# DESIGN-BUILD AGREEMENT
# I-635 LBJ EAST PROJECT

**between**

**TEXAS DEPARTMENT OF TRANSPORTATION**

**and**

**[*DB CONTRACTOR*]**

# Dated as of:_____, 2019

**DALLAS COUNTY**

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## LIST OF EXHIBITS


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# DESIGN-BUILD AGREEMENT

## I-635 LBJ EAST PROJECT

This Design-Build Agreement (this "**Design-Build Agreement**" or "**DBA**"), dated as of [●], 2019 (the "**Effective Date**"), is entered into by and between:

**TxDOT**: Texas Department of Transportation, a public agency of the State of Texas

And

**DB Contractor**: [●], a [*Insert appropriate bracketed text, and delete all bracketed text that is not applicable*] [corporation organized and existing under the laws of the State of [●]] [limited liability company (LLC) organized and existing under the laws of the State of [●]] [partnership, consisting of [*insert partner names and any organizational form*]] [joint venture, consisting of [●] and [●]] [an individual or sole proprietorship owned by [●]],

the location of whose principal office is:

[Address]
[Address].

## RECITALS

**A.** Pursuant to Transportation Code, Chapter 223, Subchapter F (the "**Code**"), TxDOT is authorized to enter into design-build contracts to facilitate private sector participation in the development of the State's transportation system.

**B.** TxDOT wishes to enter into an agreement with DB Contractor to develop, design and construct an approximately 11-mile section of Interstate Highway ("**I**") 635 from east of U.S. Highway 75 to I-30, including the I-30 Interchange with transitional work on I-635 extending south of the interchange, approximately 1.2 miles in length, and an approximately 1.5-mile section of I-30 from west of Gus Thomasson Road to east of N Galloway Avenue in Dallas County, Texas (the "**Project**"). In addition, TxDOT wishes to enter into an agreement with DB Contractor to, at TxDOT's discretion, maintain the Project for specified optional terms.

**C.** Pursuant to the Code and subchapter I in Chapter 9 of Title 43, Texas Administrative Code (the "**Rules**"), TxDOT issued a Request for Qualifications (as amended, the "**RFQ**") on June 8, 2018.

**D.** TxDOT received four qualification statements on July 6, 2018 and subsequently shortlisted three proposers.

**E.** On November 9, 2018 TxDOT issued to the shortlisted proposers a Request for Proposals (as amended, the "**RFP**") to develop, design and construct and, at TxDOT's sole option, maintain the Project.

**F.** [*Include appropriate option*.][On or before [●] (the "**Proposal Due Date**"), TxDOT received [●] responses to the RFP, including the response of DB Contractor (the "**Proposal**").] [On or before [●] (the "**Proposal Due Date**"), TxDOT received one response to the RFP, and that response of DB Contractor (the "**Proposal**") was

independently evaluated to confirm and validate that (1) the project procurement delivered value for the public investment; and (2) no anticompetitive practices were involved in the procurement.]

**G.** An RFP evaluation committee comprised of TxDOT personnel determined that DB Contractor was the proposer that best met the selection criteria set forth in the RFP and that the Proposal provided the best value to the State of Texas.

**H.** On [●] the Texas Transportation Commission accepted the recommendation of the Executive Director and the RFP evaluation committee and authorized TxDOT staff to negotiate this DBA.

**I.** Concurrently with the execution of this DBA, TxDOT and DB Contractor are entering into a Capital Maintenance Agreement ("**CMA**") for DB Contractor to provide, at TxDOT's discretion, Maintenance Services for the Project.

**J.** This DBA and the other Contract Documents collectively constitute a design-build contract, as contemplated under the Code and the Rules, and are entered into in accordance with the provisions of the RFP.

**K.** The Executive Director of TxDOT has been authorized to enter into this DBA pursuant to the Code, the Rules and the Texas Transportation Commission Minute Order, dated [●].

**L.** The Parties intend for this DBA to be a lump sum design-build agreement obligating DB Contractor to perform all work necessary to achieve completion of the Work by the Completion Deadlines specified herein for the Price, subject only to certain specified limited exceptions. In order to allow TxDOT to budget for and finance the Project and to reduce the risk of cost overruns, this DBA includes restrictions affecting DB Contractor's ability to make claims for increases to the Price or extensions of the Completion Deadlines. DB Contractor has agreed in this DBA to assume such responsibilities and risks and has reflected the assumption of such responsibilities and risks in the Price.

**M.** If DB Contractor fails to complete the Project in accordance with the Completion Deadlines set forth in the Contract Documents, then TxDOT and the members of the public represented by TxDOT will suffer substantial losses and damages. The Contract Documents provide that DB Contractor shall pay TxDOT Liquidated Damages if such completion is delayed.

**N.** The Reference Information Documents include a basic preliminary design for the Project (the "**TxDOT Schematic Design**"). DB Contractor may use the TxDOT Schematic Design as the basis for the design to be furnished by DB Contractor, subject to the terms, conditions and limitations of the Contract Documents. DB Contractor will assume full responsibility and liability with respect to the design of the Project.

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

## SECTION 1. CONTRACT

### 1.1 Abbreviations

The following abbreviations, when used in the Contract Documents, shall have the meanings set forth below.

| | |
|---|---|
| **BEP** | Brazos Electrical Power |
| **CMA** | Capital Maintenance Agreement |
| **DBA** | Design-Build Agreement |
| **ETCS** | Electronic Toll Collection System |
| **KCS** | Kansas City Southern Railroad |
| **TMPA** | Texas Municipal Power Agency |
| **TxDOT TOD** | Texas Department of Transportation Toll Operations Division |

Abbreviations used in the Contract Documents but not otherwise defined in this DBA shall have the meaning set forth in Section 1.1 of the General Conditions. If any abbreviation set forth above is also included in Section 1.1 of the General Conditions, to the extent such definitions conflict, the abbreviation in Section 1.1 of the General Conditions is hereby amended by the abbreviation set forth above.

### 1.2 Definitions

The following terms, when used in the Contract Documents, shall have the meanings set forth below.

| | |
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| **Aesthetics and Landscaping Plan** | means the plan DB Contractor prepares in conformance with the Project's final aesthetic concept as more particularly described in Section 23.1.2 of the Design-Build Specifications. |
| **Assembly** | means the additional Utility Assembly that DB Contractor shall prepare for any Project Utility Adjustment Agreement or City Utility Agreement to cover all Utility Adjustments addressed in the corresponding Utility Adjustment Agreement Amendment or any amendment to a City Utility Agreement as more particularly described in Section 14.3.4.5 of the Design-Build Specifications. |
| **Basic Configuration** | shall have the meaning set forth in Exhibit 1 to this DBA. |
| **BEP Agreements** | means the agreements between TxDOT and BEP that sets forth the terms and conditions for the BEP Transmission Line Relocations, as more particularly described in Section 2.1.3.2 of this DBA and as the same may be amended or supplemented from time to time. |
| **BEP Transmission Line Relocations** | means the relocation of the electric transmission lines owned by BEP as described in the BEP plans set forth in the RIDs. |
| **Capital Maintenance Agreement** | means that certain Capital Maintenance Agreement executed by TxDOT and DB Contractor for DB Contractor to perform maintenance for the Project. |
| **City of Dallas Reimbursable Utility** | means all Utility Adjustments required by the improvement of I-635 (including |

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| **Adjustments** | any Utility Adjustments performed along I-635 or along stub outs on roadways intersecting I-635) for City of Dallas Utilities. The Utility Adjustment Work associated with City of Dallas Reimbursable Utility Adjustments shall be included in the Work and the Price, pursuant and subject to Section 4.5 of the General Conditions, as amended pursuant to Exhibit 23 to this DBA. |
| **City of Dallas Utilities** | means all Utilities owned by the City of Dallas. |
| **City of Dallas Utility Agreement** | means the utility adjustment agreement between TxDOT and the City of Dallas with respect to the performance of Utility Adjustment Work for City of Dallas Utilities. |
| **City of Garland Reimbursable Utility Adjustments** | means all Utility Adjustments required by the improvement of I-635 (including any Utility Adjustments performed along I-635 or along stub outs on roadways intersecting I-635) for City of Garland Utilities. The Utility Adjustment Work associated with City of Garland Reimbursable Utility Adjustments shall be included in the Work and the Price, pursuant and subject to Section 4.5 of the General Conditions, as amended pursuant to Exhibit 23 to this DBA. |
| **City of Garland Utilities** | means all Utilities owned by the City of Garland. |
| **City of Garland Utility Agreement** | means the utility adjustment agreement between TxDOT and the City of Garland with respect to the performance of Utility Adjustment Work for City of Garland Utilities. |
| **City of Mesquite Reimbursable Utility Adjustments** | means all Utility Adjustments required by the improvement of I-635 (including any Utility Adjustments performed along I-635 or along stub outs on roadways intersecting I-635) for City of Mesquite Utilities. The Utility Adjustment Work associated with City of Mesquite Reimbursable Utility Adjustments shall be included in the Work and the Price, pursuant and subject to Section 4.5 of the General Conditions, as amended pursuant to Exhibit 23 to this DBA. |
| **City of Mesquite Utilities** | means all Utilities owned by the City of Mesquite. |
| **City of Mesquite Utility Agreement** | means the utility adjustment agreement between TxDOT and the City of Mesquite with respect to the performance of Utility Adjustment Work for City of Mesquite Utilities. |
| **City Reimbursable Utility Adjustments** | means the City of Dallas Reimbursable Utility Adjustments, the City of Garland Reimbursable Utility Adjustments and the City of Mesquite Reimbursable Utility Adjustments. |
| **City Utilities** | means the City of Dallas Utilities, the City of Garland Utilities and the City of Mesquite Utilities. |

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| **City Utility Agreements** | means the City of Dallas Utility Agreement, the City of Garland Utility Agreement and the City of Mesquite Utility Agreement. |
| **City Utility Delay** | has the meaning set forth in Exhibit 23 to this DBA. |
| **City Utility Owners** | means the City of Dallas, the City of Garland and the City of Mesquite. |
| **CMA Documents** | has the meaning set forth in Section 1.2 of the Capital Maintenance Agreement. |
| **Code** | has the meaning set forth in Recital A to this DBA. |
| **Contract Documents** | has the meaning set forth in Section 1.3 of this DBA. |
| **DB Contractor** or **Design-Build Contractor** | means _____, a _____, together with its successors and assigns. |
| **Design-Build Agreement** | has the meaning set forth in the preamble hereof. |
| **Design-Build Special Provisions** or **Special Provisions** | means the Design-Build Special Provisions to Items 10-26 and Items 28-30, dated as of [●]. |
| **Design-Build Specifications** | means the Design-Build Standard Specifications, Items 10-30, as modified by the Special Provisions and the Design-Build Special Specifications, Items 10,000, 10,002 and 10,003. |
| **Differing Site Conditions Deductible** | has the meaning set forth in Section 6.1 of this DBA. |
| **Differing Site Conditions Deductible Cap** | has the meaning set forth in Section 6.1 of this DBA. |
| **Disputes Board** | has the meaning set forth in the Disputes Board Agreement. |
| **Disputes Board Agreement** | means the agreement in the form attached as Exhibit 20 to this DBA. |
| **Disputes Board Decision** | has the meaning set forth in the Disputes Board Agreement. |
| **Disputes Board Error** | has the meaning set forth in Section 7(b) of Appendix 1 to Exhibit 20 to this DBA. |
| **Disputes Board Member** | means an individual serving as one of the three members of the Disputes Board. |
| **Disputes Board Member Candidates List** | has the meaning set forth in the Disputes Board Agreement. |
| **Disputes Board Member** | has the meaning set forth in the Disputes Board Agreement. |

**Qualifications**

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| **Dispute Resolution Procedures** | means the formal process for resolving Disputes described in Section 11.1 and Exhibit 20 to this DBA. None of the Disputes Review Panel Process and the Informal Resolution Procedures are included in the Dispute Resolution Procedures. |
| **DRP Rules** | means, as of the Effective Date, the administrative rules promulgated in accordance with Section 201.112(a) of the Code, adopted by TxDOT in accordance with the Texas Administrative Procedure Act, and effective under Rule §9.6 of Subchapter A, Chapter 9, Part 1, Title 43 of the Texas Administrative Code on or before the Effective Date regarding procedures applicable to the resolution of all claims and disputes of every kind or character arising under agreements such as and including the Contract Documents. |
| **Effective Date** | has the meaning set forth in the preamble to this DBA. |
| **Electronic Toll Collection System (ETCS)** | means the toll collection system to be provided by Systems Integrator, in connection with which DB Contractor provides support and coordination. |
| **Electronic Toll Collection System (ETCS) Element** | means an individual component, system, or subsystem of the ETCS to be provided by Systems Integrator, and shall include all equipment and cabinetry to be installed by Systems Integrator including the following: overhead equipment in Toll Zone, lane side equipment mounted in Toll Zone, roadside equipment cabinet at Toll Zone, backup power and fuel source at Toll Zone, overhead equipment at ETCS speed / volume detection zone, lane side equipment mounted in ETCS speed / volume detection zone, roadside equipment cabinet at ETCS speed / volume detection zone, overhead equipment at Toll Rate DMS, lane side equipment mounted at Toll Rate DMS, roadside equipment cabinet at Toll Rate DMS. |
| **Final Acceptance Deadline** | has the meaning set forth in Section 2.4.1 of this DBA. |
| **General Conditions** | has the meaning set forth in Section 1.3.2 of this DBA. |
| **HF Master Plan** | has the meaning set forth in Section 2.9 of this DBA. |
| **High Five Site** | has the meaning set forth in Section 2.9 of this DBA. |
| **Indemnified Parties** | means TxDOT, the State, the Texas Transportation Commission, FHWA, and their respective successors, assigns, officeholders, officers, directors, agents, representatives, consultants and employees. |
| **Ineligible Matters** | (i) Any matters that the Contract Documents expressly state are final, binding or not subject to dispute resolution;<br>(ii) Any claim or dispute that does not arise under the Contract |

Documents;

(iii) Any claim that is not actionable against TxDOT by DB Contractor on its own behalf or on behalf of its Subcontractors in accordance with Section 4.9 of the General Conditions and Exhibit 20 hereof;

(iv) Any claim for indemnity under Section 7.12 of the General Conditions;

(v) Any claim for injunctive relief;

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

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

(viii) Any claim arising out of or relating to any Utility Adjustment where the Utility Owner is a necessary party (unless, and only to the extent that, the applicable Utility Agreement provides for resolution of claims as set forth in Section 4.9 of the General Conditions and Exhibit 20 hereof);

(ix) Any claim or dispute that is the subject of litigation in a lawsuit filed in court to which the procedures established in Section 4.9 of the General Conditions and Exhibit 20 hereof do not apply, including any effort to interplead a Party into such a lawsuit in order to make the procedures established in Section 4.9 of the General Conditions and Exhibit 20 hereof apply;

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

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

**Instructions to Proposers** means the Instructions to Proposers issued by TxDOT on November 9, 2018, as part of the RFP with respect to the Project, including all exhibits, forms and attachments thereto and any subsequent addenda.

**KCS Track Work** shall mean the following work, to be performed by KCS at TxDOT's cost: (i) removal of existing, and installation of new, rail, plates, anchors, spikes, ties and ballets on structure as shown in exhibit A in the folder entitled "Railroad Coordination" in the RID, and (ii) removal of existing, and installation of new, concrete crossing, rail, plates, anchors, spikes, ties, ballets, gates and signals at grade crossings as shown in exhibit A in the folder entitled "Railroad Coordination" in the RID.

**KCS Track Work Delay** means a delay in the achievement of Final Acceptance due solely to the failure of KCS to complete the KCS Track Work.

**Key Personnel** means the positions identified in Exhibit 18 to this DBA.

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| **Lane Closure** | means closure of any traffic lane, or the reduction in width of any traffic lane to less than the widths specified in Section 26.2.1 of the Special Provisions, in any portion of the Project or a connecting highway, as applicable, and for any duration, including main lanes, ramps, direct connectors, frontage roads, access roads and cross roads. |
| **Lane Rental Bank** | has the meaning set forth in Exhibit 15 to this DBA. |
| **LBJIG-owned Tolling Components** | means all gantry structures, Toll Rate DMSs and support structures, structures for speed/volume detection devices and other tolling and managed lanes related items owned and operated by LBJ Infrastructure Group that conflict with the Project as of the Effective Date, and further described in the Design-Build Specifications. |
| **Liquidated Damages** | means the liquidated damages, including Key Personnel Unavailability Liquidated Damages and Liquidated Damages for Lane Closures, specified in DBA Sections 7.2, 7.3 and 7.4, and General Conditions Sections 8.3.1, 8.6.1 and 8.6.2. |
| **Maintenance NTP1** | has the meaning set forth in Exhibit 1 to the CMA. |
| **Maintenance Security** | has the meaning set forth in Exhibit 1 to the CMA. |
| **Maintenance Services** | has the meaning set forth in Exhibit 1 to the CMA. |
| **NTP1 Maximum Payment Amount** | means the amount set forth in Section 4.2.2 of this DBA. |
| **NTP1 Payment Bond Amount** | means the amount set forth in Section 5.1.2 of this DBA. |
| **NTP1 Performance Bond Amount** | means the amount set forth in Section 5.1.1 of this DBA. |
| **NTP2 Payment Bond Amount** | means the amount set forth in Section 5.1.4 of this DBA. |
| **NTP2 Performance Bond Amount** | means the amount set forth in Section 5.1.3 of this DBA. |
| **Oncor** | means Oncor Electric Delivery Company, LLC. |
| **Oncor Agreements** | means the agreements between TxDOT and Oncor that sets forth the terms and conditions for the Oncor Transmission Line Relocations, as more particularly described in Section 2.1.3.2 of this DBA and as the same may be amended or supplemented from time to time. |
| **Oncor Transmission Line Relocations** | means the relocation of the electric transmission lines owned by Oncor as described in the Oncor plans set forth in the RIDs. |
| **Performance and Measurement Table** | means Attachment 27-1 to Item 27 of the Design-Build Specifications. |

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| **Point of Termination** | means the point where an electrical circuit or communications link terminates into a specific piece of equipment, further described as the final point of termination for power or communications required to operate a device. |
| **Preliminary Exhibit A** | has the meaning set forth in Section 6.2.1 of this DBA. |
| **Price** | has the meaning set forth in Section 4.1 of this DBA. |
| **Project** | has the meaning set forth in Recital B to this DBA. |
| **Proposal** | has the meaning set forth in Recital F to this DBA. |
| **Proposal Due Date** | has the meaning set forth in Recital F to this DBA. |
| **Reference Information Documents** | has the meaning set forth in Section 1.4 of this DBA. |
| **Remaining Project ROW** | means (a) the portion of the Schematic ROW for which DB Contractor shall be responsible for acquisition activities as described in Exhibit 24 of this DBA, and (b) the Additional Properties; but excluding therefrom any portion of the Schematic ROW eliminated from the Project by a Change Order. |
| **RFP** | has the meaning set forth in Recital E to this DBA. |
| **RFP Documents** | means all of the information and materials supplied to DB Contractor in connection with the issuance of the RFQ and the RFP, including Instructions to Proposers, the Contract Documents, the CMA Documents, the Reference Information Documents and any addenda issued in connection therewith. |
| **RFQ** | has the meaning set forth in Recital C to this DBA. |
| **Rules** | has the meaning set forth in Recital A to this DBA. |
| **Substantial Completion Deadline** | has the meaning set forth in Section 2.4.1 of this DBA. |
| **Systems Integrator (SI)** | means the contractor, under separate contract to TxDOT, which shall design, construct, furnish, install, integrate, test and commission the ETCS for the Project, including scanners, readers, loops, enforcement mechanisms and other ETCS equipment necessary for the toll systems to be fully operational. |
| **Systems Integrator Coordination Work** | means the DB Contractor coordination responsibilities listed in Item 29 (Tolling), Attachment 29-1 (Toll Facility Responsibility Matrix), Item 30 (Managed Lanes), Attachment 30-1 (Managed Lane Facility Responsibility Matrix), and Attachment 30-2 (Typical Details ETCS Speed/Volume Detection Zone And Toll Rate DMS Sites) which shall apply through Final Acceptance. |
| **Systems Integrator Delay** | means a delay in the achievement of Final Acceptance due solely to the |

failure of Systems Integrator to complete its work.

**Time Period A** means the period shown as "A" on Table 26-1 of the Special Provision to Item 26.

**Time Period B** means the period shown as "B" on Table 26-1 of the Special Provision to Item 26.

**Time Period C** means the period shown as "C" on Table 26-1 of the Special Provision to Item 26.

**Time Period D** means the period shown as "D" on Table 26-1 of the Special Provision to Item 26.

**TMPA Agreement** means the agreement between TxDOT and TMPA that sets forth the terms and conditions for the TMPA Transmission Line Relocations, as more particularly described in Section 2.1.3.2 of this DBA and as the same may be amended or supplemented from time to time.

**TMPA Transmission Line Relocations** means the relocation of the electric transmission lines owned by the TMPA as described in the TMPA plans set forth in the RIDs.

**Toll Rate DMS** means a large sign with single line DMS used primarily to display dynamic toll rates.

**Toll Zone** means the zone within which a toll transaction takes place for each direction of traffic at a single geographic location, in connection with which DB Contractor shall provide required infrastructure for the ETCS and coordination services with Systems Integrator and TxDOT.

**Toll Zone and ETCS Element Milestones** means the Toll Zone milestones, tolling speed / volume detection equipment milestones, and Toll Rate DMS milestones set forth in Section 2.1.2.1(d).

**Toll Zone Work** means all work which is required in accordance with Section 2.1.2.1 of this DBA and identified as the responsibility of DB Contractor in Item 29 (Tolling), Attachment 29-1 (Toll Facility Responsibility Matrix), Attachment 29-2 (Typical Toll Zone Layout), Attachment 29-3 (Toll Zone Pavement Details), Attachment 29-4 (Toll Gantry Requirements), Attachment 29-5 (Equipment Pad Details), Item 30 (Managed Lanes), Attachment 30-1 (Managed Lane Facility Responsibility Matrix), and Attachment 30-2 (Typical Details ETCS Speed/Volume Detection Zone And Toll Rate DMS Sites).

**Transmission Line Relocation Agreements** means the BEP Agreements, the TMPA Agreement and the Oncor Agreements.

**Transmission Line Relocations** means the Oncor Transmission Line Relocations, the BEP Transmission Line Relocations and the TMPA Transmission Line Relocations.

**TxDOT-Directed Changes** means (a) any changes in the scope of the Work or terms and conditions of the Contract Documents (including changes in the standards applicable to the Work, which TxDOT has directed DB Contractor to perform as described in and subject to the limitations in Section 4.6.1.2 of the General Conditions), (b) suspensions of the Work by TxDOT for more than 48 hours per suspension or 96 hours total in accordance with Section 8.4.1 of the General Conditions, (c) any changes in the Work due to Errors in the Signed and Sealed Engineering Data, unless such Errors were known to the DB Contractor prior to the Effective Date, and (d) any material differences between the location of a Utility that is identified on the level A SUE report identified in Appendix 2 to Exhibit 3 of the DBA and the actual location of the Utility, unless such Error was known to DB Contractor prior to the Effective Date. Notwithstanding the foregoing, TxDOT shall not be liable for any changes in the Scope of Work that result in less than $10,000 in increased costs and such changes shall not be considered TxDOT-Directed Changes.

**TxDOT Tolling Components** means all gantry structures, Toll Rate DMSs and support structures, structures for speed/volume detection devices and other tolling and managed lanes related items owned by TxDOT as of the Effective Date, and to be constructed as part of the Project and further described in the Design-Build Specifications.

**TxDOT-Provided Approvals** means the approvals set forth in the table in Section 3.1 of this DBA.

**TxDOT Schematic Design** has the meaning set forth in Recital N to this DBA.

**TxDOT TOD** means the Texas Department of Transportation Toll Operations Divisions which oversees the development and operations of toll collection operating system services for TxDOT toll roads. This includes toll collection systems integration, cash collections, customer service center operations and toll management systems contracting.

**Unidentified Utilities Deductible** has the meaning set forth in Section 6.4 of this DBA.

**Unidentified Utilities Deductible Cap** has the meaning set forth in Section 6.4 of this DBA.

**USACE Individual 404 Permits** means the individual permits issued by the U.S. Army Corps of Engineers under Section 404 of the Clean Water Act (33 U.S.C. §1344) for the placement of dredged and fill material into waters of the United States, based upon the TxDOT Schematic Design and the Schematic ROW.

**Utility Adjustment** means each relocation (temporary or permanent), abandonment, Protection in Place, removal (of previously abandoned Utilities as well as of newly abandoned Utilities), replacement, reinstallation, or modification of existing Utilities necessary to accommodate construction, operation, maintenance or use of the Project, including each Transmission Line Relocation; 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 Utility Adjustment Work 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 Utility Adjustment Work for each continuous segment of that Utility located within the Project ROW shall be considered a separate Utility Adjustment.

**Utility Agreement** means the PUAA, UAA or the City Utility Agreements, as the context may require.

Capitalized terms used in the Contract Documents but not otherwise defined in this DBA shall have the meaning set forth in Section 1.2 of the General Conditions. If any definition set forth above is also included in Section 1.2 of the General Conditions, to the extent such definitions conflict, the definition in Section 1.2 of the General Conditions is hereby amended by the definition set forth above.

### 1.3 Contract Documents and Order of Precedence

The term "**Contract Documents**" shall mean the documents listed in this Section 1.3. The Contract Documents form this "**contract**" for the performance of the Work.

**1.3.1** Each of the Contract Documents is an essential part of the agreement between the Parties, and a requirement occurring in one is as binding as though occurring in all. The Contract Documents are intended to be complementary and to describe and provide for a complete agreement.

**1.3.2** In the event of a conflict among the Contract Documents, the following order of precedence shall govern the interpretation of such documents:

1. Amendments and Change Orders to the Design-Build Contract, including all exhibits and attachments thereto;

2. This DBA, including all exhibits hereto, except Exhibit 2 (DB Contractor's Proposal Commitments and ATCs) and Exhibit 3 (List of Reference Information Documents);

3. TxDOT's Design-Build Agreement General Conditions, Items 1-9 dated as of [●] (the "**General Conditions**");

4. Change Orders to TxDOT's Design-Build Standard Specifications, Design-Build Special Specifications, Item 10,000 dated as of [●] or the Special Provisions;

5. The Design-Build Special Provisions;

6. Exhibit 2 (DB Contractor's Proposal Commitments and ATCs) to this DBA; and

7. TxDOT's Design-Build Standard Specifications, Items 10-30 dated as of [●], and Design-Build Special Specifications, Item 10,000 dated as of [●];

8. Released for Construction Documents to be developed in accordance with the Contract Documents, provided that (a) specifications contained therein shall have precedence over plans; (b) no conflict shall be deemed to exist between the Released for Construction Documents and the other Contract Documents with respect to requirements of the Released for Construction Documents that TxDOT determines are more beneficial than the requirements of the other Contract Documents; and (c) any Deviations contained in the Released for Construction Documents shall have priority over conflicting requirements of other Contract Documents to the extent that the conflicts are specifically identified to TxDOT by DB Contractor and such Deviations are approved by TxDOT in writing.

**1.3.3** Notwithstanding the order of precedence among Contract Documents set forth in Section 1.3.2, in the event and to the extent that Exhibit 2 (or parts thereof) expressly states that it supersedes specific provisions of the Contract Documents (including approved deviations expressly listed in Exhibit 2), such provisions shall control over the provisions specified as superseded. Moreover, if the Proposal includes statements, offers, terms, concepts and designs that can reasonably be interpreted as offers to provide higher quality items than otherwise required by the Contract Documents or to perform services or meet standards in addition to or better than those otherwise required, or otherwise contains statements, offers, terms, concepts or designs that TxDOT considers to be more advantageous than the requirements of the other Contract Documents, DB Contractor's obligations hereunder shall include compliance with all such statements, offers, terms, concepts or designs, that shall have the priority of DBA amendments, Special Provisions amendments and General Conditions amendments, as applicable.

**1.3.4** Additional details and requirements contained in a lower priority Contract Document will control except to the extent they irreconcilably conflict with the requirements of the higher level Contract Document.

**1.3.5** Notwithstanding the order of precedence among Contract Documents set forth in Section 1.3.2, if a Contract Document contains differing provisions on the same subject matter than another Contract Document, the provisions that establish the higher quality, manner or method of performing the Work or use more stringent standards will prevail. Further, in the event of a conflict among any standards, criteria, requirements, conditions, procedures, specifications or other provisions applicable to the Project established by reference to a described manual or publication within a Contract Document or set of Contract Documents, the standard, criterion, requirement, condition, procedure, specification or other provision offering higher quality or better performance will apply, unless TxDOT in its sole discretion, approves otherwise in writing. If either Party becomes aware of any such conflict, it shall promptly notify the other party of the conflict. TxDOT shall issue a written determination respecting which of the conflicting items is to apply promptly after it becomes aware of any such conflict.

**1.3.6** In the event of any conflict, ambiguity or inconsistency between the Project Management Plan and any of the Contract Documents, the latter shall take precedence and control.

**1.3.7** 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 Contract Documents (including those Reference Information Documents that are referenced in the Contract Documents, and pursuant to Section 1.4.1, are considered Contract 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 Contract 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 Contract Documents. Accordingly, in the event of an ambiguity in or dispute regarding the interpretation of the Contract Documents, they shall not be interpreted or construed against the Person that prepared them, and, instead, other rules of interpretation and construction shall be used.

### 1.4 Reference Information Documents

The Reference Information Documents are those documents listed in Exhibit 3, Appendix 1.

**1.4.1** Portions of the Reference Information Documents are explicitly referenced in the Contract Documents for the purpose of defining requirements of the Contract Documents. The Reference Information Documents shall be deemed incorporated in the Contract Documents solely to the extent that they are so referenced, with the same order of priority as the Contract Document in which the reference occurs; provided, however, that DB Contractor shall only be entitled to rely on portions of the Reference Information Documents for increases to the Price and extensions of Completion Deadlines to the extent identified in Exhibit 3, Appendix 2.

**1.4.2** TxDOT has provided and disclosed the Reference Information Documents to DB Contractor. Except as provided in Section 1.4.1, (a) the Reference Information Documents are not mandatory or binding on DB Contractor and (b) DB Contractor is not entitled to rely on the Reference Information Documents as presenting design, engineering, operating or maintenance solutions or other direction, means or methods for complying with the requirements of the Contract Documents, Governmental Approvals or Law.

**1.4.3** TxDOT shall not be responsible or liable in any respect for any causes of action, claims or Losses whatsoever suffered by any DB Contractor-Related Entity by reason of any use of information contained in, or any action or forbearance in reliance on, the Reference Information Documents, except any schedule or monetary relief available under the Contract Documents as set forth in Section 4.6 of the General Conditions.

**1.4.4** Except as provided in Section 1.4.1, TxDOT does not represent or warrant that the information contained in the Reference Information Documents is complete or accurate or that such information is in conformity with the requirements of the Contract Documents, Governmental Approvals or Laws. DB Contractor shall have no right to additional compensation or time extension based on any incompleteness or inaccuracy in the Reference Information Documents.

## SECTION 2. SCOPE OF WORK

### 2.1 Project Scope; Special Terms and Conditions

#### 2.1.1 Project Scope

DB Contractor shall perform the services and execute the Work as described in the Contract Documents. The Work includes all design, engineering, procurement, construction and other services and items that are necessary or appropriate to design, construct, execute and complete the Project in conformance with the Basic Configuration as set forth in the TxDOT Schematic Design and otherwise in accordance with the requirements of the Contract Documents.

### 2.1.2 Special Terms and Conditions

#### 2.1.2.1 Notification and Completion of Toll Zone Work

(a) DB Contractor shall complete all Toll Zone Work on or before Substantial Completion. Section 5.11.1.2 of the General Conditions is hereby amended by adding the following as a new subsection (h) thereto: "Whether DB Contractor has completed all Toll Zone Work and satisfied all Toll Zone and ETCS Element Milestones."

