Texas Department of Transportation

BOOK 2 – TECHNICAL PROVISIONS

FOR

US 181 HARBOR BRIDGE PROJECT

Design-Build Project

ATTACHMENT 6-1
UTILITY FORMS

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

PROJECT UTILITY ADJUSTMENT AGREEMENT
(Owner Managed)

Agreement No.: _____-U-_____

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

WITNESSETH

WHEREAS, the STATE OF TEXAS, acting by and through the Texas Department of Transportation, hereinafter identified as "TxDOT", is authorized to design, construct, operate, maintain, and improve projects as part of the state highway system throughout the State of Texas, all in conformance with the applicable provisions of Chapters 201, 203, 222, 223, 224 and 228 of the Texas Transportation Code, as amended; and

WHEREAS, TxDOT proposes to construct a project identified as the _____ (the "Project") and classified as either Interstate, Toll or Traditional (meaning eligibility based on existing compensable interest in the land occupied by the facility to be relocated within the proposed highway right of way limits) as indicated below (*check <u>one</u> (1) box*). Reimbursement will be authorized by the type of project selected below in conformance with Transportation Code 203.092,

☐ Interstate

☐ Toll

☐ Traditional

;and

WHEREAS, pursuant to that certain Comprehensive Development Agreement (the "CDA") by and between TxDOT and the Developer with respect to the Project, the Developer has undertaken the obligation to design, construct, finance, operate and maintain the Project and adhere to all requirements in the CDA; and

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

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

WHEREAS, the Developer has notified the Owner that certain of its facilities and appurtenances (the "Owner Utilities") are in locational conflict with the Project (and/or the "Ultimate Configuration" of the Project), and the Owner has decided to undertake the Adjustment of the Owner Utilities and agrees that

the "Project" will be constructed in accordance with §203.092 of the Texas Transportation Code, as amended, and 23 CFR 645 Subpart A (Utility Relocations, Adjustments and Reimbursement); and

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

_____; and

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

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

AGREEMENT

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

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

☐ The Developer has hired engineering firm(s) acceptable to the Owner to perform all engineering services needed for the preparation of plans, required specifications, and cost estimates, attached hereto as Exhibit A (collectively, the "Plans"), for the proposed Adjustment of the Owner Utilities. The Developer represents and warrants that the Plans conform to the most recent Utility Accommodation Rules issued by the Texas Department of Transportation ("TxDOT"), set forth in 43 Tex. Admin. Code, Part 1, Chapter 21, Subchapter C, *et seq*. (the "UAR"). By its execution of this Agreement or by the signing of the Plans, the Owner hereby approves and confirms that the Plans are in compliance with the "standards" described in Paragraph 3(a)(4).

☐ The Owner has provided plans, required specifications and cost estimates, attached hereto as Exhibit A (collectively, the "Plans"), for the proposed Adjustment of the Owner Utilities. The Owner represents and warrants that the Plans conform to the UAR. By its execution of this Agreement, the Developer and the Owner hereby approve the Plans. The Owner also has provided to the Developer a Utility plan view map illustrating the location of existing and proposed Utility facilities on the Developer's right of way map of the Project. With regard to its preparation of the Plans, the Owner represents as follows *[check one (1) box that applies]*:

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

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

comparable to the fees typically charged by consulting engineers in the locale of the Project for comparable work for the Owner.

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

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

(i) The Owner agrees to respond (with comment and/or acceptance) to any modified Plans and/or Agreement prepared by the Developer in response to TxDOT comments within **14 business days** after receipt of such modifications; and

(ii) If the Owner originally prepared the Plans, the Owner agrees to modify the Plans in response to TxDOT comments and to submit such modified Plans to the Developer for its comment and/or approval (and resubmit to TxDOT for its comment and/or approval) within **14 business days** after receipt of TxDOT's comments.

The Owner's failure to timely respond to any modified Plans submitted by the Developer pursuant to this paragraph shall be deemed the Owner's approval of same. If the Owner fails to timely prepare modified Plans which are its responsibility hereunder, then the Developer shall have the right to modify the Plans for the Owner's approval as if the Developer had originally prepared the Plans. The Developer shall be responsible for providing Plans to and obtaining comments on and approval of the Plans from the Developer. The process set forth in this paragraph will be repeated until the Owner, the Developer and TxDOT have all approved this Agreement and the Plans.

