Texas Department of Transportation

CAPITAL MAINTENANCE AGREEMENT GENERAL CONDITIONS Items 1-8

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ITEM 1 DEFINITIONS OF TERMS

1.1 Abbreviations

Unless otherwise specified, wherever the following abbreviations or terms are used in the CMC Documents, they shall have the meanings set forth below:

AASHTO	American Association of State Highway and Transportation Officials
ASTM	American Society of Testing and Materials
BCSP	Board of Certified Safety Professionals
BICPI	Base Index CPI
CADD	Computer Aided Drafting and Design
CERCLA	Comprehensive Environmental Response Compensation and Liability Act
CFR	Code of Federal Regulations
CMA	Capital Maintenance Agreement
CMC	Capital Maintenance Contract
CPI	Consumer Price Index
CPR	Cardiopulmonary Resuscitation
CQCM	Construction Quality Control Manager
CQMP	Construction Quality Management Plan
CRCP	Continuously Reinforced Concrete Pavement
CRP	Community Rehabilitation Program
DBA	Design-Build Agreement
ECMP	Environmental Compliance and Mitigation Plan
ECMS	Electronic Content Management System
EPD	Escrowed Proposal Documents
ETCS	Electronic Toll Collection System
FHWA	Federal Highway Administration
GETS	Guardrail End Treatments Systems
GIS	Geographical Information System
GPS	Global Positioning System
GAAP	Generally Accepted Accounting Principles
HMMP	Hazardous Materials Management Plan
HUB	Historically Underutilized Business
IEMP	Incident and Emergency Management Plan
IQF	Independent Quality Firm
IQFM	Independent Quality Firm Manager
IRI	International Roughness Index
ISO	International Standards Organization
ITP	Instructions to Proposers
ITS	Intelligent Transportation System
LIBOR	London Interbank Offered Rate
MMP	Maintenance Management Plan
MMS	Maintenance Management System
MP	Maintenance Price
MQMP	Maintenance 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

PDF	Portable Document Format
PMIS	Pavement Management Information System
PSQAM	Professional Services Quality Assurance Manager
PSQCM	Professional Services Quality Control Manager
PSQMP	Professional Services Quality Management Plan
QA	Quality Assurance
QAP	Quality Assurance Plan
QC	Quality Control
QMP	Quality Management Plan
RFP	Request for Proposals
RFQ	Request for Qualifications
RID	Reference Information Document
ROW	Right of Way
SPCP	Spill Prevention and Countermeasures Plan
SW3P	Storm Water Pollution Prevention Plan
TCEQ	Texas Commission on Environmental Quality
TPDES	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
TRI	Toxics Release Inventory
TRM	Texas Reference Marker
TxDOT	Texas Department of Transportation
USFWS	United States Fish and Wildlife Service

1.2 Definitions

1.2.1 Usage

Capitalized terms used in the CMA General Conditions and the CMA Specification not defined in the Capital Maintenance Agreement have the meanings set forth in Section 1.2.2 below. The Capital Maintenance Contract includes definitions for certain terms that are used in the Capital Maintenance Contract, as noted in Section 1.2.2 below. If any definition set forth in Section 1.2.2 is also included in Section 1.2 of the Capital Maintenance Agreement, to the extent such definitions conflict, the definition in Section 1.2 of the Capital Maintenance Agreement shall govern and control.

1.2.2 Defined Terms

Abandoned Utility(ies) means a public, private, cooperative, municipal or government line, facility or system that at one time was 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, and similar substances but is no longer operated by its owner and does not provide direct or indirect service to the public.

Adjacent Work means any project, work, improvement or development to be planned, designed or constructed which could or does impact the Project and/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(s) 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 ten 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.

For purposes of this definition the term "control" shall mean the possession, directly or indirectly, of the power to cause the direction of the management of a Person, whether through voting securities, by contract, family relationship or otherwise.

Affiliated means having the status of an Affiliate.

Authorized Representative(s) has the meaning set forth in Section 8.2.1 of the CMA.

Base Index has the meaning set forth in Section 8.1.3.

Business Day(s) means day(s) on which TxDOT is officially open for business.

Capital Maintenance Contract or CMC means the Capital Maintenance Agreement and these CMA General Conditions, including all exhibits attached hereto, as such may be amended, supplemented, amended and restated or otherwise modified from time to time in accordance with the terms of the CMC.

Category 1 Defect has the meaning set forth in Section 9.4.3 of the CMA Specification.

Change in Law means (a) the adoption of any Law after the Proposal Due Date or (b) any change in any Law or in the interpretation or application thereof by any Governmental Entity after the Proposal Due Date, in each case that is materially inconsistent with Laws in effect on the Proposal Due Date; excluding, however, any change in or new Law passed or adopted but not yet effective as of the Proposal Due Date. The term "**Change in Law**" also excludes 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 of Control means any assignment, sale, financing, grant of security interest, transfer of interest or other transaction of any type or description, including by or through voting securities, asset transfer, contract, merger, acquisition, succession, dissolution, liquidation, or otherwise that results, directly or indirectly, in a change in possession of the power to direct or control or cause the direction or control of the management of DB Contractor or a material aspect of its business. A Change of Control of a shareholder, member, partner or joint venture member of DB Contractor may constitute a Change of Control of DB Contractor if such shareholder, member, partner or joint venture member possesses the power to direct or control or cause the direction or control of the management of DB Contractor. Notwithstanding the foregoing, the following shall not constitute a Change of Control:

(a) a change in possession of the power to direct or control the management of DB Contractor or a material aspect of its business due solely to a bona fide transaction involving beneficial interests in the ultimate parent organization of a shareholder, member, partner or joint venture member of DB Contractor (but not if the shareholder, member, partner or joint venture member is the ultimate parent organization), unless the transferee in such transaction is, at the time of the transaction, suspended or debarred or subject to a proceeding to suspend or debar from bidding, proposing or contracting with any federal or State department or agency;

(b) an upstream reorganization or transfer of direct or indirect interests in DB Contractor so long as there occurs no change in the entity with ultimate power to direct or control or cause the direction or control of the management of DB Contractor;

(c) a transfer of interests between managed funds that are under common ownership or control other than a change in the management or control of a fund that manages or controls DB Contractor; or

(d) the exercise of minority veto or voting rights (whether provided by applicable Law, by DB Contractor's organizational documents or by related member or shareholder agreements or similar agreements) over major business decisions of DB Contractor, provided that if such minority veto or voting rights are provided by shareholder or similar agreements, TxDOT has received copies of such agreements.

Change Order(s) means a written order issued by TxDOT to DB Contractor that meets the requirements of Section 4.5 delineating changes in the Maintenance Services within the general scope of the CMC Documents or in the terms and conditions of the CMC Documents and establishing, if appropriate, an adjustment to the Maintenance Price.

Claim(s) means: (a) a demand by DB Contractor, which is or potentially could be disputed by TxDOT, for a time extension under the CMC 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.

Claimant has the meaning set forth in Section 3.2.1.8.2.

CMA Specification is defined in the CMA.

CMC Documents is defined in the CMA.

Code is defined in the CMA.

Commission means the Texas Transportation Commission.

Comparable Limited Access Highways means highways that are substantially similar to the Project and associated facilities including frontage roads, as applicable. For purposes of this definition, determination of what highways are substantially similar to the Project shall be based on any one or more of similar age, design, engineering, construction, topographical features, operating systems and features, or other features or situations, and/or based on a geographical area in which highways have been or are susceptible to being affected by a common event (such as but not limited to flood or tornado). The presence or absence of tolling and tolling facilities shall not be a factor in determining whether a highway is substantially similar to the Project.

Construction Documents means all released for construction documents, shop drawings, working drawings, fabrication plans, material and hardware descriptions, specifications, construction quality control reports, construction quality assurance reports, and samples necessary or desirable for performance of construction work (including Renewal Work) under the terms of the Capital Maintenance Contract.

Contracting Information means all of DB Contractor's books, records and documents required to be maintained by DB Contractor in accordance with Section 5.10.4.

CPI means "Consumer Price Index U.S. City Averages for all Urban Consumers, All Items" (not seasonally adjusted) as published by the U.S. Department of Labor, Bureau of Labor Statistics.

Cumulative Maximum Pavement Renewal Work Amount means the amount shown for each year in the column titled "Cumulative Maximum Pavement Renewal Work Amount" of the Pavement Renewal Work Payment Schedule in Exhibit 3 to the CMA.

DB Contractor or Design-Build Contractor is defined in the CMA.

DB Contractor Maintenance Default has the meaning set forth in Section 7.6.1.1

DB Contractor-Related Entity(ies) means (a) DB Contractor, (b) DB Contractor's shareholders, partners, joint venturers and/or members, (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.

DB Contractor Release(s) of Hazardous Materials means (a) Release(s) of Hazardous Material, or the exacerbation of any such release(s), attributable to the actions, omissions, negligence, intentional misconduct, or breach of applicable Law, contract or Governmental Approval by any DB Contractor-Related Entity; (b) Release(s) 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 CMC Documents or any applicable Law or Governmental Approval.

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 or exceed any of the requirements set forth in the column headed "Measurement Record" in the Performance and Measurement Table.

Defect Repair Period means, for a particular Defect, the time period for rectifying such Defect as set forth in the Performance and Measurement Table.

Defense and Indemnification Procedures has the meaning set forth in Section 6.9.4.

Design-Build Agreement (DBA) is defined in the CMA.

Design-Build Specification is defined in the CMA.

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 or desirable for, or related to, the performance of design services required under the Capital Maintenance Contract in accordance with the CMC Documents, the Governmental Approvals and applicable Law.

Deviation(s) means a no-cost change in the Maintenance Services or other requirements of the CMC Documents issued in writing by TxDOT's Authorized Representative or his/her designee under Section 4.1.12 including any no-cost change, deviation, modification, alteration or exception from any requirement in the CMA Specification.

Direct Costs means costs that are clearly associated with the Maintenance Services and can be accurately traced to a Maintenance Services activity, including materials and labor. The term "Direct Costs" does not include indirect costs, such as overhead, profit, depreciation, administration costs and salaries of supervisors.

Directive Letter means a letter directing DB Contractor's performance of the Work that meets the requirements set forth in Section 4.5.2.1.

Discriminatory Change means (a) materially more onerous application to DB Contractor or the Project of alterations or changes (including additions) to the CMA Specification, Design-Build Specifications or Safety Standards relating to the Maintenance Services than the application thereof to other Comparable Limited Access Highways, or (b) selective application of alterations or changes (including additions) to the CMA Specification, Design-Build Specifications or Safety Standards relating to the Maintenance Services to DB Contractor or the Project and not to other Comparable Limited Access Highways. Notwithstanding the foregoing, such applications in response to any negligence, willful misconduct, or breach of applicable Law, Governmental Approval or contract by DB Contractor or any DB Contractor-Related Entity shall not be Discriminatory Changes.

Dispute means any Claim, dispute, disagreement or controversy between TxDOT and DB Contractor concerning their respective rights and obligations under the CMC Documents including concerning any alleged breach or failure to perform and remedies.

Dispute Resolution Procedures shall mean the dispute resolution procedures set forth in Exhibit 13 to the CMA. None of the Informal Resolution Procedures are included in the Dispute Resolution Procedures.

Draw Request(s) is defined in the CMA.

Effective Date is defined in the CMA.

Electronic Content Management System (ECMS) means the secure data management system provided by DB Contractor containing all of the data DB Contractor is required to submit to TxDOT in connection with the Maintenance Services and compatible with data systems, standards and procedures employed by TxDOT, as more particularly described in Section 4.2.5.3.

Emergency or Emergencies means, in connection with the Maintenance Services, any unforeseen event affecting the Project, whether directly or indirectly, which 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.

Emergency Services means, in connection with the Maintenance Services, law enforcement, ambulance service, fire and other similar services from agencies with whom DB Contractor establishes protocols for incident response, safety and security procedures, as set forth in the Incident and Emergency Management Plan.

Environmental Approvals means all Governmental Approvals arising from or required by any Environmental Law in connection with the Project.

Environmental Compliance and Mitigation Plan (ECMP) means the plan DB Contractor must prepare and implement in accordance with Section 9.7.6.4 of the CMA Specification.

Environmental Law 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 record keeping 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).

Equity Member means (a) each entity with a direct equity interest in DB Contractor (whether as a member, partner, joint venture member or otherwise) and (b) each entity with a 10% or greater indirect interest in DB Contractor. Notwithstanding the foregoing, if DB Contractor is a publicly traded company, shareholders with less than a 10% interest in DB Contractor shall not be considered Equity Members.

Error shall mean an error, omission, inconsistency, inaccuracy, deficiency, flaw or other defect.

Escrowed Proposal Documents or EPDs has the meaning set forth in Section 5.10.1.

Event of Default has the meaning set forth in Section 7.6.2.

Exchange Act means 15 U.S.C. § 78a et seq., as amended.

Executive Director means the executive director of the Texas Department of Transportation, or his or her successor.

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).

Fast-Track Dispute means a Dispute so designated by the Parties as set forth in Section 4.7.2.

Final Acceptance means the occurrence of all of the events and satisfaction of all of the conditions set forth in Section 5.12 of the DB General Conditions, as and when confirmed by TxDOT's issuance of a certificate.

Final Payment means the last payment made under the Capital Maintenance Contract.

Force Account Change Order means a Change Order issued in accordance with Section 4.5.10.

Force Majeure Event means any of the events listed in clauses (a) through (e) below (and no other events, including those listed in clauses (i) through (iv) 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 epidemic in the general area of the Project;

(b) 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;

(c) any spill of Hazardous Material by a third party that occurs after the date that is 120 days prior to the Initial Maintenance Term Commencement Date 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;

(d) 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; and

(e) total failure of a bridge (other than any bridge constructed by a DB Contractor-Related Entity) such that it requires replacement.

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 strike, labor dispute, work slowdown, work stoppage, secondary boycott, walkout or other similar occurrence;

(ii) the suspension, termination, interruption, 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 (b) or clause (d) above;

(iii) 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 3.3.16.3) required under the Capital Maintenance Contract or by Law; and

(iv) any matters not caused by TxDOT or beyond the control of TxDOT and not listed in clauses (a) through (e) above.

General Inspection(s) means an inspection of Maintained Elements to identify Defects and assess asset condition.

General Maintenance Amount means the amount shown in the column headed "General Maintenance Amount" in the General Maintenance Payment Schedule in Exhibit 3 to the CMA.

General Maintenance Payment has the meaning set forth in Section 8.1.2.

Generally Accepted Accounting Principles (GAAP) 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 the same or similar circumstances and conditions.

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, which 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(ies) 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.

Guarantor means each of the entities which provided a guarantee in the form of Exhibit 6 to the CMA of some or all of the obligations of DB Contractor under the CMC.

Guaranty means each guarantee executed by a Guarantor guaranteeing some or all of the obligations of DB Contractor under the Capital Maintenance Contract.

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 and/or off-site disposal of Hazardous Materials, 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 9.7.6 of the CMA Specification.

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.

Indemnified Party(ies) is defined in the CMA.

Informal Resolution Procedures has the meaning set forth in Section 4.7.

Initial Maintenance Term is defined in the CMA.

Initial Maintenance Term Commencement Date is defined in the CMA.

Inspection and Measurement Method means the inspection and measurement method for each Maintained Element set forth in the column titled "Inspection and Measurement Method" in the Performance and Measurement Table.

Intellectual Property means all current and future legal or equitable rights and interests in know-how, patents (including applications), copyrights (including moral rights), trademarks (registered and unregistered), service marks, trade secrets, designs (registered and unregistered), utility models, circuit layouts, plant varieties, business and domain names, inventions, solutions embodied in technology, and other intellectual activity, and applications of or for any of the foregoing, subsisting in or relating to the Project, Project design data or Project traffic data. Intellectual Property includes toll-setting and traffic management algorithms, and software used in connection with the Project (including software used for management of traffic on the Project), and software source code. Intellectual Property is distinguished from physical construction and equipment itself and from drawings, plans, specifications, layouts, depictions, manuals and other documentation that disclose Intellectual Property.

Key Personnel is defined in the CMA.

Key Personnel Unavailability Liquidated Damages is defined in the CMA.

Key Subcontractor shall mean any of the Subcontractors identified on Exhibit 10 of the CMA.

Law or Laws 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 CMC 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 is defined in the CMA.

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).

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 Contract)), 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 Element(s) means any elements maintained by DB Contractor within the Maintenance Limits, which include certain newly constructed or rehabilitated elements by DB Contractor, as listed in Exhibit 14 to the CMA.

Maintained Element Category(ies) 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 as shown on Exhibit 15 to the CMA, as such limits may be modified by the Record Documents.

Maintenance Management Plan means the plan for the management of maintenance prepared by DB Contractor and approved by TxDOT as set forth in Section 4.7 and Section 9.2 of the CMA Specification.

Maintenance Management System (MMS) has the meaning set forth in Section 9.6 of the CMA Specification.

Maintenance Manager means the DB Contractor's manager who is responsible for overseeing and performing the Maintenance Services in accordance with the CMC, as described more fully in Section 9.2.3.1 of the CMA Specification.

Maintenance NTP is defined in the CMA.

Maintenance NTP2 is defined in the CMA.

Maintenance NTP3 is defined in the CMA.

Maintenance Payment Bond means the payment bond delivered by DB Contractor in the form attached to the CMA as Exhibit 5, Appendix 2.

Maintenance Performance Bond means the performance bond delivered by DB Contractor in the form attached to the CMA as Exhibit 5, Appendix 1.

Maintenance Period means the period starting at the commencement of the Initial Maintenance Term and ending at the earlier of: (i) the end of the latest Maintenance Term for which a Maintenance NTP has been issued and (ii) the date of termination of this Capital Maintenance Contract.

Maintenance Price or MP has the meaning set forth in Section 8.1.1.

Maintenance Quality Manager has the meaning set forth in Section 9.2.3.2 of the CMA Specification.

Maintenance Quality Management Plan (MQMP) has the meaning set forth in Section 9.2.2 of the CMA Specification.

Maintenance Record(s) 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 9.7.10 of the CMA Specification.

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 CMC, as described more fully in Section 9.2.3.3 of the CMA Specification.

Maintenance Safety Plan means the safety plan prepared by DB Contractor as part of the Maintenance Management Plan as described in Section 9.7.4 of the CMA Specification.

Maintenance Security is defined in the CMA.

Maintenance Services means all of the services and obligations required to be performed by DB Contractor under the CMC Documents.

Maintenance Services Report has the meaning set forth in Section 9.8.3 of the CMA Specification.

Maintenance Term means the Initial Maintenance Term, Second Maintenance Term, or 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 Contract, as set forth in Section 9.7.11 of the CMA Specification.

Maintenance Transition Plan means the plan to deliver the Project to TxDOT at the end of the Maintenance Period as set forth in Section 9.7.11 of the CMA Specification.

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.

Measurement Record means for each Maintained Element the requirement set forth in the column headed "Measurement Record" in the Performance and Measurement Table.

Nonconforming Work means Maintenance Services that do not conform to the requirements of the CMC Documents, the Governmental Approvals or applicable Law.

Non-Discriminatory Change means (a) any alteration or change (including addition) to provisions in the CMA Specification, Design-Build Specifications or Safety Standards relating to the Maintenance Services of general application to Comparable Limited Access Highways or (b) revision to manuals, publications or guidelines, adoption of new manuals, publications or guidelines, changed, added or replacement standards, criteria, requirements, conditions, procedures or specifications, including Safety Standards, relating to Maintenance Services of general application to Comparable Limited Access Highways; provided, that, for purposes of changes in the Maintenance Price permitted pursuant to Section 4.5, a Non-Discriminatory Change that is required to implement a Change in Law shall be treated as a Change in Law rather than a Non-Discriminatory Change.

Non-Maintained Element(s) means any elements not maintained by DB Contractor within or beyond the Maintenance Limits. These include the Elements to be maintained by others listed in Exhibit 14 to the CMA.

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 7.7.1.

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 7.7.1.

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.

Pavement Renewal Work means Renewal Work conducted by DB Contractor as part of the Maintenance Services with respect to the wearing surface of flexible pavement that may entitle DB Contractor to Pavement Renewal Work Payments, as further described in Section 8.1.3.

Pavement Renewal Work Amount means the amount shown in the column headed "Pavement Renewal Work Amount" in the Pavement Renewal Work Payment Schedule in Exhibit 3 to the CMA.

Pavement Renewal Work Payment means an installment of the Payment Renewal Work Amount, as calculated pursuant to Section 8.1.3 and adjusted pursuant to Section 8.1.4, has the meaning set forth in Section 8.1.2.

Pavement Renewal Work Payment Schedule means the schedule in Exhibit 3 to the CMA.

Pavement Renewal Work Unit Rate means the unit rate shown in the column headed "Pavement Renewal Work Unit Rate" in the Pavement Renewal Work Payment Schedule in Exhibit 3 to the CMA.

P&P Bonds has the meaning set forth in Section 3.2.3.1.

P&P Letter of Credit has the meaning set forth in Section 3.2.1.1.

Party means DB Contractor or TxDOT, as the context may require, and "Parties" shall mean DB Contractor and TxDOT, collectively.

PCO Notice has the meaning set forth in Section 4.5.5.2.2.

Performance and Measurement Table means Attachment 1 to the CMA Specification.

Performance Requirement(s) means, for each Maintained Element in connection with the Maintenance Services, the requirements set forth in the Performance and Measurement Table. A Performance Requirement is achieved provided DB Contractor repairs each Defect within the specified Defect Repair Period.

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(s) means any individual, corporation, joint venture, limited liability company, company, voluntary association, partnership, trust, unincorporated organization or Governmental Entity.

Plan or 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 9.7.6.3 of the CMA Specification.

Prime Contractor is defined in the CMA.

Project is defined in the CMA.

Project Management Plan shall mean the document describing quality assurance and quality control activities necessary to manage the development, design, construction, operation and maintenance of the Project, containing the TxDOT-approved component parts, plans and documentation described in Section 4.2 of the Design-Build General Conditions.

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 Contract 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 which may be necessary or advisable in connection with construction of the Project and/or utility adjustments, but which are not necessary for ownership or operation of the Project.

Proposal is defined in the CMA.

Proposal Commitments has the meaning set forth in Exhibit 2 to the CMA.

Proposal Due Date is defined in the CMA.

Proprietary Intellectual Property means Intellectual Property created, used, applied or reduced to practice in connection with the Project or the Maintenance Services that derives commercial value from its protection as a trade secret under applicable Law or from its protection under patent law.

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 Tex. Gov't Code Ann. ch. 555, 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, as more particularly described in Section 9.7.5 of the CMA Specification.

Recognized Environmental Condition has the meaning set forth in ASTM E-1527-13.

Record Documents means the Construction Documents updated to reflect the as constructed project and documented changes made during construction or during the performance of the Maintenance Services, organized as a complete record of Plans, supporting calculations, and details that accurately reflect the actual condition of the constructed work, including all plans,

studies, and reports that are prepared, signed, and sealed by a Registered Professional Engineer in the performance of the work.

Reference Information Documents is defined in the CMA.

Registered Professional Engineer (PE) means a person who is duly licensed and registered by the Texas Board of Professional Engineers to engage in the practice of engineering in the State.

Reimbursable Hazardous Materials Management Costs means DB Contractor's actual costs of performance of Hazardous Materials Management, determined in accordance with Section 4.5.11.2, provided that the 25% and 145% mark-ups allowed under Section 4.5.10.1 shall be reduced to 12.5% and 130%, and the 15% mark-up allowed under Section 4.5.10.2 shall be reduced to 7.5%.

Release(s) 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.

Renewal Work means 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.

Request for Change Order means a written notice issued by DB Contractor to TxDOT under Section 4.5.4, 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 4.5.4.1, advising DB Contractor that TxDOT may issue a TxDOT-Directed Change or wishes to evaluate whether to initiate such a change pursuant to Section 4.5.4.1.