(b) DB Contractor shall complete all Work necessary (excluding work to be performed by Systems Integrator) to allow TxDOT to open the Project for revenue operations by the Final Acceptance Deadline. Further, DB Contractor acknowledges and agrees that it is responsible for the Systems Integrator Coordination Work and for allowing the Systems Integrator sufficient time in advance of the Final Acceptance Deadline to install such facilities. DB Contractor shall provide written notice to TxDOT no later than 180 days prior to the scheduled date of Substantial Completion based on and consistent with the most current Schedule Update so that Systems Integrator can coordinate its work in the Toll Zones and commence work as needed.

(c) DB Contractor shall complete the Toll Zone Work, including all Toll Zone and ETCS Element Milestones in all Toll Zones in accordance with this Section 2.1.2.1 and Items 29 and 30 of the Design-Build Specifications. DB Contractor shall coordinate and provide full and continuous unobstructed access to Systems Integrator so that Systems Integrator is able to perform its work once the Certificate of Substantial Completion has been issued. Work to be completed by Systems Integrator after Substantial Completion shall consist of installation, integration and testing of ETCS and ETCS elements and illustrated as the responsibility of Systems Integrator in Item 29 (Tolling), Attachment 29-1 (Toll Facility Responsibility Matrix), Attachment 29-2 (Typical Toll Zone Layout), Attachment 29-3 (Toll Zone Pavement Details), Attachment 29-4 (Toll Gantry Requirements), Attachment 29-5 (Equipment Pad Details), Item 30 (Managed Lanes), Attachment 30-1 (Managed Lane Facility Responsibility Matrix), and Attachment 30-2 (Typical Details ETCS Speed/Volume Detection Zone And Toll Rate DMS Sites).

(d) The Toll Zone Work shall be deemed complete upon DB Contractor's satisfactory completion of the Toll Zone and ETCS Element Milestones described in this Section 2.1.2.1(d) as evidenced by TxDOT's issuance of a Certificate of Substantial Completion. The Toll Zone and ETCS Element Milestones shall include:

(i) Toll Zone milestones:

A. Toll gantry foundation constructed
B. Toll gantry column constructed
C. Toll gantry trusses installed
D. Barrier installed
E. Maintenance driveways constructed
F. Pavement for Toll Zone locations constructed
G. Lane striping within the Toll Zone limits complete
H. Support infrastructure for toll operation constructed in accordance with System Integrator's specifications
I. Electrical conductor and tolling communication conduit installed

J. Electrical conductor and tolling communication ground boxes installed
K. Grounding systems installed at each gantry as soon as gantry construction is complete
L. Lightning protection installed at each gantry as soon as gantry construction is complete and lightning protection certification submitted to TxDOT
M. Pads and riprap for equipment cabinets, generators, and fuel tanks installed
N. Site construction complete including the completion of all activities illustrated as the responsibility of the DB Contractor in DB Contractor in Item 29 (Tolling), Attachment 29-1 (Toll Facility Responsibility Matrix), Attachment 29-2 (Typical Toll Zone Layout), Attachment 29-3 (Toll Zone Pavement Details), Attachment 29-4 (Toll Gantry Requirements), Attachment 29-5 (Equipment Pad Details),
O. Electrical Service installed, commercial power to each Toll Zone and ETCS Element complete and operational
P. Tolling communication cable installed and tested to support tolling network

(ii) Tolling Speed / volume detection equipment milestones:
A. Overhead sign support structure and mounting hardware for tolling speed / volume detection devices installed
B. Electrical conductor and tolling communication cable conduit installed
C. Electrical conductor and tolling communication cable ground boxes installed
D. Site construction complete at each tolling speed / volume detection location
E. Electrical service to site installed, commercial power to site complete and operational
F. Tolling communication cable installed, spliced, and tested to support tolling speed / volume detection network
G. Site construction complete including the completion of all activities illustrated as the responsibility of the DB Contractor in Item 30 (Managed Lanes), Attachment 30-1 (Managed Lane Facility Responsibility Matrix), and Attachment 30-2 (Typical Details ETCS Speed/Volume Detection Zone And Toll Rate DMS Sites)

(iii) Toll Rate DMS milestones:
A. Toll rate sign (foundation, sign support structure and static portion of sign) installed
B. Electrical conductor and tolling communication cable conduit installed
C. Electrical conductor and tolling communication ground boxes installed
D. Roadside site construction complete including the completion of all activities illustrated as the responsibility of the DB Contractor in Item 30 (Managed Lanes), Attachment 30-1 (Managed Lane Facility Responsibility Matrix), Attachment 30-2 (Typical Details ETCS Speed/Volume Detection Zone And Toll Rate DMS Sites)
E. Electrical Service installed, commercial power to site complete and operational
F. Tolling communication cable installed, spliced, and tested to support tolling speed / volume detection network.

(e) Section 5.11.2 of the General Conditions is hereby amended and restated in its entirety as follows:

**5.11.2 Notification of Substantial Completion**

5.11.2.1 DB Contractor shall provide TxDOT with not less than 30 days' prior written notification of the date DB Contractor determines it will achieve Substantial Completion. During

such 30-day period, DB Contractor and TxDOT shall meet and confer and exchange information on a regular cooperative basis with the goal being TxDOT's orderly, timely inspection and review of the Project and the applicable Construction Documents, and TxDOT's issuance of the Certificate of Substantial Completion.

5.11.2.2 During such 30-day period, TxDOT shall (i) conduct an inspection of the Project and its components, including the Toll Zone and ETCS Element Milestones, (ii) conduct a review of the applicable Construction Documents, (iii) conduct such other investigation as may be necessary to evaluate whether Substantial Completion is achieved, including any investigation necessary to evaluate whether the Toll Zone Work is complete, and (iv) meet with DB Contractor to exchange information about the status of any outstanding Toll Zone Work.

5.11.2.3 DB Contractor shall provide TxDOT a second written notification when DB Contractor determines it has achieved Substantial Completion. Within five days after expiration of the 30-day period and TxDOT's receipt of the second notification, TxDOT shall either (a) issue the Certificate of Substantial Completion or (b) notify DB Contractor in writing setting forth, as applicable, why the Project has not reached Substantial Completion. If TxDOT and DB Contractor cannot agree as to the date of Substantial Completion, such Dispute shall be resolved according to the procedures for resolving Disputes set forth in this Design-Build Contract.

**2.1.2.2** Schedule Requirements for Toll Zone Work

(a) In addition to the other activities required to be included in the Project Schedule pursuant to Section 8.5.1.2.2 of the General Conditions, DB Contractor shall incorporate the Toll Zone and ETCS Element Milestones schedule for each Toll Zone into the Project Baseline Schedule. DB Contractor shall meet with Systems Integrator to ensure Systems Integrator's scheduled tasks, dependencies, and durations are accurately incorporated. DB Contractor shall share the Project Schedule with Systems Integrator so that Systems Integrator can incorporate the Project Schedule and track the Project progress.

(b) In addition to meeting the other requirements set forth in the Contract Documents, the PBS2 narrative described in Section 8.5.1.2.3 of the General Conditions shall describe the plan and approach to tolling, including interfaces and coordination with Systems Integrator for Toll Zone Work.

(c) The minimum work breakdown structure requirements for the Project Baseline Schedule set forth on Attachment 8-1 to the General Conditions shall include Toll Zone and ETCS Element Milestones as Section 2.1.2.1(d).

**2.1.2.3** Conditions to Final Acceptance

As a condition to Final Acceptance, (i) DB Contractor shall provide the Systems Integrator Coordination Work, (ii) the Systems Integrator shall have completed its work, (iii) DB Contractor shall have facilitated the performance of the KCS Track Work by KCS, and (iv) the KCS Track Work shall be completed. Following Substantial Completion, DB Contractor shall deliver to TxDOT a plan to resolve any tolling infrastructure deficiencies within two days of notification thereof that are the responsibility of the DB Contractor. DB Contractor shall fully resolve any tolling infrastructure deficiencies within three days of submitting the aforementioned plan.

### 2.1.3 Special Utility Provisions

**2.1.3.1** DB Contractor acknowledges that the Price includes the following cost responsibility for Utility Adjustments in accordance with Transportation Code 203.092 as determined by the project type. DB Contractor is responsible for 100% of eligible cost of Adjustments for both Owner-Managed and DB Contractor Managed Utility Agreements. Utility Adjustments on this Project are eligible for federal participation. This Section 2.1.3.1 does not limit any of the obligations of TxDOT to make payments under the Transmission Line Relocation Agreements as set forth in Section 2.1.3.2. Notwithstanding anything to the contrary herein, if any of the City Utility Owners elects not to use DB Contractor to perform the applicable Utility Adjustments, DB Contractor shall not be responsible for paying directly to such City Utility Owner the costs of such Utility Adjustment, and TxDOT and DB Contractor will enter into a reductive Change Order removing such Utility Adjustments from the Work and decreasing the Price as set forth in Exhibit 23 to this DBA.

#### 2.1.3.2 Transmission Line Relocation Agreements

(a) The provisions set forth in this Section 2.1.3.2 shall apply to the Transmission Line Relocation Utility Adjustment Work, and to the extent of any conflict between these provisions and the rest of the Contract Documents, this Section 2.1.3.2 shall control. Except to the extent of any conflict as described in the immediately preceding sentence, all other provisions of the Contract Documents shall apply to the Transmission Line Relocations.

(b) TxDOT has entered into each of the Transmission Line Relocation Agreements and, subject Section 2.1.3.2(j) of this DBA, DB Contractor shall not be responsible for preparing or entering into any Utility Agreements with respect to any of the Transmission Line Relocations. DB Contractor hereby assumes all TxDOT's responsibilities under each of the Transmission Line Relocation Agreements and shall comply with and timely perform all obligations imposed on TxDOT by each of the Transmission Line Relocation Agreements; provided, however, that TxDOT shall remain responsible for paying the costs of (i) any reimbursements to Oncor, TMPA or BEP that are payable under its respective Transmission Line Relocation Agreement for the Transmission Line Relocations and (ii) all Utility Adjustment Work required to be performed by TxDOT or its agent under the Transmission Line Relocation Agreements.

(c) DB Contractor shall be responsible for causing, in accordance with the Project Schedule and each Transmission Line Relocation Agreement, all Utility Adjustment Work for the Transmission Line Relocations necessary to accommodate the design and construction of the Project. All Utility Adjustment Work related to the Transmission Line Relocations shall comply with (i) the Adjustment Standards in effect as of the Proposal Due Date, together with any subsequent amendments and additions to those standards that are necessary to conform to applicable Law, or are adopted by Oncor, TMPA or BEP and affect the applicable Utility Adjustment pursuant to the applicable Transmission Line Relocation Agreement, (ii) all applicable Laws, (iii) the applicable Transmission Line Relocation Agreement, and (iv) all other requirements specified in Item 14 of the Design-Build Specifications.

(d) TxDOT shall make reasonable efforts to enforce the applicable Transmission Line Relocation Agreement against Oncor, BEP and TMPA and to cause each of Oncor, BEP and TMPA to perform its obligations under its respective Transmission Line Relocation Agreement.

(e) If a conflict occurs between the terms of any Transmission Line Relocation Agreement and those of the Contract Documents, the terms that establish the higher quality, manner or method of performing

Utility Adjustment Work, establish better Good Industry Practice, or use more stringent standards shall prevail between DB Contractor and TxDOT.

(f) DB Contractor shall not enter into any agreement with any of Oncor, BEP or TMPA with respect to the Transmission Line Relocations that purport to bind TxDOT in any way, unless TxDOT has executed such agreement as a party thereto.

(g) If DB Contractor performs or furnishes Utility Adjustment Work that was initially anticipated to be performed or furnished by Oncor, BEP or TMPA under its respective Transmission Line Relocation Agreement, DB Contractor shall, to the extent that TxDOT is able to recover such cost from Oncor, BEP or TMPA (as applicable), be entitled to reimbursement from TxDOT for the actual cost to DB Contractor to perform such Utility Adjustment Work, provided that such cost is documented in a manner satisfactory to TxDOT.

(h) DB Contractor shall not be entitled to any time extension on account of the terms of any of the Transmission Line Relocation Agreements (including those related to any Betterment) and DB Contractor shall bear 100% of the risk of Critical Path delays caused by any of Oncor's, TMPA's or BEP's failure to timely comply with the requirements of its respective Transmission Line Relocation Agreement. Further, "Utility Owner Delay" shall not include any delay attributable to any of Oncor's, TMPA's or BEP's failure to cooperate with DB Contractor with respect to the Transmission Line Relocations.

(i) DB Contractor shall not be entitled to any increase in the Price or time extensions as a result of any increase in the extent, change in the character, or difference of the cost of the Utility Adjustment Work necessary for the Transmission Line Relocations from that anticipated in the applicable Transmission Line Relocation Agreement.

(j) Notwithstanding anything to the contrary in this Section 2.1.3.2, if for any reason, one of the transmission lines that is the subject of a Transmission Line Relocation Agreement must be relocated in a manner that is different from that set forth in the applicable Transmission Line Relocation Agreement, DB Contractor shall be solely responsible for such Utility Adjustment Work, including all costs and schedule impacts related thereto, and DB Contractor shall be obligated to enter into a Utility Agreement with the applicable Utility Owner for such work, and shall comply with all other requirements applicable to Utility Adjustments as set forth in the Contract Documents.

#### 2.1.3.3 Utility Adjustment Work for the City Utilities

The Contract Documents are hereby amended by the provisions set forth in Exhibit 23 to this DBA.

### 2.1.4 Obligations After Final Acceptance

DB Contractor's obligations prior to Final Acceptance shall be in accordance with the Contract Documents, including the maintenance requirements set forth in Item 27 of the Design-Build Specifications. DB Contractor's obligations after Final Acceptance shall be subject to the following requirements:

DB Contractor shall be responsible for the Warranty obligations set forth in Section 3.8 of the General Conditions.

The Contract Documents are hereby amended by the provisions set forth in Exhibit 4 to this DBA, and if TxDOT issues Maintenance NTP1, in addition to the Warranty obligations set forth in this Section 2.1.4, DB Contractor shall

be obligated to perform the Maintenance Services and all other obligations as set forth in the Capital Maintenance Agreement Documents set forth in Exhibit 4 to this DBA and the QAP for DB Projects.

### 2.2 DB Contractor's Proposal Commitments

DB Contractor's Proposal Commitments are as set forth in Exhibit 2, Appendix 1.

### 2.3 DB Contractor's ATCs

DB Contractor's approved ATCs for the Project are as set forth in Exhibit 2, Appendix 2.

### 2.4 Completion Deadlines

#### 2.4.1 Deadlines for Project Completion

The Completion Deadlines for the Project are as set forth below, as such may be adjusted by Change Order pursuant to the General Conditions.

| MILESTONE | COMPLETION DEADLINE |
|---|---|
| Substantial Completion Deadline | NTP1 plus [●] Days |
| Final Acceptance Deadline | Date of Substantial Completion plus 120 Days |

#### 2.4.2 Time is of the Essence

As a material consideration for entering into this Contract, DB Contractor hereby commits, and TxDOT is relying upon DB Contractor's commitment, to develop the Project in accordance with the time periods set forth in the Contract Documents. Except where the Contract Documents expressly provide for an extension of time, the time limitations set forth in the Contract Documents for DB Contractor's performance of its covenants, conditions and obligations are of the essence, and DB Contractor waives any right at law or in equity to tender or complete performance beyond the applicable time period, or to require TxDOT to accept such performance.

#### 2.4.3 No Time Extension

Except as specifically provided in Section 4.6 of the General Conditions, TxDOT shall have no obligation to extend a Completion Deadline, and DB Contractor shall not be relieved of its obligation to comply with the Project Schedule and meet the Completion Deadlines for any reason.

### 2.5 Job Training Plan

DB Contractor's approved Job Training Plan for the Project is set forth in Exhibit 5 to this DBA. The OJT program trainee goal for this project is [●] for trainees described in Section 3 of Exhibit 9 to Attachment 3-1 to the General Conditions.

### 2.6 DBE Goals

The Parties acknowledge that the Project is (or may be) funded with federal funds and the approved overall DBE participation goal for the Project is established as 8% of the Price.

### 2.7 DBE Performance Plan

The Parties acknowledge that the Project is (or may be) funded with federal funds and DB Contractor's approved DBE Performance Plan for the Project is set forth in Exhibit 6 to this DBA.

### 2.8 Prevailing Wages

DB Contractor shall pay, or cause to be paid, to all applicable workers employed by it or its Subcontractors performing the Work 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 this DBA.

### 2.9 TxDOT Owned Properties

DB Contractor may elect to use the parcel owned by TxDOT along US 75 at the southeast corner of the IH 635 and US 75 interchange (the "**High Five Site**") during the prosecution of the Construction Work; provided, however, that all DB Contractor activities planned for the High Five Site shall: (a) be confined to northern half of the property (north of the electric substation); (b) leave trees or other woody vegetation throughout the southern half of the property undisturbed; (c) leave woody vegetation along the channel or bank of Cottonwood Creek undisturbed; (d) not cause the removal of any existing stream crossings; (e) not cause the installation of any stream crossings along Cottonwood Creek or disturb any portion of the Cottonwood Creek channel or bank; and (f) screen storage and fabrication yards from view from adjacent accesses and frontage roads.

If DB Contractor intends to use the High Five Site, no later than thirty (30) days before NTP2, DB Contractor shall submit a master plan for the site (the "**HF Master Plan**") to TxDOT, which plan shall include: (A) the facilities that DB Contractor plans to construct, (B) the areas dedicated to fabrication, material storage, roadways, vehicle parking, vehicle maintenance, construction offices as well as temporary debris or waste accumulation, (C) the location of all existing and planned overhead and underground Utilities, and (D) the location of all fire lanes, emergency access points, security fencing and lighting. DB Contractor shall not access the High Five Site prior to TxDOT's approval of the HF Master Plan. DB Contractor may only use the High Five Site for the purposes shown on the HF Master Plan. Any subsequent revisions to the HF Master Plan shall be submitted to TxDOT for approval prior to such revisions being implemented by DB Contractor.

DB Contractor shall use and maintain the High Five Site in accordance with the following conditions: (i) the use of the property is limited to providing Project-related services exclusively for the Project, and the property may not be used by DB Contractor for any other business or commercial service; (ii) DB Contractor shall be responsible for obtaining any permit required by the State or other Governmental Entities to remodel, construct or occupy buildings on the property, and DB Contractor shall bear the cost to remodel, construct or occupy any buildings on the properties; (iii) vehicle movement on the property shall be confined to the parking areas and roadways shown on the HF Master Plan; (iv) DB Contractor shall provide a hard all weather surface for the roadways and parking areas shown on the HF Master Plan; (v) the property shall be maintained in a neat and presentable condition; (vi) DB Contractor shall provide for any insect and rodent control; (vii) inoperable vehicles shall not remain on the property for more than fourteen (14) days; (viii) DB Contractor shall ensure that all utility services are terminated when appropriate; (ix) DB Contractor shall vacate the property within thirty (30) days of [Substantial Completion]; and (x) DB Contractor shall return the property to neat and presentable condition as directed by TxDOT, which, at a minimum, shall be the same condition as when access was provided.

## SECTION 3. APPROVALS AND THIRD PARTY AGREEMENTS

### 3.1 TxDOT-Provided Approvals

TxDOT is responsible for all of the TxDOT-Provided Approvals set forth below.

| APPROVAL | DATE |
|---|---|
| Original I-635 LBJ East Environmental Assessment Finding of No Significant Impact (FONSI) | January 30, 2003 |
| Re-evaluation of I-635 LBJ East Environmental Assessment FONSI | April 24, 2017 |
| Skillman/Audelia Interchange Categorical Exclusion | June 23, 2015 |

**3.1.1** TxDOT has received all TxDOT-Provided Approvals as of the Effective Date.

**3.1.2** All conditions and requirements of the TxDOT-Provided Approvals shall automatically be deemed included in the scope of the Work.

### 3.2 Project Specific Third-Party Agreements

As described in Item 13 of the Design-Build Specifications, TxDOT has Third Party Agreements with local Governmental Entities along the Project corridor that define the requirements for construction, maintenance and operation of traffic signals, illumination and roadway maintenance, and that specify the local Governmental Entities' responsibilities and TxDOT's responsibilities with respect to the requirements. In accordance with Item 13 of the Design-Build Specifications, DB Contractor will assume and execute TxDOT's responsibilities and duties as defined in such Third Party Agreements to the extent set forth in Exhibit 8 to this DBA.

## SECTION 4. COMPENSATION

### 4.1 Price

As full compensation for performance of the Work and all other obligations of DB Contractor under the Contract Documents, TxDOT shall pay DB Contractor the lump sum Price of $[●], subject to adjustment by Change Order in accordance with the Design-Build Contract. Payments shall be made in accordance with the terms and conditions of the General Conditions.

### 4.2 Limitations on Payments

#### 4.2.1 Maximum Payment Schedule

The Maximum Payment Schedule for the Project is set forth in Exhibit 10 to this DBA.

#### 4.2.2 NTP1 Maximum Payment Amount

The "**NTP1 Maximum Payment Amount**" is $40,000,000.

### 4.3 Price Adjustment Due to Delay in NTP1

**4.3.1** TxDOT anticipates that it will issue NTP1 concurrently with or shortly after execution and delivery of this DBA, but shall have the right in its discretion to defer issuance. If the effective date of NTP1 is more than 180 days after the Proposal Due Date, and such delay in issuing NTP1 was not caused in whole or in part by the acts, omissions, negligence, intentional misconduct, or breach of applicable Law, contract or Governmental Approval of any DB Contractor-Related Entity, the Price will be adjusted by adding the following (which amount may not be less than zero) to the Price:

$$\Delta = N * (Price) * (([A-B]/B)/T)$$

where:

"$\Delta$" is the adjustment amount distributed on a *pro rata* basis over the remaining payments on the Maximum Payment Schedule;

"N" is the number of days in the period starting 180 days after the Proposal Due Date and ending on the effective date of NTP1;

"A" is the ENR Construction Cost Index (CCI) value published for the effective date of NTP1;

"B" is the CCI published for the month that contains the day that is N +15 days prior to the 15th day of the month that contains the effective date of the NTP1; and

"T" is the number of days between the 15th of the month for which the CCI value for "A" was taken and the 15th of the month for which the CCI value for "B" was taken.

**4.3.2** If a Change Order is issued during the period starting 180 days after the Proposal Due Date and ending on the effective date of NTP1, the price of the Change Order, if any, shall be adjusted based on the date that the Change Order is approved to the effective date of NTP1 using the formula set forth in Section 4.3.1 above, with "B" being the CCI for the month in which the Change Order is approved.

**4.3.3** If NTP1 has not been issued on or before 365 days after the Effective Date, the Parties may mutually agree to terms allowing an extension in time for issuance of NTP1 and adjustment of the Price. DB Contractor shall provide evidence satisfactory to TxDOT, meeting the requirements of Section 4.6.5 of the General Conditions, justifying the amount of any Price increase. If the delay in issuance of NTP1 was not caused in whole or in part by the acts, omissions, negligence, intentional misconduct, or breach of applicable Law, contract or Governmental Approval of any DB Contractor-Related Entity, and DB Contractor does not wish to negotiate an extension, or if the Parties fail to reach agreement in accordance with this Section 4.3.3, then DB Contractor's sole remedy shall be to terminate this Contract in accordance with Section 8.8.9 of the General Conditions.

**4.3.4** DB Contractor shall not be entitled to any increase in the Price or extension of the Completion Deadlines, nor shall DB Contractor have a right to terminate this Contract, with respect to any delay in issuance of NTP1 due to the acts, omissions, negligence, intentional misconduct, or breach of applicable Law, contract or Governmental Approval of any DB Contractor-Related Entity.

## SECTION 5. PERFORMANCE SECURITY

### 5.1 Bonds

With respect to DB Contractor's obligation to provide payment, performance and warranty bonds to TxDOT in accordance with Section 3.4 of the General Conditions, the following terms and conditions shall apply:

**5.1.1** The "**NTP1 Performance Bond Amount**" is $40,000,000.

**5.1.2** The "**NTP1 Payment Bond Amount**" is $40,000,000.

**5.1.3** The "**NTP2 Performance Bond Amount**" is $[*insert the portion of the Price allocable to Construction Work*].

**5.1.4** The "**NTP2 Payment Bond Amount**" is $[*insert the portion of the Price allocable to Construction Work*]

**5.1.5** Each bond and each rider required pursuant to Section 3.4 of the General Conditions shall be provided in the applicable form set forth in Exhibit 12 to this DBA.

### 5.2 Guaranty

**5.2.1** As of the Effective Date, a Guaranty [*insert appropriate bracketed text]*[is not required.][in the form attached to this DBA as Exhibit 13 shall be delivered and maintained in accordance with this Section 5.2 and the requirements of the Design-Build Contract, and the following shall be the Guarantor(s): [*insert legal names of Guarantor(s)*].]

**5.2.2** Each Guaranty assures performance of DB Contractor's obligations hereunder and shall be maintained in full force and effect throughout the duration of this Design-Build Contract and so long as DB Contractor has any obligations under the Contract Documents.

**5.2.3** DB Contractor shall report the Tangible Net Worth of DB Contractor, its Equity Members and Guarantors, if any, to TxDOT, on or before each anniversary of the Effective Date by means of audited financial statements of DB Contractor, its Equity Members and any Guarantors, and on a quarterly basis during the Term by means of certifications by the CFOs of the DB Contractor, its Equity Members and any Guarantors.

**5.2.4** If at any time during the course of this DBA, the total combined Tangible Net Worth of DB Contractor, its Equity Members (as applicable) and any Guarantors, is less than $400,000,000, DB Contractor shall provide one or more guarantees from a Guarantor acceptable to TxDOT so that the combined Tangible Net Worth of DB Contractor, its equity members (as applicable) and any Guarantors is at least $400,000,000. Each such Guaranty shall be in the form attached as Exhibit 13, together with appropriate evidence of authorization, execution, delivery and validity thereof, and shall guarantee the Guaranteed Obligations.

### 5.3 Insurance Special Provisions

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, insurance coverage in accordance with Section 3.5 of the General Conditions, and in accordance with the insurance policies, coverage, deductibles and limits specified therein.

## SECTION 6. CHANGE ORDERS

### 6.1 Differing Site Conditions

The "**Differing Site Conditions Deductible**" for the Project is the first $0 in additional Direct Costs.

The "**Differing Site Conditions Deductible Cap**" for the Project is an aggregate $0 for all Differing Site Conditions Deductibles borne by DB Contractor.

DB Contractor shall be entitled to an increase in the Price due to Differing Site Conditions only as provided in Section 4.6.9.1 of the General Conditions.

### 6.2 Relief Events

The terms "Force Majeure Events" and "Other Relief Events" shall have the meanings set forth in the General Conditions unless otherwise specified in this Section 6.2.

**6.2.1** Where TxDOT has included certain approved exhibit As for Work involving railroad property in the Reference Information Documents folders titled "Final KCS Exhibit As" and "Final DART Exhibit As" (such exhibit As referred to herein as "**Preliminary Exhibit As**") prior to the Proposal Due Date, if the final plans for such Work that are approved by the applicable railroad differ materially from the applicable Preliminary Exhibit A included in the Reference Information Documents, and such differences (a) have a material adverse impact on DB Contractor's obligations under the Contract Documents and (b) were not caused by either (i) modifications to the TxDOT Schematic Design that were initiated by DB Contractor or (ii) DB Contractor's election not to utilize the applicable Preliminary Exhibit A included in the Reference Information Documents, this shall constitute an Other Relief Event and DB Contractor may request a Change Order in accordance with the Other Relief Events provisions set forth in Section 4.6.9.3 of the General Conditions, subject to the requirements in Section 4.6 of the General Conditions.

**6.2.2** Section 4.6.9.3.2 of the General Conditions is hereby amended to add the following as a new subsections (i) and (j) thereto: "(i) Systems Integrator Delay; and (j) KCS Track Work Delay". All references to "clauses (a) through (h)" in Section 4.6.9.3.2 of the General Conditions are hereby revised as "clauses (a) through (j)".

### 6.3 Hazardous Materials

DB Contractor shall be entitled to a Price increase or an extension of a Completion Deadline due to Hazardous Materials only as provided in Section 4.6.9.4 of the General Conditions and subject to Section 4.6 of the General Conditions.

#### 6.3.1 Reimbursable Amount

In accordance with Section 4.6.9.4.1 of the General Conditions, and subject to Section 4.6 of the General Conditions, DB Contractor shall be entitled to an increase in the Price as compensation for (a) 50% of DB Contractor's Reimbursable Hazardous Materials Management Costs for Pre-existing Hazardous Materials encountered by DB Contractor that exceed $5,000,000 but do not exceed $8,000,000, (b) 100% of Reimbursable Hazardous Materials Management Costs for Pre-Existing Hazardous Materials encountered by DB Contractor that exceed $8,000,000, and (c) 100% of Reimbursable Hazardous Materials Management Costs for Pre-existing Hazardous Materials encountered on Additional Properties acquired as a result of a Necessary Basic Configuration Change or TxDOT-Directed Change. DB Contractor shall be responsible for all other costs related to Pre-existing Hazardous Materials.

#### 6.3.2 Time Extensions

DB Contractor shall be entitled to an extension of a Completion Deadline due to Hazardous Materials only as provided in Section 4.6.9.4.2 of the General Conditions and subject to Section 4.6 of the General Conditions.

### 6.4 Unidentified Utilities

#### 6.4.1 Unidentified Utilities Deductible

The "**Unidentified Utilities Deductible**" for the Project is, for each facility, the first $50,000 of Basic Costs for the Utility Adjustment due to an Unidentified Utility.

The "**Unidentified Utilities Deductible Cap**" for the Project is an aggregate $1,000,000 for all Unidentified Utilities Deductibles borne by DB Contractor.

DB Contractor shall be entitled to a Change Order with respect to certain additional Direct Costs and delays relating to Utility Adjustments, as specified in Section 4.5 of the General Conditions and subject to the restrictions and limitations set forth in Section 4.5 of the General Conditions and in Section 4.6 of the General Conditions.

#### 6.4.2 Time Extension for Unidentified Utilities

If DB Contractor encounters one or more Unidentified Utilities for which DB Contractor is entitled to compensation pursuant to Section 4.5 of the General Conditions, and the performance of the Utility Adjustments for such Unidentified Utilities results in delays to the Critical Path, such delay shall be borne equally by each Party (i.e., any affected Completion Deadline shall be extended by one day for every two full days of delay resulting from the performance of the Utility Adjustments for such Unidentified Utilities). If a delay as described in this Section 6.4.2 is concurrent with another delay which is DB Contractor's responsibility hereunder, then the delay shall be borne 100% by DB Contractor. If a delay due to the discovery of an Unidentified Utility is concurrent with another delay for which DB Contractor is entitled to a time extension, the period of TxDOT's responsibility for the delays shall run concurrently. The foregoing shall not preclude DB Contractor from obtaining a time extension with respect to New Utilities in accordance with Section 4.6.9.2.1 of the General Conditions. Except as otherwise expressly provided in this Section 6.4.2, no time extension will be allowed on account of the performance of Utility Adjustments for Unidentified Utilities. Relief pursuant to this Section 6.4.2 is subject to the restrictions and limitations set forth in Section 4.5 of the General Conditions and Section 4.6 of the General Conditions.

### 6.5 Access to Right of Way

DB Contractor shall be entitled to a Change Order for delays to the Critical Path due to failure of TxDOT to make available a portion of the Schematic ROW, or any Additional Properties that must be acquired due to a TxDOT-Directed Change, Force Majeure Event, or a Necessary Basic Configuration Change, as provided in Section 4.6.9.5 of the General Conditions and subject to the requirements of Section 4.6 of the General Conditions.

The Contract Documents are hereby amended by the provisions set forth in Exhibit 24 to this DBA.

### 6.6 Necessary Basic Configuration Changes

DB Contractor shall be entitled to an increase in the Price due to a Necessary Basic Configuration Change only as provided in Section 4.6.9.6 of the General Conditions and subject to the requirements of Section 4.6 of the General Conditions.