(b) The parties hereto acknowledge and agree that TxDOT's review, comments, and/or approval of a Utility Assembly or any component thereof shall constitute TxDOT's approval of the location and manner in which a Utility Assembly will be installed, Adjusted, or relocated within the State Highway right of way (the "ROW"), subject to the Developer and Owner's satisfactory performance of the Adjustment Work in accordance with the approved Plans. TxDOT has no duty to review Owner facilities or components for their quality or adequacy to provide the intended Utility service.

3. **Design and Construction Standards**.

(a) All design and construction performed for the Adjustment work which is the subject of this Agreement shall comply with and conform to the following:

(1) All applicable local and State Laws, regulations, decrees, ordinances and policies, including the UAR, the Utility Manual issued by TxDOT (to the extent its requirements are mandatory for the Utility Adjustment necessitated by the Project, communicated to the Owner by the Developer or TxDOT), the requirements of the CDA, and the policies of TxDOT;

(2) All Federal Laws, regulations, decrees, ordinances and policies applicable to projects receiving Federal funding, financing and/or credit assistance, including without limitation 23 CFR 645 Subparts A and B and the Buy America provisions of 23 U.S.C § 313 and 23 CFR 635.410. The Utility Owner shall supply, upon request by the Developer or TxDOT, proof of compliance with the aforementioned Laws, rules and regulations prior to the commencement of construction;

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

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

(5) Owner agrees that all service meters must be placed outside of the State ROW.

(b) Such design and construction also shall be consistent and compatible with:

(i) The Developer's current design and construction of the Project;

(ii) The "Ultimate Configuration" for the Project; and

(iii) Any other utilities being installed in the same vicinity.

The Owner acknowledges receipt from the Developer of Project plans and Ultimate Configuration documents as necessary to comply with the foregoing. In case of any inconsistency among any of the standards referenced in this Agreement, the most stringent standard shall apply.

(c) The plans, specifications, and cost estimates contained in Exhibit A shall identify and detail all Utility facilities that the Owner intends to abandon in place rather than remove, including material type, quantity, size, age, and condition. No facilities containing hazardous or contaminated materials may be abandoned, but shall be specifically identified and removed in accordance with the requirements of subparagraph (a). It is understood and agreed that the Developer shall not pay for the assessment and remediation or other corrective action relating to soil and ground water contamination caused by the utility facility prior to the removal.

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

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

(b) The Owner may utilize its own employees or may retain such contractor or contractors as are necessary to adjust the Owner Utilities, through the procedures set forth in Form "Statement Covering Contract Work" attached hereto as Exhibit C. If the Owner utilizes its own employees for the Construction work portion of the Adjustment of Owner Utilities, the Form TxDOT-U-48 is not required.

(c) The Owner shall obtain all permits necessary for the construction to be performed by the Owner hereunder, and the Developer shall cooperate in that process as needed. The Owner shall submit a traffic control plan to the Developer as required for Adjustment work to be performed on existing road rights of way.

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

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

(f) The Owner shall complete all of the Utility reconstruction and relocation work, including final testing and acceptance thereof *[check one (1) box that applies]*:

☐ On or before , 20 .

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

(g) The amount of reimbursement due to the Owner pursuant to this Agreement for the affected Adjustment(s) shall be reduced by 10% for each 30-day period (and by a pro rata amount of said 10% for any portion of a 30-day period) by which the final completion and acceptance date for the affected Adjustment(s) exceeds the applicable deadline. The provisions of this Paragraph 4(g) shall not limit any other remedy available to the Developer at Law or in equity as a result of the Owner's failure to meet any deadline hereunder.

The above reduction applies except to the extent due to:

(i) Force Majeure as described in Paragraph 24(c);

(ii) Any act or omission of the Developer, if the Owner fails to meet any deadline established pursuant to Paragraph 4(f); or

(iii) If the Developer and/or TxDOT determine, in their sole discretion, that a delay in the relocation work is the result of circumstances beyond the control of the Owner or Owner's contractor and the Developer will not reduce the reimbursement.

5. **Costs of the Work**.