Request for Proposals (RFP) is defined in the CMA.

Request for Qualification (RFQ) is defined in the CMA.

Retainage has the meaning set forth in Section 8.4.1.

Rules is defined in the CMA.

Safety Standards means those provisions of the CMA 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 Repair Period for a Category 1 Defect are Safety Standards; whereas, provisions of the CMA 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 upon issuance by TxDOT of Maintenance NTP2.

Service Line means a Utility line, up to and including the meter, the function of which is to directly connect the improvements on an individual property to another Utility line located off

such property, which other Utility line connects more than an individual line to a larger system. However, unless noted otherwise in the Design-Build Specifications, this term excludes any line that supplies an active feed from a Utility Owner's facility(ies) to supply, activate or energize TxDOT's or a Governmental Entity's Highway Service System. Such line, including its actual connection to the Utility facility, shall instead be considered to be part of the applicable Highway Service System.

Site means the Project ROW together with any areas to which DB Contractor may acquire at its own cost and expense in connection with the Maintenance Services and any additional property rights or interests acquired by DB Contractor for the performance of Renewal Work.

Site Investigation Report means the report summarizing the DB Contractor's Hazardous Materials investigative work as required by Section 9.7.6.1 of the CMA Specification.

Source Code and Source Code Documentation means software written in programming languages, such as C and Fortran, including all comments and procedural code, such as job control language statements, in a form intelligible to trained programmers and capable of being translated into object or machine readable code for operation on computer equipment through assembly or compiling, and accompanied by documentation, including flow charts, schematics, statements of principles of operations, architectural standards, and commentary, explanations and instructions for compiling, describing the data flows, data structures, and control logic of the software in sufficient detail to enable a trained programmer through study of such documentation to maintain and modify the software without undue experimentation. Source Code and Source Code Documentation also include all modifications, additions, substitutions, updates, upgrades and corrections made to the foregoing items.

Specialist Inspection(s) means an inspection requiring specialist qualifications or equipment as specified in Section 9.5.2 of the CMA Specification.

State means the State of Texas.

Storm Water Pollution Prevention Plan (SW3P) shall mean a plan that includes site map(s), 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(s) 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(s) 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.

Submittal shall mean any document, work product or other written or electronic end product or item required under the CMC Documents to be delivered or submitted to TxDOT.

Substantial Completion means the occurrence of all of the events and satisfaction of all of the conditions set forth in Section 5.11 of the DB General Conditions, as and when confirmed by TxDOT's issuance of a certificate.

Supplier means any Person not performing work at the Site that supplies machinery, equipment, materials, hardware, software, systems or any other appurtenance to the 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 Site shall not be deemed to be performing work at the Site.

Surety(ies) 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: (i) the sum of paid-in capital stock plus preferred stock plus retained earnings, less (ii) 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.

Termination for Convenience means a termination pursuant to Section 7.7.1.

Third Maintenance Term means the third five-year term of Maintenance Services provided by DB Contractor that commences upon issuance by TxDOT of Maintenance NTP3.

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.

Traffic Control Plan has the meaning set forth in Section 26.2.1 of the Design-Build Specifications.

Traffic Management Plan means the plan prepared by DB Contractor for the management of traffic as described in Section 9.7.8 of the CMA Specification.

TxDOT means the Texas Department of Transportation, and any entity succeeding to the powers, authorities and responsibilities of TxDOT invoked by or under the CMC Documents.

TxDOT-Directed Change means (a) any change in the scope of the Maintenance Services or terms and conditions of the CMC Documents (including changes in the standards applicable to the Maintenance Services), (b) suspensions of the Maintenance Services by TxDOT for more than 48 hours per suspension or 96 hours total in accordance with Section 7.4.1, and (c) a

Discriminatory Change that TxDOT has directed DB Contractor to perform. Non-Discriminatory Changes shall not be considered a TxDOT-Directed Change.

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 CMC 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 General Counsel Division 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 CMC Documents and continuing until paid.

Unilateral Change Order means a Change Order issued in accordance with Section 4.5.4.2.

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(s) means members of the traveling public and any Persons using the Project, whether by motorized or non-motorized vehicle or on foot.

Utility(ies) or utility(ies) means a public, private, cooperative, municipal and/or government line, facility or system used for the carriage, transmission and/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 term "Utility(ies)" or "utility(ies)" also includes radio towers and/or 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, tolling equipment and systems 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 Adjustment(s) means each relocation (temporary or permanent), abandonment, Protection in Place, removal (of previously Abandoned Utilities as well as of newly Abandoned Utilities), replacement, reinstallation, and/or modification of existing Utilities necessary to accommodate construction, operation, maintenance and/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 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(ies) has the meaning set forth in Section 3.6.

Warranty Period has the meaning set forth in Section 3.6.1.

ITEM 2 CMC DOCUMENTS AND INTERPRETATION

2.1 CMC Documents

The CMC Documents and order of precedence are listed in Section 1.3 of the CMA.

2.2 Contract Interpretation

2.2.1 Interpretation of the CMC 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-clauses," and "Exhibit" mean and refer to the specified section, subsection, paragraph, sentence, clause, sub-clause, or exhibit of or to the CMC Documents 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) 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;

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

(g) 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;

(h) words of any gender used herein shall include each other gender where appropriate;

(i) unless otherwise specified, lists contained in the CMC Documents defining the Project or the Maintenance Services shall not be deemed all-inclusive;

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

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

(l) 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;

(m) the division of the CMC Documents into parts, sections, and other subdivisions is for convenience of reference only and shall not affect the construction or interpretation of the CMC Document and the headings in the CMC Documents are not intended to be full or precise descriptions of the text to which they refer and shall not be considered part of the CMC Documents; and

(n) whenever the CMC 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).

2.2.2 DB Contractor acknowledges and agrees that it had the opportunity and obligation, prior to the Effective Date, to review the terms and conditions of the CMC Documents (including those Reference Information Documents that are referenced in the CMC Documents, and pursuant to Section 1.4.1 of the CMA, are considered CMC 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 CMC 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 CMC Documents. Accordingly, in the event of an ambiguity in or dispute regarding the interpretation of the CMC 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.

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

2.2.4 On plans, working drawings, and standard plans, calculated dimensions shall take precedence over scaled dimensions.

2.2.5 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.

2.2.6 **Computation of Periods**

If the date to perform any act or give any notice specified in the CMC 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 CMC Documents relating to actions to be taken in the event of an emergency and other requirements for which it is clear that performance is intended to occur on a non-Business Day, shall be performed as specified, even though the date in question may fall on a non-Business Day. Unless otherwise expressly identified, "days" means calendar days.

2.2.7 **Headings**

The captions of the articles, sections, and subsections herein are inserted solely for convenience, and under no circumstances are they or any of them to be treated or construed as part of the Capital Maintenance Contract.

2.2.8 **Explanations; Omissions and Misdescriptions**

DB Contractor shall not take advantage of or benefit from any apparent Error in the CMC Documents. Should it appear that the Maintenance Services to be done or any matter relative thereto is not sufficiently detailed or explained in the CMC 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 may discover in the CMC Documents (including those Reference Information Documents that are referenced in the CMC Documents, and pursuant to Section 1.4.1 of the CMA are considered CMC Documents to the extent so referenced), 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 CMC Documents omit or misdescribe any details of any Maintenance Services that are necessary to carry out the intent of the CMC Documents, or that are customarily performed, shall not relieve DB Contractor from performing such omitted Maintenance Services (no matter how extensive) or misdescribed details of the Maintenance Services, and they shall be performed as if fully and correctly set forth and described in the CMC Documents, without entitlement to a Change Order hereunder except as specifically allowed under Section 4.5.

2.2.9 **Referenced Standards, Policies and Specifications**

2.2.9.1 Except as otherwise specified in the CMC 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 shall comply with the latest edition or revision thereof and amendments and supplements thereto in effect as further described in Section 4.1.18.1.

2.2.9.2 In interpreting standards, policies and specifications referenced in the CMA Specification, the following apply:

(a) references to the project owner mean TxDOT; and

(b) cross-references to measurement and payment provisions contained in the referenced standards, policies and specifications shall be deemed to refer to the measurement and payment provisions contained in the CMC Documents.

2.2.10 **Integration of CMC Documents**

TxDOT and DB Contractor agree and expressly intend that, subject to the severability provisions set forth in the CMA, the CMA General Conditions and other CMC Documents constitute a single, non-severable, integrated agreement whose terms are interdependent and non-divisible.

2.2.11 **Amendments**

The CMC 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 Contract. Any amendment must be accompanied by either (a) a certification by DB Contractor that there has been no change to the disclosure of Interested Parties (as that term is defined in § 2252.908 of the Texas Government Code and in 431 T.A.C. § 46.43) that was made by DB Contractor in the most recent Form 1295 provided to TxDOT by DB Contractor or (b) if there has been a change to the disclosure of Interested Parties or the value of the amendment is $1,000,000 (as such threshold may be adjusted from time to time) or greater, a current Form 1295 completed by DB Contractor, as described in Section 4.5.7.5.

2.2.12 **Waiver**

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

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

2.2.12.3 Except as provided otherwise in the CMC 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 CMC Documents.

2.2.12.4 Either Party's waiver of any breach or failure to enforce any of the terms, covenants, conditions or other provisions of the CMC 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 CMC 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.

2.2.13 **Governing Law**

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

ITEM 3 NON-DISCRIMINATION; EQUAL EMPLOYMENT OPPORTUNITY; INSURANCE; PERFORMANCE SECURITY

3.1 Non-Discrimination; Equal Employment Opportunity

3.1.1 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 CMC Documents.

3.1.2 DB Contractor confirms for itself and all Subcontractors that DB Contractor and each Subcontractor has an equal employment opportunity policy ensuring equal employment opportunity without regard to race, color, national origin, sex, age, religion or handicap; and that DB Contractor and each Subcontractor maintains 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.

3.2 Maintenance Security

DB Contractor shall provide to TxDOT no later than 120 days prior to the Initial Maintenance Term Commencement Date, and shall maintain at all times during the Maintenance Period, 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 3.2.1 and 3.2.2 or (ii) the Maintenance Performance Bond and Maintenance Payment Bond in accordance with Section 3.2.3.

3.2.1 P&P Letter of Credit

3.2.1.1 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 3.2.1 (the "**P&P Letter of Credit**").

3.2.1.2 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 3.2.3.2 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 in accordance with the terms of the CMC Documents. If DB Contractor elects to provide a P&P Letter of Credit, DB Contractor also shall deliver to TxDOT a Guaranty satisfying the requirements of Section 4.2 of the CMA at the same time the P&P Letter of Credit is provided to TxDOT.

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

3.2.1.4 The P&P Letter of Credit shall comply with the provisions and requirements of Section 3.2.2 except as permitted or required otherwise under this Section 3.2.1. The P&P Letter of Credit shall be maintained (through extensions or replacements as provided in Section 3.2.2.3), 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, unless the P&P Letter of Credit is replaced by P&P Bonds satisfying the requirements in

Section 3.2.3, in which case the P&P Letter of Credit shall be returned to DB Contractor upon receipt of such P&P Bonds.

3.2.1.5 TxDOT has determined, as permitted by Section 223.205 of the Code, that the P&P Letter of Credit identified in this Section 3.2.1 constitutes security sufficient to ensure the proper performance of DB Contractor's obligations for maintaining the Maintained Elements as required under the CMC Documents and to protect TxDOT and claimants with respect thereto.

3.2.1.6 After issuance by TxDOT of each of Maintenance NTP2 and Maintenance NTP3, 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 3.2.1 and 3.2.2, (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 3.2.3. Furthermore, replacement Maintenance Security meeting the requirements of this Section 3.2 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 3.2.2.2.

3.2.1.7 **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 4 to the CMA, 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.

3.2.1.8 **Payment Claims Against P&P Letter of Credit**

3.2.1.8.1 Payment claims against the P&P Letter of Credit shall be governed by this Section 3.2.1.8. To ensure that all potential claimants receive notice of the procedures set forth in this Section 3.2.1.8. DB Contractor shall require that Sections 3.2.1.8.2 through 3.2.1.8.7 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 3.2.1.8 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.

3.2.1.8.2 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.

3.2.1.8.3 All claims made pursuant to this Section 3.2.1.8 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 3.2.1.8 included retainage, a separate subsequent claim for retainage need not be made.

3.2.1.8.4 The notices of claim must be delivered by certified or registered mail to the Prime Contractor at the address specified in Section 8.1 of the CMA, with a copy to DB Contractor if DB Contractor is separate from the Prime Contractor, at the address specified in Section 8.1 of the CMA, and a copy to the Texas Department of Transportation at the address specified in Section 8.1 of the CMA. In addition, if the Claimant does not have a direct contract with the Prime Contractor, a copy must be delivered to the party with which the Claimant has entered into a contract

3.2.1.8.5 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 Acceptance.

3.2.1.8.6 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.

3.2.1.8.7 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.

3.2.1.9 **Draws on the P&P Letter of Credit**

3.2.1.9.1 The P&P Letter of Credit shall be subject to draw by TxDOT prior to expiration in accordance with Section 3.2.2.3.

3.2.1.9.2 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 3.2.1.8.3, 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 3.2.1.8, and at that time, or at any other time during the pendency of the claim, the P&P Letter of Credit 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 3.2.

3.2.1.9.3 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 CMC Documents during the Maintenance Period. Any draw by TxDOT is subject to Section 7.6.2.

3.2.1.9.4 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 6.9, and accordingly will be subject to draw by TxDOT as provided in Section 7.6.2.

3.2.2 **Letters of Credit**

3.2.2.1 Wherever in the CMC 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 CMC Documents:

3.2.2.2 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 & Poor's 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.

3.2.2.3 TxDOT shall have the right to draw on the letter of credit as and when provided in Section 7.6 for draws under clause (i) below (subject to Section 3.2.1.8.2 with respect to claimants) and without prior notice to DB Contractor for draws under clause (ii) below, unless otherwise expressly provided in the CMC 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 CMC Documents for which the letter of credit is held or (ii) DB Contractor for any reason fails to deliver to TxDOT a new or replacement letter of credit, on the same terms, or at least a one year extension of the expiration date of the existing letter of credit or, (iii) with respect to the P&P Letter of Credit, has not replaced the P&P Letter of Credit with P&P Bonds satisfying the requirements of Section 3.2.3 and the required Guaranty satisfying the requirements of Section 4.2 of the CMA in either case by not later than 45 days before such expiration date, unless the applicable terms of the CMC 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 CMC Documents. If TxDOT draws on the letter of credit under clause (i) above, TxDOT shall use and apply the proceeds as provided in the CMC Documents for such letter of credit. If TxDOT draws on the letter of credit under clause (ii) above, TxDOT shall be entitled to draw on the full face amount of the letter of credit and shall retain such amount as cash security to secure the obligations under the letter of credit without payment of interest to DB Contractor.

3.2.2.4 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.

3.2.2.5 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 7.5.4, 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 Contract. 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.

3.2.2.6 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 3.2.2.5.

3.2.2.7 In the event TxDOT makes a permitted assignment of its rights and interests under this Capital Maintenance Contract, 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.

3.2.2.8 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.

3.2.2.9 **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 Contract are set forth in the provisions of this Capital Maintenance Contract describing such letter of credit.

3.2.3 **Maintenance Payment and Performance Bonds**

3.2.3.1 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 3.2.3 and Section 4.1 of the CMA (the "**P&P Bonds**").

3.2.3.2 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) the Maintenance Performance Bond and (b) the Maintenance Payment Bond that shall guarantee the performance of the Maintenance Services and shall also guarantee payment to Persons performing certain work for DB Contractor under this Capital Maintenance Contract.

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 amount of the Maintenance Performance Bond for each Maintenance Term shall be equal the total Maintenance Price payments to be made in the applicable Maintenance Term in accordance with Exhibit 3 to the CMA as such amounts are adjusted in accordance with this Section 3.2.3.2. For the purpose of determining the adjusted Maintenance Price payments in the preceding sentence, the annual Maintenance Price payment amounts described in Section 8.1 and set forth in Exhibit 3 to the CMA shall be adjusted, to the date that is 60 days prior to the date the Maintenance Security amount is required, using CPI in the same manner applied to the Maintenance Price in Section 8.1.4 and then at an annual rate of 3% for each succeeding year.

3.2.3.3 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 3.2.3.2. 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.

3.2.3.4 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, no Surety 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, TxDOT may, in its discretion, require a corresponding proportionate increase in the amount of each bond or alternative security.

3.2.3.5 After issuance by TxDOT of each of Maintenance NTP2 and Maintenance NTP3 pursuant to Section 2.4 of the CMA and no later than 30 days prior to the earlier of the commencement of the subsequent Maintenance Term or 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 3.2.3, (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 3.2.1 and 3.2.2, as well as one or more Guarantees (if required) meeting the requirements set forth in Section 4.2 of the CMA. Furthermore, replacement Maintenance Security meeting the requirements of this Section 3.2 and shall be delivered to TxDOT no later than ten days after (i) any bond previously provided becomes ineffective or (ii) the Surety (or all co-Sureties) that provided such bond no longer meet(s) the requirements hereof.

3.2.3.6 If DB Contractor fails to timely provide replacement or renewal Maintenance Security meeting the requirements of this Section 3.2 for the Second Maintenance Term, TxDOT shall have the right to draw down an amount that is equal to the lesser of (i) 20% of the amount of the Maintenance Performance Bond for the Initial Term or (ii) the Maximum Draw-Down Amount (adjusted in accordance with the methodology set forth in Section 3.2.3.7) as cash collateral to secure the performance of DB Contractor under the CMC Documents as a result of DB Contractor's failure to satisfy the Maintenance Security obligations to which DB Contractor agreed upon in executing the CMC. If DB Contractor fails to timely provide replacement or renewal Maintenance Security meeting the requirements of this Section 3.2 for the Third Maintenance Term, TxDOT shall have the right to draw down an amount that is the lesser of (a) 10% of the amount of the Maintenance Performance Bond for the Second Term or (b) 50% of the Maximum Draw-Down Amount (adjusted in accordance with the methodology set forth in Section 3.2.3.7) as cash collateral to secure the performance of DB Contractor under the CMC Documents as a result of DB Contractor's failure to satisfy the Maintenance Security obligations to which DB Contractor agreed upon in executing the CMC.

3.2.3.7 The dollar amounts described in Section 3.2.3.6 shall be adjusted, 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 CPI in accordance with the methodology set forth in Section 8.1.4. DB Contractor agrees and acknowledges that such cash collateral is necessary to secure the performance of DB Contractor under the CMC Documents as a result of DB Contractor's failure to satisfy the Maintenance Security obligations under this CMC 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 CMC. Any cash collateral not otherwise utilized by TxDOT with respect to DB Contractor's obligations under the CMC 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 3.2.3 or the P&P Letter of Credit and Guaranty (if required) in accordance with Sections 3.2.1 and 3.2.2 hereof and Section 4.2 of the CMA and (ii) one year after the end of the Maintenance Period.

3.2.3.8 DB Contractor shall procure the Maintenance Payment Bond and Maintenance Performance Bond directly.

3.3 Insurance

DB Contractor shall procure and keep in effect, or cause to be procured and kept in effect with DB Contractor as a named insured, as appropriate, the insurance policies required in accordance with this Section 3.3.

3.3.1 **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.

3.3.2 **Premiums, Deductibles and Self-Insured Retentions**

DB Contractor shall timely pay the premiums for all insurance policies required under this Capital Maintenance Contract. Subject to Section 4.3 of the CMA and Section 4.5, 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.

3.3.3 **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 Contract that is maintained by an insured or any such additional insured shall be in excess of such insurance and shall not contribute with it.

3.3.4 **Verification of Coverage**

3.3.4.1 Within ten days of TxDOT issuing a Maintenance NTP (or, with respect to the Initial Maintenance Term, no later than 170 days prior to the Initial Maintenance Term Commencement Date), DB Contractor shall deliver to TxDOT a certificate of insurance. Each required certificate must meet the requirements of Texas Insurance Code Chapter 1811 and, to the extent permitted under applicable Laws, state the identity of all carriers, named insureds and additional insureds required under the CMC Documents, state the type and limits of coverage, deductibles, subrogation waiver, and termination provisions of the policy, include as attachments all additional insured, endorsements required under the CMC Documents, and be signed by an authorized representative of the insurance company shown on the certificate or its agent or broker and otherwise be in form satisfactory to TxDOT. Each such certificate of insurance evidencing policies required to be obtained by DB Contractor 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 3.3. DB Contractor certifies to TxDOT by submitting each Subcontractor certificate of insurance that the insurances represented in the certificate fully comply with the requirements of this Section 3.3 that are applicable to Subcontractor policies.

3.3.4.2 In addition, within a reasonable time after receipt of each insurance policy (but not to exceed 30 days after receipt), 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.

3.3.4.3 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 7.6.1 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 3.3.4 (or until TxDOT obtains an insurance policy, if it elects to do so).

3.3.5 **Subcontractor Insurance Requirements**

3.3.5.1 DB Contractor's obligations regarding Subcontractor's insurance are set forth in Section 3.3.30. 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 Contract, and also including requirements to comply with the primary and non-contributory, waiver of subrogation, and notice of cancellation provisions of this Section 3.3.

3.3.5.2 If any Subcontractor fails to procure and keep in effect the insurance required of it under Section 3.3.30, 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.

3.3.6 **Policies with Insureds in Addition to DB Contractor**

3.3.6.1 All insurance policies, other than those subject to Section 3.3.5, that are required to be maintained by DB Contractor under the CMA that also insure Persons (whether as named or additional insureds) in addition to DB Contractor shall comply or be endorsed to comply with the following provisions.

3.3.6.2 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 the requirements of this Section 3.3.6. 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).

3.3.6.3 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.

3.3.6.4 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. 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 DB Contractor's commercial general liability policy or endorsements providing equivalent coverage, including products-completed operations.

3.3.7 **Additional Terms and Conditions**

3.3.7.1 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 except after 30 days' prior written notice (or ten days in the case of cancellation or non-renewal for non-payment of premium), return receipt requested, has been given to TxDOT and each other insured or additional insured party, provided that DB Contractor may obtain as comparable an endorsement as possible if it establishes unavailability of this endorsement as set forth in Section 3.3.11. Such endorsement shall not include any limitation of liability of the insurer for failure to provide such notice. Should such an endorsement not be available, prior to an insurance policy being canceled, voided, suspended, adversely modified, or reduced in coverage or in limits, DB Contractor shall require its insurance broker to furnish 30 days' prior written notice (or ten days in the case of cancellation for non-payment of premium) to TxDOT and each other insured or additional insured party, return receipt requested. DB Contractor's agreement to comply with this requirement shall be provided along with the certificates of insurance.

3.3.7.2 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).

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

3.3.8 **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 3.3, 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 3.3.16.3), 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 3.3.11, 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 insurer's consent to the insured's waiver of recovery in advance of loss.

3.3.9 **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 3.3.12 or Section 4.5.

3.3.10 **Support of Indemnifications**

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

3.3.11 **Inadequacy or Unavailability of Required Coverages**

3.3.11.1 TxDOT makes no representation that the limits of liability specified for any insurance policy to be carried pursuant to this Capital Maintenance Contract or approved variances therefrom are adequate to protect DB Contractor against its undertakings under the CMC 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 CMC Documents or otherwise at Law.

3.3.11.2 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, 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 3.3 as is commercially reasonable under then-existing insurance market conditions.

3.3.11.3 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.

3.3.12 **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.

3.3.13 **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.

3.3.14 **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 form of underlying policies and shall comply with all insurance requirements, terms and provisions set forth in this CMC for the applicable type of coverage.