### 6.7 Form of Change Order

Each Request for Change Order and Change Order shall meet the requirements of Section 4.6 of the General Conditions and shall be provided in the applicable form set forth in Exhibit 14 to this DBA.

### 6.8 DB Contractor Reimbursement for Eminent Domain Assistance

In accordance with Section 4.4.2.1 of the General Conditions, DB Contractor shall be responsible for the performance of support services for the condemnation proceedings described in Item 15 of the Design-Build Specifications for any parcels within the Schematic ROW that require acquisition by eminent domain. DB Contractor shall be entitled to reimbursement for DB Contractor's reasonable out-of-pocket costs of providing such services up to the maximum amounts set forth in Exhibit 11 to this DBA.

## SECTION 7. FEES; LIQUIDATED DAMAGES

### 7.1 Fees for Early Issuance of NTP2

TxDOT may condition any early issuance of NTP2 pursuant to Section 8.1.1 of the General Conditions upon payment by DB Contractor to TxDOT the amount of $1,000 for each day during the period that NTP2 has been issued and any condition to NTP2 remains unsatisfied.

### 7.2 Liquidated Damages Respecting Delays

**7.2.1** The amounts of any liquidated damages for which DB Contractor may be liable pursuant to Section 8.6.1 of the General Conditions shall be as follows:

(a) $200,000 for each day after the Substantial Completion Deadline and through the date of Substantial Completion, but not to exceed 365 days;

(b) $50,000 per day for each day after the Final Acceptance Deadline and through the date of Final Acceptance.

**7.2.2** DB Contractor acknowledges that the liquidated damages described in this Section 7.2 are reasonable in order to compensate TxDOT for damages it will incur as a result of late completion of the Project or portions thereof as set forth in this Section 7.2 and Section 8.6 of the General Conditions.

### 7.3 Liquidated Damages for Lane Closures and Lane Rental Charges

The Liquidated Damages for Lane Closures and Lane Rental Charges for which DB Contractor may be liable pursuant to Section 8.6.2 of the General Conditions shall be as set forth in Exhibit 15 to this DBA. DB Contractor acknowledges and agrees that such Liquidated Damages for Lane Closures and Lane Rental Charges are reasonable in order to compensate TxDOT for damages it will incur as a result of such Lane Closures.

### 7.4 Key Personnel Change Fees; Key Personnel Unavailability Liquidated Damages

**7.4.1** As deemed compensation to TxDOT for Losses described in Section 8.3.1.4 of the General Conditions, DB Contractor agrees to pay to TxDOT the following Key Personnel Change Fees amounts in accordance with such section. The Key Personnel Change Fees shall be assessed in the amounts set forth below for changes to Key Personnel during the periods described below. Each period shall be determined by the progress percentages, which are calculated by dividing the DB Contractor's earned to date amount set forth in the most recent approved Draw Request by the Price.

| POSITION | KEY PERSONNEL CHANGE FEE PERIODS | | | |
|---|---|---|---|---|
| | **PERIOD 1 (0%-40% Progress Percentage)** | **PERIOD 2 (40%-60% Progress Percentage)** | **PERIOD 3 (60%-80% Progress Percentage)** | **PERIOD 4 (80%-100% Progress Percentage)** |
| Project Manager | $150,000 | $150,000 | $75,000 | $75,000 |
| Construction Manager | $150,000 | $150,000 | $75,000 | $75,000 |
| Design Manager | $150,000 | $75,000 | $75,000 | $37,500 |
| Lead MOT Design Engineer | $150,000 | $150,000 | $75,000 | $75,000 |
| Independent Quality Firm Manager | $150,000 | $150,000 | $150,000 | $75,000 |
| Professional Services Quality Assurance Manager | $150,000 | $75,000 | $75,000 | $37,500 |

**7.4.2** As deemed compensation to TxDOT for Losses described in Section 8.3.1.5 of the General Conditions, DB Contractor agrees to pay to TxDOT the following Key Personnel Unavailability Liquidated Damages amounts in accordance with such section, for each day that the relevant Key Personnel role is not filled by an approved individual:

| POSITION | KEY PERSONNEL UNAVAILABILITY LIQUIDATED DAMAGES (per day) |
|---|---|
| Project Manager | $10,000 |
| Construction Manager | $10,000 |
| Design Manager | $10,000 |
| Lead Maintenance of Traffic Design Engineer | $10,000 |
| Independent Quality Firm Manager | $10,000 |
| Professional Services Quality Assurance Manager | $10,000 |

### 7.5 Additional Acknowledgements Regarding Liquidated Damages

DB Contractor further agrees and acknowledges that:

**7.5.1** As of the Effective Date, the amounts of Liquidated Damages set forth herein 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's act or omission, and do not constitute a penalty.

**7.5.2** DB Contractor further acknowledges that these damages are incapable of accurate measurement because of, among other things, the unique nature of the Project and the unavailability of a substitute for it.

**7.5.3** The Parties have agreed to Liquidated Damages 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.

**7.5.4** Such sums are reasonable in light of the anticipated or actual harm caused, the difficulties of the proof of loss, and the inconvenience or infeasibility of otherwise obtaining an adequate remedy.

### 7.6 Noncompliance Points

The performance of the Work will not be subject to noncompliance points.

## SECTION 8. KEY SUBCONTRACTORS AND KEY PERSONNEL

### 8.1 Key Subcontractors

Key Subcontractors for the Project are as set forth in Exhibit 17 to this DBA.

### 8.2 Key Personnel

Key Personnel positions for the Project, and the approved individuals filling such Key Personnel roles as of the Effective Date, are as set forth in Exhibit 18 to this DBA. TxDOT requires the ability to contact certain Key Personnel, as specified in Exhibit 18, 24 hours per day, seven days per week.

## SECTION 9. NOTICE AND AUTHORIZED REPRESENTATIVES

### 9.1 Notices and Communications

**9.1.1** Notices under the Contract Documents shall be in writing and (a) delivered personally, (b) sent by certified mail, return receipt requested, (c) sent by a recognized overnight mail or courier service, with delivery receipt requested, or (d) sent by facsimile or email communication or posted to TxDOT's SharePoint site for the Project with receipt confirmed by telephone and followed by a hard copy, to the addresses set forth in this Section 9.1, as applicable (or to such other address as may from time to time be specified in writing by such Person).

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

[*DB Contractor / Firm Name*]
[*Address*]
[*Address*]
Attention: [*Name*]
Telephone: [●]
E-mail: [●]

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

[*Firm Name*]
[*Address*]
[*Address*]
Attention: [*Name*]
Telephone: [●]
E-mail: [●]

**9.1.3** All notices, correspondence and other communications to TxDOT shall be marked as regarding the I-635 LBJ East Project and shall be delivered to the following address or as otherwise directed by TxDOT's Authorized Representative:

Texas Department of Transportation
Dallas District
4777 E. Highway 80
Mesquite, TX 75150-6643
Attention: Mo Bur, P.E.
Telephone: (214) 320-6100
E-mail: mo.bur@txdot.gov

With a copy to:

Texas Department of Transportation
Project Finance, Debt & Strategic Contracts Division
125 East 11th Street
Austin, Texas 78701
Attention: Mr. Benjamin Asher
Telephone: (512) 463-8611
E-mail: *benjamin.asher@txdot.gov*

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

Texas Department of Transportation
General Counsel Division
125 East 11th Street
Austin, Texas 78701
Attention: Jack Ingram
Telephone: (512) 463-8630
E-mail: jack.ingram@txdot.gov

### 9.2 Designation of Representatives

**9.2.1** TxDOT and DB Contractor shall each designate Authorized Representative(s) who shall be authorized to make decisions and bind the Parties on matters relating to the Contract Documents. Exhibit 19 hereto provides the initial Authorized Representative designations. Such designations may be changed by a subsequent writing delivered to the other Party in accordance with Section 9.1.

**9.2.2** The Parties may also designate technical representatives who shall be authorized to investigate and report on matters relating to the administration, design and construction of the Project and negotiate on behalf of each of the Parties, but who do not have authority to bind TxDOT or DB Contractor.

## SECTION 10. REPRESENTATIONS AND WARRANTIES

### 10.1 Representations and Warranties

DB Contractor represents and warrants that:

**10.1.1** During all periods necessary for the performance of the Work, DB Contractor and all Subcontractors will maintain all required authority, license status, professional ability, skills and capacity to perform the Work in accordance with the requirements contained in the Contract Documents.

**10.1.2** As of the Effective Date, DB Contractor has evaluated the constraints affecting the Project, including the Schematic ROW limits, as well as the conditions of any TxDOT-Provided Approvals, and has reasonable grounds for believing and does believe that the Project can be administered, designed and constructed within such constraints.

**10.1.3** DB Contractor has evaluated the feasibility of performing the Work within the Completion Deadlines and for the Price, accounting for constraints affecting the Project and has reasonable grounds for believing and does believe that such performance (including meeting all Completion Deadlines for the Price) is feasible and practicable.

**10.1.4** Except as to parcels that TxDOT lacked title or access to prior to the Proposal Due Date, DB Contractor, in accordance with Good Industry Practice, examined or had the opportunity to examine the Site and surrounding locations, performed or had the opportunity to perform appropriate field studies and geotechnical investigations of the Site, investigated and reviewed available public and private records, and undertook other activities sufficient to familiarize itself with surface conditions and subsurface conditions, including the presence of Utilities, Hazardous Materials, contaminated groundwater, archeological, paleontological and cultural resources, and Threatened or Endangered Species affecting the Site or surrounding locations; and as a result of such opportunity for review, inspection, examination and other activities, DB Contractor is familiar with and accepts the physical requirements of the Work, subject to DB Contractor's rights to seek relief under Section 4.6 of the General Conditions. Before commencing any Work on a particular portion or aspect of the Project, DB Contractor shall verify all governing dimensions of the Site and shall examine all adjoining work (including any Adjacent Work) that may have an impact on such Work. DB Contractor shall ensure that any Design Documents and Construction Documents furnished as part of the Work accurately depict all governing and adjoining dimensions.

**10.1.5** DB Contractor has familiarized itself with the requirements of any and all applicable Laws and the conditions of any required Governmental Approvals prior to entering into this DBA. Except as specifically permitted under Section 4.6 of the General Conditions, DB Contractor shall be responsible for complying with the foregoing at its sole cost and without any additional compensation or time extension on account of such compliance, regardless of whether such compliance would require additional time for performance or additional labor, equipment or materials not expressly provided for in the Contract Documents. As of the Effective Date, DB Contractor has no reason to believe that any Governmental Approval required to be obtained by DB Contractor will not be granted in due course and thereafter remain in effect so as to enable the Work to proceed in accordance with the Contract Documents.

**10.1.6** All Work furnished by DB Contractor shall be performed by or under the supervision of Persons who hold all necessary and valid licenses to perform the Work in the State and by

personnel who are careful, skilled, experienced and competent in their respective trades or professions, who are professionally qualified to perform the Work in accordance with the Contract Documents and who shall assume professional responsibility for the accuracy and completeness of the Design Documents, Construction Documents and other documents prepared or checked by them.

**10.1.7** As of the Effective Date, DB Contractor is duly organized as specified in the preamble to this DBA and validly existing under the laws of the state of its organization, and has all requisite power and all required licenses to carry on its present and proposed obligations under the Contract Documents. DB Contractor and, if applicable, each of its members is duly qualified to do business, and is in good standing, in the State of Texas as of the Effective Date, and will remain in good standing throughout the Term and for as long thereafter as any obligations remain outstanding under the Contract Documents.

**10.1.8** The execution, delivery and performance of the Contract Documents to which DB Contractor is (or will be) a party have been (or will be) duly authorized by all necessary [corporate] action [of DB Contractor]; each person executing Contract Documents on behalf of DB Contractor has been (or at the time of execution will be) duly authorized to execute and deliver each such document on behalf of DB Contractor; and the Contract Documents to which DB Contractor is (or will be) a party have been (or will be) duly executed and delivered by DB Contractor.

**10.1.9** Neither the execution and delivery by DB Contractor of the Contract Documents to which DB Contractor is (or will be) a party nor the consummation of the transactions contemplated hereby or thereby is (or at the time of execution will be) in conflict with or has resulted or will result in a default under or a violation of the organizational documents or other governing instruments of DB Contractor.

**10.1.10** Each of the Contract Documents to which DB Contractor is (or will be) a party constitutes (or at the time of execution and delivery will constitute) the legal, valid and binding obligation of DB Contractor, enforceable against DB Contractor and, if applicable, each member of DB Contractor, in accordance with its terms, subject only to applicable bankruptcy, insolvency and similar laws affecting the enforceability of the rights of creditors generally and the general principles of equity.

**10.1.11** As of the Effective Date, there is no action, suit, proceeding, investigation or litigation pending and served on DB Contractor that challenges DB Contractor's authority to execute, deliver or perform, or the validity or enforceability of, the Contract Documents to which DB Contractor is a party, or that challenges the authority of DB Contractor official executing the Contract Documents; and DB Contractor has disclosed to TxDOT prior to the Effective Date any pending and un-served or threatened action, suit, proceeding, investigation or litigation with respect to such matters of which DB Contractor is aware.

**10.1.12** As of the Proposal Due Date, DB Contractor disclosed to TxDOT in writing all organizational conflicts of interest of DB Contractor and its Subcontractors of which DB Contractor was actually aware; and between the Proposal Due Date and the Effective Date, DB Contractor has not obtained knowledge of any additional organizational conflict of interest, and there have been no organizational changes to DB Contractor or its Subcontractors identified in its Proposal that have not been approved in writing by TxDOT. For this purpose, organizational conflict of interest has the meaning set forth in the Instructions to Proposers.

**10.1.13** At any time a Guaranty is required to be in place pursuant to the Contract Documents, the applicable Guarantor is duly organized, validly existing and in good standing under the laws of the state of its organization, is duly qualified to do business in and is in good standing in the State of Texas, and

will remain in good standing for as long as any obligations guaranteed by such Guarantor remain outstanding under the Contract Documents, and each such Guarantor has all requisite power and authority to carry on its present and proposed obligations under the Contract Documents.

**10.1.14** At any time a Guaranty is required to be in place pursuant to the Contract Documents, all required approvals have been obtained with respect to the execution, delivery and performance of such Guaranty, and performance of such Guaranty will not result in a breach of or a default under the applicable Guarantor's organizational documents or any indenture or loan or credit agreement or other material agreement or instrument to which the applicable Guarantor is a party or by which its properties and assets may be bound or affected.

**10.1.15** Each Guaranty has been duly authorized by all necessary corporate action, has been duly executed and delivered by each Guarantor, and constitutes the legal, valid and binding obligation of such Guarantor, enforceable in accordance with its terms, subject only to applicable bankruptcy, insolvency and similar laws affecting the enforceability of the rights of creditors generally and general principles of equity.

### 10.2 Survival of Representations and Warranties

The representations and warranties of DB Contractor contained herein shall survive the expiration or earlier termination of this Contract.

## SECTION 11. MISCELLANEOUS PROVISIONS

### 11.1 Dispute Resolution Procedures

Disputes shall be resolved pursuant to the administrative rules promulgated in accordance with Section 201.112(a) of the Code, adopted by TxDOT in accordance with the Texas Administrative Procedure Act, and effective under Rule §9.6 of Subchapter A, Chapter 9, Part 1, Title 43 of the Texas Administrative Code and subject to (i) the procedures set forth in Sections 4.9 and 4.10 of the General Conditions, (ii) the requirements set forth in Appendix 1 to Exhibit 20 to this DBA and (iii) the Disputes Board Agreement set forth as Appendix 2 to Exhibit 20 to this DBA.

The Parties' agreement regarding Dispute Resolution Procedures as set forth in this Section 11.1 shall survive expiration or earlier termination of the Term and thereafter for so long as either Party has any obligation originating under the Contract Documents.

### 11.2 Entire Agreement

The Contract Documents contain the entire understanding of the Parties with respect to the subject matter hereof and supersede all prior agreements, understandings, statements, representations, and negotiations between the Parties with respect to its subject matter.

### 11.3 Severability

If any clause, provision, section or part of the Contract Documents is ruled invalid under Section 11.1 hereof and Sections 4.9 and 4.10 of the General Conditions, or otherwise by a court having proper jurisdiction, then the Parties shall (a) promptly meet and negotiate a substitute for such clause, provision, section or part, which shall, to the greatest extent legally permissible, effect the original intent of the Parties, including an equitable adjustment to the Price to account for any change in the Work resulting from such invalidated portion; and (b) if necessary or desirable,

apply to the court or other decision maker (as applicable) that declared such invalidity for an interpretation of the invalidated portion to guide the negotiations. The invalidity or unenforceability of any such clause, provision, section or part shall not affect the validity or enforceability of the balance of the Contract Documents, which shall be construed and enforced as if the Contract Documents did not contain such invalid or unenforceable clause, provision, section or part.

### 11.4 Survival

DB Contractor's representations and warranties, the dispute resolution provisions contained in Section 11.1 and Exhibit 20 hereof and Sections 4.9 and 4.10 of the General Conditions, the indemnifications and releases contained in Section 7.12 of the General Conditions, the express rights and obligations of the Parties following termination of this DBA under Section 8.7 and Section 8.8 of the General Conditions, the provisions regarding invoicing and payment under Section 9.3 of the General Conditions, the obligations regarding Final Reconciliation under Section 9.7 of the General Conditions and all other provisions which by their inherent character should survive termination of this DBA and completion of the Work, shall survive the termination of this DBA and completion of the Work. The provisions of Section 11.1 and Exhibit 20 hereof and Sections 4.9 and 4.10 of the General Conditions shall continue to apply after expiration or earlier termination of this DBA to all Claims and Disputes between the Parties arising out of the Contract Documents.

### 11.5 Counterparts

This instrument may be executed in two or more counterparts, each of which shall be deemed an original, but all of which together shall constitute one and the same instrument.

### 11.6 [Joint and Several Liability

[*This Section 11.6 to be included only if DB Contractor is a joint venture.*]Each of the [●], [●] and [●] agree that it is jointly and severally liable for the performance of DB Contractor's liabilities and obligations under the Contract Documents; and that such joint and several liability shall not in any way be reduced, diminished or released by any change to the constitution of Design-Build Contractor. If any other Party or replacement Party to this DBA is or becomes a joint venture or a partnership, all members of such joint venture or partnership shall have joint and several liability for the obligations and liabilities of such Party under the Contract Documents, and such obligations and liabilities shall not in any way be reduced, diminished or released by any change in the constitution of such Party.]

**IN WITNESS WHEREOF,** this DBA has been executed as of the date first set forth above.

**DB CONTRACTOR:**
[*DB Contractor*]

By: _____
Name: [●]
Title: [●]

Date: _____

**TEXAS DEPARTMENT OF TRANSPORTATION:**

By: _____
Name: James M. Bass
Title: Executive Director

Date: _____

# EXHIBIT 1

## PROJECT SCOPE

The Work shall conform to the Basic Configuration and be consistent with the TxDOT Schematic Design. DB Contractor shall design and construct the Elements described below:

1. an approximately 11-mile section of I-635 from east of US 75 to I-30, including the I-30 interchange with transition work on I-635 extending south of the interchange, approximately 1.2 miles in length and an approximately 1.5-mile section of I-30 from west of Gus Thomasson Road to east of N Galloway Avenue;

2. full reconstruction and widening of the existing eight general purpose lanes to ten general purpose lanes, with auxiliary lane(s) between entrance ramps and exit ramps;

3. full reconstruction of the existing two toll managed lanes with access ramps to and from the toll managed lanes, including all tolling infrastructure;

4. full reconstruction of existing two lane discontinuous frontage road to two lane continuous frontage roads with auxiliary lanes in each direction;

5. full reconstruction of undercrossings/overcrossings and associated entrance and exit ramps, including Skillman/Audelia Interchange;

6. construction of sound walls;

7. construction of two railroad underpasses;

8. reconstruction of cross streets;

9. incidental improvements on cross streets to accommodate the reconstruction of the frontage roads and undercrossings/overcrossings, and addition of the new continuous frontage roads;

10. full reconstruction of the I-635/I-30 interchange and the associated transitional work on I-635 extending south of the interchange and the transitional work on I-30 extending east and west of the interchange;

11. full reconstruction of the I-635 existing eight general purpose lanes and auxiliary lanes to accommodate the new interchange; and

12. full reconstruction of the I-30 existing general purpose and reversible HOV lane to accommodate the new interchange.

# EXHIBIT 2

- Appendix 1: DB Contractor's Proposal Commitments
- Appendix 2: ATCs

# APPENDIX 1 TO EXHIBIT 2

## DB CONTRACTOR'S PROPOSAL COMMITMENTS

***[To be inserted from Proposal]***

| No. | Proposal Location | Proposal Commitment |
|---|---|---|
| 1 | | |
| 2 | | |
| 3 | | |
| 4 | | |
| 5 | | |

# APPENDIX 2 TO EXHIBIT 2

## ATCs

# EXHIBIT 3

Appendix 1: List of Reference Information Documents

Appendix 2: Portions of Reference Information Documents Incorporated in the Contract Documents for Purposes of DB Contractor Relief

# APPENDIX 1 TO EXHIBIT 3

## List of Reference Information Documents

# APPENDIX 2 TO EXHIBIT 3

## Portions of Reference Information Documents Incorporated in the Contract Documents for Purposes of DB Contractor Relief

- The documents under the folder titled "Utility Strip Map" in the RIDs to the extent set forth in Section 4.5.1 of the General Conditions and Section 4.6.9.2 of the General Conditions.

- The documents under the folders titled "I-635 LBJ East Geotechnical Information" and "Skillman Overcrossing Geotechnical Information" in the RIDs to the extent set forth in Section 4.6.9.1 of the General Conditions.

- The documents under the folder titled "Transmission Lines Relocation Final Plans" in the RIDs to the extent set forth in Section 2.1.3.2 of the DBA.

- The documents under the folder titled "Level A SUE" for the purpose of subsection (d) of the definition of TxDOT-Directed Change.

- The documents under the folder titled "Signed and Sealed Engineering Data" shall constitute the Signed and Sealed Engineering Data.

- The documents under the folders titled "Final KCS Exhibit As" and "Final DART Exhibit As" in the RIDs to the extent set forth in Section 6.2.1 of the DBA.

# EXHIBIT 4

## CMA AMENDMENTS

As set forth in Section 2.1.4 of the DBA, DB Contractor shall be obligated to perform the Maintenance Services and all other obligations set forth in the Capital Maintenance Agreement. Consequently, the General Conditions are amended as follows: (i) underlined text is hereby added to the General Conditions and (ii) stricken text is hereby deleted therefrom.

1. A new Section 4.6.5.6 is added to the General Conditions as follows:

   4.6.5.6 **Change Order Affecting Capital Maintenance Agreement**

   Each Change Order shall be signed by DB Contractor in its capacity as both the DB Contractor under the DBC and the DB Contractor under the CMA. Each Change Order shall state whether a change order will also be required under the CMA as a result of the change in the Work, and the reasons for such change order. If DB Contractor fails to notify TxDOT that a change order will be required under the CMA as required by this Section 4.6.5.6, such failure shall constitute DB Contractor's waiver of any right to seek such a change order.

2. Section 7.6.1.1 of the General Conditions is revised as follows:

   7.6.1.1 DB Contractor shall be responsible for maintenance of the Work and the Site in accordance with Item 27 of the Design-Build Specifications. Upon Final Acceptance, TxDOT shall assume the maintenance obligations for the Project; provided, however, that if TxDOT issues Maintenance NTP1 under the CMA, DB Contractor shall be responsible for the Maintenance Services pursuant to the terms of the CMA Documents. DB Contractor shall be relieved from responsibility for maintenance of all other portions of the Project except that DB Contractor shall be responsible for (a) maintenance of improvements owned by third parties until control of and maintenance responsibility for such improvements has been formally transferred to the third parties; (b) maintenance of mitigation sites in accordance with the Environmental Compliance and Mitigation Plan required by Item 27.6.8 of the Design-Build Specifications and any other extended maintenance responsibilities set forth in the Design-Build Specifications; and (c) maintenance within any work zones that DB Contractor implements during the performance of corrective Work in accordance with the Warranty under Section 3.8. This Section 7.6.1.1 shall not apply to, or limit, DB Contractor's obligations under the CMA Documents.

3. A new Subsection 8.7.1.1(q) is added to the General Conditions as follows:

   (q) An Event of Default under the CMA Documents.

4. A new Subsection 8.7.1.2(e) is added to the General Conditions as follows:

   (e) Respecting a DB Contractor Default under clause (q) of Section 8.7.1.1, any cure period permitted under the terms of the CMA Documents.

5. A new Section 9.4.3 is added to the General Conditions as follows:

9.4.3 **Withholding for Maintenance Security**

TxDOT shall retain from the Final Payment, and if it reasonably appears there will be insufficient funds at Final Payment, from progress payments, $[*insert amount of Maintenance Security*] as security for the provision of the Maintenance Security required under Section 7 of the CMA. DB Contractor shall have the option at any time to deliver an irrevocable letter of credit in the amount of $[*insert amount of Maintenance Security*] in lieu of the retained sums in a form and on terms acceptable to TxDOT in its discretion. TxDOT shall release the retained $[*insert amount of Maintenance Security*] or letter of credit, as applicable, to DB Contractor upon (a) the provision of the Maintenance Security required under Section 7 of the CMA within 60 days after TxDOT's issuance of Maintenance NTP1, or (b) the election of TxDOT not to issue Maintenance NTP1 within 180 days after Final Acceptance. In the event TxDOT does not receive the Maintenance Security required under Section 7 of the CMA by the deadline set forth therein, DB Contractor shall forfeit as liquidated damages and not as a penalty such sums, or if a letter of credit is provided in lieu of retained amounts, TxDOT shall have the right to draw on the letter of credit.

# EXHIBIT 5

# JOB TRAINING PLAN

**EXHIBIT 6**

**DBE PERFORMANCE PLAN**
**(to be replaced by the TxDOT-approved DB Contractor DBE Performance Plan)**

[Insert DB Contractor Name Here]

# DBE Performance Plan & Subcontracting Plan

Project: [Insert Project Name Here]

Prepared by: [Insert Name Here] , [Insert title Here]

Initial Draft: [Insert date here]

Revision 1: [Insert date here]

[Include additional revisions and dates, as applicable]

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| 4 | Standard Professional Services Agreement |
| 5 | Standard Subcontract Document |
| 6 | Federally Required Provisions |
| 7 | DBE Compliance and Monitoring Process Workflow |

**DBE Performance Plan & Subcontracting Plan**

***The [Insert DB Contractor Name] shall update the DBE Performance Plan quarterly or more frequently as requested by the Department.***

***Items in italics are recommendation and for information only.***

***This DBE Performance Plan is a pre-approved sample template listing the items that must be included in the DBE Performance Plan per TxDOT's programmatic contract documents. Although this is a pre-approved sample template, it is the DB Contractor's responsibility to comply with Contract Document requirements related to the Departments DBE Program.***

## 1. Definitions

*For specific definitions regarding terms applicable to the DBE Program, please refer to DBE Special Provision in the DBC and 49CFR26.*

## 2. Policy Statement

It is the policy of the DOT and the Texas Department of Transportation (Department) that DBEs, as defined in 49 CFR Part 26, Subpart A, and the Department's DBE Program, will have the opportunity to participate in the performance of contracts financed in whole or in part with federal funds. The DBE requirements of 49 CFR Part 26 and Department's DBE Program apply to this Design-Build Contract as follows.

The DB Contractor will solicit DBEs through reasonable and available means (reasonable and available means as defined in 49 CFR Part 26, Appendix A and the Department's DBE Program), or show Good Faith Efforts to meet the DBE goal for this Design-Build Contract.

The DB Contractor and its subcontractors shall not discriminate on the basis of race, color, national origin or sex in the performance of this Design-Build Contract. The DB Contractor shall carry out applicable requirements of 49 CFR Part 26 in the award and administration of this Design-Build Contract. Failure to carry out these requirements is a material breach of this Design-Build Contract, which may result in the termination of this Design-Build Contract or such other remedy as the Department deems appropriate.

The requirements of this Special Provision must be physically included in any subcontract including all tiers of subcontracts.

By signing the Design-Build Contract, the DB Contractor certifies that the DBE goal as stated in the Design-Build Contract will be met by obtaining commitments from DBEs or that, if the DBE goal as stated in the Design-Build Contract is not met, the DB Contractor will provide acceptable evidence of Good Faith Efforts to meet the DBE goal.

## 3. Disadvantaged Business Enterprises (DBE) Commitment

[Insert DB Contractor Name] is committed to fully integrating meaningful DBE participation into our team for this TxDOT [Insert Project name here] (Project) through outreach, technical assistance/supportive services, compliance monitoring and reporting. [Insert DB Contractor Name] proposes to accomplish maximum DBE participation through an organized outreach, solicitation, and subcontracting plan.

This commitment is made in support of the Project goal as stated in Section 2.6 – DBE Goals of the DBA:

The overall Project DBE participation goal is [Insert project DBE participation goal percentage] which includes design and construction. [Insert DB Contractor Name] commits to:

1) Submitting commitments on DBE design firms within 60 days of NTP1 (contract execution) and

2) Submitting commitments on DBE construction firms prior to the commencement of construction. Should an existing DBE firm receive additional work, the DB Contractor will submit a revised DBE commitment form for the firm to the Department.

[Insert DB Contractor Name] is committed to implementing the Project's DBE program in accordance with the federal and local guidelines found in 49 CFR Part 26 and the Department's DBE program. The [Insert DB Contractor Name] team is aware of its obligations as stated in 26 CFR 26.53(e) and Department's DBE Special Provision (Attachment 3-2). [Insert DB Contractor Name] is committed to complying with all DBE program regulations.

This commitment will be supported by a quarterly tracking system to guide the acquisition of subcontractor services in the achievement of the Project goal. See Section 11 for details.

## 4. Anticipated Areas of Consulting & Contracting Opportunities

| | | |
|---|---|---|
| *[Signing* | *Erosion Protection* | *Design Survey support* |
| *Illumination* | *Storm Sewer* | *Subsurface utility services* |
| *Signals* | *Waterline* | *Design support* |
| *Striping* | *Sanitary Sewer* | *Environ support services* |
| *Painting* | *Sidewalk* | *Utility relocation design* |
| *Barricades* | *Driveways* | *Design Quality Services* |
| *Guardrail* | *Riprap* | *Environmental Compliance* |
| *Crash Attenuators* | *Misc. Concrete* | *Construction Quality Control* |
| *Sod/Seeding* | *Re-Steel (furnish & place)* | *Construction Quality Acceptance* |
| *Landscaping* | *Geotechnical Services]* | |

DB Contractor will insert a procurement timeline for each contracting opportunity, initially, and as the project schedule is updated in accordance to DBE Special Provision, Attachment 3-2.

This list is not comprehensive but represents initial management view of possible project opportunities.

A link to the list of qualified DBEs' can be found Section 2 of the DBE Special Provision, Attachment 3-2 or below:

https://txdot.txdotcms.com/FrontEnd/VendorSearchPublic.asp?TN=txdot&XID=2340

## 5. Outreach

Our outreach programs in partnership with the Department will include:

- [Good faith efforts performed to date.
- During the Proposal phase, DBEs were interviewed and selected for professional services.
- A DBE project information meeting.
- Incorporation of opportunities in project website.
- Project and contracting advertisements in local and minority publications.
- Collaboration with other organizations to present/advertise project opportunities.
- Collaboration with TxDOT's Programs for DBE's such as PAVED, TBOD and the local TUCP.
- Participation at DBE-related events and conferences.

- Provision of project plans at plan rooms maintained by minority and women business organizations.
- Project Marketing Collateral.
- One-on-one Meeting with interested firms.
- Project Presentations.]

## 6. Professional Services Procurement

### a. General

Professional services firms are chosen on a Qualification Based Selection process. The general steps followed are outlined below. The process is more subjective than construction subcontracting which relies on prequalified firms. The criteria outlined in Section 6.d (1) must be evaluated and matched to the needs of the project and how all commitments are fulfilled.

