _____
month/day/year

Texas Department of Transportation
[Address]

Enter Shaded Cells only if applicable

Draw Request for Maintenance Services performed in the month of Change Order _____

Change Order Number	1							
Change Order Amount	$0.00	$0.00	$0.00	$0.00	$0.00	$0.00	$0.00
Date Change Order Work Began example format (2/4/20__)							
Date Change Order Work Completed example format (4/20/20__)							
1. Previous Change Order Amount Earned	$0.00	$0.00	$0.00	$0.00	$0.00	$0.00	$0.00
2. Change Order Amount Earned This Month	$0.00	$0.00	$0.00	$0.00	$0.00	$0.00	$0.00
3. Change Order Amount Earned to Date (A +B)	$0.00	$0.00	$0.00	$0.00	$0.00	$0.00	$0.00
4. Current Change Order Amount Due (B)	$0.00	$0.00	$0.00	$0.00	$0.00	$0.00	$0.00
Total All Change Orders To Date							

EXHIBIT 12

FORM OF CHANGE ORDER

CHANGE ORDER REQUEST NO. _____CONTRACT NO. _____

SECTION I

Originator:_____ Date: _____

☐ **Title:**

Contract No:

☐ **Company Name:**

DESCRIPTION:

_____
_____
_____
_____
_____

SCOPE:

_____
_____
_____
_____
_____

REASON FOR REQUEST FOR CHANGE ORDER:

_____
_____
_____
_____
_____

_____
Maintenance Manager Date

SECTION II

The total amount of this Change Order is $ _____. Documentation supporting the Change Order is attached as Exhibits _____ through _____.

This Change Order Request is for (check the applicable categories below):

- ☐ _____ A lump sum, negotiated price Change Order (provide information in Section IIA below)
- ☐ _____ A unit price/quantities Change Order (provide information in Section IIB below)
- ☐ _____ A Time and Materials Change Order (provide information in Section IIC below)

Section IIA

Lump sum price is $_____

Section IIB

UNIT PRICE ITEM	UNIT PRICE	QUANTITY	PRICE (Unit Price x Quantity)

Total of all items in above table: $_____

Section IIC

Summary of Change Order Request by Categories: [Additives/(Credits)]

A. DB Contractor Labor (construction)
   1. Wages[1] $ _____
   2. Labor benefits[1] (55% of A.1) $ _____

B. DB Contractor and Subcontractor Labor (professional services)
   1. Wages (Raw) $ _____
   2. Labor benefits[1] (145% of B.1, which includes overhead and profit) $ _____
   3. Off-duty peace officers and patrol cruisers[1] $ _____

C. Materials (with taxes, freight and discounts) $ _____

D.	Equipment[2]	$ _____
E.	Subcontracts (Time and Materials cost)	$ _____
F.	Utility Direct Costs	$ _____
G.	Overhead and Profit	
	1. Labor (25% of A.1)	$ _____
	2. Traffic Control (5% of B.3)	$ _____
	3. Materials (15% of C)	$ _____
	4. Subcontracts (5% of E)	$ _____
	5. Utility Direct Costs (5% of F)	$ _____
H.	Grand Total	$ _____

[1] Premiums on public liability and workers' compensation insurance, Social Security and unemployment insurance taxes.
[2] Equipment Costs (estimated or actual) based on *Rental Rate* Blue Book equipment rental rates calculated in accordance with Section 10.7.3 of the Capital Maintenance Agreement.

SECTION III

Justification for Change Order with reference to the Capital Maintenance Agreement:
_____
_____
_____

Change order required under Design-Build Agreement? Yes_____/No_____
If yes, state reason:
_____
_____
_____

The above three sections represent a true and complete summary of all aspects of this Request for Change Order.

This Request for Change Order includes all known and anticipated impacts or amounts, direct, indirect and consequential, which may be incurred as a result of the event, occurrence or matter giving rise to the proposed change.

If the foregoing Request for Change Order includes claims of Subcontractors or Suppliers, the undersigned have reviewed such claims and have determined in good faith that the claims are justified as to both entitlement and amount.

_____
DB Contractor Authorized Representative

Date: _____

SECTION IV (Reviewed by Maintenance Manager)

_____

Maintenance Manager

Date: _____

Comments:

_____

_____

_____

SECTION V (Reviewed by TxDOT Project Director)

_____

TxDOT Project Manager

Date_____

Comments:

_____

_____

SECTION VI (Approval by TxDOT District Engineer)

_____

TxDOT Dallas District Engineer **Date**

Comments:

_____

_____

SECTION VII (Approval by TxDOT Executive Director)

_____

TxDOT Executive Director **Date**

Comments:

_____

_____

EXHIBIT 13

AUTHORIZED REPRESENTATIVES

TxDOT Authorized Representatives

TxDOT's Executive Director, the Dallas District Engineer and their designees

DB Contractor's Authorized Representatives

(To be provided by DB Contractor.)

EXHIBIT 14

LIST OF REFERENCE INFORMATION DOCUMENTS (RID)

(To be provided by TxDOT.)

EXHIBIT 15

TRAFFIC CONTROL PLAN REQUIREMENTS

DB Contractor shall prepare a traffic control plan (TCP) for every planned Maintenance Services activity that may impact traffic, showing details of all detours, traffic control devices, striping, and signing for each phase of traffic control. Each TCP shall be submitted to TxDOT for approval and shall meet the requirements of the TMUTCD and TxDOT TCP standards.

The proposed duration, timing and extent of all Lane Closures shall be shown in the TCP and DB Contractor shall demonstrate that all such closures are necessary to perform the Maintenance Services. DB Contractor shall keep the number of Lane Closures to an absolute minimum and shall keep each Lane Closure to the shortest time and extent necessary for safe and efficient operations and in accordance with this Exhibit 15.

DB Contractor shall include details of consultation with Governmental Entities having jurisdiction over roadways adjacent to, connecting with, or crossing under or over the Project and shall confirm that there are no known conflicts with traffic control planned by such Governmental Entities that would adversely affect Users if implemented simultaneously with DB Contractor's proposed TCP.

Unless otherwise noted in the approved TCP or as directed by TxDOT, daily Lane Closures shall be limited according to the following restrictions:

A. General Restrictions for Project mainlanes, ramps, frontage roads, and arterials:

   i. No closures will be permitted between Christmas Eve and January 2nd.

   ii. No closures will be permitted the Friday, Saturday, or Sunday after Thanksgiving.

   iii. No closures will be permitted the Saturday and Sunday before Memorial Day and Labor Day.

   iv. No closures will be permitted on Saturday when July 4th falls on a Friday or Monday.

   v. Lane closures will be permitted from 9:00 P.M. to 5:00 A.M. on weeknights, Monday through Thursday.

vi. Complete closure of the mainlanes will not be allowed, unless approved in advance by TxDOT.

B. Frontage Roads and Arterial Crossings:

i. Lane closures will be permitted from 9:00 P.M. to 5:00 A.M on weeknights, Monday through Thursday.

ii. Provide and maintain access to properties and businesses adjacent to the Project ROW at all times unless otherwise directed by TxDOT.

iii. No mainlane and frontage road closures may occur at the same time, unless approved in advance by TXDOT.

C. Ramps:

i. No two adjacent ramp closures may occur at the same time.