3.3.15 **Additional Insurance Policies**

If DB Contractor carries other insurance coverage or limits in addition to that required under this CMC, then DB Contractor shall, to the extent feasible, include TxDOT and its members, directors, officers, employees, agents and the Indemnified Parties as additional insureds thereunder, if and to the extent they have an insurable interest. The additional insured endorsements shall be as described in Section 3.3.6.4; and DB Contractor shall provide to TxDOT the proofs of coverage and copy of the policy described in Section 3.3.4. The provisions of Sections 3.3.4, 3.3.6, 3.3.8, 3.3.9, 3.3.13, and 3.3.16 shall apply to all such policies of insurance coverage.

3.3.16 **Prosecution of Insurance Claims**

3.3.16.1 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 insurer(s) 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.

3.3.16.2 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. For any such incidents, potential claims and matters, DB Contractor shall ensure that, to the extent covered by DB Contractor's policies:

(a) 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.

(b) 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.

3.3.16.3 If in any instance DB Contractor has not performed its obligations respecting insurance set forth in this Capital Maintenance Contract 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 CMC 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 3.3.

3.3.16.4 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: (i) notify DB Contractor in writing of TxDOT's intent to report the claim directly with the insurer and thereafter process the claim; and (ii) proceed with reporting and processing the claim if TxDOT or the other Indemnified Party does not receive from DB Contractor, within ten 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.

3.3.16.5 All insurance proceeds received by DB Contractor for any insured loss under the builder's risk insurance policies required by this Capital Maintenance Contract in excess of $10,000,000 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 Contract.

3.3.17 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.

3.3.18 **Insurance and Commencement of Maintenance Services**

DB Contractor shall not commence the Maintenance Services under this Capital Maintenance Contract until it has obtained the insurance required under Section 3.3, has furnished original certificates of insurance evidencing the required coverage as required under Section 3.3.4 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 3.3 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.

3.3.19 **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 3.3.4.3. 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 7.6 as a result of the failure of DB Contractor or any Subcontractor to satisfy its insurance obligations herein.

3.3.20 **Premiums**

With respect to insurance policies required to be maintained during all Maintenance Terms under this Section 3.3, DB Contractor shall be entitled to reimbursement for the costs of insurance premiums, as follows:

3.3.20.1 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.

3.3.20.2 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 ten days following DB Contractor's receipt thereof.

3.3.20.3 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.

3.3.20.4 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.

3.3.21 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 for 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. 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.

3.3.22 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 when DB Contractor is undertaking a single repair, rehabilitation or new construction element valued in excess of $5,000,000, including the perils of earthquake, earth movement, flood, storm, windstorm, hurricane, tornado, subsidence and terrorism; 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, subject to the sublimit set forth in Section 3.3.22(c)(vii).

(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 $5,000,000, 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, the peril of named windstorm and flood an amount of not less than $5,000,000 per occurrence and in the aggregate, (ii) for existing property and improvements an amount of not less than $1,000,000, (iii) for "soft cost expense" an amount acceptable to TxDOT, not less than $1,000,000, (iv) for demolition, not less than $1,000,000, (v) for debris removal, not less than $1,000,000, (vi) for professional fees, not less than $1,000,000, and (vii) for valuable papers and restoration of data, plans and drawings, not less than $250,000.

(d) TxDOT shall be named as an insured on the policy as its interests may appear. DB Contractor also may, but is not obligated to, include other Subcontractors as insureds as their respective interests appear.

(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 named windstorm, flood and earthquake/earth movement, TxDOT will accept deductibles up to 5% of the policy limit.

3.3.23 **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 DB Contractor and the insureds named in Section 3.3.23(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 (for a minimum of five years after all work is completed on the Project);

(v) Broad form property damage, providing the same coverage as ISO form CG 00 01 04 13 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 3.3.24.

(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.

(d) 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. 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.

3.3.24 **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.

(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.

3.3.25 **Pollution Liability Insurance**

DB Contractor shall procure and maintain at all times during the performance of the Maintenance Services and during the Maintenance Term, insurance against claims for injuries to persons or damages to property which may arise from or in connection with the performance

of the work hereunder by DB Contractor, its agents, representatives, employees or subcontractors. Coverage shall be at least as broad as:

(a) Contractors Pollution Liability with coverage for losses caused by pollution conditions that arise from the operations of DB Contractor:

(i) Bodily injury, sickness, disease, mental anguish or shock sustained by any person, including death; medical monitoring;

(ii) Property damage including physical injury to or destruction of tangible property including the resulting loss of use thereof, clean-up costs, and the loss of use of tangible property that has not been physically injured or destroyed;

(iii) Defense, including costs, charges and expenses incurred in the investigation, adjustment or defense of claims for such compensatory damages;

(iv) Non-owned disposal site coverage for specified sites (by endorsement) if contractor is disposing of waste;

(v) Coverage for loss, clean-up costs and related legal expense because of a pollution condition arising from the named insured's goods, products, or waste during the course of transportation by a carrier to or from: (A) A job site where contracting services are being performed; or (B) a covered location, including loading or unloading of such goods, products or waste, which the insured becomes legally obligated to pay as a result of a claim first made against the insured during the policy period.

(b) Coverage shall apply to sudden and non-sudden pollution conditions including the discharge, dispersal, release or escape of smoke, vapors, soot, fumes, acids, alkalis, toxic chemicals, liquids or gases, waste materials or other irritants, contaminants or pollutants into or upon land, the atmosphere or any watercourse or body of water, provided such conditions are not naturally present in the environment in the concentration or amounts discovered, unless such natural condition(s) are released or dispersed as a result of the performance of covered operations.

(c) DB Contractor shall maintain limits of no less than $3,000,000 per occurrence and in the aggregate for the Maintenance Term. If coverage is written on a claims-made basis the policy shall include a three-year extended reporting period.

(d) The 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 on the policy. The specific scope of services required under the Capital Maintenance Contract shall be listed on the certificate of insurance.

3.3.26 Professional Liability Insurance

At all times that professional services are rendered under the Capital Maintenance Contract respecting design and construction of the Project until five years after the professional services have concluded for the Project, DB Contractor (if it is performing professional services) and

parties performing professional services shall procure and keep in force, or cause to be procured and kept in force with such party listed as named insured, professional liability insurance, as specified in subparagraphs (a) through (d) below. DB Contractor and other parties performing professional services may satisfy such insurance requirement via either a series of annual practice policies or a project-specific policy covering the period of design and construction and remaining in effect for five years thereafter.

(a) The insurance policy shall provide coverage for liability of the named insured performing the professional services arising out of any negligent act, error or omission in the performance of professional services or activities for the Project, including for bodily injury or property damage.

(b) Each policy shall have a limit of not less than $3,000,000 per claim and in the aggregate. If a project-specific policy is purchased, the aggregate limit need not reinstate annually.

(c) Each policy shall provide a deductible or self-insured retention not exceeding $1,000,000 per claim.

(d) Such insurance shall provide an indemnified party endorsement for the benefit of the Indemnified Parties with regard to third party claims for bodily injury or property damage.

The above policy limit requirements may be decreased for Subcontractors performing professional services based on the total professional services contract value as follows:

Estimated Total Professional Services Contract Value	Minimum Limit of Insurance
>$10,000,000	$3,000,000 per claim and aggregate
>$5,000,000 to $10,000,000	$2,000,000 per claim and aggregate
$1,000,000 to $5,000,000	$1,000,000 per claim and aggregate
<$1,000,000	$500,000 per claim and aggregate

3.3.27 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 Contract, 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. The workers' compensation and employer's liability insurance policy shall contain the following endorsements:

(a) A voluntary compensation endorsement;

(b) An alternative employer endorsement;

(c) An endorsement extending coverage to all states operations on an "if any" basis;

(d) U.S. Longshore and Harbor Workers' Compensation Act and Jones Act coverage (if any work is over or adjacent to navigable waters); and

(e) Employer's liability insurance limits of $1,000,000 per accident or disease.

3.3.28 **Umbrella/Excess Liability**

In addition to the Commercial General Liability, Automobile Liability and Employer's Liability Insurance policies required hereby, DB Contractor shall maintain at least $25,000,000 of umbrella/excess liability on a following form basis in excess of each of the noted policies.

3.3.29 **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 Contract 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.

3.3.30 **Subcontractors' Insurance**

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, except those providing material deliveries, Subcontractors that are fabricators (even if work is performed off-site), and Subcontractors providing professional services (including design, testing, and inspection, even if some or all services are performed off-site), to provide:

(a) 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.

(b) Automobile Liability Insurance with a combined single limit of at least $600,000.

(c) Worker's Compensation and Employer's Liability insurance with statutory coverage for workers' compensation and a $500,000 limit per accident or disease for employer's liability. The policy should include, if the work is over or next to navigable waters, coverage for U.S. Longshore and Harbor Worker's Compensation Act and Jones Act claims.

Each Subcontractor insurance policy (other than professional liability and workers' compensation) shall include 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 the Indemnified Parties. Each policy shall also provide that 30 days' notice of non-renewal or cancellation (10 days' notice 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.

3.4 **Guaranty**

See Section 4.2 of the CMA for requirements regarding guarantees.

3.5 **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 CMC Documents shall not relieve DB Contractor of any of its obligations hereunder, including the payment of Key Personnel Unavilability Liquidated Damages and any other charges or fees imposed by TxDOT pursuant to Section 6 of the CMA.

3.6 **Warranties for Maintenance Services**

DB Contractor warrants that:

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

(b) the Maintenance Services shall be free of Defects, except to the extent such Defects are inherent in prescriptive specifications included in the CMC Documents or are included in design work that meets the standard of care for engineering and architectural services set forth in Section 4.1.2.2.1 of the DB General Conditions;

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

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

(e) such Maintenance Services shall meet all of the requirements of the CMC Documents; and

(f) all design work performed pursuant to this CMC shall meet the standard of care for engineering and architectural services set forth in Section 4.1.2.2.1 of the DB General Conditions.

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

3.6.1 **Warranty Period**

3.6.1.1 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 3.6.1.2 ("**Warranty Period**"). If TxDOT determines that such Maintenance Services have not met the standards set forth in Section 3.6 at any time during the Warranty Period, then DB Contractor shall correct such Maintenance Services as specified in this Section 3.6, even if performance of such corrective Maintenance Services extend beyond the applicable Warranty Period.

3.6.1.2 The Warranties shall apply to all Maintenance Services re-done, repaired, corrected or replaced pursuant to the terms of the CMC 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 Contract).

3.6.2 **Implementation of Warranty**

3.6.2.1 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 ten 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 Contract. TxDOT may agree to accept Nonconforming Work in accordance with Section 5.3.2.

3.6.2.2 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 3.6. DB Contractor shall bear all costs of such Maintenance Services, including additional testing and inspections.

3.6.3 **Subcontractor and Extended Warranties**

3.6.3.1 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 3.6. 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 interest 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 CMC Documents in incorporating material or equipment into the work, DB Contractor shall be responsible for correcting such Defect.

3.6.3.2 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 3.6.3 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 3.6.1.2). 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.

3.6.3.3 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 CMC 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 Contract and the other CMC Documents.

3.6.4 **No Limitation on Liability**

Subject to Sections 7.5.3 and 7.5.4, the foregoing Warranties and Subcontractor warranties are in addition to all rights and remedies available under the CMC Documents or applicable Law or in equity, and shall not limit DB Contractor's liability or responsibility imposed by the CMC 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.

3.6.5 **Damages for Breach of Warranty**

3.6.5.1 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 which DB Contractor is obligated to obtain from the Subcontractor pursuant to Section 3.6.3, or (c) a misrepresentation by any Subcontractor regarding any matter for that DB Contractor is obligated to obtain representations from the Subcontractor pursuant to Section 3.6.3. Such Losses shall include any costs incurred by TxDOT for independent quality assurance and/or quality control with respect to such Maintenance Services within ten days after DB Contractor's receipt of invoices therefor, and, subject to the limitations in Sections 7.5.3 and 7.5.4, 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 Contract.

Subject to Sections 7.5.3 and 7.5.4, 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.

ITEM 4 SCOPE OF WORK

4.1 General Obligations of DB Contractor

4.1.1 DB Contractor shall furnish all Maintenance Services throughout the Maintenance Period within the Maintenance Limits. DB Contractor shall submit updated Maintenance Limits drawings for TxDOT approval as part of the applicable Maintenance Management Plan (MMP). All costs associated with providing the Maintenance Services are included in the Maintenance Price set forth in Exhibit 3 to the CMA as such may be adjusted in accordance with Section 4.5 hereof and Section 5 of the CMA.

4.1.2 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.

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

4.1.4 At all times during the Maintenance Period, DB Contractor shall carry out the Maintenance Services in accordance with (i) Good Industry Practice, as it evolves from time to time, (ii) the requirements, terms and conditions set forth in the CMC Documents, as the same may change from time to time, (iii) all Laws, (iv) the requirements, terms and conditions set forth in all Governmental Approvals, (v) the approved MMP, and all approved updates and amendments thereof, (vi) safety compliance and Safety Standards, (vii) the approved Project Management Plan and all component parts, plans and documentation prepared or to be prepared thereunder, and all approved updates and amendments thereof, and (viii) 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 (viii), 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.

4.1.4.1 DB Contractor is responsible for keeping itself informed of and applying current Good Industry Practice and TxDOT-published changes to manuals, specifications and guidelines pertaining to the Maintenance Services. DB Contractor shall be entitled to a Change Order for Discriminatory Changes as set forth in Section 4.5.11.4. DB Contractor shall not be entitled to a Change Order for Non-Discriminatory Changes except as set forth in Section 4.5.11.5.

4.1.5 DB Contractor acknowledges and agrees that, although certain provisions in the CMC 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 as it evolves from time to time, and shall conduct its commercial affairs in a manner consistent with good faith and fair dealing.

4.1.6 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 4.5 hereof and Section 5 of the CMA.

4.1.7 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.

4.1.8 DB Contractor shall remedy and repair the Project, other than the Non-Maintained Elements, and shall perform Renewal Work as necessary to meet the requirements of the CMA Specification and the other CMC Documents.

4.1.9 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.

4.1.10 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.

4.1.11 DB Contractor, at its sole cost and expense unless expressly provided otherwise in this Capital Maintenance Contract, shall comply with all provisions of the CMA 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 CMC Documents, including assessment of Key Personnel Unavilability Liquidated Damages and any other Liquidated Damages, charges or fees contemplated pursuant to Section 6 of the CMA, deductions from payments otherwise owed to DB Contractor, and termination for uncured DB Contractor Maintenance Default.

4.1.12 **Changes in CMA Specification**

DB Contractor may apply for TxDOT approval of Deviations from the CMA Specification regarding Maintenance Services. All applications shall be in writing. 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 4.7. TxDOT may elect to process the application as a Request for Change Order under Section 4.5 hereof and Section 5 of the CMA rather than as an application for a Deviation.

4.1.13 **Updates of Record Documents**

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

4.1.14 **Access**

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 CMC 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 4.1.14 shall not be grounds for an adjustment in the Maintenance Price, a Change Order or any other Claim by DB Contractor.

4.1.15 **Policing; Security and Incident and Emergency Response**

4.1.15.1 **Police Services**

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

4.1.15.1.2 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.

4.1.15.1.3 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.

4.1.15.2 **Security and Incident and Emergency Response**

4.1.15.2.1 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.

4.1.15.2.2 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.

4.1.16 **Renewal Work**

4.1.16.1 DB Contractor shall diligently perform and complete Renewal Work when required in accordance with Section 9.7.7 of the CMA Specification.

4.1.16.2 DB Contractor shall complete all Renewal Work required under this Section 4.1.16:

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

(b) if the Capital Maintenance Contract 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 Renewal Work prior to such period or TxDOT elects, at its discretion, to perform such Renewal Work, then in lieu of DB Contractor's completion of such Renewal Work, DB Contractor shall reimburse TxDOT, within ten days of delivery of an invoice therefor, for TxDOT's Recoverable Costs of completing such Renewal 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 Contract.

4.1.17 **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 CMC Documents, including this Section 4.1.17.

4.1.17.1 **Traffic Management and Traffic Control Plans**

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 4.1.17.2 below.

4.1.17.2 **Traffic Control Plan Requirements**

4.1.17.2.1 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. 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 Section 4.1.17.2. The TCP shall be compliant with Design-Build Specifications Section 26.2.1.1 (Traffic Control Plan Requirements and Restrictions). DB Contractor shall submit the TCP for TxDOT review and approval at least 14 days prior to proposed implementation. This requirement shall be increased to 21 days for full closure of the main lanes of any direction of a roadway or ramp.

4.1.17.2.2 DB Contractor shall ensure all Lane Closures for mainlanes, ramps, frontage roads and arterials meet the following requirements:

(a) DB Contractor shall use State routes for detour routes, wherever possible. If State routes are unavailable, DB Contractor shall use local roadways, provided that DB Contractor has obtained TxDOT's approval and the necessary permits from the Governmental Entity having jurisdiction. DB Contractor shall provide motorists with guidance on the use of alternate routes to divert traffic around the affected areas. This shall include the installation and maintenance of temporary regional signs and changeable message signs to divert traffic.

(b) DB Contractor shall maintain a minimum of one driveway per business at all times. For businesses with multiple driveways, when driveway closure is necessary to progress Maintenance Services, no driveway may be closed for more than 30 consecutive days or more than 45 days in a 90-day period.

(c) Complete closure of the main lanes will not be allowed, unless approved in advance by TxDOT.

(d) DB Contractor shall not close two consecutive entrance ramps or two consecutive exit ramps at the same time.

(e) DB Contractor shall coordinate any proposed Lane Closures with adjacent projects. Where multiple requests for traffic control are received from the DB Contractor and Governmental Entities that would adversely affect Users if implemented simultaneously, TxDOT will give priority to the closure submitted first.

(f) 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.

4.1.17.2.3 No Lane Closure that restricts or interferes with traffic shall be allowed from 12:00 PM (noon) on the day preceding to 12:00 AM (midnight) on the day after the regional event and holiday schedule dates shown below. TxDOT has the right by notice to the DB Contractor of not less than 90 days to lengthen, shorten, or otherwise modify the regional event and holiday schedule dates.

(a) New Year's Eve and New Year's Day (December 31 through January 1)

(b) Spring Break Week (Typically the second or third week of March)

(c) Easter Holiday Weekend (Friday through Sunday)

(d) Memorial Day Weekend (Friday through Monday)

(e) Independence Day (July 3 through noon on July 5)

(f) Labor Day Weekend (Friday through Monday)

(g) Tax-free Shopping Weekend (Friday through Monday)

(h) Thanksgiving Holiday (Wednesday through Sunday)

(i) Christmas Holiday (December 23 through December 26).

4.1.17.3 **Operation Restrictions**

4.1.17.3.1 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 9.5.1 of the CMA Specification and shall report to TxDOT the nature of any damage and the scope of necessary repairs. DB Contractor shall repair such damage subject to DB Contractor's right to a Change Order in accordance with Section 4.5 hereof and Section 5 of the CMA, upon receipt of direction from TxDOT.

4.1.17.3.2 Should Emergencies occur during DB Contractor's performance of traffic management, including vehicle accidents and structural failures, 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 4.5 hereof and Section 5 of the CMA, repair any damage to the Maintained Elements upon direction from TxDOT.

4.1.17.3.3 TxDOT shall have at all times, without obligation or liability to DB Contractor, the right to (a) issue Directive Letters to DB Contractor regarding traffic management and control (with which DB Contractor shall comply), or directly assume traffic management and control of the Project during any period that the Executive Director determines such action will be in the public interest as a result of an emergency or natural disaster; and (b) provide on the Project, via message signs or other means consistent with Good Industry Practice, traveler and driver information, and other public information (e.g., amber alerts).

4.1.18 **Requirements Applicable to Design and Construction Work**

4.1.18.1 To the extent that DB Contractor performs any design or construction work, including for Renewal Work or Change Orders, DB Contractor shall comply with the design and construction requirements set forth in the Design-Build Specifications applicable to the original design, installation or construction; provided that the work shall be performed in accordance with then-current Good Industry Practice. Whenever the Design-Build Specifications or CMA Specification require design or construction of a Maintained Element to be undertaken in compliance with a standard, manual, guideline or specification, all such design and construction work associated with that Maintained Element shall comply with the latest version of such standard, manual, guideline or specification in effect on the date the applicable Maintenance Services are performed. DB Contractor's obligation to perform design and construction work in accordance with the latest version of any such standard, manual, guideline or specification shall not require a notice from TxDOT, unless the use of such latest version qualifies as a Discriminatory Change.

4.1.18.2 In connection with the performance by DB Contractor of any Change Orders, DB Contractor shall procure and maintain (a) the insurance deemed appropriate by TxDOT in its discretion (subject to Section 3.3.11) and (b) an increase in the amount of Maintenance Security equal to the full amount of the 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 4.1.18.2 in connection with the performance by DB Contractor of any Change Orders may be included in the increased Maintenance Price as permitted in accordance with Section 4.5.

4.1.19 **Coordination with Other Parties**

4.1.19.1 DB Contractor shall fully cooperate with, and shall be solely responsible for coordinating its activities and Maintenance Services with the activities and maintenance 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 any maintenance activities for Non-Maintained Elements and Renewal Work performed by TxDOT or third parties in accordance with this Capital Maintenance Contract. 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 where such work or activities may impact Maintained Elements.

4.1.19.2 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.

4.1.19.3 Except as otherwise provided in Section 4.5 hereof and Section 5 of the CMA, 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.

4.1.19.4 Except as otherwise provided in Section 4.5 hereof and Section 5 of the CMA, 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.

4.1.19.5 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 Contract, 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.

4.1.20 **Transition Requirements**

At the expiration of the Maintenance Period or any earlier termination of this Capital Maintenance Contract, 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 CMC Documents, Governmental Approvals and applicable Law, (b) there are no DB Contractor Releases of Hazardous Materials within, on, in or under the Project ROW or real property within 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 CMC, DB Contractor shall prepare the Maintenance Transition Plan and deliver all final Record Documents relating to the Renewal Work performed under this Capital Maintenance Contract in accordance with Section 9.7.11 of the CMA Specification.

4.2 **Maintenance Management Plan**

4.2.1 DB Contractor shall submit the Maintenance Management Plan (MMP) to TxDOT for review and approval in its discretion no later than 120 days prior to the Initial Maintenance Term Commencement Date. DB Contractor may not commence Maintenance Services until TxDOT has approved the applicable MMP.

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

4.2.3 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 ten days of receiving such disapproval, submit to TxDOT a revised MMP or update thereto, as applicable.

4.2.4 **Project Management of Renewal Work**

Whenever Renewal Work is undertaken that requires design work or construction work, DB Contractor shall, unless otherwise approved by TxDOT, follow all the requirements of the DB General Conditions, including the submittal of a Project Management Plan. DB Contractor shall follow the quality management requirements set forth in Design-Build Specification Item 31.7.6.3. All design work performed pursuant to this CMC shall meet the standard of care for engineering and architectural services set forth in Section 4.1.2.2.1 of the DB General Conditions.

4.2.5 **Document Management**

4.2.5.1 The project administration chapter of the MMP shall include a document management plan. The document management plan shall contain procedures for document management including the manner in which records will be maintained in compliance with the Design-Build Specifications and any specific systems DB Contractor will use.

4.2.5.2 All electronic information submitted to TxDOT shall be searchable and legible. The MMP shall describe the controls exercised by DB Contractor to ensure that: documents (including the MMP itself) undergo relevant review and approval prior to release; users have access to current

versions of documents; versions of documents are identified; obsolete or superseded documents are so marked and prevented from unintended use; and changes to documents undergo same level of review and approval. The document management plan shall include quality control (QC) and quality assurance (QA) processes.