DBE professional service firms will have their certification verified. All firms will be required to meet the Department's criteria for performing professional services in their respective discipline.

[DB Contractor to insert approach here to include steps in providing information to potential DBE firms, as well as, how the DB Contractor expects to receive information from the DBE firms…]

### b. Proposal Phase Solicitations

DBE firms that were identified as meeting the requirements of Section 6.d below as well as being available as exclusive partners during the proposal phase were engaged by teaming agreements and participated in the proposal process. Subsequent to award, negotiations will be conducted with these firms. The following firms were included in our proposal and upon award will contribute towards meeting the DBE contract goal:

- [List DBE firms here]

### c. Execution Phase Solicitations

(1) The solicitation of additional professional services to meet the DBE requirement may become necessary during the execution of the Project for a variety of reasons such as:

(a) Added scope to the Project;

(b) Scope that was not fully defined during the Proposal preparation;

(c) Additional assistance or resources were determined to be necessary to support the Project schedule; and

(d) The inability to successfully negotiate a scope of service or fee with a previously selected firm.

DBE Goal is based on the value of the executed contract. The DBE participation value may increase, or decrease based on changes to the project contract value.

(2) A new solicitation will be issued for the services needed. The proposals submitted must be responsive to the solicitation. The following section outlines procedures for the selection process.

(3) Solicitations for proposals will be made based on need determinations discussed in the previous sections. Various resources will be used to target the subcontracting community such as but not limited to:

(a) Use our corporate vendor list;

(b) Contacts develop from outreach events;

(c) Use of the Department's DBE directory;

(d) Use of the TUCP, the local DBE certifying agency;

(e) Coordination with other subcontractor advocacy groups; and

(f) Local DBE organizations

(4) Any DBE firm selected must have their certification verified through the TUCP directory.

d. **Proposal Evaluation & Negotiation**

(1) The following criteria will be used for professional services:

[At a minimum the following items will be checked by the DB Contractor]

(a) Ability to provide the number of qualified personnel to complete the required tasks on time;

(b) Possess the requisite licenses for both the firm and personnel to authorize participation;

(c) Documentation of design project completion on time and within budget;

(d) Quality of previous project work completed, including references from past project owners (clients);

(e) Ability to start when required; and

(f) Consideration of the DBE goal for the Project.

(2) Attempt to negotiate scope, schedule of values, terms, conditions, and price with the selected proposer.

(3) If the negotiations stall or fail, repeat the process.

## 7. Construction Subcontractor Procurement

a. **General**

*It is prevalent practice in the design-build procurement process for the Design-Builder to solicit pricing from the subcontracting community based on 30% (or less) plans. [Therefore, DB Contractor to insert approach here to include plan development stage and potential risk to the DBE subcontractor…]*

b. **Bid Package Development**

(1) *[Insert DB Contractor process to include approach to providing fully developed plans to the subcontracting community, direction on how a bid package will be developed, etc.…]*

c. **DBE Identification & Solicitations**

(1) [Solicitations will contain the following information regarding the requested price proposal:

- *Project information*
- *Scope or items of work*
- *Date proposal is due*
- *Where to view plans and specs*
- *Where and how to submit price proposal*
- *To whom the proposal should be directed*
- *To whom all questions should be directed*
- *A CPM schedule illustrating when the work is to be performed*
- *Environmental, Permits, Issues, & Commitment (EPIC) Sheets associated with the work to be performed*

(2) *First time responders to a [Insert DB Contractor Name] solicitation will be required to complete a subcontractor questionnaire and participate in an interview to determine qualifications, capabilities and capacity to avoid potential issues such as DBEs failing to perform a commercially useful function. If selected, the DBE firm will be required to use Department's Compliance Monitoring and Tracking System to report work progress.*

(3) *Every effort will be made to allow two weeks to respond to any price proposal solicitation however this cannot be guaranteed. Exceptions may be granted on a case basis for non-critical items at the discretion of [Insert DB Contractor Name].*

(4) *Responsiveness – [Insert DB Contractor Name] will attempt to contact any subcontractor that did not respond to the solicitation. The reason for not quoting, if provided, will be documented.]*

d. **Proposal Evaluation**

(1) *[Insert DB Contractor process for evaluating bid proposals]*

**8. Subcontract Agreement**

a. Subcontract agreements (Subcontract) shall identify, define, and include those specific services, items, terms, and conditions that are consistent with the Contract and the scope of work including anticipated duration. The Department will monitor and ensure a commercially useful function

(CUF) review is performed. These reviews are for the purpose of ensuring that the DBE is performing and managing the work.

b. The Subcontract will be prepared and submitted with all required conditions and attachments for execution.

c. The following items are clearly defined and included in all professional services subcontracts:

(1) Identification of parties;

(2) Definition of work (scope, methods, end results);

(3) Definition of Client's responsibility;

(4) Provisions for contract changes;

(5) Compensation;

(6) Method of payment; and

(7) Federally required provisions.

d. The following terms and items are included in all construction subcontracts:

(1) Parties to the contract;

(2) Contract start and end dates;

(3) Scope of Work, including deliverables;

(4) DBE Special Provision;

(5) Schedule of Values;

(6) Payment due dates;

(7) Terms and conditions relating to premature contract termination;

(8) Terms and conditions relative to undue delays;

(9) Means to resolve claims and deputes;

(10) Indemnification terms and conditions; and

(11) Federally required provisions.

e. Any exceptions taken by the Subcontractor with regards to any of the business terms and conditions of the subcontract document will be negotiated (that is in the purview to negotiate).

f. Upon complete execution of the document, a copy will be provided to the Department.

## 9. Execution of the Work

### a. DBE Responsibilities

(1) Subcontracted work will be executed in a professional manner.

(2) The subcontractor will be an independent business and employer under the laws of Texas and will assume all the rights and responsibilities accordingly.

(3) The subcontractor will be required to diligently and faithfully execute the work covered by its agreement.

(4) The subcontractor will comply with all of the requirements of its subcontract and the Contract.

(5) The subcontractor will be required to provide monthly progress in the Department's Compliance Monitoring and Tracking System.

### b. Administration

(1) The subcontractor will report monthly, in the Department's Compliance Monitoring and Tracking System, at an agreed upon recurring monthly date, their progress quantities for the previous pay period for verification by and concurrence of the Project Manager, Deputy Project Manager, or the Construction Manager.

(2) The subcontractor will be required to carry the requisite insurance outlined in the Contract. Good Faith Efforts (GFE) in accordance with 49CFR25, Appendix A, Item F must be followed prior to rejecting a DBE proposal for failure to provide insurance as outlined in the Contract.

(3) The subcontractor will comply with administrative obligations imposed by federal requirements.

(4) The subcontractor will be required to submit any applicable reports, in the Department's Compliance Monitoring and Tracking System, such as but not limited to:

(a) Monthly progress quantities;

(b) Daily quality control reports;

(c) Certified payrolls; and

(d) DBE participation reports.

### c. Direction and Management

(1) The subcontractor will receive overall schedule and work priorities from Project Manager, Deputy Project Manager, or Construction Manager.

(2) The subcontractor is an independent business and will be required to plan, manage, oversee, and execute their contracted work in accordance with project schedule and the direction of the Project Manager, Deputy Project Manager, or Construction Manager.

(3) The subcontractor will be a licensed participant in the contractor's document management software at a security level deem appropriate by the Project Manager, Deputy Project Manager, or Construction Manager.

d. **Quality**

(1) The subcontractor will be obligated to abide by the Project Quality Management Plan (QMP).

(2) The subcontractor will be accountable for their deficient work and responsible for the implementation of the approved correction or remedy.

(3) The subcontractor will be responsible for initiating their own technical submittals associated with the items of work.

e. **Environment**

(1) Protection of the environment is a priority for every project. The Subcontractor shall abide by the Project Comprehensive Environmental Protection Plan (CEPP).

(2) The subcontractor will be required to attend the project environmental briefing/training.

(3) The subcontractor will be required to comply with all environmental commitments on the project that have direct bearing on its work.

(4) The subcontractor will comply with all applicable permits, laws, and regulations governing this project and the work subcontracted.

f. **Safety**

(1) The subcontractor is required to have its own safety program or model one after the contractor's.

(2) The subcontractor will insure their safety program is no less stringent than the Project Safety & Health Plan.

(3) The subcontractor will comply with the Project Safety & Health Plan.

(4) The subcontractor will participate in project safety briefings.

(5) The subcontractor shall be responsible for the safety of its employees.

(6) The subcontractor shall comply with all local, state, and federal safety requirements and regulations.

g. **Commercially Useful Function (CUF)**

(1) Field supervision to monitor DBE work performance to verify compliance with subcontract documents paying particular attention to whether the DBE is using its own forces and equipment. A DBE performs a CUF when it is responsible for execution of the work of the contract and is carrying out its responsibilities by actually performing, managing, and supervising the work involved. To perform a CUF, the DBE must also be responsible, with

respect to materials and supplies used on the contract, for negotiating price, determining quality and quantity, ordering the material, and installing (where applicable) and paying for the material itself. Report any activity of concern to DBE Program Coordinator or DBE Program Manager.

(2) Work with the Department on DBE work schedules so that a CUF review can be scheduled and conducted early in the project.

(3) Follow-up with the Department on CUF findings.

(4) Assist the Department as necessary on CUF monitoring throughout the course of the project.

(5) In the event of a non-CUF finding, consult with the Department on:

(a) Impacts to the project goal and the need for additional DBE credit.

(b) Whether other administrative actions are appropriate.

h. **Assistance to DBEs**

(1) [Insert DB Contractor Name] shall not provide any assistance to the DBE in the general performance of its work. The term assistance is defined in the broadest possible sense:

(a) Labor, equipment, or materials;

(b) Supervision;

(c) Ordering materials for the DBE from their suppliers;

(d) Fuel; and

(e) Any other item one would reasonably expect a viable subcontractor to provide for themselves.

(2) The only exceptions permitted by specification and allowed by [Insert DB Contractor Name] are under emergency conditions where:

(a) The safety of workers and the public is at risk;

(b) The work in progress is subject to a total loss (i.e. lose a concrete pour); and

(c) The traveling public will be seriously impacted, and excessive travel delays incurred.

(3) In the event of any emergencies as defined by Section 9.h(2), the Project Manager or is designated representative is required to call in a report to Compliance Manager outlining the circumstances and the assistance rendered. The Department will be notified immediately. A DBE EMERGENCY ASSISTANCE – CALL IN LOG will be completed. The DBE Liaison Officer will assess the value of the assistance. The value of the assistance will be deducted from the Project DBE monthly progress report.

(4) [Insert DB Contractor Name] serves as an advocate for all its subcontractors (DBE and non-DBE) with the Department in the event of changes, change orders, and payment.

(5) Joint Checks for DBEs

(a) The request for a joint check request must emanate from the DBE and/or their supplier. The request must be on the DBE's letterhead or equivalent. If no joint check agreement is provided to [Insert DB Contractor Name], the Subcontractor will utilize the Contractor's version. If a joint check agreement is provided by the DBE and/or their vendor, the Chief Financial Officer (CFO) must review and edit as necessary to maintain compliance with the DBE special provision and provides sound legal protection for [Insert DB Contractor Name].

(b) Prior to any joint check being issued, its use must be approved by the Department. CFO will prepare a request using the Department's Form 2178 signed by the DBE Liaison Officer. The form will be submitted to the Department by fax or email. Copies of the DBE's request, the joint check agreement and the associated Department Form 2178 will remain on file for audit purposes.

(c) CFO prepares the joint check in the amounts acceptable to the DBE and their supplier. The check will be sent to the DBE in a manner requested by the DBE (i.e. US Mail, Fed-Ex, etc.) All requirements shown on Department Form 2178 will be followed as well as those outlined in governing laws, rules, and regulations. Under no circumstances will the check be mailed directly to the supplier or will the DBE be required to endorse the check on our premises for [Insert DB Contractor Name] direct mailing to the supplier.

## 10. Payment

### a. Monthly Progress Payments

(1) Monthly progress payments will be made by the 10th business day following payment received by [Insert DB Contractor Name] for the items of work performed by the subcontractor. Payment to each DBE subcontractor will be recorded in the Department's Compliance Monitoring and Tracking System. All DBE subcontractors are required to pay their subcontractors within 10 business days following payment received by the DB Contractor.

(2) A number of instances can impact payment time that are outside the control of the DB Contractor or higher tier Consultant:

(a) The failure of the subcontractor to provide an invoice in a timely manner;

(b) Quality issues with the subcontractor's work;

(c) Apparent prompt pay or violations of other federally required provisions;

(d) Failure to pay vendors for materials purchased and used in the project;

(e) The Department's failure to provide copies of pay estimates in a timely manner; and

(f) Delays by the Department in payments to the DB Contractor.

b. **Withholding Progress Payments**

(1) Progress payments may be withheld for any violation or breach of a subcontract requirement such as but not limited to:

(a) Failure to comply with prompt pay requirements;

(b) Failure to be responsive to the Department or [Insert DB Contractor Name]; or

(c) Failure to comply with any subcontract provision that creates a non-compliance with the Contract.

(2) Efforts by [Insert DB Contractor Name] will be made to expeditiously remedy any impediments so that payments can be made as soon as possible.

(3) Any payment dispute will be reflected and reported monthly in the Department's tracking system.

## 11. Reporting

[Insert DB Contractor Name] will comply with the contract compliance monitoring and tracking requirements as stipulated in General Conditions, Attachment 3-2. [Insert DB Contractor Name] and DBEs will provide any noted and requested contract compliance-related data electronically in the Department's compliance monitoring and tracking system. This includes commitments, monthly payments, substitutions, good faith efforts, and Final Report (see Attachment 3-2).

a. **DBE Commitment Schedule**

We will attach a DBE commitment Form and supporting documentation, as described in Section 2.3.4 of Attachment 3-2, via the Department's tracking system upon selection of DBE subcontractor. Progress of commitments towards goal attainment will be monitored as required in Attachment 3-2.

b. **Monthly Reporting Schedule**

DBE monthly progress will be reported via the Department's Compliance Monitoring and Tracking System within 15-days after the end of a calendar month.

c. **Quarterly DBE Progress Tracking**

A quarterly report will be generated which will track commitments, progress, and projected outcomes for DBE participation. The report will track areas available for participation to guide solicitations when construction packages are ready for distribution.

d. **Final DBE Report Schedule**

Per General Conditions, Attachment 3-2, final determination of DBE participation will occur once final payment is made to all DBEs on the Project is made thru the Department's Compliance Monitoring and Tracking System and after the DBEs work is satisfactorily complete, even if final acceptance has not occurred.

e. **DBE Truckers**

If truckers are to be used towards the project goal, in addition to all the required forms, the DBE Trucking Utilization Form 2660 will be submitted for approval by the District and prior to hauling services performed for DBE credit. A request can occur via the Department's Compliance Monitoring and Tracking System as an attachment or manual submission.

**The [Insert DB Contractor Name] shall update the DBE Performance Plan quarterly or more frequently as requested by the Department. If the Project's Preliminary Baseline Schedule is updated impacting the DBE firm schedule, [Insert DB Contractor Name] will issue a new schedule to the DBE firm.**

## 12. Good Faith Efforts Documentation

Documentation from solicitation process as described in Sections 6 and 7 will be maintained. Should it become necessary to submit a good faith effort demonstration, documentation in accordance with Exhibit 6 of the DBA shall be followed.

## 13. Termination

a. Termination for convenience of a DBE subcontractor is NOT allowed unless the prime contract is terminated for convenience by the Owner.

b. Termination may occur due to the direction of the Department.

c. Termination for breach of contract may be for any action(s) include but are not limited to:

(1) Safety/OSHA violations;

(2) Environmental violations;

(3) Illegal or illicit conduct (misappropriation, etc.);

(4) Failure to perform work according to the Department's specifications;

(5) Violation of DBE rules and regulations (i.e. commercially useful function, etc.);

(6) Nonpayment of employees or bills (materials);

(7) Non-responsive to the project schedule;

(8) Failure to provide adequate resources;

(9) Unprofessional conduct; and

(10) A subcontractor removal request by the Department.

d. Any actions that could lead to termination for a DBE subcontractor must be documented and forwarded to the Department for concurrence. DB Contractor must adhere to the requirements set forth in Attachment 3-2 – DBE Special Provision.

e. Adequate opportunities must be afforded to the DBE to remedy deficiencies in accordance with the terms of the subcontract.

f. Consultation with and approval by the Department must occur prior to taking any termination action for a DBE subcontractor.

## 14. Replacement

If the DBE is part of the project goal and the DBE quits and/or is terminated, [Insert DB Contractor Name] should solicit new quotations for the remaining work from other DBEs or solicit quotations for other work available for DBEs. [Insert DB Contractor Name] will document the termination/substitution requests in the Department's Compliance Monitoring and Tracking System.

Submit to the Department for approval following the "Contract Award" procedures.

If no DBEs can be found to fulfill the goal, document and submit "Good Faith Efforts" in the Department's Compliance Monitoring and Tracking System using Form 2603 (See Sections 6, 7, and 12 for procedures).

## 15. DBE Program Oversight

a. DB Contractor:

(1) DBE Liaison Officer – [Insert name here], [Insert title here]

(2) Program Administration – [Insert name here], [Insert title here]

(3) Project Manager – [Insert name here]

(4) Deputy Project Manager – [Insert name here]

(5) Construction Manager – [Insert name here]

(6) Document Manager – [Insert name here]

b. The Department:

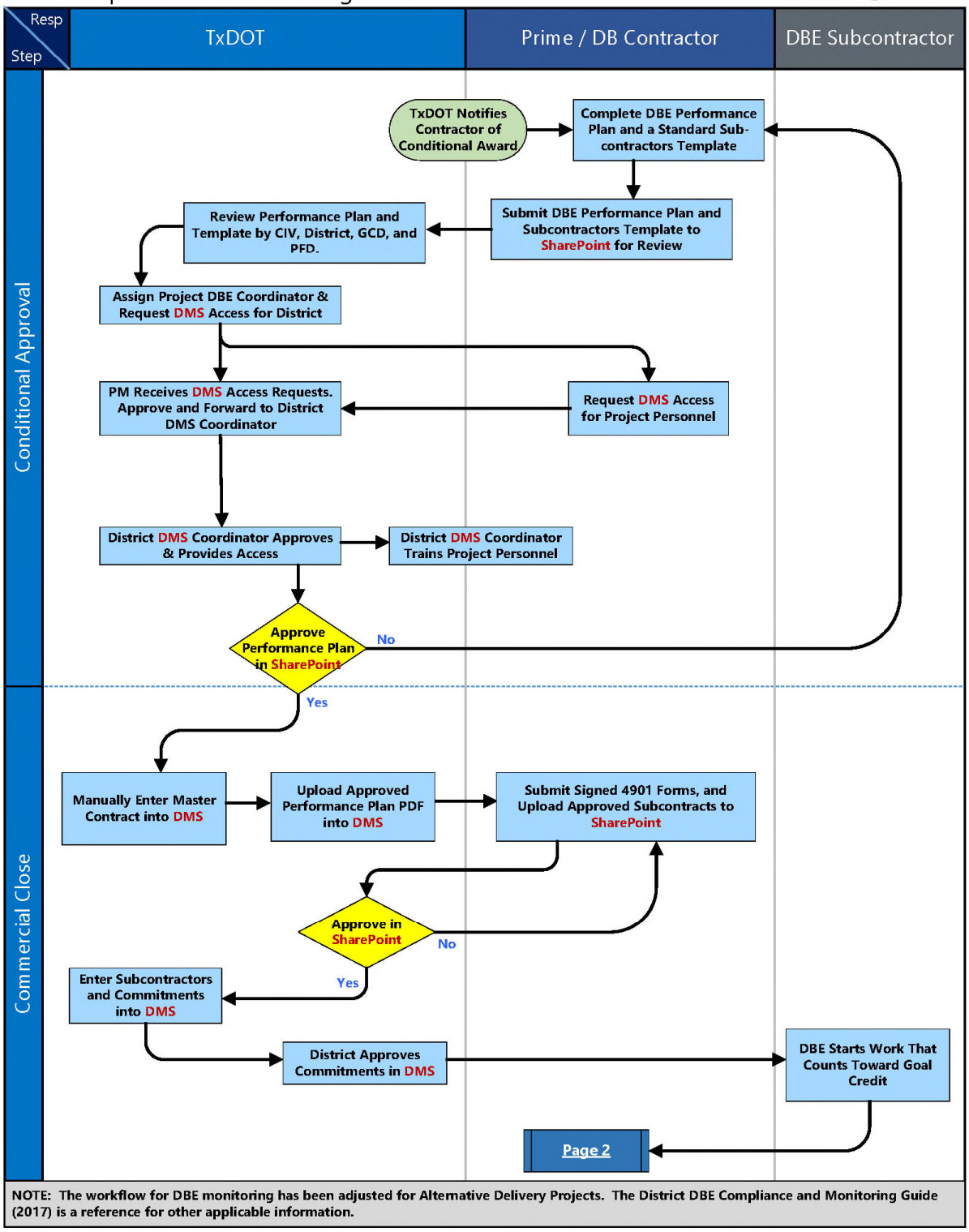
(1) District DBE Coordinator

(2) District Project Manager

# Appendix 7

Design Build Projects:
DBE Compliance and Monitoring Process

1-3-2018
Page 1 of 2

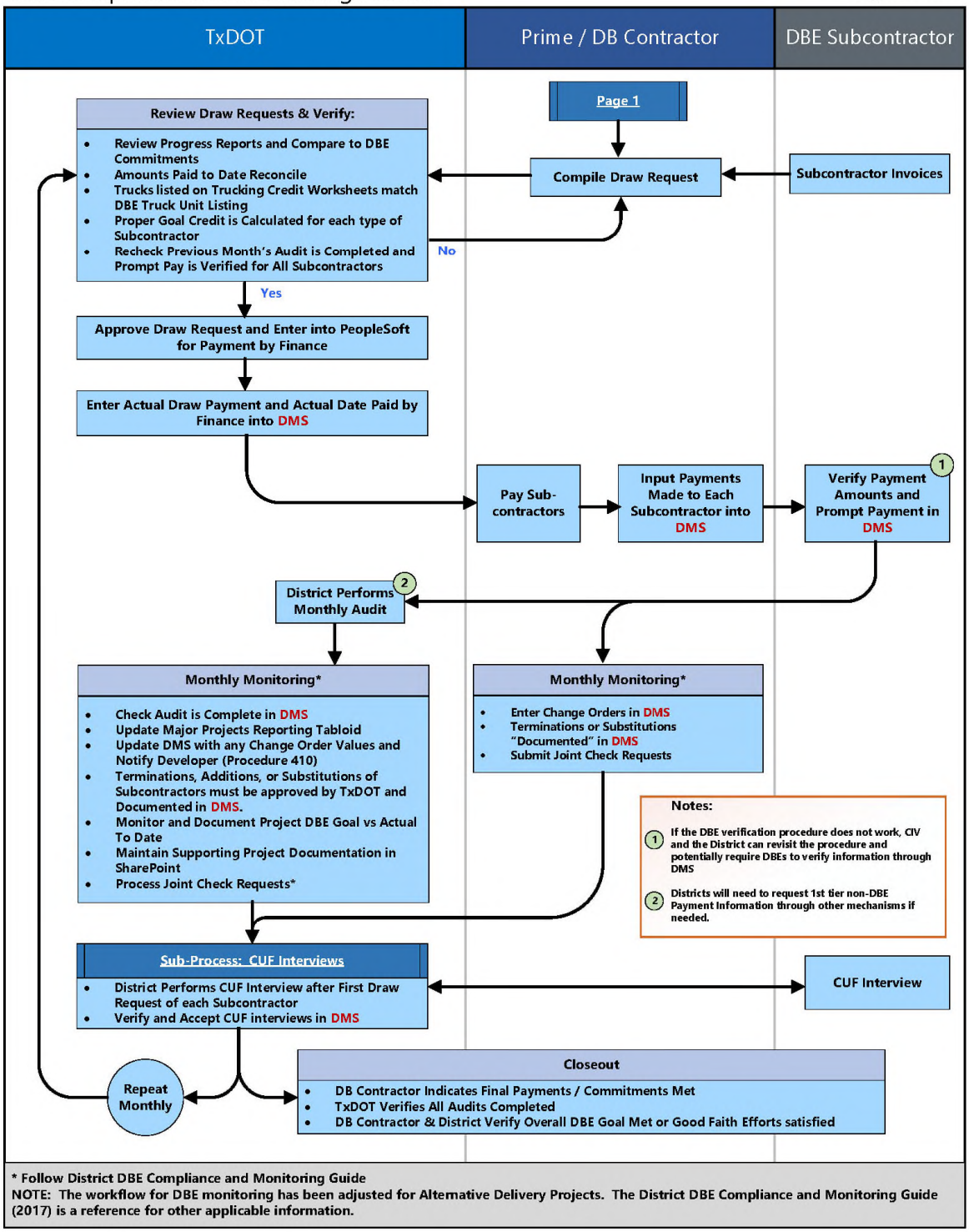



NOTE: The workflow for DBE monitoring has been adjusted for Alternative Delivery Projects. The District DBE Compliance and Monitoring Guide (2017) is a reference for other applicable information.

# Appendix 7, Cont'd

Design Build Projects:
DBE Compliance and Monitoring Process

1-3-2018
Page 2 of 2



# EXHIBIT 7

## PREVAILING WAGE RATES

# EXHIBIT 8

## DB CONTRACTOR OBLIGATIONS RELATED TO PROJECT-SPECIFIC THIRD PARTY AGREEMENTS

All DB Contractor obligations related to Third Party Agreements have been incorporated, as appropriate, into the requirements found in the Design-Build Specifications.

# EXHIBIT 9

## INTENTIONALLY DELETED

# EXHIBIT 10

## MAXIMUM PAYMENT SCHEDULE

# EXHIBIT 11

## MAXIMUM REIMBURSEMENT AMOUNTS FOR EMINENT DOMAIN ASSISTANCE

1. For each parcel that is acquired by eminent domain, within 30 days of providing evidence of payment of invoices, DB Contractor shall be entitled to reimbursement of its out-of-pocket fees and expenses for expert witnesses approved by TxDOT incurred in connection with the condemnation proceedings set forth in Section 15.4.4.3 of the Design-Build Specifications subject to the limitations in this Exhibit 11. DB Contractor shall provide the proposed expert witness fee and expense structure to TxDOT for approval no later than 45 days prior to the commencement of services by the expert. DB Contractor shall not be reimbursed for any expert witness fees or expenses incurred prior to approval of the fee and expense structure by TxDOT. DB Contractor shall not be entitled to any mark-ups, including for overhead and profit, in connection with expert witness fees and expenses.

2. For each parcel that is acquired by eminent domain, within 30 days of providing evidence of payment of invoices, DB Contractor shall be entitled to reimbursement of all other reasonable out-of-pocket costs (with the exception of expert witness fees and expenses) up to the amount of $10,000 per parcel for the performance of condemnation support services from and after the date of TxDOT's approval of the Condemnation Package, as such services are described in Section 15.4.4.2 of the Design-Build Specifications. DB Contractor shall not be entitled to any mark-ups, including for overhead and profit, in connection with such costs.

# EXHIBIT 12

## FORM OF BONDS

Appendix 1: Form of Performance Bond

Appendix 2: Form of Payment Bond

Appendix 3: Form of Warranty Bond

# APPENDIX 1 TO EXHIBIT 12

## FORM OF PERFORMANCE BOND

[To be replaced with actual Performance Bond]

## I-635 LBJ EAST PROJECT

Bond No. _____

WHEREAS, the Texas Department of Transportation ("Obligee"), has awarded to _____, a _____ ("Principal"), a Design-Build Contract for I-635 LBJ East Project, duly executed and delivered as of [●] (the "DBC") on the terms and conditions set forth therein; and

WHEREAS, upon award of the DBC, Principal is required to furnish a bond (this "Bond") guaranteeing the faithful performance of its obligations under the Contract Documents.

NOW, THEREFORE, Principal and _____, a _____ ("Surety") *[If multiple co-sureties will be used, TxDOT will revise this form of Bond to identify and refer to the Co-Sureties throughout and note that all such Co-Sureties are jointly and severally liable for all obligations under this Bond.]*, an admitted surety insurer in the State of Texas, are held and firmly bound unto Obligee in the initial amount of $_____, subject to increase in accordance with the NTP2 Rider attached hereto (the "Bonded Sum"), for payment of which sum Principal and Surety jointly and severally firmly bind themselves and their successors and assigns.

THE CONDITION OF THIS BOND IS SUCH THAT, if Principal shall promptly and faithfully perform all of its obligations under the Contract Documents, including any and all amendments and supplements thereto, then the obligations under this Bond shall be null and void; otherwise this Bond shall remain in full force and effect. Obligee shall release this Bond upon the occurrence of all of the conditions to release set forth in Section 3.4.3 of the General Conditions.

The following terms and conditions shall apply with respect to this Bond:

1. The Contract Documents are incorporated by reference herein. Capitalized terms not separately defined herein have the meanings assigned such terms in the DBC.

2. This Bond specifically guarantees the performance of each and every obligation of Principal under the Contract Documents, as they may be amended and supplemented, including but not limited to, its liability for Liquidated Damages and Lane Rental Charges, as specified in the Contract Documents, but not to exceed the Bonded Sum.

3. The guarantees contained herein shall survive Final Acceptance of the Project called for in the Contract Documents with respect to those obligations of Principal that survive such Final Acceptance of the Project.

4. Whenever Principal shall be, and is declared by Obligee to be, in default under the Contract Documents, provided that Obligee is not then in material default thereunder, Surety shall promptly:

a. arrange for the Principal to perform and complete the DBC; or

b. complete the Project in accordance with the terms and conditions of the Contract Documents then in effect, through its agents or through independent contractors; or

c. obtain bids or negotiated proposals from qualified contractors acceptable to the Obligee for a contract for performance and completion of the Work, through a procurement process approved by the Obligee, arrange for a contract to be prepared for execution by the Obligee and the contractor selected with the Obligee's concurrence, to be secured with performance and payment bonds executed by a qualified surety equivalent to the bonds issued on the DBC, and pay to the Obligee the amount of damages as described in Paragraph 6 of this Bond in excess of the unpaid balance of the Price incurred by the Obligee resulting from the Principal's default; or

d. waive their right to perform and complete, arrange for completion, or obtain a new contractor and with reasonable promptness under the circumstances, (i) after investigation, determine the amount for which they may be liable to the Obligee and, as soon as practicable after the amount is determined, tender payment therefore to the Obligee, or (ii) deny liability in whole or in part and notify the Obligee citing reasons therefore.

5. If Surety does not proceed as provided in Paragraph 4 of this Bond with reasonable promptness, Surety shall be deemed to be in default on this Bond 15 days after receipt of an additional written notice from the Obligee to Surety demanding that Surety perform its obligations under this Bond, and the Obligee shall be entitled to enforce any remedy available to the Obligee. If Surety proceeds as provided in Subparagraph 4.d of this Bond, and the Obligee refuses the payment tendered or Sureties has denied liability, in whole or in part, without further notice, the Obligee shall be entitled to enforce any remedy available to the Obligee.

6. After the Obligee has terminated the Principal's right to complete the DBC, and if Surety elects to act under Subparagraph 4.a, 4.b or 4.c above, then the responsibilities of Surety to the Obligee shall not be greater than those of the Principal under the DBC, and the responsibilities of the Obligee to Surety shall not be greater than those of the Obligee under the DBC. To the limit of the Bonded Sum, but subject to commitment of the unpaid balance of the Price to mitigation costs and damages on the DBC, Surety is obligated without duplication for:

a. the responsibilities of the Principal for correction of defective work and completion of the Work;

b. actual damages, including additional legal, design, engineering, professional and delay costs resulting from Principal's default, and resulting from the actions or failure to act of Surety under Paragraph 4 of this Bond; and

c. Liquidated Damages and Lane Rental Charges under the DBC.