(a) The Owner's costs for Adjustment of each Owner Utility shall be derived from:

(i) The accumulated total of costs incurred by the Owner for design and construction of such Adjustment, plus

(ii) The Owner's other related costs to the extent permitted pursuant to Paragraph 5(c) (including without limitation the eligible engineering costs incurred by the Owner for design prior to execution of this Agreement), plus

(iii) The Owner's right of way acquisition costs, if any, which are reimbursable pursuant to Paragraph 16.

(b) The Owner's costs associated with Adjustment of the Owner Utilities shall be developed pursuant to the method checked and described below *[check only one (1) box]*:

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

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

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

6. **Responsibility for Costs of Adjustment Work**. The Agreed Sum or Actual Cost, as applicable, of all work to be performed pursuant to this Agreement shall be allocated between the Developer and the Owner as identified in Exhibit A and in accordance with §203.092 of the Texas Transportation Code. An allocation percentage may be determined by application of an eligibility ratio, if appropriate, as detailed in Exhibit A; *provided, however*, that any portion of an Agreed Sum or Actual Cost attributable to Betterment shall be allocated 100% to the Owner in accordance with Paragraph 10. All costs charged to the Developer by the Owner shall be reasonable and shall be computed using rates and schedules not exceeding those applicable to similar work performed by or for the Owner at the Owner's expense. Payment of the costs allocated to the Developer pursuant to this Agreement (if any) shall be full compensation to the Owner for all costs incurred by the Owner in Adjusting the Owner Utilities (including without limitation costs of relinquishing and/or acquiring right of way).

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

(a) After (i) completion of all Adjustment work to be performed pursuant to this Agreement, (ii) the Developer's final inspection of the Adjustment work by Owner hereunder (and

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

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

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

8. **Billing and Payment: Agreed Sum Method**. If the Owner's costs are developed under procedure (3) described in Paragraph 5(b), then the Developer shall pay its share of the Agreed Sum to the Owner after completion of:

(a) All Adjustment work to be performed pursuant to this Agreement;

(b) The Developer's final inspection of the Adjustment work by Owner hereunder (and resolution of any deficiencies found); and

(c) The receipt of an invoice complying with the applicable requirements of Paragraph 9.

9. **Invoices**. If the Owner's costs are developed under procedure (1) or (2) described in Paragraph 5(b), then Owner shall list each of the services performed, the amount of time spent and the date on which the service was performed. The original and three (3) copies of each invoice shall be submitted to the Developer at the address for notices stated in Paragraph 22, unless otherwise directed by the Developer pursuant to Paragraph 22, together with:

(1) Such supporting information to substantiate all invoices as reasonably requested by the Developer; and

(2) Such waivers or releases of liens as the Developer may reasonably require.

The Owner shall make commercially reasonable efforts to submit final invoices not later than 120 days after completion of work. Final invoices shall include any necessary quitclaim deeds

pursuant to Paragraph 16, and all applicable record drawings accurately representing the Adjustment as installed. The Owner hereby acknowledges and agrees that any right it may have for reimbursement of any of its costs not submitted to the Developer within 18 months following completion of all Adjustment work to be performed by both parties pursuant to this Agreement shall be deemed to have been abandoned and waived. Invoices shall clearly delineate total costs and those costs that are reimbursable pursuant to the terms of this Agreement.

10. **Betterment**.

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

(i) Any upgrading which is required for accommodation of the Project;

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

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

(iv) Any upgrading required by applicable Laws, regulations or ordinances;

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

(vi) Any upgrading required by the Owner's written "standards" meeting the requirements of Paragraph 3(a)(4).

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

Any upgrading required by the Owner's written "standards" meeting the requirements of Paragraph 3(a)(4) shall be deemed to be of direct benefit to the Project.

(b) It is understood and agreed that the Developer will not pay for any Betterments and that the Owner shall not be entitled to payment therefor. No Betterment may be performed in connection with the Adjustment of the Owner Utilities which is incompatible with the Project or the Ultimate Configuration or which cannot be performed within the other constraints of applicable Law and any applicable governmental approvals, including without limitation the scheduling requirements thereunder. Accordingly, the parties agree as follows *[check the <u>one</u> (1) box that applies and complete if appropriate]*:

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

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

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

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

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

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

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

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

11. **Salvage**. For any Adjustment from which the Owner recovers any materials and/or parts and retains or sells the same, after application of any applicable Betterment credit, the Developer is entitled to a credit for the salvage value of such materials and/or parts. If the Owner's costs are developed under procedure (1) or (2) described in Paragraph 5(b), then the final invoice submitted pursuant to Paragraph 7(a) shall credit the Developer with the full salvage value. If the Owner's costs are developed under procedure (3) described in Paragraph 5(b), then the Agreed Sum includes any credit due to the Developer on account of salvage.