4.2.5.3 DB Contractor shall establish and maintain an Electronic Content Management System (ECMS) in accordance with Section 9.7.10 of the CMA Specification. DB Contractor shall submit all documents, correspondence and Submittals to TxDOT through TxDOT's dedicated SharePoint site for the Project.

4.3 Quality Management

As part of the MMP, DB Contractor shall submit a Maintenance Quality Management Plan (MQMP) in accordance with Section 9.2.2 of the CMA Specification. Whenever Renewal Work is undertaken that requires design work or construction work the DB Contractor shall follow procedures systems and obligations set forth in Section 4.3 of the DB General Conditions as appropriate to the nature of the work to be performed, in TxDOT's discretion.

4.4 Utilities

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 4.4 shall not be grounds for an adjustment in the Maintenance Price, a Change Order or any other Claim by DB Contractor.

4.5 Changes in the Maintenance Services

This Section 4.5 sets forth the requirements for obtaining all Change Orders under this Capital Maintenance Contract. 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 CMC Documents, subject only to those exceptions specified in this Section 4.5, 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 Contract, except in accordance with this Section 4.5. To the extent that any other provision of this Capital Maintenance Contract expressly provides for a Change Order to be issued, such provision is incorporated into and subject to this Section 4.5.

4.5.1 **Circumstances Under Which Change Orders May Be Issued**

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 CMC Documents.

The matters set forth in clause (c) above may be made pursuant to an amendment in accordance with the Capital Maintenance Contract unless TxDOT issues a Directive Letter, in which event the process set forth in Section 4.5.2 shall be followed.

Upon TxDOT's approval of the matters set forth in the Request for Change Order submitted by DB Contractor (whether it is initiated by TxDOT or requested by DB Contractor), TxDOT shall prepare a Change Order for execution by the Parties. A Request for Change Order is not required for Unilateral Change Orders. A Change Order may, in TxDOT's discretion, 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 performed under the requirements and conditions of the CMC Documents, except to the extent they are expressly modified by the Change Order. A Change Order shall not be effective for any purpose unless executed by TxDOT.

4.5.2 **Issuance of Directive Letter**

4.5.2.1 TxDOT may at any time issue a Directive Letter to DB Contractor (a) in the event of any desired change in the Maintenance Services, or (b) in the event of any Claim or Dispute regarding the scope of the Maintenance Services or whether DB Contractor has performed in accordance with the requirements of the CMC Documents. The first Directive Letter shall be labeled "Directive Letter No. 1" and subsequent letters shall be numbered sequentially. The Directive Letter will describe the Maintenance Services in question and may state the basis for determining compensation, if any. If the Directive Letter does not state the basis for determining compensation, compensation will be determined pursuant to Section 4.5.10. DB Contractor shall proceed immediately as directed in the Directive Letter. 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 4.5.5.2 to submit a PCO Notice requesting that TxDOT issue a Change Order except as set forth in the next sentence. If the Directive Letter states that the Maintenance Services are within DB Contractor's original scope of Maintenance Services and the directed Maintenance Services involve less than $10,000 in additional Direct Costs incurred by DB Contractor, DB Contractor shall not be entitled to a Change Order or an increase in the Maintenance Price.

4.5.2.2 Receipt of a Directive Letter or other written direction from TxDOT is a condition precedent to a Claim that a TxDOT-Directed Change has occurred; however the fact that a Directive Letter was issued by TxDOT shall not be considered evidence that a TxDOT-Directed Change occurred. The determination whether a TxDOT-Directed Change occurred or whether DB Contractor is otherwise entitled to a Change Order shall be based on an analysis of the

requirements under the CMC Documents and a determination whether the Directive Letter in fact constituted a change in those requirements.

4.5.2.3 DB Contractor shall not be entitled to additional compensation for any changed Maintenance Services not included in the Maintenance Price that is performed by DB Contractor as a TxDOT-Directed Change prior to receipt of a Directive Letter or Change Order.

4.5.3 **TxDOT Right to Issue Change Orders**

TxDOT may, at any time and from time to time, without notice to any Surety, authorize or require, pursuant to a Change Order, changes in the Maintenance Services or in terms and conditions of the Capital Maintenance Contract (including changes in the Maintenance Services); except TxDOT has no right to require any change that:

(a) is not in compliance with applicable Laws;

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

(c) constitutes a fundamental change in the nature or scope of the Maintenance Services;

(d) would cause an insured risk to become uninsurable; or

(e) would materially adversely affect the health or safety of workers or users of the Project;

4.5.4 **TxDOT-Initiated Change Orders**

4.5.4.1 **Request for Change Proposal**

4.5.4.1.1 If TxDOT desires to issue a TxDOT-Directed Change or to evaluate whether to initiate such a change, then TxDOT may, in its discretion, issue a Request for Change Proposal. The Request for Change Proposal shall set forth the nature, extent and details of the proposed TxDOT-Directed Change.

4.5.4.1.2 Within five Business Days after DB Contractor receives a Request for Change Proposal, or such longer period to which the Parties mutually agree in writing, 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 to which the Parties may mutually agree in writing, DB Contractor shall prepare and TxDOT and DB Contractor shall consult concerning the estimated cost impacts.

4.5.4.1.3 After the second consultation and provision of any data described in Section 4.5.4.1.2, TxDOT shall notify DB Contractor of TxDOT's determination to: (a) issue a Change Order, (b) require DB Contractor to provide a Request for Change Order as discussed at the meeting, (c) require DB Contractor to prepare a modified work plan for the change and a Request for Change Order based on the modified plan, or (d) not issue a Change Order.

4.5.4.1.4 If so requested, DB Contractor shall, within ten Business Days after receipt of the notification described in Section 4.5.4.1.3, prepare and submit to TxDOT for review and approval by TxDOT a Request for Change Order for the requested change, in a format provided by TxDOT, complying with all applicable requirements of Section 4.5.7, and incorporating and fully addressing all requests made by TxDOT.

4.5.4.1.5 DB Contractor shall bear the cost of developing the Request for Change Order in response to a Request for Change Proposal, including any modifications thereto requested by TxDOT, except that DB Contractor shall be entitled to costs (without markup for overhead and profit) in excess of $10,000 incurred for design, estimating and scheduling work required to prepare the Request for Change Order. Such costs must be pre-authorized by TxDOT, to be reimbursable. If the Change Order is approved, such design and estimating and scheduling costs will be included within the Change Order, otherwise, they shall be separately reimbursed through a separate Change Order.

4.5.4.1.6 If DB Contractor and TxDOT are unable to reach agreement on a Change Order, TxDOT may, in its discretion, order DB Contractor to proceed with the performance of the Maintenance Services in question notwithstanding such disagreement. Such order may, at TxDOT's option, be in the form of a Unilateral Change Order or a Directive Letter. Upon receipt of a Unilateral Change Order or Directive Letter, as the case may be, pending final resolution of the relevant Change Order by the Parties or according to the procedures for resolving Disputes in this Capital Maintenance Contract, (a) DB Contractor shall implement and perform the Maintenance Services in question as directed by TxDOT and (b) TxDOT will make interim payment(s) to DB Contractor on a monthly basis for the reasonable documented costs of the Maintenance Services in question, subject to meeting the record requirements in Section 4.5.12 and any subsequent adjustment through the procedures for resolving Disputes in this Capital Maintenance Contract.

4.5.4.2 **Unilateral Change Orders**

TxDOT may issue a Unilateral Change Order at any time, regardless of whether it has issued a Request for Change Proposal or received a Request for Change Order. If the Unilateral Change Order is not issued as a lump sum, DB Contractor shall be entitled to compensation in accordance with Section 4.5.10 for additional Work that are required to be performed as the result of the Unilateral Change Order. If TxDOT and DB Contractor are unable to agree upon the amount of any adjustment to the Price, then DB Contractor shall have the right to submit the issue of the Price adjustment to dispute resolution in accordance with Section 4.7 and Exhibit 13 to the CMA.

4.5.5 **DB Contractor-Requested Change Orders**

DB Contractor's entitlement to a Change Order for eligible changes is subject to the restrictions and limitations contained in this Section 4.5 and elsewhere in the CMC 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 4.5.5.2, followed by submittal of a Request for Change Order and supporting documentation to TxDOT. Change Orders may be requested by DB Contractor only pursuant to this Section 4.5.5.

4.5.5.1 **Eligible Changes**

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 Force Majeure Events, Hazardous Materials, Non-Discriminatory Changes and Damage to the Project, to the extent provided in Section 4.5.11; and

(c) additional costs directly attributable to uncovering, removing and restoring the work, to the extent provided in Section 5.9.1.2.

4.5.5.2 **Procedures**

The requirements set forth in this Section 4.5.5 and Section 4.5.6 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 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 4.5.5 and Section 4.5.6.

4.5.5.2.1 **Delivery of 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 4.5.5.1. 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 a PCO Notice as described in Section 4.5.5.2.2.

4.5.5.2.2 **PCO Notices**

The term "**PCO Notice**" means 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 4.5.5.1 and stating which subsection is applicable. The first notice shall be labeled "PCO Notice No. 1" and subsequent notices shall be numbered sequentially.

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) cite any and all provisions of the CMC Documents supporting the anticipated Request for Change Order, (e) state in detail the basis that the maintenance service is not required by this Capital Maintenance Contract, if applicable, (g) identify particular elements of performance for which additional compensation may be sought under this Section 4.5.5.2, (h) 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 3.3.16.3, with respect to the event giving rise to the request for additional compensation, and (i) provide an estimate of the time within which a response to the notice is required to minimize cost, delay or disruption of performance.

If the PCO Notice relates to a decision that this Capital Maintenance Contract leaves to the discretion of a Person or as to which this Capital Maintenance Contract 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.

Any adjustments made to this Capital Maintenance Contract shall not include increased costs or time extensions for delay resulting from DB Contractor's failure to timely provide requested additional information under this Section 4.5.5.2.2.

4.5.5.2.3 **Importance of notice; Waiver**

DB Contractor shall deliver Each PCO Notice as promptly as possible after the occurrence of such event or situation. If any PCO Notice is delivered later than ten 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 prior to the date of delivery of the PCO Notice. Furthermore, if any PCO Notice concerns any condition or material described in Section 4.5.11.2, 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.

In addition to the limitations set forth above in this Section 4.5.5.2.3, 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, unless DB Contractor can show, based on a preponderance of the evidence, that: (a) TxDOT was not materially prejudiced by the lack of notice, or (b) TxDOT's Authorized Representative specified in accordance with the Capital Maintenance Contract had actual knowledge, prior to the expiration of the 60-day period, of the event or situation and that DB Contractor believed it was entitled to a Change Order with respect thereto. In other words, if the requirements of clause (a) or clause (b) above are satisfied, DB Contractor shall retain the right to receive a Change Order, but shall be deemed to have waived the right to collect any and all costs incurred prior to the date of delivery of the PCO Notice.

After delivery of a PCO Notice, DB Contractor must submit a Request for Change Order in accordance with Section 4.5.6 as a condition precedent to receipt of a Change Order.

4.5.6 **Requests for Change Orders**

4.5.6.1 **Delivery of Request for Change Order**

DB Contractor shall deliver a Request for Change Order under this Section 4.5.6.1 to TxDOT within 30 days after delivery of the PCO Notice or within 10 Business Days after receipt of TxDOT's determination to require a Request for Change Order in accordance with Section 4.5.4.1.3, whichever is applicable. TxDOT may require design and construction costs to be covered by separate Requests for Change Order. If DB Contractor fails to deliver a complete Request for Change Order meeting all of the requirements of Section 4.5.6.2 within the appropriate time period, DB Contractor shall be required to provide a new PCO Notice before it may submit a Request for Change Order.

4.5.6.2 **Incomplete Requests for Change Order**

The first Request for Change Order shall be labeled "Request for Change Order No. 1" and subsequent RCOs shall be numbered sequentially. Each Request for Change Order shall meet all requirements set forth in this Section 4.5.6; provided that if any such requirements cannot be met due to the nature and/or timing of the occurrence, DB Contractor shall provide an incomplete Request for Change Order that fills in all information capable of being ascertained. Each incomplete Request for Change Order shall: (a) include a list of those Change Order requirements that are not fulfilled together with an explanation 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 Maintenance Price increase associated therewith, to the extent such amount is then ascertainable.

4.5.6.3 **Additional Information to TxDOT**

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, and shall cause its Subcontractors to do the same, so that TxDOT or its designee can investigate the basis for such proposed Change Order.

4.5.6.4 **Response and Follow-up**

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, expenditures to date and time anticipated for completion of the activities for which the time extension is claimed. TxDOT may reject the Request for Change Order at any point in the process. TxDOT's failure to respond to a complete Request for Change Order within 15 Business Days of delivery of the request shall not be deemed an acceptance of the Request for Change Order, and DB Contractor shall have the burden of following up with TxDOT on the status of any Request for Change Order submitted.

4.5.6.5 **Importance of Timely Response**

DB Contractor acknowledges and agrees that, due to limitations on funding for the Project, timely delivery of PCO Notices and Requests for Change Orders and updates thereto are of vital importance to TxDOT. TxDOT is relying on 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. The following matters (among others) shall be considered in determining whether TxDOT has been prejudiced by DB Contractor's failure to provide timely notice: (a) the effect of the delay on alternatives available to TxDOT (that is, a comparison of alternatives that are available at the time notice was actually given and alternatives that would have been available had notice been given within ten days after occurrence of the event or when such occurrence should have been discovered in the exercise of reasonable prudence); and (b) the impact of the delay on TxDOT's ability to obtain and review objective information contemporaneously with the event.

4.5.6.6 **Review of Subcontractor Claims**

Prior to submission by DB Contractor of any Request for Change Order which 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 claims by the Subcontractor that constitute the basis for the Request for Change Order and determined in good faith that each such claim is justified hereunder and that DB Contractor is justified 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 claims components and shall include a certification signed by DB Contractor's Maintenance Manager stating that DB Contractor has investigated the basis for the Subcontractor's claims and has determined that such claims are 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 5.10.1, and has no reason to believe and does not believe that the factual basis for the Subcontractor's claim is falsely represented. Any Request for Change Order involving Subcontractor-performed Maintenance Services that is not accompanied by such analysis and certification shall be considered incomplete.

4.5.6.7 **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 4.7 hereof and Exhibit 13 to the CMA. DB Contractor shall maintain and deliver to TxDOT, upon request, contemporaneous records, meeting the requirements of Section 4.5.12, 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.

4.5.7 **Contents of Change Orders**

4.5.7.1 **Form of Change Order**

Each Request for Change Order and Change Order shall be prepared using the forms set forth in Exhibit 7 to the CMA, and shall meet all applicable requirements of this Section 4.5.

4.5.7.2 **Scope of Work, Cost Estimate and Other Supporting Documentation**

DB Contractor shall prepare a scope of work, cost estimate, and other information as required by this Section 4.5.7.2 for each Request for Change Order.

4.5.7.2.1 **Scope of Work**

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

4.5.7.2.2 **Cost Estimate**

The cost estimate shall set out the estimated costs in such a way that a fair evaluation can be made. It shall include a breakdown for labor, materials, equipment and markups for overhead and profit, unless TxDOT agrees otherwise. If the work is to be performed by Subcontractors and if the work is sufficiently defined to obtain Subcontractor quotes, 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 4.5.9. 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 non-occurrence of an event.

4.5.7.2.3 **Other Supporting Documentation**

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

4.5.7.3 **Justification**

All Requests for Change Orders shall include an attachment containing a detailed narrative justification therefor, describing the circumstances underlying the proposed change, identifying the specific provision(s) of Section 4.5 that permit a Change Order to be issued, and describing the data and documents (including all data and reports required under Section 4.5.12) that establish the necessity and amount of such proposed change.

4.5.7.4 **Certification**

Each 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 the following is true and correct: (a) the amount of compensation requested is justified as to entitlement and amount, (b) the amount of compensation requested includes all known and anticipated impacts or amounts that may be incurred as a result of the event or matter giving rise to such proposed change, and (c) the cost and pricing data forming the basis for the Change Order is complete, accurate and current. Each Change Order involving Maintenance Services by a Subcontractor for which pricing data is required to be provided under Section 5.10.3 shall include a statement that the Subcontractor pricing data has been provided and shall include a copy of the certification required to be provided by the Subcontractor under Section 5.10.3.

4.5.7.5 **Certificate of Interested Parties (Form 1295)**

In connection with an amendment to this Agreement, including any Change Order or Deviation, DB Contractor shall either (i) provide a certification to TxDOT certifying that there has been no change to the Interested Parties (as that term is defined in § 2252.908 of the Texas Government Code and in 1 T.A.C. § 46.3) disclosed in the most recent Form 1295, Certificate of Interested Parties ("**Form 1295**") filed by DB Contractor with the Texas Ethics Commission in connection with this Capital Maintenance Contract, 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"), or (ii) if there has been a change to the disclosure of Interested Parties or if the value of the amendment is $1,000,000 or greater, file a new Form 1295 with the Texas Ethics Commission as required by the Form 1295 Laws. DB Contractor

shall indicate the CSJ for this Capital Maintenance Contract and the applicable Change Order, Deviation or amendment number in the fields provided on Form 1295.

If DB Contractor is required to file a Form 1295 pursuant to this Section 4.5.7.5 in connection with any amendment, 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 Contract until it has received either the certification or the Form 1295 as required by this Section 4.5.7.5; provided, that DB Contractor's filing of such certification or Form 1295 does not obligate TxDOT to execute a Change Order or any other amendment to this Capital Maintenance Contract. TxDOT will acknowledge receipt of each Form 1295 submitted by DB Contractor in relation to each amendment to the CMC Documents, including each Change Order and Deviation, 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**.

4.5.7.6 **Effect of Change Order Under Design-Build Contract**

DB Contractor acknowledges that it has reviewed the Design-Build Contract, including provisions affecting Change Orders requested by DB Contractor under this Capital Maintenance Contract. DB Contractor expressly agrees to comply with and be bound by Section 4.6.5.6 of the DB General Conditions.

4.5.7.7 **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.

4.5.8 **Certain Limitations**

4.5.8.1 **Limitation on Price Increases**

Any increase in the Price allowed hereunder shall exclude: (a) costs caused by the acts, omissions, negligence, intentional misconduct, or breach of applicable Law, contract or Governmental Approval by any DB Contractor-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 damages as described in clause (b) above, and not otherwise disallowed hereunder, would be reimbursable.

4.5.8.2 **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.

4.5.9 Change Order Pricing For Lump Sum Or Unit Price Change Orders

The price of a Change Order under this Section 4.5.9 shall be a negotiated lump sum price or unit prices as provided below. If requested by TxDOT, in its discretion, negotiation for lump sum or unit price Change Orders may be based on the information contained in the EPDs or on an Open Book Basis.

4.5.9.1 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 4.5.10: (a) showing all impacts on the CMC Documents from Maintenance Services additions, deletions and modifications shown in the Change Order being priced; and (b) setting out the proposed costs in such a way that a fair evaluation can be made. When the Change Order adds or deletes Maintenance Services to DB Contractor's scope, the detailed cost proposal shall be negotiated based on estimates or actual costs of labor, material and equipment in accordance with Section 4.5.9.4 or an estimate including a bill of any material and a breakdown of labor and equipment costs in accordance with Section 4.5.9.5, as applicable. Markup for profit and overhead consistent with Section 4.5.10 shall apply to Maintenance Services added or deleted by Change Orders.

4.5.9.2 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.

4.5.9.3 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 cost of services and that provides for a revised Change Order to be issued after a certain services have been performed, thus allowing a refinement and further definition of the agreed cost.

4.5.9.4 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 in accordance with Section 4.5.10. For negotiated Change Orders, markups for profit and overhead shall be consistent with Section 4.5.10.7.

4.5.9.5 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 a current estimate

including a bill of material, breakdown of labor, material and equipment costs. Credits for mark-up for profit and overhead shall be as provided in Section 4.5.10. The current estimated amount of risk associated with such Maintenance Services shall be an additional factor in determining the amount of the Maintenance Price reduction. When a deletion of Maintenance Services is involved, documented cancellation and Supplier restocking charges may be included in costs and subtracted from the Price reduction.

4.5.9.6 **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 4.5.9.4 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 4.5.9.5 shall be used on the net decrease in cost in order to establish the amount to be deducted from the Maintenance Price.

4.5.9.7 **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 and a not-to-exceed (NTE) amount. If DB Contractor determines that the costs of the Maintenance Services authorized pursuant to a Unit-priced Change Order will exceed the stated NTE amount, DB Contractor shall notify TxDOT of the additional costs required to complete such Work and TxDOT may approve an increase to the stated NTE amount. DB Contractor is not obligated to perform Work authorized pursuant to a Unit-priced Change Order once the approved NTE amount (as it may be adjusted) has been reached. Upon final determination of the quantities, TxDOT will issue a modified Change Order setting forth the final adjustment to the Maintenance Price, which shall not exceed the stated NTE amount (as such amount may be adjusted as described herein).

4.5.9.8 **All-Inclusive Change Orders**

All Change Orders executed by DB Contractor shall be all-inclusive, comprehensive and complete and shall not include any conditions with respect to pricing or schedule, except as permitted for Force Account Change Orders.

4.5.9.9 **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 Capital Maintenance Contract that is deemed to be self-insured by DB Contractor under Section 3.3. All of the foregoing shall be solely the responsibility of DB Contractor.

4.5.10 **Force Account Change Orders**

TxDOT may at its discretion issue a Force Account Change Order whenever TxDOT determines that it is advisable. The Force Account Change Order shall instruct DB Contractor to perform the additional (or modified) Maintenance Services, indicate expressly the intention to treat the items as changes in the Maintenance Services, set forth the kind, character, and limits of the Maintenance Services as far as they can be ascertained, state the terms under which changes to the Maintenance Price will be determined and state a not-to-exceed (NTE) total change in the Maintenance Price. DB Contractor will maintain its records as required by Section 4.5.12 and submit daily records in accordance with Section 4.5.12.2.1. If DB Contractor determines that the costs of the Maintenance Services authorized pursuant to a Force Account Change Order will exceed the stated NTE, DB Contractor shall notify TxDOT of the additional costs required to complete such Work and TxDOT may approve an increase to the stated NTE. DB Contractor is not obligated to perform Work authorized pursuant to a Unit-priced Change Order once the approved NTE (as it may be adjusted) has been reached. Upon final determination of the allowable costs and subject to Section 4.5.12.2.4, TxDOT shall issue a modified Change Order setting forth the final adjustment to the Maintenance Price, which shall not exceed the stated NTE amount (as such amount may be adjusted as described herein).

4.5.10.1 **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, the actual wages (i.e., the base wage paid to the employee exclusive of any fringe benefits) for each hour that the labor and foremen or others approved by TxDOT are actually engaged in the Maintenance Services. An additional 25% of the actual wages will be paid as compensation for overhead, superintendence, profit, and small tools. An additional 45% of the actual wages (excluding the 25% compensation for overhead) will be paid as compensation for all insurance and taxes including the cost of premiums on public liability and workers' compensation insurance, Social Security, and unemployment insurance taxes. These markups 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.

(b) For non-construction-related work (professional services), (1) the actual wages (i.e., the base wage paid to the employee exclusive of any fringe benefits); plus (2) a labor surcharge in the amount of 145% or the approved FAR rates, whichever is greater, 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.

4.5.10.2 **Material Costs**

Material costs for Change Order work shall be the actual cost of all materials to be used in the performance of the Maintenance Services plus a 15% markup 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.

4.5.10.3 **Equipment**

4.5.10.3.1 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 equipment rental rates shall be those tabulated in the most recent version of the Rental Rate Blue Book. The rental rates to be used shall be the published monthly rate divided by 176 times the age and regional adjustment factors plus the hourly operating costs; plus

(b) 15% of the equipment rental rates for overhead and profit.

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 the Maintenance Services, or (iv) any Affiliate of DB Contractor or any affiliate of a 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.