7. No alteration, modification or supplement to the Contract Documents or the nature of the work to be performed thereunder, including without limitation any extension of time for performance, shall in any way

affect the obligations of Surety under this Bond provided that the aggregate dollar amount of TxDOT-Directed Changes, without the Surety's prior written consent thereto having been obtained, does not increase the Price by more than $_____ *[Insert amount that is 10% of the Price]*. Surety waives notice of any alteration, modification, supplement or extension of time other than Change Orders for TxDOT-Directed Changes in excess of such amount.

8. Correspondence or claims relating to this Bond should be sent to Surety at the following address:

_____

_____

_____

9. No right of action shall accrue on this Bond to or for the use of any entity other than Obligee or its successors and assigns.

IN WITNESS WHEREOF, Principal and Surety have caused this Bond to be executed and delivered as of _____, 20__.

Principal: _____
By: _____
Its: _____
(Seal)

Surety: _____
By: _____
Its: _____
(Seal)

**[*ADD APPROPRIATE SURETY ACKNOWLEDGMENTS*]**

**SURETY**

_____ By:_____
or secretary attest Name
Title:
Address:

## NTP2 RIDER

To be attached to
and form a part of
Bond No.

Type of
Bond: **Performance Bond**

dated
effective

(MONTH-DAY-YEAR)

**[DB Contractor]**

, as Principal,

(PRINCIPAL)

and by , as Surety,

in favor of **Texas Department of Transportation**

(OBLIGEE)

in consideration of the mutual agreements herein contained the Principal and the Surety hereby consent to the following:

**The Bonded Sum hereunder shall increase to the amount of $_____ [ONE HUNDRED PERCENT (100%) of the Price allocable to Construction Work effective upon issuance by the Obligee of NTP2 under the DBC].**

Nothing herein contained shall vary, alter or extend any provision or condition of this bond except as herein expressly stated.

This rider is effective

(MONTH-DAY-YEAR)

Signed and Sealed

(MONTH-DAY-YEAR)

(PRINCIPAL)

By: _____

(PRINCIPAL)

_____

(SURETY)

By: _____

**Attorney in fact**

# APPENDIX 2 TO EXHIBIT 12

## FORM OF PAYMENT BOND

## [To be replaced by actual Payment Bond]

## I-635 LBJ EAST PROJECT

Bond No. _____

WHEREAS, the Texas Department of Transportation ("Obligee"), has awarded to _____, a _____ ("Principal"), a Design-Build Contract for I-635 LBJ East Project, duly executed and delivered as of [●] (the "DBC") on the terms and conditions set forth therein; and

WHEREAS, upon award of the DBC, Principal is required to furnish a bond (this "Bond") guaranteeing payment of claims by Subcontractors and Suppliers.

NOW, THEREFORE, Principal and _____, a _____ ("Surety") *[If multiple co-sureties will be used, TxDOT will revise this form of Bond to identify and refer to the Co-Sureties throughout and note that all such Co-Sureties are jointly and severally liable for all obligations under this Bond.]*, an admitted surety insurer in the State of Texas, are held and firmly bound unto Obligee in the initial amount of $[●], subject to increase in accordance with the NTP2 Rider attached hereto (the "Bonded Sum"), for payment of which sum Principal and Surety jointly and severally firmly bind themselves and their successors and assigns.

THE CONDITION OF THIS BOND IS SUCH THAT, if Principal shall fail to pay any valid claims by Subcontractors and Suppliers with respect to the Work, then Surety shall pay for the same in an amount not to exceed the Bonded Sum; otherwise this Bond shall be null and void upon the occurrence of all of the conditions to release set forth in Section 3.4.4 of the General Conditions.

The following terms and conditions shall apply with respect to this Bond:

1. The Contract Documents are incorporated by reference herein. Capitalized terms not separately defined herein have the meanings assigned such terms in the DBC.

2. No alteration, modification or supplement to the Contract Documents or the nature of the work to be performed thereunder, including without limitation any extension of time for performance, shall in any way affect the obligations of Surety under this Bond, provided that the aggregate dollar amount of TxDOT-Directed Changes without the Surety's prior written consent thereto having been obtained, does not increase the Price by more than $_____ *[Insert amount that is 10% of the Price]*. Surety waives notice of any alteration, modification, supplement or extension of time other than Change Orders for TxDOT-Directed Changes in excess of such amount.

3. Correspondence or claims relating to this Bond should be sent to Surety at the following address:

_____
_____
_____

4. This Bond shall inure to the benefit of Subcontractors and Suppliers with respect to the Work so as to give a right of action to such persons and their assigns in any suit brought upon this Bond.

IN WITNESS WHEREOF, Principal and Surety have caused this Bond to be executed and delivered as of _____, 2019.

Principal: _____

_____

By: _____

_____

Its: _____

(Seal)

Surety: _____

_____

By: _____

_____

Its: _____

(Seal)

**[*ADD APPROPRIATE SURETY ACKNOWLEDGMENTS*]**

**SURETY**

_____ By: _____

or secretary attest

Name

Title:

Address:

## NTP2 RIDER

To be attached to and form a part of

Bond No.

Type of Bond: **Payment Bond**

dated effective

(MONTH-DAY-YEAR)

**[DB Contractor]**

, as Principal,

(PRINCIPAL)

and by , as Surety,

in favor of **Texas Department of Transportation**

(OBLIGEE)

in consideration of the mutual agreements herein contained the Principal and the Surety hereby consent to the following:

**The Bonded Sum hereunder shall increase to the amount of $_____ [ONE HUNDRED PERCENT (100%) of the Price allocable to Construction Work effective upon issuance by the Obligee of NTP2 under the DBC].**

Nothing herein contained shall vary, alter or extend any provision or condition of this bond except as herein expressly stated.

This rider is effective

(MONTH-DAY-YEAR)

Signed and Sealed

(MONTH-DAY-YEAR)

(PRINCIPAL)

By: _____

(PRINCIPAL)

_____

(SURETY)

By: _____

**Attorney in fact**

# APPENDIX 3 TO EXHIBIT 12

## FORM OF WARRANTY BOND

## [To be replaced with actual Warranty Bond]

## I-635 LBJ EAST PROJECT

Bond No. _____

WHEREAS, the Texas Department of Transportation ("Obligee"), has awarded to _____, a _____ ("Principal"), a Design-Build Contract for I-635 LBJ East Project, duly executed and delivered as of [●] (the "DBC"), on the terms and conditions set forth therein; and

WHEREAS, as a condition to Final Acceptance and release of the Performance Bond and Payment Bond as set forth in the DBC, Principal is required to furnish a bond (this "Bond") guaranteeing the faithful performance of its obligations under the Contract Documents after Final Acceptance, including payment of claims by Subcontractors and Suppliers.

NOW, THEREFORE, Principal and _____, a _____ ("Surety") *[If multiple co-sureties will be used, TxDOT will revise this form of Bond to identify and refer to the Co-Sureties throughout and note that all such Co-Sureties are jointly and severally liable for all obligations under this Bond.]*, an admitted surety insurer in the State of Texas, are held and firmly bound unto Obligee in the amount of $_____ ***[Insert amount that is 10% of the Price]*** (the "Bonded Sum"), for payment of which sum Principal and Surety jointly and severally firmly bind themselves and their successors and assigns.

THE CONDITION OF THIS BOND IS SUCH THAT, if Principal shall promptly and faithfully perform all of its obligations under the Contract Documents, as they may be amended or supplemented, including without limitation the fulfillment of all Warranties, and payment of claims by Subcontractors and Suppliers, then the obligations under this Bond shall be null and void; otherwise this Bond shall remain in full force and effect, it being expressly understood and agreed that the liability of Surety for any and all claims hereunder shall in no event exceed the Bonded Sum.

The following terms and conditions shall apply with respect to this Bond:

1. The Contract Documents are incorporated by reference herein. Capitalized terms not separately defined herein have the meanings assigned such terms in the DBC.

2. This Bond shall inure to the benefit of all Subcontractors and Suppliers with respect to the Work, other than entities having an equity interest in Principal, so as to give a right of action to such persons and their assigns in any suit brought upon this Bond.

3. The guarantees contained herein shall survive Final Acceptance of the Project.

4. Whenever Principal shall fail to pay the lawful claims of any of the persons identified in Paragraph 2 above with respect to the Work, excluding entities having an equity interest in Principal, then Surety shall pay for the same in an amount not to exceed the Bonded Sum.

5. Whenever Principal shall be, and is declared by the Obligee to be, in default with respect to its obligations under the Contract Documents, provided that the Obligee is not then in material default thereunder, Surety shall promptly take one of the following actions with the consent of the Obligee:

a. arrange for Principal to perform and complete the DBC;

b. complete the Work in accordance with the terms and conditions of the Contract Documents then in effect, through its agents or through independent contractors;

c. obtain bids or negotiated proposals from qualified contractors acceptable to the Obligee for a contract for performance and completion of the Work (as defined in the DBC), through a procurement process approved by the Obligee, arrange for a contract to be prepared for execution by the Obligee and the contractor selected with the Obligee's concurrence, to be secured with performance and payment bonds executed by a qualified surety equivalent to the bonds issued on the DBC, and pay to the Obligee the amount of damages as described in Paragraph 7 of this Bond in excess of the unpaid balance of the Price incurred by the Obligee resulting from the Principal's default; or

d. waive its right to perform and complete, arrange for completion, or obtain a new contractor and with reasonable promptness under the circumstances, (i) after investigation, determine the amount for which it may be liable to the Obligee and, as soon as practicable after the amount is determined, tender payment therefor to the Obligee or (ii) deny liability in whole or in part and notify the Obligee citing reasons therefor.

6. If Surety does not proceed as provided in Paragraph 5 of this Bond with reasonable promptness, Surety shall be deemed to be in default on this Bond 15 days after receipt of an additional written notice from the Obligee to Surety demanding that Surety perform its obligations under this Bond, and the Obligee shall be entitled to enforce any remedy available to the Obligee. If Surety proceeds as provided in Subparagraph 5.d of this Bond, and the Obligee refuses the payment tendered or Surety has denied liability, in whole or in part, without further notice the Obligee shall be entitled to enforce any remedy available to the Obligee.

7. After the Obligee has terminated the Principal's right to complete the DBC, and if Surety elects to act under Subparagraph 5.a, 5.b or 5.c above, then the responsibilities of Surety to the Obligee shall not be greater than those of the Principal under the DBC, and the responsibilities of the Obligee to Surety shall not be greater than those of the Obligee under the DBC. To the limit of the Bonded Sum, but subject to commitment of the unpaid balance of the Price to mitigation costs and damages on the DBC, Surety is obligated without duplication for:

a. the responsibilities of the Principal for correction of defective work and completion of the Work;

b. actual damages, including additional legal, design professional and delay costs resulting from Principal's default, and resulting from the actions or failure to act of Surety under Paragraph 5 of this Bond; and

c. Liquidated Damages and Lane Rental Charges under the DBC.

8. No alteration, modification or supplement to the Contract Documents or the nature of the work to be performed thereunder, including without limitation any extension of time for performance, shall in any way affect the obligations of Surety under this Bond, provided that the aggregate dollar amount of TxDOT-Directed Changes, without the Sureties' prior written consent thereto having been obtained, does not increase the Price by more than $_____ *[Insert amount that is 10% of the Price]*. Surety waives notice of any alteration, modification, supplement or extension of time other than Change Orders for TxDOT-Directed Changes in excess of such amount.

9. Correspondence or claims relating to this Bond should be sent to Surety at the following address:

_____
_____
_____

IN WITNESS WHEREOF, Principal and Surety have caused this Bond to be executed and delivered as of _____, 20__.

Principal: _____
By: _____
Its: _____
(Seal)

Surety: _____
By: _____
Its: _____
(Seal)

**[*ADD APPROPRIATE SURETY ACKNOWLEDGMENTS*]**

**SURETY**

_____ By: _____
or secretary attest
Name
Title:
Address:

# EXHIBIT 13

## FORM OF GUARANTY

## GUARANTY

THIS GUARANTY (this "Guaranty") is made as of [●] by _____, a _____ ("Guarantor"), in favor of the TEXAS DEPARTMENT OF TRANSPORTATION, an agency of the State of Texas ("TxDOT").

### RECITALS

A. _____, as design-build contractor ("DB Contractor"), and TxDOT are parties to that certain Design-Build Contract (the "DBC") pursuant to which DB Contractor has agreed to develop, design, and construct the I-635 LBJ East Project (the "Project"). Initially capitalized terms used herein without definition will have the meaning given such term in the Contract Documents.

B. To induce TxDOT to (i) enter into the DBC; and (ii) consummate the transactions contemplated thereby, Guarantor has agreed to enter into this Guaranty.

C. DB Contractor is a _____. The Guarantor is _____. The execution of the DBC by TxDOT and the consummation of the transactions contemplated thereby will materially benefit Guarantor. Without this Guaranty, TxDOT would not have entered into the DBC with DB Contractor. Therefore, in consideration of TxDOT's execution of the DBC and consummation of the transactions contemplated thereby, Guarantor has agreed to execute this Guaranty.

**NOW, THEREFORE,** in consideration of the foregoing Recitals, and for other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, Guarantor agrees as follows:

**1. Guaranty.** Guarantor guarantees to TxDOT and its successors and assigns the full and prompt payment and performance when due of all of the obligations of DB Contractor arising out of, in connection with, under or related to the Contract Documents. The obligations guaranteed pursuant to this Guaranty are collectively referred to herein as the "Guaranteed Obligations."

**2. Unconditional Obligations.** This Guaranty is a guaranty of payment and performance and not of collection. Except as provided in Section 21, this Guaranty is an absolute, unconditional and irrevocable guarantee of the full and prompt payment and performance when due of all of the Guaranteed Obligations, whether or not from time to time reduced or extinguished or hereafter increased or incurred, and whether or not enforceable against DB Contractor. If any payment made by DB Contractor or any other Person and applied to the Guaranteed Obligations is at any time annulled, set aside, rescinded, invalidated, declared to be fraudulent or preferential or otherwise required to be repaid or refunded, then, to the extent of such payment or repayment, the liability of Guarantor will be and remain in full force and effect as fully as if such payment had never been made. Guarantor covenants that this Guaranty will not be fulfilled or discharged, except by the complete payment and performance of the Guaranteed Obligations, whether by the primary obligor or Guarantor under this Guaranty. Without limiting the generality of the foregoing, Guarantor's obligations hereunder will not be released, discharged or otherwise affected by (a) any change in the Contract Documents or the obligations thereunder, or any insolvency, bankruptcy or similar proceeding affecting DB Contractor, Guarantor or their respective assets, and (b) the existence of any claim or set-off which DB Contractor has or Guarantor may have against TxDOT, whether in connection with this Guaranty or any unrelated transaction, provided that nothing in this Guaranty will be deemed a waiver by Guarantor of any claim or prevent the assertion of any claim by separate suit. This Guaranty will in all respects be a continuing, absolute and unconditional

guaranty irrespective of the genuineness, validity, regularity or enforceability of the Guaranteed Obligations or any part thereof or any instrument or agreement evidencing any of the Guaranteed Obligations or relating thereto, or the existence, validity, enforceability, perfection, or extent of any collateral therefor or any other circumstances relating to the Guaranteed Obligations, except as provided in Section 21.

**3. Independent Obligations.** Guarantor agrees that the Guaranteed Obligations are independent of the obligations of DB Contractor and if any default occurs hereunder, a separate action or actions may be brought and prosecuted against Guarantor whether or not DB Contractor is joined therein. TxDOT may maintain successive actions for other defaults of Guarantor. TxDOT's rights hereunder will not be exhausted by the exercise of any of its rights or remedies or by any such action or by any number of successive actions until and unless all Guaranteed Obligations have been paid and fully performed.

a. Guarantor agrees that TxDOT may enforce this Guaranty, at any time and from time to time, without the necessity of resorting to or exhausting any security or collateral and without the necessity of proceeding against DB Contractor. Guarantor hereby waives the right to require TxDOT to proceed against DB Contractor, to exercise any right or remedy under any of the Contract Documents or to pursue any other remedy or to enforce any other right.

b. Guarantor will continue to be subject to this Guaranty notwithstanding: (i) any modification, agreement or stipulation between DB Contractor and TxDOT or their respective successors and assigns, with respect to any of the Contract Documents or the Guaranteed Obligations; (ii) any waiver of or failure to enforce any of the terms, covenants or conditions contained in any of the Contract Documents or any modification thereof; (iii) any release of DB Contractor from any liability with respect to any of the Contract Documents; or (iv) any release or subordination of any collateral then held by TxDOT as security for the performance by DB Contractor of the Guaranteed Obligations.

c. The Guaranteed Obligations are not conditional or contingent upon the genuineness, validity, regularity or enforceability of any of the Contract Documents or the pursuit by TxDOT of any remedies which TxDOT either now has or may hereafter have with respect thereto under any of the Contract Documents.

d. Notwithstanding anything to the contrary contained elsewhere in this Guaranty, Guarantor's obligations and undertakings hereunder are derivative of, and not in excess of, the obligations of DB Contractor under the DBC. Accordingly, in the event that DB Contractor's obligations have been changed by any modification, agreement or stipulation between DB Contractor and TxDOT or their respective successors or assigns, this Guaranty shall apply to the Guaranteed Obligations as so changed.

**4. Liability of Guarantor.**

a. TxDOT may enforce this Guaranty upon the occurrence of a breach by DB Contractor of any of the Guaranteed Obligations, notwithstanding the existence of any dispute between TxDOT and DB Contractor with respect to the existence of such a breach.

b. Guarantor's performance of some, but not all, of the Guaranteed Obligations will in no way limit, affect, modify or abridge Guarantor's liability for those Guaranteed Obligations that have not been performed.

c. TxDOT, upon such terms as it deems appropriate, without notice or demand and without affecting the validity or enforceability of this Guaranty or giving rise to any reduction, limitation, impairment, discharge or termination of Guarantor's liability hereunder, from time to time may (i) with respect to the financial obligations of DB Contractor, if and as permitted by the DBC, renew, extend, accelerate, increase the rate of interest on, or otherwise change the time, place, manner or terms of payment of financial obligations that are Guaranteed

Obligations, and/or subordinate the payment of the same to the payment of any other obligations, (ii) settle, compromise, release or discharge, or accept or refuse any offer of performance with respect to, or substitutions for, the Guaranteed Obligations or any agreement relating thereto, (iii) request and accept other guarantees of the Guaranteed Obligations and take and hold security for the payment and performance of this Guaranty or the Guaranteed Obligations, (iv) release, surrender, exchange, substitute, compromise, settle, rescind, waive, alter, subordinate or modify, with or without consideration, any security for performance of the Guaranteed Obligations, any other guarantees of the Guaranteed Obligations, or any other obligation of any Person with respect to the Guaranteed Obligations, (v) enforce and apply any security hereafter held by or for the benefit of TxDOT in respect of this Guaranty or the Guaranteed Obligations and direct the order or manner of sale thereof, or exercise any other right or remedy that TxDOT may have against any such security, as TxDOT in its discretion may determine, and (vi) exercise any other rights available to it under the Contract Documents.

d. This Guaranty and the obligations of Guarantor hereunder will be valid and enforceable and will not be subject to any reduction, limitation, impairment, discharge or termination for any reason (other than indefeasible performance in full of the Guaranteed Obligations), including without limitation the occurrence of any of the following, whether or not Guarantor will have had notice or knowledge of any of them: (i) any failure or omission to assert or enforce or agreement or election not to assert or enforce, or the stay or enjoining, by order of court, by operation of law or otherwise, of the exercise or enforcement of, any claim or demand or any right, power or remedy (whether arising under the Contract Documents, at law, in equity or otherwise) with respect to the Guaranteed Obligations or any agreement or instrument relating thereto; (ii) any rescission, waiver, amendment or modification of, or any consent to departure from, any of the terms or provisions (including without limitation provisions relating to events of default) of the Contract Documents or any agreement or instrument executed pursuant thereto; (iii) TxDOT's consent to the change, reorganization or termination of the corporate structure or existence of DB Contractor; or (iv) any defenses, set-offs or counterclaims that DB Contractor may allege or assert against TxDOT in respect of the Guaranteed Obligations, except as provided in Section 21.

**5. Waivers.** To the fullest extent permitted by law, Guarantor hereby waives and agrees not to assert or take advantage of: (a) any right to require TxDOT to proceed against DB Contractor or any other Person or to proceed against or exhaust any security held by TxDOT at any time or to pursue any right or remedy under any of the Contract Documents or any other remedy in TxDOT's power before proceeding against Guarantor; (b) any defense that may arise by reason of the incapacity, lack of authority, death or disability of, or revocation hereby by, Guarantor, DB Contractor or any other Person or the failure of TxDOT to file or enforce a claim against the estate (either in administration, bankruptcy or any other proceeding) of any such Person; (c) any defense that may arise by reason of any presentment, demand for payment or performance or otherwise, protest or notice of any other kind or lack thereof; (d) any right or defense arising out of an election of remedies by TxDOT even though the election of remedies, such as nonjudicial foreclosure with respect to any security for the Guaranteed Obligations, has destroyed the Guarantor's rights of subrogation and reimbursement against DB Contractor by the operation of law or otherwise; (e) all notices to Guarantor or to any other Person, including, but not limited to, notices of the acceptance of this Guaranty or the creation, renewal, extension, modification, accrual of any of the obligations of DB Contractor under any of the Contract Documents, or of default in the payment or performance of any such obligations, enforcement of any right or remedy with respect thereto or notice of any other matters relating thereto, except the notice required in Section 8.7.1.3 of the General Conditions; (f) any defense based upon any act or omission of TxDOT that directly or indirectly results in or aids the discharge or release of DB Contractor, Guarantor or any security given or held by TxDOT in connection with the Guaranteed Obligations; and (g) any and all suretyship defenses under applicable law.

**6. Waiver of Subrogation and Rights of Reimbursement.** Until the Guaranteed Obligations have been indefeasibly paid in full, Guarantor waives any claim, right or remedy that it may now have or may hereafter acquire against DB Contractor that arises from the performance of Guarantor hereunder, including, without limitation, any claim, right or remedy of subrogation, reimbursement, exoneration, contribution, or indemnification, or participation in any claim, right or remedy of TxDOT against DB Contractor, or any other security or collateral that TxDOT now has or hereafter acquires, whether or not such claim, right or remedy arises in equity, under contract, by

statute, under common law or otherwise. All existing or future indebtedness of DB Contractor or any shareholders, partners, members, joint venturers of DB Contractor to Guarantor is subordinated to all of the Guaranteed Obligations. Whenever and for so long as DB Contractor shall be in default in the performance of a Guaranteed Obligation, no payments with respect to any such indebtedness shall be made by DB Contractor or any shareholders, partners, members, joint venturers of DB Contractor to Guarantor without the prior written consent of TxDOT. Any payment by DB Contractor or any shareholders, partners, members, joint venturers of DB Contractor to Guarantor in violation of this provision shall be deemed to have been received by Guarantor as trustee for TxDOT.

**7. Waivers by Guarantor if Real Property Security.** If the Guaranteed Obligations are or become secured by real property or an estate for years, Guarantor waives all rights and defenses that Guarantor may have because the Guaranteed Obligations are secured by real property. This means, among other things:

a. TxDOT may collect from Guarantor without first foreclosing on any real or personal property collateral pledged by DB Contractor.

b. If TxDOT forecloses on any real property collateral pledged by DB Contractor:

(1) The amount of the Guaranteed Obligation may be reduced only by the price for which that collateral is sold at the foreclosure sale, even if the collateral is worth more than the sale price.

(2) TxDOT may collect from Guarantor even if TxDOT, by foreclosing on the real property collateral, has destroyed any right Guarantor may have to collect from DB Contractor.

This is an unconditional and irrevocable waiver of any rights and defenses Guarantor may have because the Guaranteed Obligations are secured by real property.

**8. Cumulative Rights.** All rights, powers and remedies of TxDOT hereunder will be in addition to and not in lieu of all other rights, powers and remedies given to TxDOT, whether at law, in equity or otherwise.

**9. Representations and Warranties.** Guarantor represents and warrants that:

a. it is a [*corporation/limited liability company*] duly organized, validly existing, and in good standing under the laws of the State of [●], and qualified to do business and is in good standing under the laws of the State of Texas;

b. it has all requisite corporate power and authority to execute, deliver and perform this Guaranty;

c. the execution, delivery, and performance by Guarantor of this Guaranty have been duly authorized by all necessary corporate action on the part of Guarantor and proof of such authorization will be provided with the execution of this Guaranty;

d. this Guaranty has been duly executed and delivered and constitutes the legal, valid and binding obligation of Guarantor, enforceable against Guarantor in accordance with its terms;

e. neither the execution nor delivery of this Guaranty nor compliance with or fulfillment of the terms, conditions, and provisions hereof will conflict with, result in a material breach or violation of the terms, conditions, or provisions of, or constitute a material default, an event of default, or an event creating rights of acceleration, termination, or cancellation, or a loss of rights under: (1) the certificate of incorporation or by-laws of Guarantor, (2) any judgment, decree, order, contract, agreement, indenture, instrument, note, mortgage, lease, governmental permit or other authorization, right restriction or obligation to which Guarantor is a party or any of its property is subject or by which Guarantor is bound, or (3) any federal, state, or local law, statute, ordinance, rule or regulation applicable to Guarantor;

f. it now has and will continue to have full and complete access to any and all information concerning the transactions contemplated by the Contract Documents or referred to therein, the financial status of DB Contractor and the ability of DB Contractor to pay and perform the Guaranteed Obligations;

g. it has reviewed and approved copies of the Contract Documents and is fully informed of the remedies TxDOT may pursue, with or without notice to DB Contractor or any other Person, in the event of default of any of the Guaranteed Obligations;

h. it has made and so long as the Guaranteed Obligations (or any portion thereof) remain unsatisfied, it will make its own credit analysis of DB Contractor and will keep itself fully informed as to all aspects of the financial condition of DB Contractor, the performance of the Guaranteed Obligations and of all circumstances bearing upon the risk of nonpayment or nonperformance of the Guaranteed Obligations. Guarantor hereby waives and relinquishes any duty on the part of TxDOT to disclose any matter, fact or thing relating to the business, operations or conditions of DB Contractor now known or hereafter known by TxDOT;

i. no consent, authorization, approval, order, license, certificate, or permit or act of or from, or declaration or filing with, any governmental authority or any party to any contract, agreement, instrument, lease, or license to which Guarantor is a party or by which Guarantor is bound, is required for the execution, delivery, or compliance with the terms hereof by Guarantor, except as have been obtained prior to the date hereof; and

j. there is no pending or, to the best of its knowledge, threatened action, suit, proceeding, arbitration, litigation, or investigation of or before any Governmental Entity that challenges the validity or enforceability of this Guaranty.

**10. Governing Law.** The validity, interpretation and effect of this Guaranty are governed by and will be construed in accordance with the laws of the State of Texas applicable to contracts made and performed in such State and without regard to conflicts of law doctrines except to the extent that certain matters are preempted by Federal law. Guarantor consents to the jurisdiction of the State of Texas with regard to this Guaranty. The venue for any action regarding this Guaranty shall be Travis County, Texas.

**11. Entire Document.** This Guaranty contains the entire agreement of Guarantor with respect to the transactions contemplated hereby, and supersedes all negotiations, representations, warranties, commitments, offers, contracts and writings prior to the date hereof, written or oral, with respect to the subject matter hereof. No waiver, modification or amendment of any provision of this Guaranty is effective unless made in writing and duly signed by TxDOT referring specifically to this Guaranty, and then only to the specific purpose, extent and interest so provided.

**12. Severability.** If any provision of this Guaranty is determined to be unenforceable for any reason by a court of competent jurisdiction, it will be adjusted rather than voided, to achieve the intent of the parties and all of the provisions not deemed unenforceable will be deemed valid and enforceable to the greatest extent possible.

**13. Notices.** Any communication, notice or demand of any kind whatsoever under this Guaranty shall be in writing and delivered by personal service (including express or courier service), by electronic communication, whether by telex, telegram or telecopying (if confirmed in writing sent by registered or certified mail, postage prepaid, return receipt requested), or by registered or certified mail, postage prepaid, return receipt requested, addressed as follows:

If to TxDOT: Texas Department of Transportation

_____

_____

Attention:_____
Telephone:_____
Facsimile:_____

With copies to: Texas Department of Transportation
Office of General Counsel

_____

Attention:_____
Telephone:_____
Facsimile:_____

If to Guarantor: _____

_____

_____

Attention:_____
Telephone:_____
Facsimile:_____

Either Guarantor or TxDOT may from time to time change its address for the purpose of notices by a similar notice specifying a new address, but no such change is effective until it is actually received by the party sought to be charged with its contents.

All notices and other communications required or permitted under this Guaranty that are addressed as provided in this Section 13 are effective upon delivery, if delivered personally or by overnight mail, and are effective five days following deposit in the United States mail, postage prepaid if delivered by mail.

**14. Captions.** The captions of the various sections of this Guaranty have been inserted only for convenience of reference and do not modify, explain, enlarge or restrict any of the provisions of this Guaranty.

**15. Assignability.** This Guaranty is binding upon and inures to the benefit of the successors and assigns of Guarantor and TxDOT, but is not assignable by Guarantor without the prior written consent of TxDOT, which consent may be granted or withheld in TxDOT's sole discretion. Any assignment by Guarantor effected in accordance with this Section 15 will not relieve Guarantor of its obligations and liabilities under this Guaranty.

**16. Construction of Agreement.** Ambiguities or uncertainties in the wording of this Guaranty will not be construed for or against any party, but will be construed in the manner that most accurately reflects the parties' intent as of the date hereof.

**17. No Waiver.** Any forbearance or failure to exercise, and any delay by TxDOT in exercising, any right, power or remedy hereunder will not impair any such right, power or remedy or be construed to be a waiver thereof, nor will it preclude the further exercise of any such right, power or remedy.

**18. Bankruptcy; Post-Petition Interest; Reinstatement of Guaranty.**

(a) The obligations of Guarantor under this Guaranty will not be reduced, limited, impaired, discharged, deferred, suspended or terminated by any proceeding, voluntary or involuntary, involving the bankruptcy, insolvency, receivership, reorganization, liquidation or arrangement of DB Contractor or by any defense that DB Contractor may have by reason of the order, decree or decision of any court or administrative body resulting

from any such proceeding. TxDOT is not obligated to file any claim relating to the Guaranteed Obligations if DB Contractor becomes subject to a bankruptcy, reorganization, or similar proceeding, and the failure of TxDOT so to file will not affect Guarantor's obligations under this Guaranty.

(b) Guarantor acknowledges and agrees that any interest on any portion of the Guaranteed Obligations that accrues after the commencement of any proceeding referred to in clause (a) above (or, if interest on any portion of the Guaranteed Obligations ceases to accrue by operation of law by reason of the commencement of said proceeding, such interest as would have accrued on such portion of the Guaranteed Obligations if said proceedings had not been commenced) will be included in the Guaranteed Obligations because it is the intention of Guarantor and TxDOT that the Guaranteed Obligations should be determined without regard to any rule of law or order which may relieve DB Contractor of any portion of such Guaranteed Obligations. Guarantor will permit any trustee in bankruptcy, receiver, debtor in possession, assignee for the benefit of creditors or any similar person to pay TxDOT, or allow the claim of TxDOT in respect of, any such interest accruing after the date on which such proceeding is commenced.

**19. Attorneys' Fees.** Guarantor agrees to pay to TxDOT without demand reasonable attorneys' fees and all costs and other expenses (including such fees and costs of litigation, arbitration and bankruptcy, and including appeals) incurred by TxDOT in enforcing, collecting or compromising any Guaranteed Obligation or enforcing or collecting this Guaranty against Guarantor or in attempting to do any or all of the foregoing.

**20. Joint and Several Liability.** If the Guarantor is comprised of more than one individual or entity, such individuals or entities, as applicable, shall be jointly and severally liable for the Guaranteed Obligations. If more than one guaranty is executed with respect to DB Contractor and the Project, each guarantor under such a guaranty shall be jointly and severally liable with the other guarantors with respect to the obligations guaranteed under such guaranties.