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

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

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

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

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

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

16. **Real Property Interests**.

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

    (b) If acquisition of any new easement or other interest in real property ("**New Interest**") is necessary for the Adjustment of any Owner Utilities, then the Owner shall be responsible for undertaking such acquisition. The Owner shall implement each acquisition hereunder expeditiously so that related Adjustment construction can proceed in accordance with the

Developer's Project schedules. The Developer shall be responsible for its share (if any, as specified in Paragraph 6) of the actual and reasonable acquisition costs of any such New Interest (including without limitation the Owner's reasonable overhead charges and reasonable legal costs as well as compensation paid to the landowner), excluding any costs attributable to Betterment as described in Paragraph 16(c), and subject to the provisions of Paragraph 16(e); *provided, however*, that all acquisition costs shall be subject to the Developer's prior written approval. Eligible acquisition costs shall be segregated from other costs on the Owner's estimates and invoices. Any such New Interest shall have a written valuation and shall be acquired in accordance with applicable Law.

(c) The Developer shall pay its share only for a replacement in kind of an Existing Interest (e.g., in width and type), unless a New Interest exceeding such standard:

(i) Is required in order to accommodate the Project or by compliance with applicable Law; or

(ii) Is called for by the Developer in the interest of overall Project economy.

Any New Interest which is not the Developer's cost responsibility pursuant to the preceding sentence shall be considered a Betterment to the extent that it upgrades the Existing Interest which it replaces, or in its entirety if the related Owner Utility was not installed pursuant to an Existing Interest. Betterment costs shall be solely the Owner's responsibility.

(d) For each Existing Interest located within the Project right of way, upon completion of the related Adjustment work and its acceptance by the Owner, the Owner agrees to execute a quitclaim deed or other appropriate documentation relinquishing such Existing Interest to TxDOT, unless the affected Owner Utility is remaining in its original location or is being reinstalled in a new location within the area subject to such Existing Interest. All quitclaim deeds or other relinquishment documents shall be subject to TxDOT's approval as part of its review of the Utility Assembly as described in Paragraph 2. For each Existing Interest relinquished by the Owner, the Developer shall do one (1) of the following to compensate the Owner for such Existing Interest, as appropriate:

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

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

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

(e) All Utility Joint Use Acknowledgments (UJUA) and/or Utility Installation Requests (UIR), Form 1082 shall be subject to TxDOT approval as part of its review of the Utility Assembly as described in Paragraph 2. A Utility Joint Use Acknowledgment is required where an Existing Utility Property Interest exists and the existing or proposed Utility will remain or be Adjusted within the boundaries of the Existing Utility Property Interest. All other accommodations not located on Existing Utility Property Interests will require a Utility Installation Requests, Form 1082.

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

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

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

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

19. **Assignment; Binding Effect; TxDOT as Third Party Beneficiary**. The Owner and the Developer may not assign any of its rights or delegate any of its duties under this Agreement without the prior written consent of the other parties and of TxDOT, which consent may not be unreasonably withheld or delayed; *provided, however*, that the Developer may assign any of its rights and/or delegate any of its duties to TxDOT or to any other entity with which TxDOT contracts to fulfill the Developer's obligations at any time without the prior consent of the Owner.

This Agreement shall bind the Owner, the Developer and their successors and permitted assigns, and nothing in this Agreement nor in any approval subsequently provided by any party hereto shall be construed as giving any benefits, rights, remedies, or claims to any other person, firm, corporation or other entity, including, without limitation, any contractor or other party retained for the Adjustment work or the public in general; *provided, however*, that the Owner and the

Developer agree that although TxDOT is not a party to this Agreement, TxDOT is intended to be a third-party beneficiary to this Agreement.

20. **Breach by the Parties**.