4.5.10.3.2 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 15% markup for overhead and profit.

4.5.10.3.3 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.

4.5.10.4 **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 Force Account basis in accordance with this Section 4.5.10, 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.

4.5.10.5 **Other Direct Costs**

For any justified Direct Cost incurred for Change Order work not covered by the categories of costs contained in Sections 4.5.10.1 through 4.5.10.4, 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.

4.5.10.6 **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 adjusted commencing on the Initial Maintenance Term Commencement Date and annually thereafter throughout the Maintenance Period by the percentage based on CPI set forth in Section 8.1.4, provided that the comparison CPI shall be the CPI published for the month three months prior to the month in which Initial Maintenance Term Commencement Date 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 and 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 for construction work and labor surcharge for non-construction work 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) any and all administrative, 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;

(f) bond and insurance premiums; and

(g) accessories such as computer assisted drafting and design (CADD) systems, software and computers, facsimile machines, scanners, plotters, etc.

4.5.10.7 **Change Order Data**

4.5.10.7.1 DB Contractor shall maintain its records in such a manner as to provide a clear distinction between: (a) the Direct Cost of Maintenance Services that 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 provide the total of costs through the date of the report. For workers, the reports

shall include hours worked, rates of pay, names and classifications. For equipment, the reports shall include size, type, identification number, rental rate and actual working hours of operation. All such records and reports shall be made immediately available to TxDOT upon its request. The cost of furnishing such reports are deemed to be included in DB Contractor's overhead and fee percentages.

4.5.10.7.2 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 Force Account Change Order. When such reports are agreed upon and signed by both Parties, they will become the basis of payment.

4.5.11 **Change Orders for Force Majeure Events; Hazardous Materials; Discriminatory Changes; Non-Discriminatory Changes; Damage to the Project**

4.5.11.1 **Force Majeure Events**

Subject to the limitations contained in, and upon DB Contractor's fulfillment of all applicable requirements of, this Section 4.5 hereof and Section 5 of the CMA, 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.

4.5.11.2 **Hazardous Materials Management**

Subject to the limitations contained in, and upon DB Contractor's fulfillment of all applicable requirements of, this Section 4.5 hereof and Section 5 of the CMA, 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 DB Contractor Releases of Hazardous Materials.

4.5.11.2.1 **Limits on Compensation for Hazardous Materials**

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 Management Costs for the work in question, subject to the limitations set forth in this Section 4.5.11. DB Contractor shall not be entitled to a Change Order for additional compensation with respect to the Hazardous Materials Management responsibilities set forth in Section 4.6.1.

Entitlement to compensation shall be limited to work performed pursuant to DB Contractor's Hazardous Materials Management Plan approved by TxDOT in accordance with Section 9.7.6.1 of the CMA Specification, 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.

DB Contractor shall be deemed to have waived the right to collect any and all costs incurred in connection with any Hazardous Materials Management 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).

In cases involving reimbursement for Hazardous Materials Management under this Section 4.5.11, 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.

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.

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.

4.5.11.2.2 **Insurance Proceeds**

If the cost of any Hazardous Materials Management is covered by the insurance described in Section 3.3, DB Contractor shall be entitled to reimbursement of its costs from proceeds of insurance and self-insurance, up to the limits of the applicable policy, less any deductibles, which shall be DB Contractor's responsibility. To the extent that such proceeds are available, DB Contractor shall not be entitled to payment hereunder on any other basis for such Hazardous Materials Management.

4.5.11.3 **Damage to the Project**

4.5.11.3.1 Subject to the restrictions and limitations set forth in this Section 4.5 hereof and Section 5 of the CMA, DB Contractor shall be entitled to a Change Order for its reasonable and documented costs to repair direct physical damage to any of the Maintained Elements to the extent set forth in this Section 4.5.11.3.

4.5.11.3.2 DB Contractor shall be entitled to a Change Order for its costs to repair direct physical loss or damage, including debris removal, to the extent such damage is directly attributable to and resulting from any of the following events, provided (1) the event is beyond the control of the DB Contractor-Related Entities, (2) the event is not due to an act, omission, negligence, recklessness, willful misconduct, breach of contract or Law of any DB Contractor-Related Entity, and (3) the event (or the effects of such event) could not have been avoided by the exercise of caution, due diligence, or reasonable efforts by DB Contractor:

(a) the acts of third parties (not including DB Contractor-Related Entities or other parties acting on behalf of DB Contractor), including (i) collision with the Project by aircraft,

ships, watercraft, trains, vehicles or other equipment; (ii) riot or civil commotion; (iii) vandalism; (iv) leakage from fire extinguishing equipment; and (v) terrorism; and

(b) the following events: (i) lightning; (ii) explosion; (iii) fire; (iv) collapse or "sinkhole collapse"; (v) volcanic action; (vi) windstorm or hail; (vii) earthquake; (viii) tsunami; (ix) hurricane; (x) tornado; and (xi) any other natural disaster that 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.

4.5.11.3.3 In no event, shall DB Contractor be entitled to a Change Order for increased costs caused by any of the following:

(a) normal wear and tear (regardless of the amount or type of traffic on the Project);

(b) settling, cracking, bulging, shrinkage or expansion of any portion of the Project;

(c) rust, or other corrosion, decay, deterioration;

(d) hidden, latent or patent defects; or

(e) faulty Work, design defects, or other faulty workmanship or materials in the Work, as such term is defined in the Design-Build Contract.

4.5.11.3.4 If damage to a Maintained Element occurs, DB Contractor shall immediately notify TxDOT thereof telephonically or in person, to be followed immediately by written notification. DB Contractor shall be responsible for determining the appropriate action to be undertaken, subject to concurrence by TxDOT. In the event that any Governmental Approvals specify a procedure to be followed, DB Contractor shall follow the procedure set forth in the Governmental Approvals.

4.5.11.3.5 DB Contractor shall bear the burden of proving that damage to the Maintained Elements meeting the requirements of and subject to the limitations in this Section 4.5.11.3 has occurred.

4.5.11.4 **Discriminatory Changes**

4.5.11.4.1 TxDOT shall have the right to adopt at any time, and DB Contractor acknowledges it must comply with all Discriminatory Changes. DB Contractor shall implement a Discriminatory Change only after TxDOT issues a Change Order or Directive Letter therefor pursuant to Section 4.5.

4.5.11.5 **Non-Discriminatory Changes**

4.5.11.5.1 Subject to the restrictions and limitations set forth in this Section 4.5 hereof and Section 5 of the CMA, DB Contractor shall be entitled to additional costs for Non-Discriminatory Changes to the extent set forth in this Section 4.5.11.5. DB Contractor shall not be entitled to any schedule relief for Non-Discriminatory Changes. Except as set forth in this Section 4.5.11.5, Non-Discriminatory Changes shall not require a Change Order or Directive Letter.

4.5.11.5.2 DB Contractor is entitled to an increase in the Maintenance Price solely for additional costs required for Renewal Work due to a Non-Discriminatory Change only if TxDOT directs DB Contractor to implement the Non-Discriminatory Change (or DB Contractor is otherwise obligated by Law to implement such Non-Discriminatory Change) prior to the date when DB

Contractor performs or is scheduled to perform the Renewal Work (if any) on the affected Maintained Element. Such additional costs shall be determined using the principles set forth in Section 4.5.9.

4.5.11.5.3 If compliance with a Non-Discriminatory Change requires Renewal Work, DB Contractor shall commence performance of and diligently perform such Renewal Work not later than the first to occur of (a) the date when DB Contractor next performs Renewal Work on such Maintained Element, (b) the date when DB Contractor is first obligated to perform Renewal Work on such Maintained Element, or (c) provided TxDOT gives no less than 30 days' prior notice to DB Contractor, the date on which TxDOT commences actions to implement the Non-Discriminatory Change on any Comparable Limited Access Highways that TxDOT manages or operates, as determined by TxDOT.

4.5.11.5.4 For purposes of Section 4.5.11.5.3(c), DB Contractor shall not be entitled to delay commencement or completion of its work on grounds that TxDOT is delayed in commencing or completing implementing actions on Comparable Limited Access Highways where: (a) TxDOT is delayed due to the extensive system of Comparable Limited Access Highways for which TxDOT is responsible; or (b) the change, addition or replacement of the Design-Build Specifications, CMA Specification or Safety Standard applies only upon the occurrence of a condition or circumstance that has not yet occurred in respect of a Comparable Limited Access Highway that TxDOT manages or operates.

4.5.12 **Change Order Records**

DB Contractor shall maintain its records in such a manner as to provide a clear distinction between the Direct Costs for 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 as well as Utility Adjustments. 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.

4.5.12.1 **Waiver**

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 or timely provide to TxDOT cost data meeting the requirements of this Capital Maintenance Contract.

4.5.12.2 **Additional Force Account Record Requirements**

In addition to the requirements of this Section 4.5.12, for Force Account Change Orders, DB Contractor shall provide the following:

4.5.12.2.1 **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 Force Account basis. The daily Force Account Maintenance Services 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; and

(d) transportation of materials.

The reports shall also state the total costs to date for the Force Account Change Order work.

4.5.12.2.2 **Supplier's Invoices**

Materials charges shall be substantiated by valid copies of Supplier's invoices. Such invoices shall be submitted with the daily Force Account work reports, or if not available, they shall be submitted with subsequent daily Force Account 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.

4.5.12.2.3 **Execution of Reports**

All Force Account Change Order reports shall be signed by DB Contractor's Maintenance Manager.

4.5.12.2.4 **Adjustment**

TxDOT will compare its records with the completed daily Force Account Work reports furnished by DB Contractor and make any necessary adjustments. When these daily Force Account 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 Force Account basis shall be open, during all regular business hours, to inspection or audit by representatives of TxDOT during the life of this Capital Maintenance Contract and for a period of not less than five years after the termination of the Capital Maintenance Contract, 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 date of Final

Acceptance, DB Contractor will be given a reasonable notice of the time when such audit is to begin.

4.5.13 **Matters Not Eligible for Maintenance Price Increase**

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 4.5 and Section 5 of the CMA 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) 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;

(b) changes to the nature or frequency of Maintenance Services required to be performed (compared to the nature and frequency anticipated by the DB Contractor in its Proposal) 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;

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

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

(e) materials replacement, re-seeding and re-vegetation for erosion;

(f) design or construction Errors;

(g) 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 3.3.16.3;

(h) 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);

(i) groundwater levels or subsurface moisture content;

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

(k) any suspensions, terminations, interruptions, denials, non-renewals 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;

(l) 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 Contract or arise out of the nature of the Maintenance Services; and

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

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 Contract 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.

DB CONTRACTOR HEREBY EXPRESSLY WAIVES ALL RIGHTS TO ASSERT ANY AND ALL CLAIMS BASED ON ANY CHANGE IN MAINTENANCE SERVICES, 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 REQUEST FOR CHANGE ORDER, AND AGREES THAT IT SHALL BE ENTITLED TO NO COMPENSATION, DAMAGES OR TIME EXTENSION WHATSOEVER IN CONNECTION WITH THE MAINTENANCE SERVICES EXCEPT TO THE EXTENT THAT THE CMC DOCUMENTS EXPRESSLY SPECIFY THAT DB CONTRACTOR IS ENTITLED TO A CHANGE ORDER OR OTHER COMPENSATION, DAMAGES OR TIME EXTENSION.

4.5.14 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 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 4.5 and Section 5 of the CMA (including agreement as to the amount of compensation allowed under a Force Account 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 4.7 hereof and Exhibit 13 of the CMA. 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 4.5.10 with respect thereto.

4.5.15 Accord and Satisfaction

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.

4.5.16 **Changes Not Requiring Change Order**

Changes in the Maintenance Services or requirements in the CMC 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 CMC Documents shall require either a Directive Letter, Capital Maintenance Contract amendment or a Change Order.

4.5.17 **No Release or Waiver**

4.5.17.1 No Change Order granted hereunder shall release DB Contractor's Surety from its obligations. Maintenance Services shall continue and be carried out in accordance with all the provisions of the CMC Documents and this Capital Maintenance Contract shall be and shall remain in full force and effect, unless formally suspended or terminated by TxDOT in accordance with the terms hereof.

4.5.17.2 The performance and acceptance of any part of the Maintenance Services or materials specified by this Capital Maintenance Contract 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 Contract for abandonment or failure to complete within the time specified (as it may have been extended) or to impose and deduct damages as may be provided.

4.5.17.3 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.

4.6 **Waste Disposal and Hazardous Materials Management**

4.6.1 **General Requirements**

4.6.1.1 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.

4.6.1.2 For any Hazardous Materials that are DB Contractor's responsibility under this Capital Maintenance Contract, 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 4.6.2,

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 ten 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 Contract.

4.6.2 **Procedures for Hazardous Materials Management**

4.6.2.1 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 and/or construction techniques, to avoid excavation or dewatering in areas with Hazardous Materials or Recognized Environmental Conditions. Where excavation or dewatering of Hazardous Materials or Recognized Environmental Conditions is unavoidable, 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 CMC Documents, applicable Law and Good Industry Practice, contaminated soil and groundwater shall not be disposed off-site.

4.6.2.2 Except where DB Contractor is required to take immediate action under the CMC 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.

4.6.2.3 DB Contractor's rights to a Change Order with respect to costs directly attributable to performance of Hazardous Materials Management are set forth in Section 4.5.11.2.

4.6.3 **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.

4.6.4 **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.

4.6.5 **Off-Site Disposal and Hazardous Material Generator**

4.6.5.1 Off-site disposal of Hazardous Materials other than DB Contractor Releases of Hazardous Materials is subject to the following provisions:

(a) As between DB Contractor and TxDOT, TxDOT shall be considered the generator and assume generator responsibility for Hazardous Materials other than DB Contractor Releases of Hazardous Materials.

(b) 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. With regard to Hazardous Materials other than DB Contractor Releases of Hazardous Materials, TxDOT shall comply with the applicable standards for generators including those found at 40 CFR Part 262, including the responsibility to sign manifests for the transport of hazardous wastes. The foregoing shall not preclude or limit any rights, remedies or defenses that TxDOT or DB Contractor may have against any Governmental Entity or other third parties, including prior owners, lessees, licensees and occupants of any parcel of land that is or becomes part of the Project ROW.

(c) To the extent permitted by applicable Law, TxDOT shall indemnify, save, protect and defend DB Contractor from Third Party Claims and Losses arising out of or related to generator liability for Hazardous Material for which DB Contractor is not considered the generator pursuant to this Section 4.6.5, specifically excluding generator liability for actual and threatened DB Contractor Releases of Hazardous Materials.

4.6.5.2 As between DB Contractor and TxDOT, DB Contractor shall be considered the generator and assume generator responsibility only for DB Contractor Releases of Hazardous Materials. For such Hazardous Materials, the following provisions shall apply:

(a) Hazardous Materials Management costs, including assessment, containment, and remediation expenses, on, arising from or related to such shall not be compensable to DB Contractor or entitle DB Contractor to any schedule extension.

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

4.7 Informal Resolution Procedures

As a condition precedent to the right to have any Dispute resolved pursuant to the formal Disputes resolution process set forth in Exhibit 13 to the CMA 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 this Section 4.7 (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.

4.7.1 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 CMC 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 schedule 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 and staging);

(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 formal Dispute resolution process to modify its statement of the Dispute and/or the amount of money or other right, remedy or relief sought.

4.7.2 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 4.7.3 shall not be required.

4.7.3 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.

4.7.4 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; or (b) either Party may commence the formal Disputes resolution process pursuant to Exhibit 13 to the CMA.

4.8 Partnering

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.

4.8.1 Schedule; Participation

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.

4.8.2 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.

ITEM 5 CONTROL OF THE MAINTENANCE SERVICES

5.1 Management and Administration

5.1.1 TxDOT Responsibility for Policy Decisions.

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

5.1.2 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 CMC 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 be responsible for paying all tolls for its personnel, Subcontractors and Suppliers, unless directed otherwise in writing by TxDOT. DB Contractor shall have no interest, right or title in or to: (a) any toll or other revenues arising out of the use of the Project; (b) the Project; or (c) the Project ROW.

5.1.3 Safety

5.1.3.1 DB Contractor shall take all reasonable precautions and be solely responsible for the safety of, and shall provide protection to prevent damage, injury, or loss to, all persons on the Site or who would reasonably be expected to be affected by the Maintenance Services, including individuals performing Maintenance Services, employees of TxDOT and its consultants, visitors to the Site during the performance of Maintenance Services and members of the traveling public who may be affected by the Maintenance Services. DB Contractor shall at all times comply with all health and safety requirements contained in the CMC Documents and DB Contractor's Maintenance Safety Plan and all such requirements under applicable Law, including all rules, directives and guidance of the U.S. Department of Homeland Security or comparable State agency. When performing Maintenance Services, DB Contractor shall coordinate and cooperate with all Governmental Entities providing security, first responder and other public emergency response services.

5.1.3.2 Obligations to Minimize Impacts

DB Contractor shall ensure that all of its activities and the activities of DB Contractor-Related Entities are undertaken in a manner that will minimize the effect on surrounding property and the traveling public to the maximum extent practicable.

5.2 Submittals and Approvals

5.2.1 Obligation to Cooperate

TxDOT's consultants may assist TxDOT in the management and oversight of the Project and the CMC Documents. DB Contractor shall cooperate with TxDOT's consultants in the exercise of their respective duties and responsibilities in connection with the Project.

5.2.2 **Maintenance Services Report**

For each quarterly period during the Maintenance Period, DB Contractor shall submit to TxDOT a Maintenance Services Report meeting the requirements of Section 9.8.3 of the CMA Specification. The Maintenance Services Report shall be submitted to TxDOT on or before the 10th day of the month following the end of the applicable quarterly period.

5.2.3 **Governmental Approvals**

5.2.3.1 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 non-renewal of, or failure to obtain any Governmental Approval.

5.2.3.2 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.

5.2.3.3 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 CMC Documents or Governmental Approvals, except to the extent (if any) that responsibility for performance of such measures is expressly assigned to TxDOT in the CMC Documents.

5.2.4 **Software Compatibility**

5.2.4.1 Unless otherwise specifically stated in the CMC Documents, DB Contractor is responsible for assuring that all software it uses for any aspect of the Project is the latest version of the software used by TxDOT on the Project. "Compatible" for use in this Section 5.2.4 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 ensure that TxDOT is able to implement compatible usage of all software utilized by DB Contractor.

5.2.4.2 In addition to all other requirements set forth in the CMC Documents, DB Contractor shall submit all documents, correspondence and Submittals to TxDOT through TxDOT's dedicated SharePoint site for the Project unless otherwise directed by TxDOT. Nothing in this Section 5.2.4 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 CMC Documents, including the requirements set forth in Section 8.1 of the CMA.

In order for any submittal to SharePoint to satisfy written notice requirements hereunder, DB Contractor shall concurrently send an email notice to the applicable individuals otherwise satisfying the requirements set forth in Section 8.1 of the CMA notifying such individuals of the submittal to SharePoint.

5.3 Nonconforming Work

5.3.1 Rejection, Removal and Replacement of Nonconforming Work

Nonconforming Work rejected by TxDOT shall be removed and replaced so as to conform to the requirements of the CMC 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 Maintenance Services 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.

5.3.2 Agreement to Accept Nonconforming Work

5.3.2.1 If TxDOT agrees to accept Nonconforming Work without requiring it to be fully corrected, 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, or (c) 100% of DB Contractor's cost savings associated with its failure to perform the Maintenance Services in accordance with the requirements of the CMC Documents. Such reimbursement shall be payable to TxDOT within 10 days after DB Contractor's receipt of an invoice therefor. Alternatively, TxDOT may deduct the amount of such costs and expenses from any sums owed by TxDOT to DB Contractor pursuant to this Capital Maintenance Contract.

5.3.2.2 DB Contractor acknowledges and agrees that, subject to DB Contractor's right to correct Nonconforming Work in accordance with Section 5.3.1, including the timelines therein, TxDOT shall have discretion regarding acceptance or rejection of Nonconforming Work and shall have discretion with regard to the amount payable in connection therewith. Payment, reimbursement or deduction of the amounts owing to TxDOT under this Section 5.3.2 shall be a condition precedent to the acceptance of the applicable Nonconforming Work.

5.3.2.3 Where such Nonconforming Work is allowed to remain uncorrected in accordance with this Section 5.3.2 and such Nonconforming Work requires that a Performance Requirement different to that set forth in the Performance and Measurement Table to this Capital Maintenance Contract is necessary, TxDOT shall establish such different Performance Requirement for such Nonconforming Work.

5.4 Cooperation with Representatives

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

5.5 Cooperation with Other Contractors

DB Contractor acknowledges that TxDOT has awarded or plans to award contracts for construction and other work at or near the Maintenance Limits. DB Contractor shall fully cooperate and be solely responsible for coordinating with such other contractors, Governmental Entities and projects, and shall schedule and sequence the Maintenance Services as reasonably necessary to accommodate the work of such other contractors and projects. Further, DB Contractor shall conduct its Maintenance Services and perform its obligations under the CMC Documents without interfering with or hindering the progress or completion of the work being performed by other contractors or of the work relating to such other projects.

5.6 Coordination with Utility Owners and Adjacent Property Owners

DB Contractor shall coordinate with Utility Owners and owners of property adjoining the Project, and with their respective contractors, as more particularly described in the CMC Documents.

5.7 Interference by Other Contractors

If DB Contractor asserts that any of TxDOT's other contractors have interfered with the Maintenance Services, then DB Contractor's sole remedy shall be to seek recourse against such other contractors.

5.8 Cooperation with Railroads

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 by DB Contractor, railroad and TxDOT have been incorporated or satisfactorily resolved, 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.

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.

5.9 Oversight and Inspection

5.9.1 DB Contractor Inspection and Testing

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

DB Contractor shall carry out General Inspections and Specialist Inspections in accordance with Section 9.5 of the CMA Specification and the MMP. DB Contractor shall use the results of General Inspections and Specialist Inspections to maintain asset condition and service levels, and to develop programs of maintenance and Renewal Work to minimize the effect of Maintenance Services on Users and other members of the public.

5.9.1.1 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 CMC Documents, DB Contractor shall not proceed beyond that point until TxDOT has made such approval or waived its right in writing to inspect or 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.

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 5.3.2) 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 CMC 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.

5.9.1.2 Obligation to Uncover Finished Work

Whenever DB Contractor performs design work or 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 Design-Build Contract). DB Contractor shall inform TxDOT in writing of any construction work to be performed under this Capital Maintenance Contract that is to be covered and offer a full and adequate opportunity to TxDOT to examine by inspection, testing, or other means such part of the work before it is covered. DB Contractor shall permit examination by TxDOT, including by removing or uncovering any part 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 CMC Documents.

If any work examined by TxDOT is found not to be in conformance with the requirements of the CMC Documents, then uncovering, removing and restoring all work at TxDOT's direction shall be at DB Contractor's cost and DB Contractor shall not be entitled to any adjustment to the Maintenance Price or any other relief. Furthermore, if DB Contractor performs any work or uses any materials without adequate notice to and opportunity for prior inspection by TxDOT (if applicable) or without inspection in accordance with the CMC Documents, TxDOT may direct the work to be uncovered, removed or restored at DB Contractor's cost and without an adjustment to the Maintenance Price or any other relief, even if TxDOT determines that all of the work is in conformance with the requirements of the CMC Documents.

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

5.9.2.1 Oversight and Acceptance

The oversight, spot checks, inspections, verifications, audits, tests, reviews, acceptances and approvals conducted by TxDOT and other Persons do not constitute acceptance of Nonconforming Work (except in limited circumstances as expressly provided in Section 5.3.2) or waiver of any warranty or legal or equitable right with respect thereto. TxDOT may request 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 CMC Documents, whether or not previous oversight, spot checks, inspections, verifications, audits, tests, reviews, acceptances or approvals were conducted or waived by TxDOT or any such Persons.