**21. Defenses.** Notwithstanding any other provision to the contrary, Guarantor shall be entitled to the benefit of all defenses available to DB Contractor under the DBC except (a) those expressly waived in this Guaranty, (b) failure of consideration, lack of authority of DB Contractor and any other defense to formation of the DBC, and (c) defenses available to DB Contractor under any federal or state law respecting bankruptcy, arrangement, reorganization or similar relief of debtors. Action against Guarantor under this Guaranty shall be subject to no prior notice or demand except for the notice provided in Section 8.7.1.3 of the General Conditions.

IN WITNESS WHEREOF, Guarantor has executed this Guaranty as of the date first written above.

_____
a _____

By:_____
Name:_____
Title:_____

By: _____
Name:_____
Title:_____

# EXHIBIT 14

## CHANGE ORDER FORMS

Appendix 1: Form of Request for Change Order

Appendix 2: Form of Change Order

# APPENDIX 1 TO EXHIBIT 14

## FORM OF REQUEST FOR CHANGE ORDER

**REQUEST FOR CHANGE ORDER NO. _____**
**CONTRACT NO. _____**

**SECTION I**

**Originator: _____ Date:_____**

- **Title: _____**

**Contract No: _____**

- **DB Contractor Name: _____**

**DESCRIPTION:**

_____
_____
_____
_____

**SCOPE:**

_____
_____
_____
_____
_____

**REASON FOR REQUEST FOR CHANGE ORDER:**

_____
_____

_____
**DB Contractor Authorized Representative**

**Date: _____**

**SECTION II**

The total amount of this Request for Change Order is $ _____. Documentation supporting the Request for Change Order is attached as Exhibits _____ through _____.

Payment Activity/Project Schedule Items Added/Deducted:

| Activity No. | Description | Amount |
|---|---|---|
| _____ | _____ | _____ |

This Request for Change Order is for (check the applicable categories below):

- _____ A lump sum, negotiated price Change Order (provide information in Section IIA below); or
- _____ A unit price/quantities Change Order (provide information in Section IIB below); or
- _____ A Force Account Change Order (provide information in Section IIC below)

**Section IIA**[1]

Lump sum price is $_____

**Section IIB**[2]

| UNIT PRICE ITEM | UNIT PRICE | ESTIMATED QUANTITY | PRICE (Unit Price x Quantity) |
|---|---|---|---|
| | | | |
| | | | |
| | | | |
| | | | |
| | | | |

Total of all items in above Table based on estimated quantities: $_____

**Section IIC**[3]

Summary of Request for Change Order by Force Account Categories: [Additives/(Credits)]

[1] Section IIA to be included and completed for negotiated, lump sum Change Orders pursuant to General Conditions Section 4.6.7

[2] Section IIB to be included and completed for unit price Change Orders pursuant to General Conditions Section 4.6.7.7

[3] Section IIC to be included and completed for Force Account Change Order pursuant to General Conditions Section 4.6.8

| | | | |
|---|---|---|---|
| A. | DB Contractor Labor (construction) | | |
| | 1. | Wages (unburdened) | $ _____ |
| | 2. | Insurance and taxes[4] (35% of A.1) | $ _____ |
| B. | DB Contractor and Subcontractor Labor (professional services) | | |
| | 1. | Wages (unburdened) | $ _____ |
| | 2. | Labor surcharge (145% of B.1, which includes overhead and profit) | $ _____ |
| C. | Materials (with taxes, freight and discounts) | | $ _____ |
| D. | Equipment[5] (includes 15% overhead and profit) | | $ _____ |
| E. | Subcontracts (Force Account basis) | | $ _____ |
| F. | Utility Owner Direct Costs | | $ _____ |
| G. | Overhead and Profit | | |
| | 1. | Labor[6] (25% of A.1) | $ _____ |
| | 2. | Materials (15% of C) | $ _____ |
| | 3. | Subcontracts (5% of E) | $ _____ |
| | 4. | Utility Owner Direct Costs (5% of F) | $ _____ |
| H. | Grand Total | | $ _____ |

**SECTION III[7]**

The status of the Substantial Completion Deadline is as follows:

- ❑ Unaffected by this Request for Change Order
- ❑ Affected by (increasing) (decreasing) the date of the Substantial Completion Deadline by _____calendar days.

The status of Final Acceptance Deadline is as follows:

- ❑ Unaffected by this Request for Change Order
- ❑ Affected by (increasing) (decreasing) the date of the Final Acceptance Deadline by _____calendar days.

Accordingly, the summary of the dates of the Substantial Completion Deadline and the Final Acceptance Deadline are as follows:

---

[4] For insurance and taxes including the cost of premiums on public liability and workers' compensation insurance, Social Security, and unemployment insurance taxes (see General Conditions Section 4.6.8.1)

[5] Tabulated in accordance with the most recent version of the Rental Rate Blue Book and General Conditions Section 4.6.8.3.1

[6] For overhead, superintendence, profit, and small tools (see General Conditions Section 4.6.8.1)

[7] Revise list of Completion Deadlines if applicable to the Project

1. Substantial Completion Deadline: _____
   (+ or - _____ days from base of _____ calendar days after NTP1)

2. Final Acceptance Deadline: _____
   (+ or - _____ days from base of _____ calendar days after NTP1)

Justification for Request for Change Order with reference to the Design-Build Contract:
_____
_____
_____

Change order required under CMA? Yes_____/No_____
If yes, state reason:
_____
_____
_____

The undersigned Authorized Representative of DB Contractor hereby certifies, under penalty of perjury, as follows:

(a) the above three sections represent a true and complete summary of all aspects of this Request for Change Order;

(b) the amount of time and/or compensation requested is justified as to entitlement and amount;

(c) this Request for Change Order includes all known and anticipated impacts or amounts, direct, indirect and consequential, which may be incurred as a result of the claim, event, occurrence or matter giving rise to the proposed change;

(d) the cost and pricing data forming the basis for the Request for Change Order is complete, accurate and current; and

(e) 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 1 T.A.C. § 46.4) that was made by DB Contractor in the most recent Form 1295 disclosure of interested parties form provided to TxDOT by DB Contractor. Alternatively, if there has been a change to the disclosure of Interested Parties or if the value of this Change Order is $1,000,000 or greater, DB Contractor has submitted with this Change Order a current Form 1295. This certification does not apply, and submission of a current Form 1295 is not required, in the event that DB Contractor is a publicly traded business entity, or is a wholly owned subsidiary of a publicly traded business entity.

If the foregoing Request for Change Order includes claims of Subcontractors or Suppliers, the undersigned have reviewed such claims and have determined in good faith that the claims are justified as to both entitlement and amount.

_____
**DB Contractor Authorized Representative**

**Date:** _____

**SECTION IV (Reviewed/Approved by TxDOT District Engineer)**

_____
**TxDOT District Engineer**

**Date:** _____

**Comments:**
_____
_____
_____

**SECTION V (Reviewed by FHWA Project Representative, if applicable)**

_____
**FHWA Project Representative**

**Date**_____

**Comments:**
_____
_____
_____

**SECTION VI (Reviewed by TxDOT Chief Engineer, if applicable)**[8]

_____
**TxDOT Chief Engineer**

**Date**_____

**Comments:**

[*Include if signature not required*] [Not Applicable - This Change Order is less than $10 million and does not exceed the $30 million cumulative threshold. Upon concurrence by the Project Finance, Debt and Strategic Contracts

[8] If not required, insert "NOT APPLICABLE" in signature line.

Division Director and General Counsel Division, the District Engineer will have final approval of the Change Order for execution.]

**SECTION VII (Reviewed by Chief Financial Officer, if applicable)**[9]

_____

**TxDOT Chief Financial Officer**

**Date**_____

**Comments:**

[*Include if signature not required*] [Not Applicable - This Change Order is less than $10 million and does not exceed the $30 million cumulative threshold. Upon concurrence by the Project Finance, Debt and Strategic Contracts Division Director and General Counsel Division, the District Engineer will have final approval of the Change Order for execution.]

**SECTION VIII (Reviewed by TxDOT Executive Director, if applicable)**[10]

_____

**TxDOT Executive Director**

**Date**_____

**Comments:**
[*Include if signature not required*] [Not Applicable - This Change Order is less than $10 million and does not exceed the $30 million cumulative threshold. Upon concurrence by the Project Finance, Debt and Strategic Contracts Division Director and General Counsel Division, the District Engineer will have final approval of the Change Order for execution.]

_____
_____
_____

[9] If not required, insert "NOT APPLICABLE" in signature line.
[10] If not required, insert "NOT APPLICABLE" in signature line.

# APPENDIX 2 TO EXHIBIT 14

## FORM OF CHANGE ORDER

**CHANGE ORDER NO. _____ CONTRACT NO. _____**

**SECTION I**

**Originator: _____ Date: _____**

- **Title: _____**

**Contract No:_____**

- **DB Contractor Name: _____**

**DESCRIPTION:**

_____
_____
_____
_____
_____

**SCOPE:**

_____
_____
_____
_____
_____

**REASON FOR CHANGE ORDER:**

_____
_____

_____
**DB Contractor Authorized Representative**

**Date: _____**

**SECTION II**

The total amount of this Change Order is $ _____. Documentation supporting the Change Order is attached as Exhibits _____ through _____.

Payment Schedule Items Added/Deducted:

| Activity No. | Description | Amount |
|---|---|---|
| _____ | _____ | _____ |

This Change Order is for (check the applicable categories below):

- _____ A lump sum, negotiated price Change Order (provide information in Section IIA below)
- _____ A unit price/quantities Change Order (provide information in Section IIB below)
- _____ A Force Account Change Order (provide information in Section IIC below)

**Section IIA**[1]

Lump sum price is $_____

**Section IIB**[2]

| UNIT PRICE ITEM | UNIT PRICE | ESTIMATED QUANTITY | PRICE (Unit Price x Quantity) |
|---|---|---|---|
| | | | |
| | | | |
| | | | |
| | | | |
| | | | |

Total of all items in above Table based on estimated quantities: $_____

**Section IIC**[3]

Summary of Force Account Categories: [Additives/(Credits)]

[1] Section IIA to be included and completed for negotiated, lump sum Change Orders pursuant to General Conditions Section 4.6.7

[2] Section IIB to be included and completed for unit price Change Orders pursuant to General Conditions Section 4.6.7.7

[3] Section IIC to be included and completed for Force Account Change Order pursuant to General Conditions Section 4.6.8

A. DB Contractor Labor (construction)

1. Wages (unburdened) $ _____
2. Insurance and taxes[4] (35% of A.1) $ _____

B. DB Contractor and Subcontractor Labor (professional services)
1. Wages (unburdened) $ _____
2. Labor surcharge (145% of B.1, which includes overhead and profit) $ _____

C. Materials (with taxes, freight and discounts) $ _____

D. Equipment[5] (includes 15% overhead and profit) $ _____

E. Subcontracts (Force Account basis) $ _____

F. Utility Owner Direct Costs $ _____

G. Overhead and Profit

1. Construction Labor[6] (25% of A.1) $ _____
2. Materials (15% of C) $ _____
3. Subcontracts (5% of E) $ _____
4. Utility Owner Direct Costs (5% of F) $ _____

H. Not to Exceed Amount $ _____

**SECTION III[7]**

The status of Substantial Completion Deadline is as follows:

- ❑ Unaffected by this Change Order
- ❑ Affected by (increasing) (decreasing) the date of Substantial Completion Deadline by _____ calendar days.

The status of Final Acceptance Deadline is as follows:

- ❑ Unaffected by this Change Order
- ❑ Affected by (increasing) (decreasing) the date of the Final Acceptance Deadline by _____ calendar days.

Accordingly, the summary of the dates of the Substantial Completion Deadline and the Final Acceptance Deadline are as follows:

---

[4] For insurance and taxes including the cost of premiums on public liability and workers' compensation insurance, Social Security, and unemployment insurance taxes (see General Conditions Section 4.6.8.1)
[5] Tabulated in accordance with the most recent version of the Rental Rate Blue Book and General Conditions Section 4.6.8.3.1
[6] For overhead, superintendence, profit, and small tools (see General Conditions Section 4.6.8.1)
[7] Revise list of Completion Deadlines if applicable to the Project

1. Substantial Completion Deadline: _____
   (+ or - _____ days from base of _____ calendar days after NTP1)

2. Final Acceptance Deadline: _____
(+ or - _____ days from base of _____ calendar days after NTP1)

Justification for Change Order with reference to the Contract Documents:
_____
_____
_____

Change order required under Capital Maintenance Agreement? Yes_____/No_____
If yes, state reason:
_____
_____
_____

The undersigned Authorized Representative of DB Contractor hereby certifies, under penalty of perjury, as follows:

(a) the above three sections represent a true and complete summary of all aspects of this Change Order;

(b) the amount of time and/or compensation requested is justified as to entitlement and amount;

(c) this Change Order includes all known and anticipated impacts or amounts, direct, indirect and consequential, which may be incurred as a result of the claim, event, occurrence or matter giving rise to the proposed change;

(d) the cost and pricing data forming the basis for the Change Order is complete, accurate and current; and

(e) 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 1 T.A.C. § 46.4) that was made by DB Contractor in the most recent Form 1295 disclosure of interested parties form provided to TxDOT by DB Contractor. Alternatively, if there has been a change to the disclosure of Interested Parties or if the value of this Change Order is $1,000,000 or greater, DB Contractor has submitted with this Change Order a current Form 1295. This certification does not apply, and submission of a current Form 1295 is not required, in the event that DB Contractor is a publicly traded business entity, or is a wholly owned subsidiary of a publicly traded business entity.

If the foregoing Change Order includes claims of Subcontractors or Suppliers, the undersigned have reviewed such claims and have determined in good faith that the claims are justified as to both entitlement and amount.

_____
**DB Contractor Authorized Representative**

**Date:** _____

**SECTION IV (Reviewed by TxDOT District Engineer)**

_____

**TxDOT District Engineer**

**Date:** _____

**Comments:**

_____

_____

_____

**SECTION V (Reviewed by FHWA Project Representative, if applicable)**

_____

**FHWA Project Representative**

**Date**_____

**Comments:**

_____

_____

_____

**SECTION VI (Reviewed by TxDOT Chief Engineer, if applicable)**[8]

_____

**TxDOT Chief Engineer**

**Date**_____

**Comments:**

[*Include if signature not required*] [Not Applicable - This Change Order is less than $10 million and does not exceed the $30 million cumulative threshold. Upon concurrence by the Project Finance, Debt and Strategic Contracts Division Director and General Counsel Division, the District Engineer will have final approval of the Change Order for execution.]

_____

_____

_____

[8] If not required, insert "NOT APPLICABLE" in signature line.

**SECTION VII (Reviewed by Chief Financial Officer, if applicable)**[9]

_____

**TxDOT Chief Financial Officer**

**Date**_____

**Comments:**

[*Include if signature not required*] [Not Applicable - This Change Order is less than $10 million and does not exceed the $30 million cumulative threshold. Upon concurrence by the Project Finance, Debt and Strategic Contracts Division Director and General Counsel Division, the District Engineer will have final approval of the Change Order for execution.]

**SECTION VII (Reviewed by TxDOT Executive Director, if applicable)**[10]

_____

**TxDOT Executive Director**

**Date**_____

**Comments:**
[*Include if signature not required*] [Not Applicable - This Change Order is less than $10 million and does not exceed the $30 million cumulative threshold. Upon concurrence by the Project Finance, Debt and Strategic Contracts Division Director and General Counsel Division, the District Engineer will have final approval of the Change Order for execution.]

_____
_____
_____

[9] If not required, insert "NOT APPLICABLE" in signature line.
[10] If not required, insert "NOT APPLICABLE" in signature line.

# EXHIBIT 15

## LIQUIDATED DAMAGES FOR LANE CLOSURES AND LANE RENTAL CHARGES

The Liquidated Damages for Lane Closures and Lane Rental Charges for which DB Contractor may be liable pursuant to Section 8.6.2 of the General Conditions and Section 7.3 of the DBA are established as below in Table 15-1.

Table 15-1: Liquidated Damages for Lane Closures and Lane Rental Charges

| **Eastbound/Southbound or Westbound/Northbound I-635** | **Time Period A** Liquidated Damages Per Hour | **Time Period B** Lane Rental Charges Per Hour | **Time Period C** Lane Rental Charges Per Hour | **Time Period D** Lane Rental Charges Per Hour |
|---|---|---|---|---|
| One Lane Closed* | $10,000 | $50 | $50 | $10,000 |
| Two Lanes Closed** | $50,000 | $10,000 | $100 | $50,000 |
| Three Lanes Closed | $125,000 | $50,000 | $5,000 | $125,000 |
| Four or more Lanes Closed – including Full Mainlane Closure | $250,000 | $100,000 | $30,000 | $250,000 |

*A full closure and detour of a one lane ramp or one lane direct connection shall be assessed as "One Lane Closed".

**A full closure and detour of a two lane ramp or two lane direct connection shall be assessed as "Two Lanes Closed".

Lane Closures implemented by DB Contractor as directed by TxDOT related to work performed by Systems Integrator shall be exempt from Liquidated Damages for Lane Closures and Lane Rental Charges.

Liquidated Damages for Lane Closures and Lane Rental Charges shall be assessed in quarter-hour increments for any Lane Closure during the Term. The assessment of Liquidated Damages for Lane Closures and Lane Rental Charges shall be for Lane Closures during which one or more lanes (including main lanes, ramps to/from such roadway, and direct connectors) are closed or have a width that is less than the minimum requirements as described in Item 26 and the Special Provision to Item 26.

Liquidated Damages for Lane Closures and Lane Rental Charges shall apply to any Lane Closure that occurs in connection with the performance of Work as described above and shall be assessed every quarter-hour or part thereof for each lane closed or has a reduced width. DB Contractor shall report to TxDOT on a daily basis any Lane Closures or reduced widths that give rise to Liquidated Damages for Lane Closures or Lane Rental Charges.

Provision of liquidated damage values for Time Period A does not imply TxDOT's consent to closing freeway or ramp lanes during the peak periods (Time Period A) and DB Contractor is not permitted to schedule Lane Closures during Time Period A.

The first $45,000,000 of cumulative Lane Rental Charges incurred by DB Contractor with respect to Lane Closures as described above will not be assessed against DB Contractor (the "**Lane Rental Bank**").

DB Contractor may earn schedule-related incentives as shown below in Table 15-2 as described in the Special Provision to Item 26 and shall be subject to Liquidated Damages if the listed closures are not terminated by the deadlines indicated in the Special Provision to Item 26.

Table 15-2: Schedule-Related Incentives and Disincentives

| | **Incentive for Making Certain Roadways Available** | **Disincentive for Prolonged Closure (Liquidated Damages)** |
|---|---|---|
| Cross-Street #5: Skillman Street | $5,000/day, maximum of 1095 days, payable to DB Contractor if DB Contractor makes available to motorists full proposed Skillman Street and adjacent frontage road sections prior to the Substantial Completion Deadline. | N/A |
| Cross-Street #20: La Prada Drive | $10,000/day, maximum of 270 days, not payable to DB Contractor but any earned incentive increases Lane Rental Bank, for re-opening La Prada Drive to motorists prior to expiration of the permitted closure period in the manner described in Special Provision to Item 26 | $10,000/day for each day La Prada Drive remains closed beyond the number of days permitted in Special Provision to Item 26 |
| Cross-Street #24: Gus Thomasson Road | $20,000/day, maximum of 180 days, not payable to DB Contractor but any earned incentive increases Lane Rental Bank, for re-opening Gus Thomasson Road to motorists prior to expiration of the permitted closure period in the manner described in Special Provision to Item 26 | $20,000/day for each day Gus Thomasson Road remains closed beyond the number of days permitted in Special Provision to Item 26 |

# EXHIBIT 16

## INTENTIONALLY DELETED

# EXHIBIT 17

## KEY SUBCONTRACTORS

[*To Be Inserted From Proposal*]

# EXHIBIT 18

## KEY PERSONNEL

| POSITIONS | INDIVIDUAL |
|---|---|
| Project Manager | |
| Construction Manager | |
| Design Manager | |
| Lead Maintenance of Traffic (MOT) Design Engineer | |
| Independent Quality Firm Manager | |
| Professional Services Quality Assurance Manager | |

# EXHIBIT 19

## INITIAL DESIGNATION OF AUTHORIZED REPRESENTATIVES

TxDOT Authorized Representatives: *(To be provided by TxDOT)*

DB Contractor's Authorized Representatives: *(To be provided by DB Contractor)*

# EXHIBIT 20

## DISPUTES RESOLUTION REQUIREMENTS

Appendix 1: Additional Disputes Resolution Provisions

Appendix 2: Disputes Board Agreement

# APPENDIX 1 TO EXHIBIT 20

## ADDITIONAL DISPUTES RESOLUTION PROVISIONS

1. **Dispute Resolution Procedures**

   a. The Parties agree, in accordance with 43 Texas Administrative Code Section 9.6, to be bound by and subject to the procedures established in this Appendix 1 to Exhibit 20 (this "Appendix 1") as an agreement regarding dispute resolution procedures that shall survive expiration or earlier termination of the Term and thereafter for so long as either Party has any obligation originating under the Contract Documents.

   b. The provisions of this Appendix 1 are intended to accord with Section 201.112 of the Code and the DRP Rules promulgated thereunder.

   c. As used in this Appendix 1, the phrase "the procedures established in this Appendix 1" includes the procedures established in this Appendix 1, the Disputes Board Agreement, the DRP Rules, the Code and the Texas Government Code.

   d. All Disputes arising under the Contract Documents shall be resolved pursuant to the Disputes Review Panel Process and Informal Resolution Procedures and, if not resolved thereby, the Dispute Resolution Procedures, except the following: (i) any equitable relief sought in Travis County, Texas District Court that TxDOT is permitted to bring against DB Contractor under Section 1(g); and (ii) Ineligible Matters.

   e. Any disagreement between the Parties as to whether the Disputes Review Panel Process, Informal Resolution Procedures and/or the Dispute Resolution Procedures apply to a particular Dispute shall be treated as a Dispute for resolution in accordance with this Appendix 1.

   f. With respect to any Dispute for resolution in accordance with the procedures established in this Appendix 1, the Parties agree that (i) such Dispute must be asserted in writing to the other Party prior to the running of the applicable statute of limitations and (ii) provided that this is done, the applicable statute of limitations shall be tolled until the 30th day after conclusion of the last such procedure applicable to such Dispute.

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

2. **Informal Resolution As Condition Precedent**

As a condition precedent to the right to have any Dispute resolved pursuant to the Dispute Resolution Procedures or by a district court, the claiming Party must first attempt to resolve the Dispute with the responding Party through the procedures described in Sections 4.9 and 4.10 of the General Conditions.

3. **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: (a) the Parties may mutually agree to initiate mediation in accordance with Section 9 hereof, or (b) either Party may refer the Dispute to the Disputes Board for resolution pursuant to Section 5 hereof.

4. **Disputes Board Agreement**

a. The Parties executed the Disputes Board Agreement on the effective date therein. The Disputes Board Agreement governs all aspects of the Disputes Board, as well as all rights and responsibilities of the Parties with respect to the Disputes Board, that are not otherwise addressed in this Appendix 1, the DRP Rules and the Code.

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

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

d. The Disputes Board shall have the authority to resolve any Dispute other than Ineligible Matters and any actions for equitable relief in district court that TxDOT is permitted to bring against DB Contractor under Section 1(g) hereof.

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

f. If a Disputes Board Decision awards an amount payable by one Party to the other, such amount became or shall become due and payable on the date required for payment in accordance with the applicable DRP governed agreement. If the date of payment is not specified in a DRP governed agreement, the payment shall be due ten days after the date the Final Order Implementing Decision for such decision becomes final under Section 8 (or, if the tenth day is not a Business Day, the next Business Day).

g. Except for those matters subject to Section 15, interest at LIBOR on an amount payable by one Party to the other shall accrue beginning on the date such amount was due and continuing until the date such amount is paid.

h. A Party desiring to pursue a Dispute against the other Party shall, after completion of the Informal Resolution Procedures, serve 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 Contract Documents;

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

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

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

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

ix. Any other information the claiming Party considers relevant.

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: (1) the notice of Dispute is served in good faith; and (2) 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 (3) the designated representative is duly authorized to execute and deliver the notice and such certification on behalf of the claiming Party.

If the notice of Dispute fails to meet the certification requirements under this Section 4(h), on motion of the responding Party the Disputes Board shall suspend proceedings on the Dispute until a correct and complete written certification is delivered, and shall have the discretionary authority to dismiss the Dispute for lack of a correct certification if it is not delivered within a reasonable time as set by the Disputes Board. Prior to the entry by the Disputes Board of a final decision on a Dispute, the Disputes Board shall require a defective certification to be corrected.

5. **Submission of Dispute to Disputes Board**

a. Within 15 days (seven days for Fast-Track Disputes) after the end of the last time period under the Informal Resolution Proceedings, either Party may refer a Dispute to the Disputes Board for resolution by serving written notice on the other Party. The notice shall include the information set forth in Section 4(h) above. Within 15 days (seven days for Fast-Track Disputes) after a Party refers a Dispute to the Disputes Board, the responding Party shall serve a written response upon the claiming Party's designated agent. The response shall include the same information as the notice of Dispute issued under Section 4(h) above, to the extent applicable; shall be signed by the designated representative of the responding Party; and shall constitute a certification by the responding Party that:

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

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

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

b. Neither Party may attempt to seek resolution of a Dispute by the Disputes Board or litigate the merits of any Dispute in court if such Dispute is not timely referred to the Disputes Board within the 15 day time period under Section 5(a) above, except for Ineligible Matters and Disputes for which TxDOT is entitled to seek relief in court.

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

6. **Finality of Disputes Board Decision**

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

7. **SOAH Administrative Hearings and Final Orders**

a. **Appeal of Disputes Board Decision**

i. If, within 20 days after the Disputes Board's issuance of the Disputes Board Decision to TxDOT and DB Contractor (the "**Appeal Period**"), either Party is dissatisfied with the Disputes Board Decision due to a good faith belief that Disputes Board Error occurred, (1) DB Contractor may request the Executive Director to seek and/or (2) TxDOT may seek a formal administrative hearing before SOAH pursuant to Texas Government Code, Chapter 2001, and Section 201.112 of the Code, solely on the grounds that Disputes Board Error occurred. Upon receipt of DB Contractor's request for a formal administrative hearing before SOAH, the Executive Director shall, as a purely ministerial act, refer the matter to SOAH within ten Business Days after receipt of DB Contractor's request.

ii. If DB Contractor does not request, and TxDOT does not seek for itself, a formal administrative hearing before SOAH under Section 7(a)(i) within the Appeal Period, then within ten Business Days after the expiration of the Appeal Period, the Executive Director shall issue the Final Order Implementing Decision as a purely ministerial act. If the Executive Director fails to issue the Final Order Implementing Decision within this ten Business Day time period, the Disputes Board Decision shall become effective as the Final Order Implementing Decision for all purposes on the next Business Day.

iii. Neither Party may attempt to:

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

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

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

b. **Appeal of Disputes Board Error to SOAH**

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

i. The Disputes Board failed, in any material respect, to properly follow or apply the procedures for handling, hearing and deciding on the Dispute established under this Appendix 1 and such failure prejudiced the rights of a Party; or

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

c. **SOAH Proceeding and ALJ Proposal For Decision**

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

ii. Each Party may file exceptions to the proposal for decision with the ALJ no later than seven days after issuance of the ALJ's proposal for decision and, in response to a Party's exceptions, the other Party may file a reply to the excepting Party's exceptions with the

ALJ no later than 14 days after issuance of the proposal for decision. The ALJ shall review all exceptions and replies and notify TxDOT and DB Contractor no later than 21 days after issuance of the proposal for decision whether the ALJ recommends any changes to the proposal for decision, amends the proposal for decision in response to exceptions and replies to exceptions, and/or corrects any clerical errors in the proposal for decision. The ALJ shall reissue its written proposal for decision to the Executive Director and TxDOT, together with written findings of fact and conclusions of law, if revised from those previously furnished to the Parties.

iii. Unless a Party in good faith challenges the Disputes Board's authority to resolve the Dispute because the Dispute is an Ineligible Matter (1) in the proceedings before the Disputes Board, (2) as a Disputes Board Error during the Appeal Period, (3) in the SOAH proceeding or (4) in exceptions to the ALJ's proposal for decision timely filed under Section 7(c)(ii) above, any objection to the Disputes Board's authority to resolve the applicable Dispute shall be deemed waived by such Party.

d. **Final Orders of Executive Director.**

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

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

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

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

i. If the ALJ determined that Disputes Board Error occurred, a Final Order Vacating Decision shall be deemed to have been issued for all purposes by the Executive Director

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

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

8. **Judicial Appeal of Final Orders Under Substantial Evidence Rule.**

Each issued or deemed issued Final Order Implementing Decision and Final Order Vacating Decision shall be considered a final order for purposes of DB Contractor's ability to seek judicial appeal thereof under Section 201.112(d) of the Code under the substantial evidence rule. TxDOT and DB Contractor hereby agree that (a) pursuant to Section 2001.144(a)(4) of the Texas Government Code, each Final Order Implementing Decision and Final Order Vacating Decision shall be final (and therefore eligible for appeal under Section 201.112(d) of the Code) on the date such final order is issued or deemed issued by the Executive Director and (b) pursuant to Section 2001.145 of the Texas Government Code, TxDOT and DB Contractor hereby agree that the filing of a motion for rehearing shall not be a prerequisite for appeal of such final orders under Section 201.112(d) of the Code.

9. **Mediation.**

DB Contractor and TxDOT, by mutual agreement, may refer a Dispute (as well as any dispute with a Utility Owner relating to any Utility Adjustment) to mediation for resolution. The Parties shall use diligent efforts to convene and conclude any such mediation within 30 days after they agree to refer the Dispute to mediation. DB Contractor and TxDOT shall share equally the expenses of the mediation. If any Dispute has been referred to mediation by mutual agreement of the Parties, but the Dispute is not resolved within the foregoing 30-day period, then either Party can, on or after the 31st day, cease participating in such mediation. A Party shall give written notice to the other Party that it will no longer participate. The deadlines in this Appendix 1 for processing a Dispute are tolled, day for day, during mediation.

10. **Confidential Information**

a. Subject to the Public Information Act, all discussions, negotiations, Disputes Panel Process and Informal Resolution Procedures between the Parties to resolve a Dispute, and all documents and other written materials furnished to a Party or exchanged between the Parties during any such discussions, negotiations, or Informal Resolution Procedures, shall, to the extent allowed by law, be considered confidential and not subject to disclosure by either Party.

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

i. All information that has been deposited into escrow [pursuant to Section 5.12.3 of the ITP] shall be treated as confidential to the extent allowed by law by the Parties and the Disputes Board, the ALJ and the court, as applicable, and, further, shall be subject to a protective order issued by the Disputes Board, the ALJ or the court, as applicable, to protect such information from disclosure to third Persons.

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

11. **Dispute Resolution: Additional Requirements for Subcontractor Disputes**

For purposes of this Appendix 1, a "Subcontractor Dispute" shall include any Dispute by a Subcontractor, including also any pass-through claims by a lower tier Subcontractor, against DB Contractor that is actionable by DB Contractor against TxDOT and arises from Work, materials or other services provided or to be provided under the Contract Documents. If DB Contractor determines to pursue a Dispute against TxDOT that includes a Subcontractor Dispute, the following additional conditions shall apply:

a. DB Contractor shall identify clearly in all submissions pursuant to this Appendix 1, that portion of the Dispute that involves a Subcontractor Dispute.