(a) If the Owner claims that the Developer has breached any of its obligations under this Agreement, the Owner will notify the Developer and TxDOT in writing of such breach, and the Developer shall have 30 days following receipt of such notice in which to cure such breach, before the Owner may invoke any remedies which may be available to it as a result of such breach; *provided, however,* that both during and after such period TxDOT shall have the right, but not the obligation, to cure any breach by the Developer. Without limiting the generality of the foregoing:

(i) TxDOT shall have no liability to the Owner for any act or omission committed by the Developer in connection with this Agreement; and

(ii) In no event shall TxDOT be responsible for any repairs or maintenance to the Owner Utilities Adjusted pursuant to this Agreement.

(b) If the Developer claims that the Owner has breached any of its obligations under this Agreement, the Developer will notify the Owner and TxDOT in writing of such breach, and the Owner shall have 30 days following receipt of such notice in which to cure such breach, before the Developer or the Developer may invoke any remedies which may be available to it as a result of such breach.

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

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

Owner: [Address Line #1]
[Address Line #2]
[City, State Zip]
Phone:
Fax:

Developer: [Address Line #1]
[Address Line #2]
[City, State Zip]
Phone:
Fax:

A party sending a notice of default of this Agreement to another party shall also send a copy of such notice to TxDOT and to the CDA Utility Manager at the following addresses:

TxDOT: Texas Department of Transportation
Attention: Strategic Projects Division - ROW Office
125 E. 11th Street
Austin, Texas 78701-2483

CDA Utility Manager: [Insert project address and contact]

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

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

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

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

(c) Except for approvals by TxDOT, and except as may be specifically provided otherwise in this Agreement, shall be deemed granted if no response is provided to the party requesting an Approval within the time period prescribed by this Agreement (or if no time period is prescribed, then **14 calendar days**), commencing upon actual receipt by the party from which an Approval is requested or required, of a request for Approval from the requesting party. All requests for Approval shall be sent out by the requesting party to the other party in accordance with Paragraph 22.

24. **Time; Force Majeure**.

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

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

(c) No party shall be liable to another party for any delay in performance under this Agreement from any cause beyond its control and without its fault or negligence ("**Force Majeure**"), such as acts of God, acts of civil or military authority, fire, earthquake, strike, unusually severe weather, floods or power blackouts. If any such event of Force Majeure occurs, the Owner agrees, if requested by the Developer, to accelerate its efforts hereunder if reasonably feasible in order to regain lost time, so long as the Developer agrees to reimburse the Owner for the reasonable and actual costs of such efforts.

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

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

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

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

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

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

31. **Applicable Law, Jurisdiction and Venue**. This Agreement shall be governed by the Laws of the State of Texas, without regard to the conflict of laws principles thereof. Venue for any action brought to enforce this Agreement or relating to the relationship between any of the parties shall be the District Court of County, Texas [or the United States District Court for the Western District of Texas (Austin)].

32. **Waiver of Consequential Damages**. No party hereto shall be liable to any other party to this Agreement, whether in contract, tort, equity, or otherwise (including negligence, warranty, indemnity, strict liability, or otherwise), for any punitive, exemplary, special, indirect, incidental, or consequential damages, including, without limitation, loss of profits or revenues, loss of use, claims of customers, or loss of business opportunity.

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

34. **Counterparts**. This Agreement may be executed in any number of counterparts. Each such counterpart hereof shall be deemed to be an original instrument but all such counterparts together shall constitute one (1) and the same instrument.

35. **Effective Date**. This Agreement shall become effective upon the later of (a) the date of signing by the last party (either the Owner or the Developer) signing this Agreement, and (b) the date of TxDOT's approval as indicated by the signature of TxDOT's representative, below.

APPROVED BY:

TEXAS DEPARTMENT OF TRANSPORTATION

By: Donald C. Toner, Jr., SR/WA
[Printed Name]

By: _____
Authorized Signature

_____ [*Title*]
Strategic Projects Division

Date: _____

OWNER

By: _____
[Print Owner Name]

By: _____
Duly Authorized Representative

_____ [*Title*]
_____ [*Company*]

Date: _____

[DB CONTRACTOR]

By: _____
[Print Name]

By: _____
Duly Authorized Representative

_____ [*Title*]
_____ [*Company*]

Date: _____

DEVELOPER

By: _____
[Print Name]

By: _____
Duly Authorized Representative

_____ [*Title*]
_____ [*Company*]

Date: _____