5.9.2.2 No Estoppel

DB Contractor shall not be relieved of obligations to perform the Maintenance Services in accordance with the CMC Documents, or any of its Warranty or indemnity obligations, as the result of oversight, spot checks, audits, reviews, tests or inspections performed by any Persons, approvals or acceptances made by any Persons, or any failure of any Person to take such action. TxDOT shall not be precluded or estopped, by any measurement, estimate or certificate made, 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 or materials do not conform in fact to the requirements of the CMC 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 its Guarantors or Sureties such damages as TxDOT may sustain by reason of DB Contractor's failure to comply or to have complied with the terms of the CMC Documents.

5.10 Documents, Records and Audits

5.10.1 Escrowed Proposal Documents

Prior to execution of this Capital Maintenance Contract, DB Contractor delivered to TxDOT 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 Contract, the EPDs shall be 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 CMC 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) Warranty Period and all required extensions have expired as required under Section 3.6.1; (b) all Claims or Disputes regarding the Maintenance Services have been settled; and (c) Final Payment has been made and accepted.

5.10.1.1 **Availability for Review**

The EPDs shall be available during business hours for joint review by DB Contractor, TxDOT and TxDOT's consultants, and any dispute resolver in accordance with Section 4.7 hereof and Exhibit 13 to the CMA, in connection with approval of the Maintenance Services Submittals Schedule, negotiation of Change Orders and resolution of Claims or Disputes under the CMC Documents, and also as described in Section 5.10.1.6. 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.

5.10.1.2 **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 and TxDOT consultants' right to review the EPDs as provided in this Section 5.10.1. 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 5.10.1, provided that the Parties execute a mutually agreeable confidentiality agreement with respect to EPDs that constitute trade secrets or proprietary information, which confidentiality agreement shall explicitly acknowledge that it is subject to applicable Law (including the Public Information Act).

5.10.1.3 **Representation**

DB Contractor represents and warrants that the EPDs constitute all documentary information used in the preparation of its 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 CMC Documents and that nothing in the EPDs shall change or modify any CMC Document.

5.10.1.4 **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 3.3. 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 Contract.

5.10.1.5 **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 5.10.1.4, 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, and that they shall meet the requirements of Section 5.10.1.4.

5.10.1.6 **Review by TxDOT to Confirm Completeness**

TxDOT may at any time conduct a review of the EPDs to determine whether they are complete. If TxDOT determines that any data is missing from an EPD, 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 Contract shall be reviewed, organized and indexed in the same manner described in the ITP.

5.10.2 **Financial Reporting Requirements**

5.10.2.1 DB Contractor shall deliver to TxDOT financial and narrative reports, statements, certifications, budgets and information as and when required under the CMC Documents.

5.10.2.2 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 CMC Documents. In addition, DB Contractor shall deliver to TxDOT the following financial statements for each Guarantor, at the times specified below:

5.10.2.2.1 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;

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

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

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

5.10.2.3 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.

5.10.2.4 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.

5.10.2.5 All reports and information delivered by DB Contractor under Sections 5.10.2.3 and 5.10.2.4 shall also be delivered electronically, to the extent electronic files exist, and be suitable for posting on the web.

5.10.3 **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 Major 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, constitutes 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.

5.10.4 **Maintenance and Inspection of Records**

5.10.4.1 Except for EPDs (which shall be maintained as set forth in Section 5.10.1), DB Contractor shall keep and maintain in the county in which the Project is located, or in another location TxDOT approves in writing, all of DB Contractor's books, records and documents relating to the Project, Proposal, procurement for the CMC or Maintenance Services (including management, scheduling, cost accounting and other services), including copies of all original documents delivered to TxDOT. DB Contractor shall keep and maintain such books, records, and documents in accordance with the Texas State Records Retention Schedule and applicable provisions of the CMC Documents, and in accordance with Good Industry Practice. DB Contractor shall notify TxDOT where such records and documents are kept.

5.10.4.2 DB Contractor shall make all its books, records, and documents available for inspection by TxDOT and its authorized representatives and legal counsel at DB Contractor's principal offices in Texas or at TxDOT's project office for EPDs, at all times during normal business hours, without charge. DB Contractor shall provide copies thereof to TxDOT, or make available for review to TxDOT (a) as and when expressly required by the CMC Documents, including as required by Section 5.10.6 or (b) for those not expressly required, upon request and at no expense to DB Contractor; provided, however, that any costs associated with such copies shall be reasonable. TxDOT may conduct any such inspection upon 48 hours' prior written notice or unannounced and without prior notice where there is good faith suspicion of fraud. The right of inspection includes the right to make extracts and take notes. The provisions of this Section 5.10.4.2 are subject to the following:

5.10.4.2.1 DB Contractor shall preserve and retain records and documents for the respective time periods applicable to TxDOT as set forth in Texas State Records Retention Schedule or, if not addressed therein, for a minimum of the later of the date of completion of the CMC or five years after the date the record or document is generated; provided that if the CMC Documents specify any different time period for retention of particular records, such time period shall control. Notwithstanding the foregoing, all records which relate to Claims and Disputes being processed or actions brought under the procedures for resolving Disputes shall be retained and made available until any later date that such Claims, Disputes and actions are finally resolved.

5.10.4.2.2 Upon the completion of the Capital Maintenance Contract, DB Contractor shall, at TxDOT's election, either (a) submit to TxDOT at DB Contractor's cost and expense all Contracting Information related to this Capital Maintenance Contract in the custody or possession of DB Contractor, or (b) preserve such Contracting Information for the respective time periods applicable to TxDOT as set forth in the Texas State Records Retention Schedule.

5.10.5 **Audits**

5.10.5.1 In addition to all of TxDOT's other rights set forth herein, including under Section 5.9.1.1, TxDOT shall have such rights to review and audit DB Contractor, its Subcontractors and their respective books and records as and when TxDOT deems necessary in connection with Claims or Disputes or for purposes of verifying compliance with the CMC Documents and applicable Law. Without limiting the foregoing, TxDOT shall have the right to audit the Maintenance Management Plan and compliance therewith, including the right to inspect Maintenance Services and activities and to verify the accuracy and adequacy of the Maintenance Management Plan and its component parts, plans and other documentation. TxDOT may conduct any such audit of books and records upon 48 hours' prior written notice or unannounced and without prior notice where there is good faith suspicion of fraud.

5.10.5.2 All Claims or Disputes filed against TxDOT shall be subject to audit at any time following the filing of the Claim or Dispute. The audit may be performed by employees of TxDOT or by an auditor under contract with TxDOT. No notice is required before commencing any audit within 60 days after termination of this Capital Maintenance Contract. 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. At a minimum, DB Contractor shall make the following documents available to the auditors:

(a) daily time sheets and supervisor's daily reports;

(b) union agreements;

(c) insurance, welfare, and benefits records;

(d) payroll registers;

(e) earnings records;

(f) payroll tax forms;

(g) material invoices and requisitions;

(h) material cost distribution work sheet;

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

(j) Subcontractors' (including Suppliers) invoices;

(k) Subcontractors' and agents' payment certificates;

(l) canceled checks (payroll, Subcontractors and Suppliers);

(m) job cost report;

(n) job payroll ledger;

(o) general ledger;

(p) cash disbursements journal;

(q) 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

(r) 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, and all documents that establish the time periods, individuals involved, the hours for the individuals, and the rates for the individuals.

5.10.5.3 Full compliance by DB Contractor with the provisions of this Section 5.10.5 is a contractual condition precedent to DB Contractor's right to seek relief under Section 4.7 and Exhibit 13 to the CMA.

5.10.5.4 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.

5.10.5.5 DB Contractor represents and warrants the completeness and accuracy of all information it or its agents provides in connection with TxDOT audits, and shall cause all Subcontractors other than TxDOT and Governmental Entities acting as Subcontractors to warrant the completeness and accuracy of all information such Subcontractors or their agents provide in connection with TxDOT audits.

5.10.5.6 DB Contractor's internal and third-party quality and compliance auditing responsibilities shall be set forth in the Project Management Plan, consistent with the audit requirements referred to in this Section 5.10.5.

5.10.5.7 Nothing in the CMC 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 Contract or indirectly through a Subcontract, (b) acceptance of funds directly under this Capital Maintenance Contract 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.

5.10.6 **Public Information Act**

5.10.6.1 DB Contractor acknowledges and agrees that all records, documents, drawings, plans, specifications and other materials relating to the Project, the Maintenance Services or this Capital Maintenance Contract, including materials submitted by DB Contractor, are subject to the provisions of the Public Information Act. To the extent that this Capital Maintenance Contract involves the exchange or creation of "public information" (as such term is defined by the Texas Public Information Act) that TxDOT collects, assembles or maintains or has the right of access to, and is not otherwise excepted from disclosure under the Public Information Act,

DB Contractor is required, at no additional charge to the State, to make any such information available in PDF format, which is accessible by the public. If 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 5.10.6 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.

5.10.6.2 In addition to the foregoing, the requirements of Subchapter J, Chapter 552, Government Code, may apply to this Capital Maintenance Contract, and the DB Contractor agrees that the Capital Maintenance Contract can be terminated if the DB Contractor knowingly or intentionally fails to comply with a requirement of that subchapter.

5.10.6.3 If TxDOT receives a request for public disclosure of materials relating to this Capital Maintenance Contract, TxDOT will use reasonable efforts to notify DB Contractor of the request. Within five Business Days after receipt from TxDOT of a request for information that may include Contracting Information, DB Contractor shall submit to TxDOT at its expense all responsive materials and information maintained by or in the custody or possession of DB Contractor, regardless of whether such information was received from or previously submitted to TxDOT. Except for information that may be disclosed by TxDOT pursuant to Section 2.6 of the ITP or information described by Section 552.0222(b) of the Public Information Act, TxDOT will forward all responsive materials and information to the Office of the Attorney General and request an opinion prior to disclosing any such materials. DB Contractor shall have 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 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.

5.10.6.4 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.

5.10.7 **Ownership of Documents**

Subject to this Section 5.10.7, all data, sketches, charts, calculations, plans, specifications, electronic files, correspondence and other documents created or collected under the terms of the CMC 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 CMC Documents, including studies, manuals, Record Documents, 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 5.10.7 in accordance with the requirements of Section 5.10.4 and shall deliver copies to TxDOT as required by the CMC Documents or upon request if not otherwise required to be delivered, with an indexed set delivered to TxDOT as a condition to Final Payment.

5.10.8 **Intellectual Property**

5.10.8.1 All Proprietary Intellectual Property, including with respect to Source Code and Source Code Documentation, shall remain exclusively the property of DB Contractor or its Affiliates or Subcontractors that supply the same, notwithstanding any delivery of copies thereof to TxDOT.

5.10.8.2 TxDOT shall have and is hereby granted a nonexclusive, transferable, irrevocable, fully paid up right and license to use, reproduce, modify, adapt and disclose, and sublicense others to use, reproduce, modify, adapt and disclose, the Proprietary Intellectual Property of DB Contractor, including with respect to Source Code and Source Code Documentation, solely in connection with the Project and any State Highway owned and operated by TxDOT or a State or regional Governmental Entity; provided that TxDOT shall have the right to exercise such license only at the following times:

(a) from and after the expiration or earlier termination of this Capital Maintenance Contract for any reason whatsoever; and

(b) during any time that a receiver is appointed for DB Contractor, or during any time that there is pending a voluntarily or involuntary proceeding in bankruptcy in which DB Contractor is the debtor, in which case TxDOT may exercise such license only in connection with the Project.

5.10.8.3 Subject to the license and rights granted to TxDOT pursuant to Section 5.10.8.2, TxDOT shall not at any time sell any Proprietary Intellectual Property of DB Contractor or use, reproduce, modify, adapt and disclose, or allow any party to use, reproduce, modify, adapt and disclose, any such Proprietary Intellectual Property for any other purpose.

5.10.8.4 The right to transfer the license is limited to any Governmental Entity that succeeds to the power and authority of TxDOT generally or with respect to the Project.

5.10.8.5 The right to sublicense is limited to State or regional Governmental Entities that own or operate a State Highway or other road, and to the concessionaires, contractors, subcontractors, employees, attorneys, consultants and agents that are retained by or on behalf of TxDOT or

any such State or regional Governmental Entity in connection with the Project or another State Highway or other road. All such sublicenses shall be subject to Section 5.10.8.6.

5.10.8.6 Subject to Section 5.10.5, TxDOT shall:

(a) not disclose any Proprietary Intellectual Property of DB Contractor to any Person other than authorized transferees and sublicensees who agree to be bound by any confidentiality obligations of TxDOT relating thereto;

(b) enter into a commercially reasonable confidentiality agreement if requested by DB Contractor with respect to the licensed Proprietary Intellectual Property; and

(c) include, or where applicable require such State or regional Governmental Entity to include, in the contract with the sublicensee its covenant to employ sound business practices no less diligent than those used for its own confidential information, and no less diligent than required by commercially reasonable standards of confidentiality, to protect all Proprietary Intellectual Property of DB Contractor and other materials provided under the sublicense against disclosure to third parties not in receipt of a sublicense, and to use the sublicense only for the permitted purposes.

5.10.8.7 Notwithstanding any contrary provision of this Capital Maintenance Contract, in no event shall TxDOT or any of its directors, officers, employees, consultants or agents be liable to DB Contractor, any Affiliate or any Subcontractor for any damages, including loss of profit, arising out of breach of the duty of confidentiality set forth in Section 5.10.8.6 if such breach is not the result of gross negligence or intentional misconduct. DB Contractor hereby irrevocably waives all claims to any such damages.

5.10.8.8 DB Contractor shall continue to have a full and complete right to use any and all duplicates or other originals of its Proprietary Intellectual Property in any manner it chooses.

5.10.8.9 With respect to any Proprietary Intellectual Property, including with respect to Source Code and Source Code Documentation, owned by a Person other than DB Contractor, including any Affiliate, and other than TxDOT or a Governmental Entity acting as a Subcontractor, DB Contractor shall obtain from such owner, concurrently with execution of any contract, subcontract or purchase order with such owner or with the first use or adaptation of the Proprietary Intellectual Property in connection with the Project, both for DB Contractor and TxDOT, nonexclusive, transferable, irrevocable, fully paid up licenses to use, reproduce, modify, adapt and disclose such Proprietary Intellectual Property solely in connection with the Project and any State Highway, owned and operated by TxDOT or a State or regional Governmental Entity, of at least identical scope, purpose, duration and applicability as the license granted under Section 5.10.8.2. The foregoing requirement shall not apply, however, to mass-marketed software products (sometimes referred to as “shrink wrap software”) owned by such a Person where such a license cannot be extended to TxDOT using commercially reasonable efforts. The limitations on sale, transfer, sublicensing and disclosure by TxDOT set forth in Sections 5.10.8.3 through 5.10.8.6 shall also apply to TxDOT’s licenses in such Proprietary Intellectual Property.

ITEM 6 LEGAL RELATIONS AND RESPONSIBILITIES

6.1 Compliance with Laws

DB Contractor shall comply with all Laws that affect the performance of the Maintenance Services.

6.2 Permits, Licenses and Taxes

6.2.1 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 Contract, 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 through itself or subcontracts with licensed/registered professional service firms as provided herein. Any references in the CMC 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 6.2 shall control and supersede every other provision of all CMC Documents.

6.2.2 Taxes

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 this Section 6.2.2, due to its misinterpretation of Laws respecting taxes or incorrect assumptions regarding applicability of taxes.

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.

6.3 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 Contract, regardless of whether such errors, omissions, inconsistencies or Defects were also included in the Preliminary Schematic Design or Reference Information Documents.

6.4 **Independent Contractor**

6.4.1 DB Contractor is an independent contractor, and nothing contained in the CMC Documents shall be construed as creating any relationship between TxDOT and DB Contractor other than that of Project owner and independent contractor.

6.4.2 Nothing in the CMC 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 "Design-Build" may be used on occasion to refer to contractual relationships of the type hereby created, the Parties do not thereby express any intention to form or hold themselves out as a de jure or de facto partnership, joint venture, or similar relationship to share net profits or net losses, or to give TxDOT control or joint control over DB Contractor's financial decisions or discretionary actions concerning the Project and the Maintenance Services.

6.4.3 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. None of DB Contractor, any Subcontractor, nor any of their respective employees is or shall be deemed to be an employee of TxDOT. Except as otherwise specified in the CMC 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.

6.5 **Successors and Assigns**

6.5.1 The CMC Documents shall be binding upon and inure to the benefit of TxDOT and DB Contractor and their permitted successors, assigns and legal representatives.

6.5.2 TxDOT may transfer and assign all or any portion of its rights, title and interests in and to the CMC Documents, including rights with respect to the Payment and Performance 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 other public agency or public entity as permitted by Law;

(b) without DB Contractor's consent, to any 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.

6.5.3 In the event of TxDOT's assignment of all of its rights, title and interests in the CMC Documents as permitted hereunder, DB Contractor shall have no further recourse to TxDOT under the CMC Documents or otherwise except as specifically provided by other contractual agreement or by statute.

6.5.4 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 CMC 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.

6.6 **Change of Organization or Name**

6.6.1 DB Contractor shall not change the legal form of its organization in a manner that adversely affects TxDOT's rights, protections and remedies under the CMC Documents without the prior written approval of TxDOT, which consent may be granted or withheld in TxDOT's discretion.

6.6.2 In the event either Party changes its name, such Party agrees to promptly furnish the other Party with written notice of change of name and appropriate supporting documentation.

6.7 **Limitation on Third Party Beneficiaries**

It is not intended by any of the provisions of the CMC 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 6.7, the duties, obligations and responsibilities of the Parties to the CMC Documents with respect to third parties shall remain as imposed by Law. The CMC 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.

6.8 **No Personal Liability of TxDOT Employees; Limitation on State's Liability**

6.8.1 **No Personal Liability of TxDOT Employees**

6.8.1.1 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 CMC Documents. They shall not be, or be 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.

6.8.1.2 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 CMC Documents.

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

6.8.2 **Limitation on State's Liability**

In no event shall TxDOT be liable for injury, damage, or death sustained by reason of a defect or want of repair on or within the Site during the period 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 Contract to take any action with respect to the Project, including the right to review, comment on, disapprove or accept maintenance services, 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.

6.9 INDEMNIFICATION

6.9.1 SUBJECT TO SECTION 6.9.2, DB CONTRACTOR SHALL RELEASE, PROTECT, DEFEND, INDEMNIFY, AND HOLD HARMLESS THE INDEMNIFIED PARTIES FROM AND AGAINST ANY AND ALL CLAIMS, CAUSES OF ACTION, SUITS, JUDGMENTS, INVESTIGATIONS, LEGAL OR ADMINISTRATIVE PROCEEDINGS, DEMANDS, AND LOSSES, IN EACH CASE IF ASSERTED OR INCURRED BY OR AWARDED TO ANY THIRD PARTY, ARISING OUT OF, RELATING TO OR RESULTING FROM:

(a) THE BREACH OR ALLEGED BREACH OF ANY OF THE CMC DOCUMENTS BY ANY DB CONTRACTOR-RELATED ENTITY;

(b) THE FAILURE OR ALLEGED FAILURE BY ANY DB CONTRACTOR-RELATED ENTITY TO COMPLY WITH THE GOVERNMENTAL APPROVALS, ANY APPLICABLE ENVIRONMENTAL LAWS OR OTHER LAWS (INCLUDING LAWS REGARDING HAZARDOUS MATERIALS MANAGEMENT);

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

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

(e) ANY AND ALL CLAIMS BY ANY GOVERNMENTAL OR TAXING AUTHORITY CLAIMING TAXES BASED ON GROSS RECEIPTS, PURCHASES OR SALES, THE USE OF ANY PROPERTY OR INCOME OF ANY 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 LIENS FILED IN CONNECTION WITH THE MAINTENANCE SERVICES, INCLUDING ALL EXPENSES AND ATTORNEYS', ACCOUNTANTS', AND EXPERT WITNESS FEES AND COSTS INCURRED IN DISCHARGING ANY STOP NOTICE OR LIEN, AND ANY OTHER LIABILITY TO SUBCONTRACTORS FOR FAILURE TO PAY SUMS DUE FOR THEIR SERVICES,

PROVIDED THAT TxDOT HAS PAID ALL UNDISPUTED AMOUNTS OWING TO DB CONTRACTOR WITH RESPECT TO SUCH MAINTENANCE SERVICES;

(g) ANY ACTUAL OR THREATENED DB CONTRACTOR RELEASE OF HAZARDOUS MATERIALS;

(h) THE CLAIM OR ASSERTION BY ANY OTHER (i) 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 THE DB CONTRACTOR-RELATED ENTITY WAS NOT IN ANY MANNER ENGAGED IN PERFORMANCE OF THE MAINTENANCE SERVICES OR (ii) CONTRACTOR THAT ANY DB CONTRACTOR-RELATED ENTITY INTERFERED WITH OR HINDERED THE PROGRESS OR COMPLETION OF MAINTENANCE SERVICES BEING PERFORMED BY SUCH OTHER CONTRACTOR, SO AS TO CAUSE INCONVENIENCE, DISRUPTION, DELAY, OR LOSS, TO THE EXTENT SUCH CLAIM ARISES OUT OF THE ACTUAL OR ALLEGED CULPABLE ACT, ERROR, OMISSION, NEGLIGENCE, BREACH, OR MISCONDUCT OF ANY DB CONTRACTOR-RELATED ENTITY;

(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 UNDER THE CMC DOCUMENTS OR (ii) THE ACTS OR OMISSIONS OF ANY DB CONTRACTOR-RELATED ENTITY THAT RENDER TxDOT UNABLE TO PERFORM OR ABIDE BY AN OBLIGATION THAT TxDOT OWES TO A THIRD PERSON, INCLUDING GOVERNMENTAL ENTITIES, UNDER ANY AGREEMENT BETWEEN TxDOT AND A THIRD PERSON WHERE THE AGREEMENT WAS EXPRESSLY DISCLOSED TO DB CONTRACTOR;

(j) THE FRAUD, BAD FAITH, ARBITRARY OR CAPRICIOUS ACTS, OR VIOLATION OF LAW BY ANY DB CONTRACTOR-RELATED ENTITY IN OR ASSOCIATED WITH THE PERFORMANCE OF THE MAINTENANCE SERVICES;

(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, REQUIREMENTS OF THE CMC DOCUMENTS, THE 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) ERRORS, OMISSIONS, INCONSISTENCIES, OR OTHER DEFECTS IN THE DESIGN, CONSTRUCTION OR MAINTENANCE PERFORMED UNDER THE CMC DOCUMENTS, REGARDLESS OF WHETHER SUCH ERRORS, OMISSIONS, INCONSISTENCIES OR

DEFECTS WERE ALSO INCLUDED IN THE SCHEMATIC DESIGN OR REFERENCE INFORMATION DOCUMENTS; AND

(m) ANY CLAIM BY A DB CONTRACTOR-RELATED ENTITY ARISING OUT OF, RELATING TO, OR RESULTING FROM THE PERFORMANCE BY TxDOT OF MATERIAL INSPECTION AND TESTING SERVICES PURSUANT TO SECTION 5.9.1.1.

6.9.2 Subject to the releases and disclaimers herein, DB Contractor's indemnity obligation shall not extend to any third-party Loss to the extent caused by:

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

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

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

6.9.3 In claims by an employee of DB Contractor, a Subcontractor, anyone directly or indirectly employed by them or anyone for whose acts they may be liable, the indemnification obligation under this Section 6.9 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.

6.9.3.1 For purposes of this Section 6.9, "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 that is not covered by the Indemnified Party's worker's compensation program.