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

c. DB Contractor shall require in all Subcontracts that all Subcontractors:

i. agree to submit Subcontractor Disputes to DB Contractor in a proper form and in sufficient time to allow processing by DB Contractor in accordance with this Appendix 1;

ii. agree to be bound by the terms of this Appendix 1 to the extent applicable to Subcontractor Disputes;

iii. agree that, to the extent a Subcontractor Dispute is involved, completion of all steps required under this Appendix 1 shall be a condition precedent to pursuit by the Subcontractor of any other remedies permitted by Law, including institution of a lawsuit against DB Contractor;

iv. agree that any Subcontractor Dispute brought against a Surety, that also is actionable against TxDOT through DB Contractor, shall be stayed until completion of all steps required under this clause (c); and

v. agree that the existence of a dispute resolution process for Disputes involving Subcontractor Disputes shall not be deemed to create any claim, right or cause of action by any Subcontractor against TxDOT. Subcontractors shall, at all times, have rights and remedies only against DB Contractor.

12. **Subsequent Proceedings**

a. **Exclusive Jurisdiction and Venue**

The Parties agree that the exclusive jurisdiction and venue for any legal action or proceeding, at law or in equity, that is permitted to be brought by a Party in court arising out of the Contract Documents shall be the district courts of Travis County, Texas.

b. **Admissibility of Disputes Resolution Proceedings**

The admissibility, in any administrative or judicial proceeding subsequent to this dispute resolution process, of the Parties' submittals and any TxDOT determinations shall be in the discretion of the appropriate administrative officer or the court in accordance with applicable Law.

13. **Continuation of Disputed Work.**

At all times during the Dispute Resolution Procedures set forth in this DBA, DB Contractor and all Subcontractors shall continue with the performance of the Work and their obligations, including any disputed Work or obligations, diligently and without delay, in accordance with this DBA, except to the extent enjoined by order of a court or otherwise approved by TxDOT in its discretion. DB Contractor acknowledges that it shall be solely responsible for the results of any delaying actions or inactions taken during the pendency of resolution of a Dispute relating to the Work even if DB Contractor's position in connection with the Dispute ultimately prevails. In addition, during the pendency of resolution of a Dispute relating to the Work, the Parties shall continue to comply with all provisions of the Contract Documents, the Project Management Plan, the Governmental Approvals and applicable Law.

14. **Records Related to Claims and Disputes**

Throughout the course of any Work that is the subject of any Dispute that is the subject of the Dispute Resolution Procedures of this DBC, DB Contractor shall keep separate and complete records of any extra costs, expenses, and other monetary effects relating to the disputed Work, and shall permit TxDOT access to these and any other records needed for evaluating the Dispute. These records shall be retained for a period of not less than one year after the date of resolution of the Dispute pertaining to such disputed Work (or for any longer period required under any other applicable provision of the Contract Documents).

15. **Interest**

This Section 15 applies only to claims that are subject to the Texas Prompt Payment Act, Government Code, Chapter 2251.

In the event a DB Contractor elects to pursue a formal Dispute with TxDOT under this Appendix 1, TxDOT shall notify DB Contractor whether it will dispute the claim not later than the 21st day after the date TxDOT

receives the claim. A payment becomes overdue and begins to accrue interest in accordance with the Texas Prompt Payment Act, Government Code, Chapter 2251.

16. **Attorneys' Fees**

A party shall pay the attorneys' fees of the other party for Disputes brought pursuant to this Appendix 1 only if such payment is required pursuant to the Texas Prompt Payment Act and the payment of attorneys' fees is ordered in a TxDOT administrative order or in a judicial order.

# APPENDIX 2 TO EXHIBIT 20
# DISPUTES BOARD AGREEMENT

THIS DISPUTES BOARD AGREEMENT (this "**Agreement**") is made and entered into this [●], (the "**Effective Date**") by and between the Texas Department of Transportation ("**TxDOT**"), and _____ ("**DB Contractor**"). TxDOT and DB Contractor are sometimes referred to individually herein as a "**Party**" and collectively as the "**Parties**."

RECITALS

A. TxDOT and DB Contractor are parties to that certain Design-Build Contract for I-635 LBJ East Project, dated as of the Effective Date (the "**DBC**") and the other Contract Documents, all of which collectively comprise a comprehensive DBC under Chapter 223 of the Code.

B. Appendix 1 to Exhibit 20 to the DBA, among other things, provides for the establishment and operation of a disputes review board (each such board being referred to herein as the "**Disputes Board**") to resolve each Dispute if, as and when, a Dispute arises under the Contract Documents.

NOW THEREFORE, in consideration of the terms, conditions, covenants and agreements contained herein and in the Contract Documents, the receipt and sufficiency of which the Parties hereby acknowledge, the Parties hereby agree as follows:

**Section 1. Definitions and References.**

1.1 All capitalized terms used in this Agreement and not defined or modified herein shall have the same meaning as set forth in the Contract Documents.

1.2 Appendix 1 to Exhibit 20 to the DBA, which, among other things, discusses the Disputes Board's role in resolving Disputes, is incorporated herein by reference.

1.3 Unless expressly indicated otherwise, all references in this Agreement to a "Section" mean the Section contained in this Agreement.

**Section 2. Purpose and Role of the Disputes Board; Binding Disputes Board Decision.**

The sole purpose of the Disputes Board is to fairly and impartially consider all Disputes brought to it and to resolve such Disputes in a Disputes Board Decision (as defined in Section 5.5 below). The Disputes Board is not a supervisory, advisory, or facilitating body and has no role other than as expressly described in this Agreement and in Appendix 1 to Exhibit 20 to the DBA. Notwithstanding that each Disputes Board Member will have been engaged by a Party under a Disputes Board Member Joinder Agreement (as defined in Section 3.1.2 below), none of the Disputes Board Members shall consider themselves an appointee, representative, agent or advocate of the Party who engaged him or her. Disputes Board Members are charged with discharging their responsibilities hereunder in an impartial, objective, independent and professional manner without regard to the particular interests of either Party. Upon completion of the remainder of procedures required under the Code and the DRP Rules, each Disputes Board Decision shall be final, conclusive, binding upon and enforceable against the Parties.

**Section 3. Selection, Replacement and Removal of Disputes Board Members and Candidates.**

3.1 Selection of Disputes Board Member Candidates and Disputes Board Members.

3.1.1 At all times, each Party shall endeavor to maintain a list of five candidates who satisfy the Disputes Board Member Qualifications (as defined in Section 4 below) and have been approved or deemed approved by the other Party to serve on the Disputes Board (each such list being a "**Disputes Board Member Candidates List**"). As

of the Effective Date, (a) TxDOT accepts and consents to the final Disputes Board Member Candidates List of DB Contractor previously approved or deemed approved by TxDOT on or before the Effective Date and (b) DB Contractor accepts and consents to the Disputes Board Member Candidates List of TxDOT previously approved or deemed approved by DB Contractor on or before the Effective Date.

3.1.2 If at any time, pursuant to Appendix 1 to Exhibit 20 to the DBA, a Dispute is referred by TxDOT or DB Contractor to the Disputes Board for resolution, each Party shall, within 15 days after notice of such referral is given or received, as applicable (or within 7 days after notice of a Fast-Track Dispute is given or received, as applicable), appoint and engage one of the preapproved candidates on its Disputes Board Member Candidates List to serve on the Disputes Board. The Disputes Board empanelled to resolve each Dispute shall consist of three individuals, except as otherwise provided for resolution of Small Claims under Section 5.3.3 or as the Parties may agree pursuant to Section 3.1.4 below, which shall consist of (a) one Disputes Board Member selected by TxDOT, (b) one Disputes Board Member selected by DB Contractor and (c) a third individual selected pursuant to Section 3.1.3 below. To set forth the terms and conditions of such appointment and engagement, each Party and its appointed Disputes Board Member shall enter into a Disputes Board Member Joinder Agreement in the form attached hereto as Attachment 1 (each such agreement, upon execution, being referred to herein as a "**Disputes Board Member Joinder Agreement**" and incorporated herein by reference).

3.1.3 The two Disputes Board Members appointed to the Disputes Board shall, as their first duty following appointment shall, within 15 days after their appointment (or within 7 days after their appointment, if the Dispute for resolution by the Disputes Board is a Fast-Track Dispute), select the third Disputes Board Member (the **"Disputes Board Chair"**) from among the remaining candidates that appear on the Parties' Disputes Board Member Candidate Lists. If the two Disputes Board Members appointed by DB Contractor and TxDOT are unable to reach agreement on their selection of the Disputes Board Chair within such time period, then either DB Contractor or TxDOT or both shall request that the Chief Administrative Judge of the Travis County District Courts select the Disputes Board Chair from among the remaining candidates that appear on the Parties' Disputes Board Member Candidate Lists. Both Parties waive all rights to appeal the decision of the Chief Administrative Judge, except if the individual designated by such judge to serve as the Disputes Board Chair is not among the qualified and approved candidates remaining on the Parties' Disputes Board Member Candidate Lists. Within 15 days after the selection of the Disputes Board Chair by the two appointed Disputes Board Members or the Chief Administrative Judge (or within 7 days after such selection if the Dispute is a Fast-Track Dispute), the Party on whose list the Disputes Board Chair appears and the individual selected to serve as the Disputes Board Chair on the Disputes Board shall enter into a Disputes Board Member Joinder Agreement.

3.1.4 The Parties may mutually agree at any time prior to the Dispute Board's issuance of a Disputes Board Decision that the relevant Dispute shall be resolved by the Disputes Board Chair alone rather than by the three member Disputes Board, and any such agreement shall be irrevocable upon issuance of the joint written directive next described. If the Parties so agree, they shall issue a joint written directive to the Disputes Board (or to the two appointed Disputes Board Members or the Chief Administrative Judge of the Travis County District Courts, if such Disputes Board Members or Chief Administrative Judge are or is then in the process of selecting the Disputes Board Chair pursuant to Section 3.1.3 above) stating their mutual agreement that the Disputes Board Chair alone shall resolve the relevant Dispute. If the Parties issue such a joint written directive, the Disputes Board Chair rather than the Disputes Board shall resolve the relevant Dispute in accordance with the terms and conditions of this Agreement (except insofar as this Agreement contemplates resolution of a Dispute by a three member Disputes Board) and, if the three member Disputes Board had been previously empanelled, the two Party-appointed Disputes Board Members shall be dismissed from any further service on the Disputes Board.

3.2 Replacing Candidates on a Party's Disputes Board Member Candidates List.

3.2.1 At any time, either Party may replace any of the individuals on its Disputes Board Member Candidates List that are not then serving on the Disputes Board, provided, however, that no such individual shall be added to the Disputes Board Member Candidates List of the proposing Party (the **"Nominating Party"**) until

complete Disclosure Statements on such individual are furnished to the other Party (the **"Evaluating Party"**) and the Evaluating Party approves or is deemed to approve such individual for inclusion on the Nominating Party's Disputes Board Member Candidates List. **"Disclosure Statements"** shall consist of the proposed Disputes Board Member candidate's resume of experience and a discussion of the Disputes Board Member Qualifications as they apply to the proposed candidate. Within 30 days after receipt of a proposed candidate's Disclosure Statements by the Evaluating Party (the **"Disputes Board Member Candidate Evaluation Period"**), the Evaluating Party shall evaluate the proposed candidate's Disclosure Statements and notify the Nominating Party as to whether the candidate is approved by the Evaluating Party for inclusion on the Nominating Party's Disputes Board Member Candidates List.

3.2.2 During the Disputes Board Member Candidate Evaluation Period, the Evaluating Party (a) shall submit written inquiry to the Nominating Party if, in the Evaluating Party's reasonable judgment, the Disclosure Statements for the proposed candidate are incomplete such that, if they are not supplemented to the Evaluating Party's reasonable satisfaction, such incompleteness will comprise a basis for the Evaluating Party's disapproval of the proposed candidate and (b) may submit written inquiries to the Nominating Party if the Evaluating Party has questions or concerns about the proposed candidate's qualifications to serve on the Disputes Board in light of the Disputes Board Member Qualifications. Within fifteen days after the Nominating Party's receipt of any such written inquiry from the Evaluating Party, the Nominating Party shall (or shall cause the proposed candidate to) furnish a written response to the Evaluating Party's inquiry. The Evaluating Party may submit up to three such written inquiries. The Disputes Board Member Candidate Evaluation Period shall be extended a total of 30 days (including the 15 day inquiry response period) for each written inquiry made by the Evaluating Party. The submission of incomplete Disclosure Statements (following written inquiry from the Evaluating Party so that the Nominating Party has the opportunity to supplement any such incomplete Disclosure Statements) or failure by the Nominating Party or its proposed candidate to fully respond to the Evaluating Party's written inquiry shall constitute a basis for the Evaluating Party to disapprove the proposed candidate during the Disputes Board Member Candidate Evaluation Period. If the Evaluating Party notifies the Nominating Party of its approval, or does not notify the Nominating Party of its disapproval, of a proposed candidate within the Disputes Board Member Candidate Evaluation Period, such candidate shall be approved or deemed approved by the Evaluating Party.

3.2.3 During the course of the Nominating Party replacing five consecutive potential candidates on its Disputes Board Member Candidates List on a cumulative basis over time, the Evaluating Party may, upon notice to the Nominating Party, disapprove up to two proposed candidates for any or no reason. The Evaluating Party may, upon notice to the Nominating Party, only disapprove all subsequently proposed candidates of the Nominating Party based on any such candidate's failure to satisfy the Disputes Board Member Qualifications (which failure shall be described in detail in the Evaluating Party's notice of disapproval).

3.2.4 In furtherance of the Parties' objective of having in place at all times two Disputes Board Member Candidate Lists comprised of five nominated and approved candidates meeting the Disputes Board Qualifications, but subject to the provisions of Section 3.2.3, if the Evaluating Party does not approve a proposed candidate for inclusion on the Nominating Party's Disputes Board Member Candidates List, the Nominating Party shall propose subsequent candidates in reasonably rapid succession, and the selection process shall continue until the Evaluating Party's approval is obtained or deemed obtained as to a proposed candidate's inclusion on the Nominating Party's Disputes Board Member Candidates List.

3.2.5 If the Evaluating Party disapproves a proposed candidate of the Nominating Party due to failure of such candidate to satisfy the Disputes Board Member Qualifications, but the Nominating Party disagrees that such candidate is not qualified or eligible for service, the Nominating Party may initiate Informal Resolution Procedures and then, if such disagreement is not resolved to the Nominating Party's satisfaction, Dispute Resolution Procedures in order to resolve such Dispute.

3.3 Removal of Disputes Board Member; Appointment of Replacement.

3.3.1 The appointment of a Disputes Board Member (including the Disputes Board Chair) to the Disputes Board may be terminated at any time by any of the Persons specified below in this Section 3.3.1 due to the occurrence of Misconduct or due to Conflict of Interest not previously waived under Section 4.3.1 (such termination constituting a termination "**For Cause**" hereunder), effective upon service of such Person's notice of termination on the affected Disputes Board Member and, if the terminating Person is a Party, the other Party or, if the terminating Person is not a Party, the Parties. Following termination and removal of a Disputes Board Member For Cause or the death or resignation of a Disputes Board Member, the Disputes Board shall not proceed with the resolution of the applicable Dispute until a replacement Disputes Board Member has been appointed.

(a) Any two members of the Disputes Board may terminate the third Disputes Board Member's appointment For Cause;

(b) TxDOT and DB Contractor may, upon mutual agreement, terminate any Disputes Board Member's appointment For Cause or without cause; and

(c) TxDOT or DB Contractor may unilaterally terminate the appointment of any Disputes Board Member For Cause.

Provided, however, that if a Disputes Board Member's appointment is terminated For Cause and a Party disagrees that such Disputes Board Member should have been terminated For Cause, such Party may, within 5 Business Days after notice of the Disputes Board Member's termination of appointment is received, initiate Informal Resolution Procedures and then, if such disagreement is not resolved to the disagreeing Party's satisfaction, Dispute Resolution Procedures in order to resolve such Dispute. A Party may not unilaterally or by mutual agreement with the other Party terminate the appointment of any Disputes Board member For Cause and then dispute the proprietary of such termination.

3.3.2 In the event that one or more Disputes Board Members needs to be replaced due to removal, death or resignation of one or more Disputes Board Members, replacement Disputes Board Members shall be appointed in the same manner as the predecessor Disputes Board Members(s) until the Disputes Board is reconstituted as a three person board. The appointment of each replacement Disputes Board Member will begin as soon as notice of removal, death or resignation is given or received and shall be completed as soon as possible, but in no event more than 30 days thereafter.

**Section 4. Qualifications and Conduct of Disputes Board Members.**

**"Disputes Board Member Qualifications,"** as they pertain to each Disputes Board Member or proposed candidate for inclusion on a Party's Disputes Board Member Candidate List, consist of the requisite experience described in Section 4.1 below and the absence of grounds for disqualification as described in Section 4.2 below.

4.1 Requisite Experience. All Disputes Board Members shall be attorneys who (a) are retired judges with at least ten years prior experience as a sitting judge or (b) are active members of the State Bar of Texas or any other state bar with at least ten years prior experience acting as mediators, arbitrators or dispute board members for commercial disputes, in either case who have not been subject to disciplinary action within the past ten years. Preference shall be given to attorneys who, in addition to meeting the foregoing qualifications, are also experienced in interpreting or adjudicating contract rights and claims involving financing, design, construction, operations and/or maintenance of public infrastructure projects.

4.2 Disqualification. No Disputes Board Member shall have a financial interest in the Design-Build Agreement, in any Subcontract or the Project or in the outcome of any Dispute decided hereunder, except for payments to that member for services on the Disputes Board.

4.3 Effect of Party's Prior Approval of Disputes Board Member.

4.3.1 An Evaluating Party's approval or deemed approval of a proposed candidate for inclusion on the Nominating Party's Disputes Board Member Candidates List shall constitute an irrevocable waiver of any subsequent objection to such individual's lack of qualifications under Section 4.1 (except if such individual's lack of qualifications constitutes Misconduct, as addressed in Section 4.3.2 below).

4.3.2 No approval or deemed approval by the Evaluating Party of a proposed candidate for inclusion on the Nominating Party's Disputes Board Member Candidates List shall constitute a waiver of any objection to a Conflict of Interest or Misconduct of such individual under Section 4.2, except that any matter fully disclosed in an individual's Disclosure Statements prior to inclusion of such individual on the Nominating Party's Disputes Board Member Candidates List with the approval or deemed approval of the Evaluating Party may not be subsequently asserted by the Evaluating Party as a Conflict of Interest or Misconduct constituting grounds for termination and removal of such individual from the Nominating Party's Disputes Board Member Candidates List or from service as a Disputes Board Member on the Disputes Board.

**Section 5. Procedures and Scope of Work of the Disputes Board.**

5.1 Procedures; Modification of Procedures. The Disputes Board shall conduct its proceedings to resolve a Dispute in accordance with the requirements specified or referenced herein; provided, however, that:

(a) The Parties may jointly modify the procedures applicable to the Disputes Board's proceedings to resolve a Dispute, effective upon the Disputes Board Chair's receipt of the Parties' written notice of the Parties' mutually agreed modification of such procedures describing such modification in detail (the foregoing being without limitation to any requirements applicable to the Parties' amendment of the DBC or any requirements applicable to modification of the DRP Rules or the Sections of the Code under which the DRP Rules are promulgated); and

(b) The Disputes Board may modify the procedures applicable to its proceedings to resolve a Dispute so as to be more responsive to the needs of the Parties, provided that (i) the Disputes Board Chair issues written notice to the Parties describing the proposed modification in detail and (ii) both Parties give their written consent thereto, effective upon the Disputes Board Chair's receipt of the Parties' written consent thereto.

5.2 Ineligible Matters. As a preliminary matter prior to consideration of the underlying matter, the Disputes Board shall hear, consider and render a Disputes Board Decision with respect to the responding Party's assertion that a particular claim, demand, dispute, disagreement or controversy is an Ineligible Matter. Resolution of whether a claim, demand, dispute, disagreement or controversy is a Dispute that the Disputes Board has authority to resolve or an Ineligible Matter shall be resolved as a preliminary matter by the Disputes Board, and the Disputes Board Decision shall reflect that the underlying matter is a Dispute eligible for resolution by the Disputes Board unless a majority of the Disputes Board determines with positive assurance that such a determination would not be correct.

5.3 Procedures for Disputes Board's Resolution of Disputes.

5.3.1 The Disputes Board shall conduct its proceedings in accordance with the Commercial Rules, including time periods in which actions by the Disputes Board shall occur. "**Commercial Rules**" means the dispute resolution proceedings set forth in Attachment 2 attached hereto. For Fast-Track Disputes, the time frames provided in the Commercial Rules for Expedited Procedures (as defined in Attachment 2) shall apply in accordance with the Commercial Rules.

5.3.2 Each Disputes Board Member, or the Disputes Board Chair on behalf of the Disputes Board, shall promptly notify the Parties if any circumstances has or is likely to arise that would prevent prompt resolution of the applicable Dispute in accordance with the Commercial Rules and this Agreement.

5.3.3 The following provisions pertain to Small Claims:

(a) A **"Small Claim"** is a Claim or related or similar Claims which arise fairly contemporaneously out of the same set of acts, events or circumstances that the Parties mutually agree to have resolved solely by the Disputes Board Chair. A non-binding example of a Small Claim is where the cumulative amount in controversy of a Claim or related or similar Claims is $100,000 or less.

(b) Once the Disputes Board Chair is appointed to resolve a Small Claim, the other two Disputes Board Members shall be released from further service. Thereafter, in the context of the Disputes Board Chair's resolution of a Small Claim hereunder, all references in the Dispute Resolution Procedures established in Appendix 1 to Exhibit 20 to the DBA to the "Disputes Board" or the "Disputes Board Members" shall mean and refer to the Disputes Board Chair. At any time prior to the close of the Disputes Board hearing under R-27 of the Commercial Rules, if, due to amendment of the Dispute as to the amount in controversy, aggregation of the Dispute with other Disputes or other changes that cause a Party to no longer consent to resolution of the Dispute as a Small Claim by the Dispute Board Chair, such Party may, upon notice to the Disputes Board Chair and the other Party, withdraw its assent to resolution of the Dispute as a Small Claim by the Disputes Board Chair and require that a full three-member Disputes Board be empanelled to resolve such Dispute.

(c) The Disputes Board Chair shall have no authority to award compensation or damages in a Disputes Board Decision regarding a Small Claim aggregating more than $100,000, and TxDOT or DB Contractor as the claiming Party, as the case may be, asserting a Small Claim hereby irrevocably waives any right, at law or in equity, to any damages or award arising out of such Small Claim in excess of $100,000; provided, however, that the amount of $100,000 as stated in this Section 5.3.3(c) shall be adjusted on every fifth anniversary of the Effective Date by the percentage increase (if any) in the CPI between the date the CPI was most recently published before the Effective Date and the date most recently published before the date of adjustment.

5.4 Aggregation of Disputes. Either Party shall be entitled to request the Disputes Board to aggregate the consideration of multiple Disputes for resolution by the Disputes Board where common questions of fact, Law and contract interpretation and the efficiencies to be gained in conducting a single proceeding to resolve all such Disputes merit the aggregate consideration of all such Disputes. Upon receipt of such a request, the Disputes Board shall consider the aggregated Disputes in a single proceeding unless, as a preliminary matter, the Disputes Board determines (after considering any evidence presented by the Parties in support of, or in opposition to, the proposed aggregation of such Disputes for resolution in a single proceeding) that there are insufficient common questions of fact, Law and contract interpretation among the proposed aggregated Disputes and/or the efficiencies to be gained by conducting a single proceeding to resolve such Disputes are outweighed by the need for separate and independent resolution of some or all of the proposed aggregated Disputes (as specified in the Disputes Board Decision on this matter) by a separately empanelled Disputes Board in a separate proceeding. A Disputes Board Decision regarding whether Disputes will be aggregated for resolution in a single proceeding before the Disputes Board shall be final, binding and not subject to appeal.

5.5 Issuance of Disputes Board Decision and Any Minority Report. The Disputes Board should make every effort to reach a unanimous decision among the Disputes Board Members. If this proves infeasible, the dissenting Disputes Board Member may prepare a minority report. Within 20 days after the final hearing on an Dispute (other than a Fast-Track Dispute, in which case within 5 days after the final hearing the Fast-Track Dispute), the Disputes Board Chair shall issue the Dispute Board's written decision (each, a "**Disputes Board Decision**"), together with its written findings of fact and conclusions of law in support of the Disputes Board Decision, to the Parties.

5.6 Confidential Materials; Return or Destruction Thereof. "**Confidential Materials**" are all discussions, negotiations, testimony and evidence between the Parties and/or in a proceeding before the Disputes Board that are confidential pursuant to Section 10 of Appendix 1 to Exhibit 20 to the DBA. Each Disputes Board Member shall

maintain the privacy of Confidential Materials pursuant to Section 10 of Appendix 1 to Exhibit 20 to the DBA. Within 30 days after issuance of the Final Order Implementing Decision, the Disputes Board Chair shall furnish written notice to each Party listing the Confidential Materials in the Disputes Board's possession and, except for those Confidential Materials that a Party directs the Disputes Board to return to such Party in writing within 15 days after receipt of such notice, the Disputes Board Chair shall destroy all copies of all Confidential Materials in the Disputes Board's possession. Until the time for the Disputes Board Chair's issuance of the foregoing written notice, the Disputes Board shall hold all Confidential Materials in confidence other than making them available for production into evidence in subsequent proceedings.

5.7 Dissolution of Disputes Board. Once the Disputes Board Decision of the Disputes Board becomes final and the Executive Director has issued a Final Order Implementing Decision, the Disputes Board shall be dissolved and the Disputes Board Members serving on such Disputes Board shall be released from further service.

**Section 6. Necessity of Submission of Dispute to Disputes Board.**

A Party's submission of a Dispute to the Disputes Board for resolution and the Dispute Board's issuance of the Disputes Board Decision shall be conditions precedent to any subsequent proceeding concerning such Dispute, except as otherwise provided in Appendix 1 to Exhibit 20 to the DBA.

**Section 7. TxDOT and DB Contractor Responsibilities.**

7.1 TxDOT Responsibilities. TxDOT shall serve upon each Disputes Board Member one copy of the Contract Documents. TxDOT shall also serve upon each Disputes Board Member (and concurrently upon DB Contractor) any other documents which are or may become pertinent to the activities of the Disputes Board, including but not limited to any Change Order, Directive Letter or other written direction, instruction, determination or decision of TxDOT.

7.2 DB Contractor Responsibilities. DB Contractor shall serve on each Disputes Board Member (and concurrently on TxDOT) one set of any documents which are or may become pertinent to the activities of the Disputes Board, except those documents furnished by TxDOT. Such documents may include, but shall not be limited to, any drawings or sketches, calculations, procedures, schedules, estimates or other documents and Submittals which are used in the performance of the Work or in justifying or substantiating DB Contractor's position.

7.3 Parties' Responsibilities for Costs and Expenses; Cooperation.

7.3.1 Each Party shall be responsible and make payment for its one-half share of all facilities fees, support services costs and other expenses of the Disputes Board's proceedings within 30 days after receipt of invoices for such costs and expenses. A Party that disputes an invoice for any such cost or expense relating to the Disputes Board's proceedings shall notify the other Party of such dispute promptly after receipt of such invoice. If either Party fails to pay its share of the amount owing under any invoice for such costs and expenses at the time require for payment, then, unless the non-paying Party is disputing the amount due, (a) the other Party may make payment in lieu of the non-paying Party and (b) the paying Party will be entitled to recover (or offset) the amount paid on behalf of the refusing Party, with interest at the maximum rate permitted by Law, no matter which Party is the prevailing Party.

7.3.2 Each Party shall diligently cooperate with the Disputes Board and the other Party and shall perform such acts as may be necessary to obtain an efficient and expeditious resolution of the Dispute submitted to the Disputes Board. If either Party fails to diligently cooperate with the Disputes Board or the other Party (upon evidence of such failure presented to and evaluated by the Disputes Board) and the Disputes Board determines that such failure was egregious, the Disputes Board shall take into account such egregious failure to cooperate in its determination of the Disputes Board Decision; subject, however, to the limitations on the Disputes Board's authority set forth in Section 4 of Appendix 1 to Exhibit 20 to the DBA.

**Section 8. Term.**

Consistent with the DRP Rules, the term of this Agreement shall commence on the Effective Date and continue in full force and effect for the Term of the DBC and thereafter for so long as either Party has any obligation originating under the Contract Documents until the applicable statute of limitations on any Dispute in regard to such obligation has expired.

**Section 9. Payment of Disputes Board Members' Fees, Costs and Expenses.**

9.1 Payment for Services. Payment of fees for work performed and services rendered by each Disputes Board Member and for his or her direct out-of-pocket costs and expenses shall be calculated in accordance with the payment terms set forth for such Disputes Board Member in his or her respective Disputes Board Member Joinder Agreement. The personal services of the Disputes Board Member are a condition to receiving payments hereunder. Such payments shall be full compensation for work performed and services rendered by each respective Disputes Board Member, and for all labor, materials, supplies, equipment and incidentals necessary for such Disputes Board Member's participation in the operation of the Disputes Board.

9.2 Disputes Board Member Invoices. Each Disputes Board Member shall submit invoices on a monthly basis concurrently to TxDOT and DB Contractor for payment for such Disputes Board Member's work performed and services rendered in the prior month. Such invoices shall be in a format approved by TxDOT and DB Contractor, accompanied by an itemization of days and hours billed along with a description of activities performed during each day in that billing period, and an itemization of direct non-salary costs incurred supported by copies of the original bills, invoices, expense accounts and miscellaneous supporting data. The amount to be paid shall be established from the applicable billing rate set forth in each Disputes Board Member's Disputes Board Member Joinder Agreement plus costs and expenses in accordance with such agreement.

9.3 Payment by Parties. Each Party shall be responsible and make payment for its one-half share of all fees, costs and expenses of the Disputes Board Members' service on the Disputes Board. Each Disputes Board Member will be paid within 30 days of the Parties' receipt and acceptance of invoices therefor. A Party that disputes a Disputes Board Member's invoice shall notify such member and the other Party of such dispute promptly after receipt of such invoice. If either Party fails to pay its share of the amount owing to any Disputes Board Member at the time required for payment, then, unless the non-paying Party is disputing the amount due, (a) the other Party may make payment in lieu of the non-paying Party and (b) the paying Party will be entitled to recover (or offset) the amount paid on behalf of the refusing Party, with interest at the maximum rate permitted by Law, no matter which Party is the prevailing Party.

9.4 Retention of Cost Records and Accounts. Disputes Board Members shall keep available for inspection by representatives of TxDOT and DB Contractor, for a period of five years after the final payment, the cost records and accounts pertaining to this Agreement and the performance of work and rendition of services as a member of the Disputes Board. If any claim arising out of, in connection with, or related to this Agreement is initiated before the expiration of the five year period, the cost records and accounts shall be retained until such claim involving the records is completed.

9.5 Parties to Bear Own Costs. Each Party shall bear its own costs arising out of or in connection with the Dispute Resolution Procedures.

9.6 Diligent Cooperation. The Parties shall diligently cooperate with one another and the Disputes Board, and shall perform such acts as may be necessary to obtain an efficient and expeditious resolution of Disputes submitted to the Disputes Board. If either Party refuses to diligently cooperate, and the other Party, after first giving notice setting forth the Party's basis for its contention of non-cooperation and requesting specific action, incurs additional costs or attorneys', accountants' and expert witness fees solely as a result of such failure to diligently cooperate, then the Disputes Board may award such additional costs and, accountants' and expert witness fees to

the Party giving such notice, even if such Party is not the prevailing Party in the Dispute. The Party so entitled to such award shall have the right to pursue and enforce it in any subsequent proceedings.

**Section 10. Nonassignability.**

Disputes Board Members shall not assign or delegate any of the work or services to be rendered in connection with the Dispute Resolution Procedures without the prior written consent of both TxDOT and DB Contractor.

**Section 11. Legal Relations.**

11.1 Disputes Board Member as Independent Contractor. The Parties mutually understand and agree that any Disputes Board Member, in the performance of duties as a Disputes Board Member on the Disputes Board, is acting in the capacity of an independent contractor and not as an employee or agent of TxDOT or DB Contractor. No Disputes Board Member will be entitled to any employee benefits from either Party.