6.9.4 **Defense and Indemnification Procedures**

6.9.4.1 Subject to Section 6.9.4.6, 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 6.9.1, TxDOT 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 6.9.4.3. 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.

6.9.4.2 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 6.9.4.3 shall apply.

6.9.4.3 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 Contract.

6.9.4.4 If DB Contractor accepts the tender of defense under Section 6.9.4.3(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 maintain the confidentiality of all communications between it and DB Contractor concerning such defense.

6.9.4.5 If DB Contractor responds to the tender of defense as specified in Section 6.9.4.3(a) or 6.9.4.3(c), the Indemnified Party shall be entitled to select its own legal counsel and otherwise control the defense of such claim, including settlement.

6.9.4.6 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.

6.9.4.7 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, except to the extent the Indemnified Party conducts its own defense as a result of DB Contractor's denial of such defense pursuant to Section 6.9.4.3(c). In the event the Indemnified Party is entitled to and elects to conduct its own defense, then:

(a) in the case of a defense conducted under Section 6.9.4.3(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 6.9.4.3(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 arbitrator 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 6.9.4.3(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. If a dispute resolver determines that DB Contractor wrongfully denied the defense of the Indemnified Party, the Indemnified Party shall be entitled to reimbursement of the costs of defense, including reimbursement of reasonable attorneys' fees and other litigation and defense costs, and indemnification of the amount paid to settle or compromise the claim, in addition to interest at the rate calculated in accordance with Section 6.11 payable on such defense and settlement amounts from the date such costs and expenses are incurred by the Indemnified Party.

6.9.4.8 The Parties acknowledge that while Section 6.9 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 this Section 6.9, and consistent with the outcome of such proceedings concerning the respective liabilities of the Parties on the third-party claim.

6.9.4.9 In determining responsibilities and obligations for defending suits pursuant to this Section 6.9.4, 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.

6.10 Joint and Several Liability

Refer to the CMA for special joint and several liability provisions applicable to joint ventures and partnerships.

6.11 Interest on Amounts Due and Owing

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

6.12 TxDOT Monetary Obligations

All TxDOT monetary obligations under the CMC Documents are subject to appropriation by the Texas Legislature. This Section 6.12 applies to all monetary obligations of TxDOT set forth in the CMC Documents, notwithstanding any contrary provisions of the CMC Documents. The CMC Documents do not create a debt under the Texas Constitution.

6.13 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 CMC 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 and/or approval by TxDOT and/or others hereunder shall not relieve DB Contractor of any of its obligations under the CMC Documents or in any way diminish its liability for performance of such obligations or its obligations under this Section 6.

6.14 CERCLA Agreement

The indemnities set forth in Section 6.9.1(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 8607(e), to insure, protect, hold harmless and indemnify the Indemnified Parties.

6.15 No Effect on Other Rights

The obligations under this Section 6 shall not be construed to negate, abridge, or reduce other rights or obligations which would otherwise exist in favor of an Indemnified Party hereunder.

6.16 No Relief from Responsibility

No rights of TxDOT described in this Section 6, 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 CMC Documents;

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

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

6.17 Israel Boycott Certification and Prohibition

"Boycott Israel" means refusing to deal with, terminating business activities with, or otherwise taking any action that is intended to penalize, inflict economic harm on, or limit commercial relations specifically with Israel, or with a person or entity doing business in Israel or in an Israeli-controlled territory, but does not include an action made for ordinary business purposes.

DB Contractor hereby certifies that neither DB Contractor nor any wholly owned subsidiaries, majority owned subsidiaries, parent companies, or for-profit affiliates Boycott Israel.

DB Contractor represents and warrants that DB Contractor and its wholly owned subsidiaries, majority owned subsidiaries, parent companies, and for-profit affiliates shall not Boycott Israel during the term of this Capital Maintenance Contract.

ITEM 7 PROSECUTION AND PROGRESS

7.1 Notice to Proceed and Commencement of Maintenance Services

Refer to the CMA for all provisions related to Notices to Proceed and commencement of the Maintenance Services.

7.2 Subcontracting

7.2.1 Subcontracts

7.2.1.1 DB Contractor shall retain or cause to be retained only Subcontractors that are qualified, experienced and capable in the performance of the portion of the Maintenance Services assigned. DB Contractor shall ensure that each Subcontractor has at the time of execution of the Subcontract, and maintains at all times during performance of the assigned Maintenance Services, all licenses required by applicable Laws. DB Contractor shall not permit any Subcontractor to perform any Maintenance Services hereunder prior to such Subcontractor's execution of a Subcontract.

7.2.1.2 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 Contract, and (b) all warranties (express and implied) of such Subcontractor shall inure to the benefit of TxDOT.

7.2.1.3 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 ten days after execution, copies of all Major Subcontracts and, within ten days after receipt of a request from TxDOT, copies of all other Subcontracts as may be requested.

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

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

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

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

7.2.1.8 The retention 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 shall at all times be held fully responsible to the Indemnified Parties for the acts and omissions of 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 Contract will create any contractual relationship between TxDOT and any Subcontractor of DB Contractor.

7.2.1.9 The following additional requirements shall apply to Key Subcontractors:

(a) 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:

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

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

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

(b) If DB Contractor makes changes to a Key Subcontractor in violation of Section 7.2.1.9(a), DB Contractor shall pay to TxDOT 100% of any cost savings resulting from the change.

7.2.1.10 Each Subcontract shall:

(a) set forth a standard of professional responsibility or a standard for commercial practice equal to the requirements of the CMC Documents and Good Industry Practice for work of similar scope and scale and shall set forth effective procedures for claims and change orders;

(b) require the Subcontractor to carry out its scope of work in accordance with the CMC Documents, the Governmental Approvals and applicable Law;

(c) without cost to DB Contractor or TxDOT, expressly permit assignment to TxDOT or its successor, assign or designee of all DB Contractor's rights under the Subcontract, contingent only upon delivery of written request from TxDOT following termination of this Capital Maintenance Contract, allowing TxDOT or its successor, assign or designee 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, such assignment to include the benefit of all Subcontractor warranties, indemnities, guarantees and professional responsibility;

(d) expressly state that any acceptance of assignment of the Subcontract to TxDOT or its successor, assign or designee shall not operate to make the assignee responsible or liable for any breach of the Subcontract by DB Contractor or for any amounts due and owing under the Subcontract for work or services rendered prior to assumption (but without restriction on the Subcontractor's rights to suspend work or demobilize due to DB Contractor's breach);

(e) expressly include a covenant to recognize and attorn to TxDOT upon receipt of written notice from TxDOT that it has exercised its rights under this Capital Maintenance Contract, 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 written notice;

(f) not be assignable by the Subcontractor to any Person other than TxDOT (or its assignee) 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 (e.g., constructor, equipment Supplier, designer, service provider); (ii) permit audit thereof with respect to the Project or Maintenance Services by each of DB Contractor and TxDOT pursuant to Section 5.10.4; 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 Contract;

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

(i) 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 (i) shall limit the authority of TxDOT to give such direction or take such action that, in its discretion, is necessary to remove an immediate and present threat to the safety of life or property;

(j) include an agreement by the Subcontractor to give evidence in any dispute resolution proceeding pursuant to Section 4.7 and Exhibit 13 to the CMA, if such participation is requested by either TxDOT or DB Contractor;

(k) expressly provide that all Liens, claims and charges of the Subcontractor and its subcontractors at any time shall not attach to any interest of TxDOT in the Project or the Project ROW;

(l) with respect to Major Subcontracts, expressly include a covenant, expressly stated to survive termination of the Major Subcontract, to promptly execute and deliver to TxDOT a new contract between the Major Subcontractor and TxDOT on the same terms and conditions as the Major Subcontract, in the event (i) the Major Subcontract is rejected by DB Contractor in bankruptcy or otherwise wrongfully terminated by DB Contractor and (ii) TxDOT delivers written request for such new contract following termination or expiration of this Capital Maintenance Contract; and

(m) be consistent in all other respects with the terms and conditions of the CMC Documents to the extent such terms and conditions are applicable to the scope of work of such Subcontractors, and include all provisions required by this Capital Maintenance Contract.

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

7.2.2 **Labor Standards**

7.2.2.1 In the performance of its obligations under the CMC Documents, DB Contractor at all times shall comply, and require by Subcontract that all Subcontractors and Suppliers comply, with all

applicable federal and State labor, occupational safety and health standards, rules, regulations and federal and State orders.

7.2.2.2 All individuals performing Maintenance Services shall have the skill and experience and any licenses required to perform the Maintenance Services assigned to them.

7.2.2.3 If any individual employed by DB Contractor or any Subcontractor is not performing the Maintenance Services in a proper, safe and skillful manner, then DB Contractor shall, or shall cause such Subcontractor to, remove such individual and such individual shall not be re-employed on the Maintenance Services. If, after notice and reasonable opportunity to cure, such individual is not removed or if DB Contractor fails to ensure that skilled and experienced personnel are furnished for the proper performance of the Maintenance Services, then TxDOT may suspend the affected portion of the Maintenance Services by delivery of written notice of such suspension to DB Contractor. Such suspension shall be considered a suspension for cause and shall in no way relieve DB Contractor of any obligation contained in the CMC Documents or entitle DB Contractor to any additional compensation or time extension hereunder.

7.2.3 **Ethical Standards**

7.2.3.1 Within 90 days after the Effective Date, DB Contractor shall adopt written policies establishing ethical standards of conduct applicable to all DB Contractor-Related Entities, including DB Contractor's supervisory and management personnel, in dealing with (i) TxDOT and the Maintenance Manager and (ii) employment relations. Such policy shall be subject to review and comment by TxDOT prior to adoption. Such policy shall include standards of ethical conduct concerning the following:

(a) restrictions on gifts and contributions to, and lobbying of, TxDOT, the Texas Transportation Commission, TxDOT consultants and any of their respective commissioners, directors, officers and employees;

(b) protection of employees from unethical practices in selection, use, hiring, compensation or other terms and conditions of employment, or in firing, promotion and termination of employees;

(c) protection of employees from retaliatory actions (including discharge, demotion, suspension, threat, harassment, pay reduction or other discrimination in the terms and conditions of employment) in response to reporting of illegal (including the making of a false claim), unethical or unsafe actions or failures to act by any DB Contractor-Related Entity;

(d) restrictions on directors, members, officers or supervisory or management personnel of any DB Contractor-Related Entity engaging in any transaction or activity, including receiving or offering a financial incentive, benefit, loan or other financial interest, that is, or to a reasonable person appears to be, in conflict with or incompatible with the proper discharge of duties or independence of judgment or action in the performance of duties, or adverse to the interests of the Project or employees;

(e) restrictions on use of office or job position for a purpose that is, or would to a reasonable person appear to be, primarily for the private benefit of a director, member, officer or supervisory or management person, rather than primarily for the benefit of DB Contractor

or the Project, or primarily to achieve a private gain or an exemption from duty or responsibility for a director, member, officer or supervisory or management person; and

(f) restrictions on directors, members, officers or employees of any DB Contractor-Related Entity performing any of the Maintenance Services if the performance of such services would be prohibited under TxDOT's published conflict of interest rules and policies applicable to TxDOT's design-build agreement program, or would be prohibited under Section 572.054 of the Texas Government Code.

7.2.3.2 DB Contractor shall cause its directors, members, officers and supervisory and management personnel, and include contract provisions requiring those of all other DB Contractor-Related Entities, to adhere to and enforce the adopted policy on ethical standards of conduct. DB Contractor shall establish reasonable systems and procedures to promote and monitor compliance with the policy.

7.2.4 **Prevailing Wages**

7.2.4.1 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 7 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 7 to the Design-Build Agreement as escalated based on changes in CPI in accordance with the methodology set forth in Section 8.1.4. 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 any Subcontracts with TxDOT or Governmental Entities.

7.2.4.2 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 Contract 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 requirements pertaining to prevailing wages or DB Contractor's failure to include in the Maintenance Price adequate wages over the duration of this Capital Maintenance Contract.

7.2.4.3 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.

7.2.4.4 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.

7.2.5 **E-Verify**

Pursuant to Executive Order RP-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 Contract.

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

7.2.6 **Uniforms**

Any uniforms, badges, logos and other identification worn by personnel of DB Contractor-Related Entities shall bear colors, lettering, design or other features to ensure clear differentiation from those of TxDOT and its employees.

7.2.7 **State Use Program**

7.2.7.1 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."

7.2.7.2 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.

7.3 **Key Personnel**

7.3.1 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 Maintenance Services during the applicable Maintenance Term.

7.3.2 On or before (i) 120 days prior to the Initial Maintenance Term Commencement Date and (ii) 60 days after TxDOT issues a Maintenance NTP for any subsequent Maintenance Term, DB Contractor shall obtain TxDOT's written approval of any change to the person serving as the Maintenance Manager under the Design-Build Contract, or the person then serving as the Maintenance Safety Manager, as applicable.

7.3.3 During the Maintenance Period, DB Contractor shall promptly notify TxDOT in writing of any proposed changes in a person filling a Key Personnel role. DB Contractor shall not change, or permit any change in, the person filling a Key Personnel role without the prior written consent of TxDOT. Before DB Contractor replaces a person filling a Key Personnel role, TxDOT shall be given the opportunity to interview and approve or disapprove the replacement candidate(s). DB Contractor's request to replace a person filling a Key Personnel role 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.

7.3.4 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.

7.3.5 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 representative(s). TxDOT requires the ability to contact the Maintenance Manager and such field representative(s) 24 hours per day, seven days per week.

7.3.6 DB Contractor represents, warrants and covenants that the personnel identified in DB Contractor's Proposal 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.

7.3.7 If an individual filling a Key Personnel role is not available for the Maintenance Services and 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 a Key Personnel role and that it is impracticable and extremely difficult to ascertain and determine the actual Losses which would accrue to TxDOT in such event. Therefore, for each day that a Key Personnel role is not filled by an approved individual, DB Contractor agrees to pay TxDOT Key Personnel Unavailability Liquidated Damages in the amount set forth in Section 6.3 of the CMA, for each position not filled, as deemed compensation to TxDOT for such Losses.

7.3.8 DB Contractor understands and agrees that any Key Personnel Unavailability Liquidated Damages payable in accordance with this Section 7.3 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 ten 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 Unavailability Liquidated Damages from any amounts owed by TxDOT to DB Contractor or to collect such Key Personnel Unavailability Liquidated Damages from any bond, letter of credit or Guaranty furnished under this Capital Maintenance Contract. Notwithstanding the foregoing, DB Contractor shall not be liable for Key Personnel Unavailability Liquidated Damages under Section 7.3.7 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 (i) no later than 120 days prior to the Initial Maintenance Term Commencement Date or (ii) within 60 days after TxDOT issues a Maintenance NTP for any subsequent Maintenance Term, provided, however, in each such 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 Contract, including the provisions of this Section 7.3.

7.3.9 DB Contractor acknowledges and agrees that the Key Personnel positions are of critical importance to TxDOT and the Project. In addition to the approval rights of TxDOT set forth in this Section 7.3 and the Key Personnel Unavailability Liquidated Damages set forth in Sections 7.3.7, if an individual in a Key Personnel position leaves that position for a reason other than as set forth in clauses (a)-(c) of Section 7.3.8, TxDOT shall have the right to terminate this Capital Maintenance Contract for default under Section 7.7, 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.

7.4 Suspension

7.4.1 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 CMC 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 Maintenance Services upon receipt of written notice from TxDOT directing DB Contractor to resume the Maintenance Services. 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 48 hours each up to a total of 96 hours, which shall not be considered a TxDOT-Directed Change. Adjustments of the Price shall be available for any such TxDOT-Directed Change, subject to DB Contractor's compliance with the terms and conditions set forth in Section 4.5 hereof and Section 5 of the CMA.

7.4.2 Suspensions for Cause

7.4.2.1 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, workers, other 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 CMC Documents;

(c) carry out orders of TxDOT set forth in a Directive Letter;

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

(e) comply with the requirements for developing and implementing the MQMP.

7.4.2.2 DB Contractor shall promptly comply with any such written suspension order, even if DB Contractor disputes the grounds for suspension. DB Contractor shall promptly recommence the Maintenance Services upon receipt of written notice from TxDOT directing DB Contractor to resume the Maintenance Services. If TxDOT orders suspension of the Maintenance Services on one of the foregoing grounds but it is finally determined under the procedures for resolution of Disputes of this Capital Maintenance Contract that such grounds did not exist, it shall be treated as a suspension for TxDOT's convenience under Section 7.4.1.

7.4.3 Responsibilities of DB Contractor During Suspension Periods

During periods that the Maintenance Services are suspended, DB Contractor shall continue to be responsible for the Maintenance Services and shall prevent damage or injury to the Maintained Elements, and shall 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.

7.5 Liquidated Damages and Limitation of Liability

7.5.1 Additional Acknowledgements Regarding Liquidated Damages, Charges and Fees

DB Contractor further agrees and acknowledges that:

(a) as of the Effective Date, the amounts of Liquidated Damages, and the other charges and fees imposed pursuant to Section 6 of the CMA represent good faith estimates and evaluations by the Parties as to the actual potential damages that TxDOT would incur as a result of DB Contractor failures to perform or impermissible Lane Closures, and do not constitute a penalty;

(b) the Parties have agreed to such Liquidated Damages and the other charges and fees imposed pursuant to Section 6 of the CMA in order to fix and limit DB Contractor's costs and to avoid later Disputes over what amounts of damages are properly chargeable to DB Contractor;

(c) such sums are reasonable in light of the anticipated or actual harm caused by DB Contractor failures or impermissible Lane Closures, the difficulties of the proof of loss, and the inconvenience or infeasibility of otherwise obtaining an adequate remedy; and

(d) such Liquidated Damages and the other charges and fees imposed pursuant to Section 6 of the CMA are not intended to, and do not, liquidate DB Contractor's liability under the indemnification provisions of Section 6.9, even though Third Party Claims against

Indemnified Parties may arise out of the same event, breach or failure that gives rise to the Liquidated Damages, charges or fees.

7.5.2 **Payment; Satisfaction; Waiver; Non-Exclusive Remedy**

7.5.2.1 DB Contractor shall pay any Liquidated Damages owing under this Section 7.5 and any other charges and fees imposed pursuant to Section 6 of the CMA within 20 days after TxDOT delivers to DB Contractor TxDOT's invoice or demand therefor, such invoice or demand to be issued not more often than monthly. For clarification, this provision does not excuse DB Contractor from including all amounts of Liquidated Damages and any additional charges and fees imposed pursuant to Section 6 of the CMA owed to TxDOT within its Draw Request in accordance with Section 8.2.2, regardless of whether DB Contractor has received TxDOT's invoice.

7.5.2.2 TxDOT shall have the right to deduct and offset Liquidated Damages and the other charges and fees imposed pursuant to Section 6 of the CMA from any amounts owing DB Contractor. TxDOT also shall have the right to draw on any bond, certificate of deposit, letter of credit or other security provided by DB Contractor pursuant to this Capital Maintenance Contract to satisfy Liquidated Damages and the other charges and fees imposed pursuant to Section 6 of the CMA not paid when due.

7.5.2.3 Subject to Section 7.7.3, TxDOT's right to, and imposition of Liquidated Damages and the other charges and fees imposed pursuant to Section 6 of the CMA are in addition, and without prejudice, to any other rights and remedies available to TxDOT under this Capital Maintenance Contract, at law or in equity respecting the breach, failure to perform or DB Contractor Default that is the basis for the Liquidated Damages, or any other breach, failure to perform or DB Contractor Default, except for recovery of the monetary damage that the Liquidated Damages are intended to compensate.

7.5.3 **Limitation of DB Contractor's Liability**

Notwithstanding any other provision of the CMC Documents, to the extent permitted by applicable Law, TxDOT will not seek indemnification and defense under Section 6.9 or to recover damages from DB Contractor relating to this Capital Maintenance Contract (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% of the Maintenance Price (summed for all three Maintenance Terms) up to $100,000,000 (which amount shall specifically include any Liquidated Damages paid pursuant to this Section 7.5); (c) any amounts paid by or on behalf of DB Contractor that are covered by insurance proceeds from insurance policies required under the CMC Documents; 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.

7.5.4 **Limitation on Consequential Damages**

7.5.4.1 Notwithstanding any other provision of the CMC Documents and except as set forth in this Section 7.5.4.1 and in Section 7.5.4.2, to the extent permitted by applicable Law, neither party shall be liable to the other for punitive damages or indirect, incidental or consequential

damages, whether arising out of breach of this Capital Maintenance Contract, tort (including negligence) or any other theory of liability, and each party hereby releases the other party from any such liability.

7.5.4.2 The foregoing limitations 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 3.3, (ii) covered by the proceeds of insurance actually carried by or insuring DB Contractor under policies solely with respect to the Project and the Maintenance Services, regardless of whether required to be carried pursuant to Section 3.3, or (iii) DB Contractor is deemed to have self-insured the Loss pursuant to Section 3.3.16.3;

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

(c) DB Contractor's indemnities set forth in Section 6.9.1 or elsewhere in the CMC Documents;

(d) DB Contractor's obligation to pay Liquidated Damages and the other charges and fees imposed pursuant to Section 6 of the CMA or any other provision of the CMC 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 Contract by DB Contractor that occurs prior to the end of the Maintenance Period, subject to a cap in the amount of $1,000,000.

7.6 Default and Remedies

7.6.1 Default of DB Contractor

7.6.1.1 Events and Conditions Constituting Default

DB Contractor shall be in breach under this Capital Maintenance Contract 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 Contract;

(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 CMC Documents, including failure to perform the Maintenance Services in accordance with the CMC Documents;

(c) DB Contractor fails to resume performance of Maintenance Services which 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 obtain, provide and maintain any insurance, bonds, guarantees, letters of credit or other performance security as and when required under this Capital Maintenance Contract for the benefit of relevant parties, or fails to comply with any requirement of this Capital Maintenance Contract pertaining to the amount, terms or coverage of the same;

(f) DB Contractor makes or attempts to make or suffers a voluntary or involuntary assignment or transfer of all or any portion of this Capital Maintenance Contract in violation of Section 6.5;

(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 and Suppliers and in accordance with applicable Laws, or fails to make payment to TxDOT when due of any amounts owing to TxDOT under this Capital Maintenance Contract;

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

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

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

(k) any final judgment is issued holding 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 in the CMC Documents made by DB Contractor, or any certificate, schedule, report, instrument or other document delivered by or on behalf of DB Contractor to TxDOT pursuant to the CMC Documents is false or materially misleading or inaccurate when made or omits material information when made;

(m) DB Contractor commences a voluntary case seeking liquidation, reorganization or other relief with respect to itself or its debts under any U.S. or foreign bankruptcy, insolvency, or other similar Law now or hereafter in effect; seeks the appointment of a trustee, receiver, liquidator, custodian, or other similar official of it or any substantial part of its assets; becomes insolvent, or generally does not pay its debts as they become due; admits in writing its inability to pay its debts; makes an assignment for the benefit of creditors; or takes any action to authorize any of the foregoing; 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, a composition or arrangement with creditors, a readjustment of debts or other relief with respect to DB Contractor or DB Contractor's debts under any U.S. or foreign bankruptcy, insolvency or other similar Law now or hereafter in effect; seeking the appointment of a trustee, receiver, liquidator, custodian, or other similar official of 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 Capital Maintenance Contract or any of the other CMC Documents is rejected, including a rejection pursuant to 11 USC § 365 or any successor statute; and

(p) DB Contractor or, if DB Contractor is a joint venture, any Equity Member, knowingly or intentionally fails to comply with a requirement of Subchapter J, Chapter 552, Government Code that is applicable to DB Contractor.

7.6.1.2 **Notice and Opportunity to Cure**

7.6.1.2.1 For the purpose of TxDOT's exercise of other remedies and subject to remedies that this Section 7.6 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 7.6.1.1, the same cure period, if any, as is available under the Design-Build Contract;

(b) respecting a DB Contractor Maintenance Default under clauses (b) through (d), and clauses (g) through (j) and clause (p) of Section 7.6.1.1, a period of ten 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 which by its nature cannot be cured (which shall include the items described in clauses (e) and (f) and clauses (k) through (n) of Section 7.6.1.1); and

(c) if a DB Contractor Maintenance Default is capable of cure but, by its nature, cannot be cured within ten 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.

7.6.1.2.2 Failure to provide notice to the Surety shall not preclude TxDOT from exercising its remedies against DB Contractor. Notwithstanding the provisions of this Section 7.6, 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.

7.6.2 **TxDOT Remedies for DB Contractor Default**

7.6.2.1 If any DB Contractor Maintenance Default described in Section 7.6.1.1 is not subject to cure or is not cured within the period (if any) specified in Section 7.6.1.2.1, 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 CMC 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 Contract 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 7.6.3 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 Contract) payable by DB Contractor to TxDOT, including reimbursements owing, Liquidated Damages and any other charges or fees imposed pursuant to Section 6 of the CMA, 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 CMC Documents.

(f) TxDOT shall have the right, but not the obligation, to pay any amount and/or perform any act as may then be required from DB Contractor under the CMC 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 7.6.1.1(e)) to complete this Capital Maintenance Contract or may enter into an agreement for the completion of this Capital Maintenance Contract 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 CMC 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 which it may in its discretion consider necessary to complete the Maintenance Services; and (vi) prosecute and defend any action or proceeding incident to the Maintenance Services.

7.6.2.2 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 CMC 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 witness fees and costs, together with the cost of completing the Maintenance Services under the CMC 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 Contract, 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 6.11 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.

7.6.2.3 DB Contractor acknowledges that if a DB Contractor Maintenance Default under Section 7.6.1.1(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 ten days of delivery of the request shall entitle TxDOT to terminate this Capital Maintenance Contract 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 CMC Documents, including the Maintenance Performance Bond, any letter of credit and Guaranty.

7.6.2.4 In lieu of the provisions of this Section 7.6.2 for terminating the Capital Maintenance Contract 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 CMC Documents and may treat the parts remaining undone as if they had never been included or contemplated by this Capital Maintenance Contract. No Claim under this Section 7.6.2.4 will be allowed for prospective profits on, or any other compensation relating to, Maintenance Services uncompleted by DB Contractor.

7.6.2.5 If this Capital Maintenance Contract is terminated for grounds which are later determined not to justify a termination for default, such termination shall be deemed to constitute a termination for convenience pursuant to Section 7.7.1.

7.6.2.6 The exercise or beginning of the exercise by TxDOT of any one or more rights or remedies under this Section 7.6.2 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.

7.6.2.7 If TxDOT suffers damages as a result of any DB Contractor-Related Entity's breach, omission or failure to perform an obligation under the CMC Documents, then, subject to the limitation on liability contained in Sections 7.5.3 and 7.5.4, 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.

7.6.2.8 DB Contractor and each Surety and Guarantor shall not be relieved of liability for continuing Liquidated Damages or continuing assessment of any other charges or fees imposed pursuant to Section 6 of the CMA 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 7.6.2.

7.6.2.9 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 5.3.2 in lieu of the remedies specified in this Section 7.6.

7.6.3 **TxDOT Step-in Rights**

7.6.3.1 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.

7.6.3.2 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.

7.6.3.3 DB Contractor shall reimburse TxDOT, within ten days of receiving an invoice, for TxDOT's Recoverable Costs in connection with the performance of any act or Maintenance Services authorized by this Section 7.6.3. 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 Contract.

7.6.3.4 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 7.6.3, 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 7.6.3, 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.

7.6.3.5 TxDOT's rights under this Section 7.6.3 are subject to the right of any Surety under payment and performance bonds to assume performance and completion of all bonded work.

7.6.3.6 In the event TxDOT takes action described in this Section 7.6.3 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.

7.6.4 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 Contract 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 Contract 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 7.7.1. Upon such termination, the Parties' rights and obligations shall be as set forth in Section 7.7.1.

7.7 Termination

7.7.1 Termination for Convenience

7.7.1.1 TxDOT may, at any time, terminate this Capital Maintenance Contract and the performance of the Maintenance Services by DB Contractor, in whole or in part, if TxDOT determines, in its discretion, that a termination is in TxDOT's best interest ("**Termination for Convenience**"). TxDOT shall terminate by delivering to 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 Contract under this Section 7.7.1 shall not relieve DB Contractor or any Surety or Guarantor of its obligation for any claims arising prior to termination.

7.7.1.2 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 Contract, 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 CMC Documents;

(b) Subcontracts and other agreements that TxDOT agrees in writing to assume in accordance with Section 7.7.9; and

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

7.7.2 DB Contractor's Responsibilities After Receipt of Notice of Termination

After receipt of a Notice of Termination for Convenience or Notice of Partial Termination for Convenience, and except as otherwise directed by TxDOT, DB Contractor shall timely comply with the following obligations independent of, and without regard to, the timing for determining, adjusting, settling, and paying any amounts due DB Contractor under this Capital Maintenance Contract:

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

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

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

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

(e) to the extent directed by TxDOT, execute and deliver to TxDOT written assignments, in form and substance reasonably acceptable to TxDOT, of all of DB Contractor's right, title, and interest in and to (i) Subcontracts that relate to the terminated Maintenance Services, provided TxDOT assumes in writing all of DB Contractor's obligations thereunder that arise after the effective date of the termination and (ii) all assignable warranties, claims and causes of action held by DB Contractor against Subcontractors and other third parties in connection with the terminated Maintenance Services, to the extent such Maintenance Services are adversely affected by any Subcontractor or other third-party breach of warranty, contract or other legal obligation;

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

(g) within 30 days after notice of termination is received, DB Contractor shall provide TxDOT with an inventory list of all materials, supplies and equipment previously produced, purchased or ordered from Suppliers for use in performing the Maintenance Services and not yet used, including its storage location, as well as any documentation or other property required to be delivered hereunder which is either in the process of development or previously completed but not yet delivered to TxDOT, and such other information as TxDOT may request; and transfer title and deliver to TxDOT through bills of sale or other documents of title, as directed by TxDOT: (i) work in process, completed work, supplies, equipment and other material produced or acquired for the Maintenance Services terminated, and (ii) all design and construction documents related to the Project and/or the Maintenance Services and all other completed or partially completed drawings (including plans, elevations, sections, details and diagrams), specifications, records, samples, information and other property that would have been required to be furnished to TxDOT if the Maintenance Services had been completed;

(h) complete performance in accordance with the CMC Documents of all Maintenance Services not terminated, except to the extent performance of the remaining Maintenance

Services is rendered impossible due to the scope of the partial Termination for Convenience;

(i) take all action that may be necessary or that TxDOT may direct for the safety, protection and preservation of (i) the public, including public and private vehicular movement, (ii) the Maintenance Services and (iii) equipment, machinery, materials and property related to the Project that are 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 Section 7.7.2(g)(i); 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 reasonable 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 CMC 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;

(l) carry out such other directions as TxDOT may give for the termination of the Maintenance Services; and

(m) take such other actions as are necessary or appropriate to mitigate further cost.

7.7.3 **Disposition of Subcontracts**

7.7.3.1 Not later than 60 days prior to the effective date of termination under Section 7.6.2 or 7.7.1, 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.

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

7.7.3.3 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.

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

7.7.3.5 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 7.

7.7.4 **Settlement Proposal**

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 7.7.6 and 7.7.7. 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 allow such an 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 determine, on the basis of information available, the amount, if any, due DB Contractor because of the termination and shall pay DB Contractor the amount so determined, and DB Contractor shall be bound by TxDOT's determination.

7.7.5 **Amount of Negotiated Termination Settlement**

Subject to the provisions of Section 7.7.4, and based on (and no more than) the measure of compensation described in Sections 7.7.6 and 7.7.7, 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 7.7.1. Upon determination of the settlement amount, this Capital Maintenance Contract 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 CMC 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(s) of credit or other security issued in addition to, or in lieu of, any security provided pursuant to this Capital Maintenance Contract.

7.7.6 **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 7.7.1, the amount payable (exclusive of interest charges) shall be determined by TxDOT in accordance with the following, but without duplication of any items or of any amounts agreed upon in accordance with Section 7.7.5:

7.7.6.1 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:

(a) DB Contractor's actual reasonable out-of-pocket costs, without profit, and including equipment costs only to the extent permitted under the CMC Documents for (i) all Maintenance Services, excluding all Pavement Renewal Work, 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 by DB Contractor, for 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. 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 CMC Documents, and the excessive actual cost shall be disallowed;

(b) a sum, as profit on clause (a) above, determined by TxDOT to be fair and reasonable, provided DB Contractor establishes to TxDOT's satisfaction that it is reasonably probable that DB Contractor would have made a profit had the Capital Maintenance Contract been completed, and provided further that the profit allowed shall in no event exceed 4% of the cost owing to DB Contractor under clause (a);

(c) the cost of settling and paying claims arising out of the termination of Maintenance Services under Subcontracts as provided in Section 7.7.2(f), exclusive of the amounts paid or payable on account of supplies or materials delivered or services furnished by the Subcontractor prior to the effective date of the Notice of Termination for Convenience or Notice of Partial Termination for Convenience of Work under this Capital Maintenance Contract, which amounts shall be included in the cost on account of which payment is made under clause (a) above;

(d) the reasonable out-of-pocket costs (including reasonable overhead) of the preservation and protection of property incurred pursuant to Section 7.7.2(i) and any other reasonable out-of-pocket costs (including overhead) incidental to termination of the Maintenance Services under this Capital Maintenance Contract, 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 Contract; and

(e) for any Pavement Renewal Work completed by Developer after the Initial Term and as of the Termination Date and for which Developer has not received payment solely due to the reason set forth in Section 8.1.3.5, the Pavement Renewal Work Payment amount payable in accordance with Section 8.1.3.6 upon a Termination for Convenience.

7.7.6.2 DB Contractor acknowledges and agrees that it shall not be entitled to any compensation in excess of the value of the Maintenance Services performed (determined as provided in Section 7.7.6.1) plus its settlement costs and that items such as lost or anticipated profits, unabsorbed overhead, and opportunity costs shall not be recoverable by it upon termination of this Capital Maintenance Contract. The total amount to be paid to DB Contractor, exclusive of costs described in Sections 7.7.6.1(c), (d) and (e), may not exceed the total General Maintenance Amount for the Maintenance Term in which the termination occurs, less the General Maintenance 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 7.7.6.1 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 7.7.2(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 Contract 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 the Maintenance Services.

7.7.6.3 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 Contract. Any proposal by DB Contractor for an equitable adjustment under this Section 7.7.6.3 shall be requested within 90 days from the effective date of 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 Contract.

7.7.7 **Reduction in Amount of Claim**

The amount otherwise due DB Contractor under this Section 7.7 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 Contract, (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 7.7, 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 Contract, (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 credit to which TxDOT is entitled under Section 5.3.2); and (f) any amounts due or payable by DB Contractor to TxDOT.

7.7.8 **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 Contract 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 7.7, such excess shall be payable by DB Contractor to TxDOT upon demand.

7.7.9 **Subcontracts**

7.7.9.1 Each Subcontract shall provide that, in the event of a termination for convenience by TxDOT, the Subcontractor will not be entitled to any anticipatory or unearned profit on Maintenance Services terminated or partly terminated, or to any payment that constitutes consequential damages on account of the termination or partial termination.

7.7.10 **Termination Based on Failure to Issue of a Maintenance NTP**

TxDOT's election not to issue Maintenance NTP2 or Maintenance NTP3 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 CMC terminates because TxDOT elects not to issue any of Maintenance NTP2 or Maintenance NTP3 except Pavement Renewal Work Payments permitted to be made pursuant to Section 8.1.3.6.

7.7.11 **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 any termination under this Section 7.7. The payment to DB Contractor determined in accordance with this Section 7.7 constitutes DB Contractor's exclusive remedy for a termination hereunder.

7.7.12 **No Waiver; Release**

7.7.12.1 Notwithstanding anything contained in this Capital Maintenance Contract to the contrary, a termination under this Section 7.7 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 CMC Documents.

7.7.12.2 Subject to Section 7.7.13, TxDOT's payment to DB Contractor of the amounts required under this Section 7.7 shall constitute full and final satisfaction of, and upon payment TxDOT shall be forever released and discharged from, any and all Claims, causes of action, suits, demands, and Losses, known or unknown, suspected or unsuspected, that DB Contractor may have against TxDOT arising out of or relating to the terminated Maintenance Services. Upon such payment, DB Contractor shall execute and deliver to TxDOT all such releases and discharges as TxDOT may reasonably require to confirm the foregoing, but no such written release and discharge shall be necessary to give effect to the foregoing satisfaction and release.

7.7.13 **Dispute Resolution**

The failure of the Parties to agree on amounts due under this Section 7.7 shall be a Dispute to be resolved in accordance with Section 4.7 hereof and Exhibit 13 to the CMA.

7.7.14 **Allowability of Costs**

All costs claimed by DB Contractor under this Section 7.7 must be allowable, allocable and reasonable in accordance with the cost principles and procedures of 48 CFR Part 31.

ITEM 8 PAYMENT

8.1 Payment for Maintenance Services

8.1.1 During the term of this Capital Maintenance Contract, in full consideration for the performance by DB Contractor of its duties and obligations under the CMC Documents, TxDOT shall pay the amounts determined as set forth in Section 8.1.2 and 8.1.3, as adjusted in accordance with Section 8.1.4 (the "Maintenance Price") and subject to Sections 8.1.4, 8.1.5 and 8.1.6 and to such additions to and deductions from the compensation as may be provided for pursuant to Section 4.5 hereof and Section 5 of the CMA. 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 4.5 hereof and Section 5 of the CMA, by an amendment to this Capital Maintenance Contract, or as provided in Section 8.1.5. 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 CMC Documents to be performed, and that are performed, by DB Contractor prior to the Initial Maintenance Term Commencement Date, or (b) after the expiration or earlier termination of this Capital Maintenance Contract. For the avoidance of doubt, no portion of the Maintenance Price shall be payable prior to the Initial Maintenance Term Commencement Date.

8.1.2 Subject to Sections 8.1.5 and 8.1.6, DB Contractor shall be paid for Maintenance Services provided under this Capital Maintenance Contract, a monthly payment equivalent to the sum of (a) one-twelfth (1/12) of the General Maintenance Amount for the applicable year of the then-current Maintenance Term as set forth in Exhibit 3 to the CMA (the "**General Maintenance Payment**"), except as such payment will be adjusted pursuant to Section 8.1.5, plus (b) an installment of the Pavement Renewal Work Amount calculated in accordance with Section 8.1.3, if any (the "**Pavement Renewal Work Payment**"). Such amounts 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 Beginning in the Second Maintenance Term, if TxDOT elects to issue Maintenance NTP 2, DB Contractor shall be eligible to receive, as a component of the Maintenance Price, the Pavement Renewal Work Payment in Exhibit 3 to the CMA, upon satisfaction of the requirements and subject to the provisions set forth in this Section 8.1.3.

8.1.3.1 The amount of any Pavement Renewal Work Payment for each Draw Request shall be calculated by multiplying (a) the total number of square yards of the total number of square yards of Pavement Renewal Work meeting the requirements set forth in Sections 8.1.3.2, 8.1.3.3, and 8.1.3.4 that has been completed by DB Contractor and not previously invoiced by (b) the Pavement Renewal Work Unit Rate.

8.1.3.2 DB Contractor is entitled to receive Pavement Renewal Work Payments only for the performance and satisfactory completion of flexible pavement overlay in accordance with the requirements of TxDOT Pavement Manual Chapter 7, Section 6.1 or 6.2 with a minimum overlay thickness of 2.0 inches. Such overlay shall provide a low maintenance surface course, uniform across all lanes complying with the requirements for new construction. Milling may be conducted prior to overlay, not to exceed the depth of overlay at any location. Overlay with a thickness of less than 2.0 inches may be eligible for Pavement Renewal Work Payments at

TxDOT's sole discretion. Pavement Renewal Work shall be conducted in compliance with the requirements of CMA Specification.

8.1.3.3 In order to avoid unnecessary disruption to Users and ensure the pavement performs satisfactorily over its intended design life, TxDOT requires Pavement Renewal Work to be undertaken in substantial packages and reserves the right to defer Pavement Renewal Work Payments until the quantity of Pavement Renewal Work completed and not yet invoiced exceeds 10% of the total flexible pavement area.

8.1.3.4 For any given flexible pavement area, DB Contractor shall be entitled to Pavement Renewal Work Payment only once throughout the Maintenance Period.

8.1.3.5 If the cumulative value of Pavement Renewal Work Payments as calculated in accordance with Section 8.1.3.1 above exceeds the Cumulative Maximum Pavement Renewal Work Amount available in the applicable year, then regardless of the number of square yards of eligible Pavement Renewal Work satisfactorily completed, the total Pavement Renewal Work Payment shall not exceed the Cumulative Maximum Pavement Renewal Amount and DB Contractor shall be entitled to receive payment for such excess amount only as described in Section 8.1.3.6 below.

8.1.3.6 For any part of the Pavement Renewal Work Payment not payable solely for the reason set forth in Section 8.1.3.5 above, DB Contractor may include such amount for payment in any subsequent Draw Request and such amount shall be eligible for payment only at such time (if any) as funds are available to DB Contractor pursuant to the Cumulative Maximum Pavement Renewal Work Amount. Additionally, after issuance of Maintenance NTP2, for any part of the Pavement Renewal Work Payment not payable solely for the reason set forth in Section 8.1.3.5, upon the expiration of the Maintenance Period or upon a Termination for Convenience by TxDOT, DB Contractor will be entitled to payment for such amount up to the Cumulative Maximum Pavement Renewal Work Amount for year 15 as set forth in Exhibit 3 to the CMA. The amounts payable upon termination or expiration shall be adjusted in accordance with Section 8.1.4 to the date upon which payment is made.

8.1.3.7 DB Contractor acknowledges and agrees that the General Maintenance Amount to be paid during the Initial Maintenance Term is compensation for all Maintenance Services required during the Initial Maintenance Term, including any Pavement Renewal Work. If DB Contractor is obligated to perform Pavement Renewal Work during the Initial Maintenance Term, DB Contractor shall perform such Pavement Renewal Work but shall not become eligible for Pavement Renewal Work Payment for such Pavement Renewal Work during the Initial Maintenance Term, upon expiration of the Initial Maintenance Term, or during any subsequent Maintenance Term.

8.1.4 The Maintenance Price will be adjusted in accordance with this Section 8.1.4 as follows:

(a) The CPI for the month three months prior to the month in which this Capital Maintenance Contract is executed will establish the Base Index (BICPI).

(b) For the General Maintenance Payments, the annual amounts shall be adjusted by multiplying the annual amount payable for such year by the CPI for the month that is three months prior to the month in which the applicable year commences and dividing such amount by the BICPI.

(c) The formula that reflects the foregoing related to General Maintenance Payments is: Adjusted General Maintenance Payment = (annual General Maintenance Amount) x (CPI/BICPI).

(d) For the Pavement Renewal Work Payments, the payments in any year shall be adjusted by multiplying the Pavement Renewal Work Unit Rate for such year by the CPI for the month that is three months prior to the month in which the applicable year commences and dividing such amount by the BICPI.

(e) The formula that reflects the foregoing related to Pavement Renewal Work Payments is: Adjusted Pavement Renewal Work Payment = (the total number of square yards of Pavement Renewal Work meeting the requirements set forth in Sections 8.1.3.2, 8.1.3.3, and 8.1.3.4 that has been completed by DB Contractor and not previously invoiced) x (Pavement Renewal Work Unit Rate) x (CPI/BICPI).

8.1.5 During the last six months of the Maintenance Period, monthly General Maintenance Payments shall be calculated in accordance with this Section 8.1.5. For months seven through eleven of the final twelve months of the Maintenance Period, the monthly General Maintenance Payments shall be equal to five percent (5%) of the General Maintenance Amount for the last year of the Maintenance Period as set forth in Exhibit 3 to the CMA, adjusted in accordance with Section 8.1.4. For the final month of the Maintenance Period, the monthly General Maintenance Payment shall be equal to twenty-five percent (25%) of the General Maintenance Amount for the last year of the Maintenance Period as set forth in Exhibit 3 to the CMA, adjusted in accordance with Section 8.1.4. Such amounts shall be payable in arrears pursuant to Draw Requests submitted on the first day of each month.

8.1.6 If DB Contractor fails to fulfill any requirement or obtain any TxDOT approval or third party approval that the CMC 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 ten 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 Contract 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 4 to the CMA 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 each Draw Request certification shall be executed by the 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, Key Personnel Unavailability Liquidated Damages, and any charges or fees imposed pursuant to Section 6 of the CMA for the prior month. Such attached report shall include:

(a) a description of any charges or fees imposed pursuant to Section 6 of the CMA assessed 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, charges or fees were assessed;

(b) any adjustments to reflect previous over-payments and/or under-payments;

(c) a detailed calculation of any interest payable in respect of any amounts owed; and

(d) any other amount due and payable from DB Contractor to TxDOT or from TxDOT to DB Contractor under this Capital Maintenance Contract, 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 ten Business Days after TxDOT's receipt of a complete Draw Request, TxDOT will review the Draw Request and all attachments and certificates thereto, and shall notify 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 CMC Documents related thereto. Within 15 Business Days after TxDOT's receipt of a complete Draw Request meeting the requirements of this Capital Maintenance Contract, 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. With respect to the General Maintenance Payment:

(a) For each Maintenance Term year, if the first month is a partial month: (i) the first General Maintenance Payment for such Maintenance Term year shall be equal to the adjusted monthly General Maintenance Payment, times the number of days for which payment is being made, divided by the total number of days in the month, and (ii) the final General Maintenance Payment for such Maintenance Term year shall be equal to the remaining balance of the adjusted General Maintenance Amount for the applicable year.

(b) For any partial month not captured by subsection (a) above, the partial month General Maintenance Payment shall be equal to the adjusted monthly General Maintenance Payment, times the number of days for which payment is being made, divided by the total number of days in the month.

8.2.4 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 and any charges or fees imposed pursuant to Section 6 of the CMA 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 until such time as DB Contractor provides evidence to TxDOT that the stop payment, claim or Lien is released;

(c) any sums, including TxDOT's Recoverable Costs, expended by TxDOT in performing any of DB Contractor's obligations under the CMC 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 Contract.

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

8.3 **Payment to Subcontractors**

8.3.1 No later than ten days after receipt of payment from TxDOT, 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 ten days after satisfactory completion of all Maintenance Services to be performed by a Subcontractor, including provision of appropriate releases, certificates and other evidence of the Subcontractor's compliance with its Subcontract and all applicable requirements of the CMC 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:

8.3.2.1 the Subcontractor has fulfilled the Subcontract requirements and the requirements under the CMC Documents for the subcontracted Maintenance Services, including the submission of all submittals required by the Subcontract and the CMC Documents; and

8.3.2.2 the Maintenance Services performed by the Subcontractor have been inspected and approved in accordance with the CMC 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 Non-Renewal of P&P Bonds**

8.4.1 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 as the earlier to occur of (a) the date on which DB Contractor provides replacement Maintenance Security 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.

8.4.2 The Retainage, subject to reduction as specified below, shall be held by TxDOT until 60 days after the expiration of the Warranties under this Capital Maintenance Contract. 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 and/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.

8.4.3 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 **Payment 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 CMC Documents, and DB Contractor shall not cease or slow down its performance under the CMC Documents on account of any such amount or dispute. Any Claim or Dispute regarding such payment shall be resolved pursuant to Section 4.7 hereof and Exhibit 13 to the CMA. 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.