11.2 No Effect on Potential Liabilities Under the Contract Documents or by Law. Except for the payment, offset and reimbursement obligations agreed to by the Parties as set forth herein, nothing in this Agreement alters the potential liabilities of either Party as provided under the Contract Documents and, subject to the terms and conditions of the Contract Documents, by Law.

11.3 Damages Waiver. Neither TxDOT nor DB Contractor will hold any Disputes Board Member responsible for claims, damages, losses and expenses, including, but not limited to attorneys' fees and expenses, arising out of or resulting from the actions and recommendations of the Disputes Board, and the Parties expressly waive any right to the foregoing, except as a result of fraud, willful misconduct or criminal actions of the applicable Disputes Board Member.

**Section 12. Applicable Law.**

The Disputes for resolution by the Disputes Board shall be governed by and resolved under the Laws of the State of Texas, without regard to conflicts of law principles that would refer one to the Laws of another State.

**Section 13. Amendment in Writing.**

This Agreement may be altered, amended or revoked only by an instrument in writing signed by each Party. No verbal agreement or implied covenant or agreement shall be held to vary the terms hereof, any statute, law or custom to the contrary notwithstanding.

**Section 14. Complementary Provisions; Order of Priority.**

The Parties intend for the procedures established in Appendix 1 to Exhibit 20 to the DBA and any other relevant provisions of the Contract Documents, and the terms and conditions of this Agreement (except where this Agreement says they shall not apply), to be complementary. In the event of any conflict between this Agreement and Appendix 1 to Exhibit 20 to the DBA or any other relevant provision of the Contract Documents, the DBC or other DRP governed agreement shall control.

**Section 15. Notices.**

Notices hereunder shall be sent as provided in Section 9.1 of the DBA. The address for each Disputes Board Member shall be set forth on the signature page of each Disputes Board Member Joinder Agreement.

[signatures on following page]

IN WITNESS WHEREOF, the Parties, intending to be legally bound, have executed this Agreement as of the Effective Date.

**DB Contractor:**

**[DB Contractor]**

By_____
Name:_____
Title:_____

**TEXAS DEPARTMENT OF TRANSPORTATION**

By: _____
James M. Bass
Executive Director

# ATTACHMENT 1 TO DISPUTES BOARD AGREEMENT

## DISPUTES BOARD MEMBER JOINDER AGREEMENT

This DISPUTES BOARD MEMBER JOINDER AGREEMENT (this "Agreement") is entered into [●] by and between _____ [Specify TxDOT or DB Contractor] (the "Appointing Party"), and _____, an individual (the "Disputes Board Member").

RECITALS

A. TxDOT and DB Contractor are parties to that certain Design-Build Contract for the I-635 LBJ East Project, dated as of the Effective Date (the "**DBC**") and the other Contract Documents, all of which collectively comprise a design-build agreement under Chapter 223 of the Code.

B. Appendix 1 to Exhibit 20 to the DBA, among other things, provides for the establishment and operation of a disputes review board (each such board being referred to herein as the "**Disputes Board**") to resolve each Dispute if, as and when, a Dispute arises under the Contract Documents.

C. The Appointing Party desires to appoint the Disputes Board Member to the Disputes Board to resolve such a dispute and the Disputes Board Member desires to accept such appointment, each on the terms and conditions set forth in Appendix 1 to Exhibit 20 to the DBA, the Disputes Board Agreement and this Agreement, and for that purpose, the parties hereto have agreed to enter into this Agreement pursuant to Section 3.1.2 of the Disputes Board Agreement.

NOW THEREFORE, in consideration of the terms, conditions, covenants and agreements contained herein and in the Disputes Board Agreement, the receipt and sufficiency of which the parties hereto hereby acknowledge, the parties hereto hereby agree as follows:

**Section 1. Definitions and References.**

1.1 All capitalized terms used in this Agreement and not defined or modified herein shall have the same meaning as set forth in the Contract Documents and, if not defined therein, in the Disputes Board Agreement.

1.2 The Disputes Board Agreement and Appendix 1 to Exhibit 20 to the DBA, which, among other things, discusses the Disputes Board's role in resolving Disputes, are incorporated herein by reference.

**Section 2. Appointment.**

2.1 Appointment. The Appointing Party appoints the Disputes Board Member to the Disputes Board to serve thereupon and resolve the applicable Dispute, and the Disputes Board Member accepts such appointment and agrees to perform such service, each in accordance with the terms and conditions of Appendix 1 to Exhibit 20 to the DBA, the Disputes Board Agreement and this Agreement.

2.2 Term of Service. The Disputes Board Member shall serve on the Disputes Board through resolution of the Dispute before the Disputes Board and issuance of the Final Order Implementing Decision in respect thereto, except that (a) unless he or she is the Disputes Board Chair, he or she may be earlier dismissed from service pursuant to Section 5.3.3(b) of the Disputes Board Agreement because the dispute to be resolved is a Small Claim; (b) the Disputes Board Member may resign for health considerations or other reasons of disability; or (c) the Disputes Board Member shall resign if he or she discovers facts or circumstance that would, in such member's reasonable good faith judgment, prevent such member from discharging his or her duties in the resolution of a Dispute in the impartial and objective manner required under the Disputes Board Agreement or facts or circumstances that such member reasonably and in good faith believes would result in a Party terminating such member's appointment For

Cause. The Disputes Board Member shall endeavor to give 30 days' notice prior to the effective date of his or resignation.

**Section 3. Representations, Warranties and Covenants.**

3.1 Representations and Warranties. The Disputes Board Member hereby represents and warrants to TxDOT and DB Contractor, under penalty of perjury, that such Disputes Board Member satisfies the Disputes Board Member Qualifications.

3.2 Covenants. The Disputes Board Member covenants to TxDOT and DB Contractor that he or she:

(a) Shall be bound by and perform such member's obligations with respect to the Dispute Resolution Procedures in accordance with the procedures established under Appendix 1 to Exhibit 20 to the DBA;

(b) Shall not engage in any conduct, including, but not limited to, having any communications, dealings or interactions with either Party, the Conflicts Group or any other Person in any manner, that would be or result in a Disputes Board Error; and

(c) Shall preserve, maintain and protect the confidentiality of Confidential Materials in accordance with Section 10 of Appendix 1 to Exhibit 20 to the DBA.

**Section 4. Compensation.**

4.1 Invoicing and Payment. The Disputes Board Member's hourly billing rate and costs and expenses for service on the Disputes Board or means for calculating same are attached hereto as Annex I. Invoicing and payment of fees, costs and expenses shall take place in accordance with Sections 9.1, 9.2 and 9.3 of the Disputes Board Agreement.

4.2 No Compensation After Termination. If the Disputes Board Member's appointment to the Disputes Board is terminated, whether For Cause or otherwise, the Disputes Board Member will not be entitled to receive payment for any services rendered or costs and expenses incurred after the date of termination of such appointment.

**Section 5. General Provisions.**

5.1 Third Party Beneficiary. Whichever of TxDOT or DB Contractor that is not the Appointing Party is an express third party beneficiary of this Agreement entitled to enforce the terms and conditions hereof against the Disputes Board Member.

5.2 Nonassignability. The Disputes Board Member shall not assign or delegate any of the work or services to be rendered in connection with the Dispute Resolution Procedures without the prior written consent of both TxDOT and DB Contractor.

5.3 Disputes Board Member as Independent Contractor. The Disputes Board Member is acting in the capacity of an independent contractor and not as an employee or agent of TxDOT or DB Contractor. The Disputes Board Member is not entitled to any employee benefits from either Party.

5.4 Consequential Damages Waiver. In no event shall TxDOT or DB Contractor have any liability to the Disputes Board Member other than for payment of the Disputes Board Member's fees, costs and expenses hereunder. Neither TxDOT nor DB Contractor shall be liable to the Disputes Board Member for any special, consequential, indirect, enhanced, punitive, or similar damages (including lost profits that are not direct damages), including but not limited to attorneys' fees and expenses, arising under or in connection with this Agreement, and the Disputes Board Member expressly waives any right to the foregoing.

5.5 Governing Law. This Agreement shall be governed by and construed in accordance with the Laws of the State of Texas, without regard to conflicts of law principles that would refer one to the Laws of another State.

5.6 Entire Agreement. This Agreement, and the documents referenced herein, contain the entire understanding of the parties hereto with respect to the subject matter hereof and supersede all prior agreements, understandings, statements, representations and negotiations between the parties hereto with respect to its subject matter.

5.7 Amendment in Writing. This Agreement may be altered, amended or revoked only by an instrument in writing signed by each Party. No verbal agreement or implied covenant or agreement shall be held to vary the terms hereof, any statute, law or custom to the contrary notwithstanding.

5.8 Survival. This Agreement shall automatically terminate upon expiration or termination of the Disputes Board Member's service hereunder, except that the provisions of this Section 5 shall survive termination of this Agreement.

5.9 Counterparts. This instrument may be executed in two or more counterparts, each of which shall be deemed an original, but all of which together shall constitute one and the same instrument.

[signatures on following page]

IN WITNESS WHEREOF, the parties hereto, intending to be legally bound, have executed this Agreement as of the day and year first set forth above.

**Appointing Party:**
**[TxDOT or DB Contractor]**

By_____
Name:_____
Title:_____

**Disputes Board Member**

By: _____
Name:_____
Address:
_____
_____
_____
_____

**Annex 1**
**to**
**Disputes Board Member Joinder Agreement**

**Fees, Costs, and Expenses**

[*to be attached*]

## ATTACHMENT 2 TO DISPUTES BOARD AGREEMENT

## COMMERCIAL RULES

### R-1. Agreement of The Parties

(a) The "Expedited Procedures" means the rules set forth in Sections E-1 through E-6 below. Unless the Parties determine otherwise, the Expedited Procedures shall apply to Fast-Track Disputes in addition to any other portion of these rules that is not in conflict with the Expedited Procedures.

(b) The "Procedures for Large, Complex Commercial Disputes" means the rules set forth in Sections L-1 through L-3 below. Unless the Parties agree otherwise, such Procedures shall apply to all cases in which the Dispute is valued at $500,000 or more, exclusive of claimed interest, fees and costs. The Parties may also agree to use such Procedures in cases involving non-monetary Disputes. Such Procedures shall be applied in addition to any other portion of these rules that is not in conflict with the Procedures for Large, Complex Commercial Disputes.

(c) All other cases shall be administered in accordance with Sections R-2 through R-43 of these rules.

(d) If there is any inconsistency between these Commercial Rules and Appendix 1 to Exhibit 20 to the DBA, Appendix 1 to Exhibit 20 to the DBA shall control.

### R-2. Disputes Board

The term "Disputes Board" in these Commercial Rules refers to the three member Disputes Board, constituted for a particular case, or to the Disputes Board Chair, as the context requires.

### R-3. Assumed Objection

Unless the responding Party states otherwise in its response to the claiming Party's notice of referral of a Dispute to the Disputes Board, all aspects of the Dispute will be deemed to be denied by the other Party (other than any objection to the Disputes Board's authority to resolve the Dispute, which must be affirmatively asserted).

### R-4. Changes of Claim

After notice of referral of a Dispute to the Disputes Board is given or received, if either Party desires to make any amended, new, or different claim or counterclaim, it shall be made in writing and filed with the Disputes Board. The Party asserting such an amended, new or different claim or counterclaim shall provide a copy to the other Party, who shall have 15 days from the date of such transmission within which to file an answering statement with the Disputes Board.

### R-5. Jurisdiction

(a) The Disputes Board shall have the power to rule on its own jurisdiction, i.e., to determine if an alleged Dispute is an Ineligible Matter.

(b) The Disputes Board shall rule on jurisdictional objections as a preliminary matter prior to proceeding with proceedings to resolve the underlying Dispute.

### R-6. Administrative Conference

At the request of either Party or upon the Disputes Board's own initiative, the Disputes Board may conduct an administrative conference, in person or by telephone, with the Parties and/or their representatives. The conference may address such issues as the replacement of one or more Disputes Board Members, potential

mediation of the Dispute, potential exchange of information, a timetable for hearings and any other administrative matters.

**R-7. Appointment**

Because the Disputes Board Agreement between the Parties specifies a method of appointing a Disputes Board, that designation or method shall be followed.

**R-8. Disclosure**

(a) Any person appointed or to be appointed as a Disputes Board Member shall disclose to the Parties any circumstance likely to give rise to justifiable doubt as to such Disputes Board Member's impartiality or independence, including any bias or any financial or personal interest in the result of the arbitration or any past or present relationship with the Parties or their representatives. Such obligation shall remain in effect throughout the period of such member's service on the Disputes Board.

(b) In order to encourage disclosure by Disputes Board Members and candidates, disclosure of information pursuant to this R-8 is not to be construed as an indication that the disclosing individual considers that the disclosed circumstance is likely to affect impartiality or independence.

**R-9. Disqualification of Disputes Board Member**

Each Disputes Board Member shall be impartial and independent and shall perform his or her duties with diligence and in good faith, and shall be subject to disqualification for:

(a) inability or refusal to perform his or her duties with diligence and in good faith, and

(b) any grounds for disqualification provided by applicable law, the Disputes Board Agreement or the Contract Documents.

**R-10. No Ex Parte Communication with Disputes Board Members**

(a) During the period that any Disputes Board Member is then serving on a Disputes Board, (i) neither Party, including its counsel or designated representatives, shall communicate ex parte with such Disputes Board Member and (ii) no Disputes Board Member shall communicate ex parte with any Person (other than other Disputes Board Members), including but not limited to, either Party, its counsel or designated representatives, regarding any aspect of the applicable Dispute.

(b) Each Party may communicate with individuals listed on its respective Disputes Board Member Candidates List for the purposes of (i) ascertaining their availability to serve on a particular Disputes Board and/or (ii) reconfirming such individuals' qualifications under the Disputes Board Member Qualifications and the absence of Conflicts of Interest and Misconduct, provided that the communicating Party simultaneously furnishes copies of all such written correspondence with such individuals to the other Party and gives the other Party advance notice and opportunity to participate in all verbal communication with such individuals. Ex parte communication regarding the substance of any Dispute between a Party and individuals listed on its respective Disputes Board Member Candidates List is prohibited.

**R-11. Hearings After Filling of Vacancies**

In the event of the appointment of a substitute Disputes Board Member, the panel of Disputes Board Members shall determine in its sole discretion whether it is necessary to repeat all or part of any prior hearings.

**R-12. Preliminary Hearing**

(a) At the request of either Party or at the discretion of the Disputes Board, the Disputes Board may schedule as soon as practicable a preliminary hearing with the Parties and/or their representatives. The preliminary hearing may be conducted by telephone at the Disputes Board's discretion.

(b) During the preliminary hearing, the Parties and the Disputes Board should discuss the future conduct of the case, including clarification of the nature of the Dispute, a schedule for the hearings and any other preliminary matters.

**R-13. Exchange of Information; Discovery**

(a) At least five Business Days prior to the hearing, the Parties shall exchange (i) copies of all exhibits they intend to submit at the hearing and (ii) lists of witnesses anticipated to be called at the hearing, in each case except for witnesses or exhibits to be offered for the purpose of impeachment or rebuttal.

(b) The Disputes Board Chair is authorized to resolve any disputes concerning the exchange of information or the Parties' discovery.

**R-14. Date, Time, and Place of Hearing**

The Disputes Board Chair shall set the date, time, and place for each hearing at a neutral and reasonably cost-efficient location in Travis County, Texas that is reasonably convenient for the Parties. The Parties shall respond to requests for hearing dates in a timely manner, be cooperative in scheduling the earliest practicable date, and adhere to the established hearing schedule. The Disputes Board shall send a notice of hearing to the Parties at least 5 Business Days in advance of the hearing date, unless otherwise agreed by the Parties.

**R-15. Attendance of Witnesses**

Except for each Party's counsel and other authorized representative, upon the request of either Party or its own initiative, the Disputes Board shall have the power to require the exclusion of any witness or potential witness during the testimony of any other witness.

**R-16. Representation**

Each Party may be represented by counsel or other authorized representative. A Party intending to be so represented shall notify the other Party and the Disputes Board of the name and address of the representative at least three days prior to the date set for the hearing at which that person is first to appear. When such a representative initiates or responds for a Party in the course of the Dispute Resolution Procedures, notice is deemed to have been given by the Party represented by such representative.

**R-17. Dispute Board Members' Certifications; Witness Oaths**

Before proceeding with the first hearing, each Disputes Board Member shall have entered into a Disputes Member Joinder Agreement with a Party in which he or she certifies, under penalty of perjury as to his or her meeting the Disputes Board Member Qualification and the absence of Conflicts of Interest and Misconduct (and a covenant to not engage in Misconduct). The Disputes Board shall require witnesses to testify under oath.

**R-18. Stenographic Record**

Any Party desiring a stenographic record shall make arrangements directly with a stenographer and shall notify the other Party of these arrangements at least three days in advance of the hearing. The requesting Party shall pay the cost of the record. If the transcript is agreed by the Parties, or determined by the Disputes Board to be the

official record of the proceeding, it must be provided to the Disputes Board and made available to the other Party for inspection, at a date, time, and place determined by the Disputes Board.

**R-19. Interpreters**

Any Party wishing an interpreter shall make all arrangements directly with the interpreter and shall assume the costs of the service.

**R-20. Postponements**

The Disputes Board may postpone any hearing upon agreement of the Parties, upon request of a Party for good cause shown, or upon the Disputes Board's own initiative for good cause shown.

**R-21. Proceedings in the Absence of a Party or Representative**

The Dispute Board's proceedings may proceed in the absence of either Party or representative who, after due notice, fails to be present or fails to obtain a postponement. A Disputes Board Decision shall not be made solely on the default of a Party. The Disputes Board shall require the Party who is present to submit such evidence as the Disputes Board may require for the making of a Disputes Board Decision.

**R-22. Conduct of Proceedings**

(a) The claimant Party shall present evidence to support its claim. The respondent Party shall then present evidence to support its defense. Witnesses for each Party shall also submit to questions from the Disputes Board and the adverse Party. The Disputes Board has the discretion to vary this procedure, provided that the Parties are treated with equality and that each Party has the right to be heard and is given a fair opportunity to present its case.

(b) The Disputes Board, exercising is discretion, shall conduct the proceedings with a view to expediting the resolution of the Dispute and may direct the order of proof, bifurcate proceedings and direct the Parties to focus their presentations on issues the decision of which could dispose of all or part of the case.

(c) The Parties may agree to waive oral hearings in any case.

**R-23. Evidence**

(a) The Parties may offer such evidence as is relevant and material to the Dispute and shall produce such evidence as they or the Disputes Board deems relevant and necessary to an understanding and determination of the Dispute. Conformity to the Texas Rules of Evidence shall be required, except where these Commercial Rules contain a contrary rule. All evidence shall be taken in the presence of all of the Disputes Board Members and both of the Parties, except where a Party fails to attend the hearing or has waived the right to be present.

(b) Subject to the Texas Rules of Evidence, the Disputes Board shall determine the admissibility, relevance, and materiality of the evidence offered and may exclude evidence deemed by the Disputes Board to be cumulative or irrelevant.

(c) The Disputes Board shall take into account applicable principles of legal privilege, such as those involving the confidentiality of communications between a lawyer and client.

(d) Special discovery and evidentiary rules:

(i) The Disputes Board Chair shall, at the request of either Party, issue subpoenas for the attendance of witnesses or the production of books, records, documents or other evidence, whether for deposition or for hearing, in the manner provided by law for issuance of a subpoena in a civil action pending in a state district court. All

provisions of the Texas Rules of Civil Procedure for service and response to subpoenas in a civil action pending in state district court shall apply to subpoenas issued pursuant hereto.

(ii) Each Party shall be entitled to take depositions of witnesses and to propound written discovery in the manner, and to the extent, provided by Law for discovery in a civil action pending in a state district court, consistent with Rule 190.3 of the Texas Rules of Civil Procedure. The Disputes Board Chair shall, at the request of either Party, or may, on his or her own initiative, adopt a discovery control plan as contemplated by Rule 190.4 of the Texas Rules of Civil Procedure.

(iii) The disclosure of expert witness information and the depositions of designated expert witnesses shall be conducted as provided by the Texas Rules of Civil Procedure for cases in state district court.

(iv) At the hearing, each Party shall have the right to be heard, to present evidence, including expert witness testimony, and to cross-examine witnesses, including the Independent Engineer.

**R-24. No Evidence by Affidavit; Post-hearing Filing of Documents or Other Evidence**

(a) The Disputes Board may not receive and consider the evidence of witnesses by declaration or affidavit.

(b) If the Parties agree or the Disputes Board directs that documents or other evidence be submitted to the Disputes Board after the hearing, the documents or other evidence shall be transmitted to each Disputes Board Member. Both Parties shall be afforded an opportunity to examine and respond to such documents or other evidence.

**R-25. Inspection or Investigation**

The Disputes Board may find it necessary to make an inspection or investigation in connection with its proceedings and, if so, shall so advise the Parties. The Disputes Board shall set the date and time of such inspection or investigation and notify the Parties thereof. Any Party who so desires may be present at such an inspection or investigation. In the event that one or both of the Parties are not present at the inspection or investigation, the Disputes Board shall make an oral or written report to the Parties on the result or findings from such inspection or investigation and afford them an opportunity to comment.

**R-26. Interim Measures**

(a) The Disputes Board may take whatever interim measures it deems necessary, including measures for the protection or conservation of property and disposition of perishable goods.

(b) Such interim measures may take the form of an interim Disputes Board Decision.

(c) A request for interim measures addressed by a Party to a Travis County, Texas district court shall not be deemed incompatible with the agreement to have the underlying Dispute resolved by the Disputes Board or a waiver of the right to have the underlying Dispute resolved by the Disputes Board.

**R-27. Closing of Hearing**

The Disputes Board shall specifically inquire of both Parties whether they have any further proofs to offer or witnesses to be heard. Upon receiving negative replies or if satisfied that the record is complete, the Disputes Board shall declare the hearing closed. If briefs are to be filed, the hearing shall be declared closed as of the final date set by the Disputes Board for the receipt of briefs. If documents are to be filed as provided in R-24 and the date set for their receipt is later than that set for the receipt of briefs, the later date shall be the closing date of the hearing. The time limit within which the Disputes Board is required to make the Disputes Board Decision shall commence, in the absence of other agreements by the Parties, upon the closing of the hearing.

**R-28. Reopening of Hearing**

The hearing may be reopened only upon application of a Party for good cause shown, as determined in the discretion of the Disputes Board, at any time before the Disputes Board Decision is issued. The Disputes Board may reopen the hearing and shall have 30 days from the closing of the reopened hearing within which to issue the Disputes Board Decision.

**R-29. Waiver of Rules**

Any Party who proceeds with the Disputes Board proceedings after knowledge that any provision or requirement of these rules has not been complied with and who fails to state an objection in writing to the other Party and the Disputes Board shall be deemed to have waived the right to object.

**R-30. Extensions of Time**

The Parties may modify any period of time in these rules by mutual agreement. The Disputes Board may for good cause extend any period of time established by these rules, except the time for issuance of the Disputes Board Decision. The Disputes Board shall notify the Parties of any extension.

**R-31. Serving of Notice**

(a) Any papers, notices, or process necessary or proper for the initiation or continuation of Disputes Board proceedings under these rules, for any court action in connection therewith, or for the entry of judgment on any Disputes Board Decision made under these rules shall be given in accordance with Section 9.1 of the DBA.

(b) Unless otherwise instructed by the Disputes Board, any documents submitted by either Party to the Disputes Board shall simultaneously be provided to the other Party.

**R-32. Majority Decision**

When the panel consists of more than one Disputes Board Member, a majority of the Disputes Board Members must make all decisions.

**R-33. Time of Issuance of the Disputes Board Decision**

The Disputes Board Decision shall be issued promptly by the Disputes Board and no later than 30 days from the date of closing the hearing, or, if oral hearings have been waived, from the date of the Parties' transmittal of the final statements and proofs to the Disputes Board.

**R-34. Form of Disputes Board Decision**

(a) Any Disputes Board Decision shall be in writing and signed by a majority of the Disputes Board Members.

(b) The Disputes Board shall also issue written findings of fact and conclusions of law to accompany the Disputes Board Decision.

**R-35. Scope of Disputes Board Decision**

(a) The Disputes Board may determine the occurrence of any event that is a prerequisite to a Party's claim for any remedy or relief in the Dispute, and grant any remedy or relief to resolve the Dispute, that the Disputes Board deems just and equitable and within the scope of the agreement of the Parties under Appendix 1 to Exhibit 20 to the DBA, including, but not limited to, specific performance of any obligation under the Contract Documents.

(b) In addition to a final Disputes Board Decision, the Disputes Board may make other decisions, including interim, interlocutory, or partial rulings, orders, and decisions. In any interim, interlocutory, or partial Disputes Board Decision, the Disputes Board may assess and apportion the fees, expenses, and compensation related to such Disputes Board Decision as the Disputes Board determines is appropriate, subject, however, to the limitations of the Disputes Board's authority in Section 4(e) of Appendix 1 to Exhibit 20 to the DBA.

(c) In the final Disputes Board Decision, the Disputes Board shall assess compensation amounts. The Disputes Board may apportion fees and expenses between the Parties in such amounts as the Disputes Board determines is appropriate in its discretion, subject, however, to the limitations of the Disputes Board's authority under Section 4(e) of Appendix 1 to Exhibit 20 to the DBA.

**R-36. Disputes Board Decision upon Settlement**

If the Parties settle the Dispute during the course of the Disputes Board proceedings and if the Parties so request, the Disputes Board may set forth the terms of the settlement in a "consent Disputes Board Decision."

**R-37. Acceptance of Delivery of Disputes Board Decision**

The Parties shall accept as notice and delivery of the written Disputes Board Decision, together with the written findings of fact and conclusions of law, addressed and provided to them in the manner provided under Section 9.1 of the DBA.

**R-38. Correction of Errors in Disputes Board Decision**

Within 5 Business Days after the transmittal of a Disputes Board Decision, either Party, upon notice to the other Party, may request the Disputes Board, through the Disputes Board Chair, to correct any clerical, typographical, or computational errors in the Disputes Board Decision. The Disputes Board is not empowered under this R-38 to redetermine the merits of any Dispute already decided. The other Party shall be given 5 Business Days to object to the request on the ground that there is no clerical, typographical, or computational error in the decision. The Disputes Board shall perform the request correction of errors within 10 Business Days after transmittal by the Disputes Board Chair of the request for correction of errors unless the other Party objects. Any unresolved disagreement between the Parties as to the existence of a clerical, typographical, or computational error in the Disputes Board Decision can be subsequently pursued, if at all, under R-28.

**R-39. Release of Documents for Subsequent Proceedings**

The Disputes Board shall, upon the written request of a Party, furnish to the Party, at the Party's expense, certified copies of any papers in the Disputes Board's possession that may be required in further administrative or judicial proceedings relating to resolution of the Dispute.

**R-40. Applications to Court and Exclusion of Liability**

(a) No judicial proceeding by a Party relating to a Dispute shall be deemed a waiver of the Party's right to have the Dispute resolved by Dispute Board proceedings.

(b) Neither any Disputes Board Member nor the Disputes Board in a proceeding under these rules is a necessary or proper Party in judicial proceedings relating to a Dispute.

**R-41. Expenses**

The expenses of witnesses for either side shall be paid by the Party producing such witnesses. All other expenses of the Dispute Board's proceedings, including required travel and other expenses of the Disputes Board, Disputes Board representatives, and any witness and the cost of any proof produced at the direct request of the Disputes Board, shall be borne equally by the Parties, unless they agree otherwise or unless the Disputes Board in

the Disputes Board Decision assesses such expenses or any part thereof against any specified Party or the Parties (in the latter case subject, however, to the limitations of the Disputes Board's authority under Section 4(e) of Appendix 1 to Exhibit 20 to the DBA).

**R-42. Interpretation and Application of Rules**

The Disputes Board shall interpret and apply these rules insofar as they relate to the Disputes Board's powers and duties to resolve the particular Dispute for which such Disputes Board was empanelled to resolve.

**R-43. No Suspension for Nonpayment**

If a Disputes Board Member's compensation or administrative charges have not been paid in full, such Disputes Board Member may so inform the Parties in order that one of them may advance the required payment. If such payments are not made, and the non-paying Party does not within 30 days after its receipt of the unpaid Disputes Board Member's invoice provide notice to such member and the other Party as to such Party's dispute of such member's invoice, the Disputes Board may order the suspension or termination of the proceedings. If a Party disputes a Disputes Board Member's invoice and provides such notice, no suspension or termination of the proceedings shall occur. Ex parte conversations to resolve a fee dispute between the Dispute Board Member whose invoice is disputed and the disputed Party are prohibited during the Dispute Board's resolution of the Dispute, and any such conversations shall be deferred until the Disputes Board Decision is final.

## EXPEDITED PROCEDURES FOR FAST-TRACK DISPUTES

**E-1. Serving of Notices**

In addition to notice provided pursuant to Section 9.1 of the DBA, the Parties can agree in writing to also accept notice by telephone. If the Parties so agree, a failure to confirm in writing any such oral notice, the proceeding shall nevertheless be valid if notice has, in fact, been given by telephone.

**E-2. Exchange of Exhibits**

At least two Business Days prior to the hearing, the Parties shall exchange copies of all exhibits they intend to submit at the hearing. The Disputes Board shall resolve disputes concerning the exchange of exhibits.

**E-3. Proceedings on Documents**

Where no Party's claim exceeds $10,000, exclusive of interest and arbitration costs, and other cases in which the Parties agree, the Dispute shall be resolved by submission of documents, unless either Party requests an oral hearing, or the Disputes Board determines that an oral hearing is necessary. The Disputes Board shall establish a fair and equitable procedure for the submission of documents.

**E-4. Date, Time, and Place of Hearing**

In cases in which a hearing is to be held, the Disputes Board shall set the date, time, and place of the hearing, to be scheduled to take place within 10 days after appointment of the Disputes Board Chair. The Disputes Board will notify the Parties in advance of the hearing date.

**E-5. The Hearing**

(a) Each Party shall have equal opportunity to submit its proofs and complete its case.

(b) The Disputes Board shall determine the order of the hearing and schedule and control its duration consistent with the objective of expedited resolution of the Fast-Track Dispute, and may require further submission of

documents within two days after the hearing. For good cause shown, the Disputes Board may schedule additional hearings within seven Business Days after the initial hearing.

(c) Any Party desiring a stenographic record may arrange for one pursuant to the provisions of R-18.

**E-6. Time of Award**

Unless otherwise agreed by the Parties, the Disputes Board Decision shall be rendered not later than 14 days from the date of the closing of the hearing or, if oral hearings have been waived, from the date of the Parties' transmittal of the final statements and proofs to the Disputes Board.

## PROCEDURES FOR LARGE, COMPLEX COMMERCIAL DISPUTES

**L-1. Administrative Conference**

Prior to the commencing proceedings to resolve a Dispute, the Disputes Board shall, unless the Parties agree otherwise, conduct an administrative conference with the Parties and/or their attorneys or other representatives by conference call within 7 days after the Disputes Board Chair is appointed. In the event the Parties are unable to agree on a mutually acceptable time for the administrative conference, the Dispute Board shall, upon three Business Days' advance notice, schedule the administrative conference for 9 a.m. (CST) on the fourth Business Day and such administrative conference shall take place at such date and time. Such administrative conference shall be conducted for the following purpose of obtaining additional information about the nature and magnitude of the Dispute and the anticipated length of hearing and scheduling and for such additional purposes as the Parties or the Disputes Board may deem appropriate.

**L-2. Preliminary Hearing**

As promptly as practicable after the appointment of the Disputes Board, a preliminary hearing shall be held among the Parties and/or their attorneys or other representatives and the Disputes Board. If the Parties agree, the preliminary hearing will be conducted by telephone conference call rather than in person. At the preliminary hearing the matters to be considered shall include, without limitation:

(a) service of a detailed statement of the Dispute, including damages and defenses, a statement of the issues asserted by each Party and positions with respect thereto, and any legal authorities the Parties may wish to bring to the attention of the Disputes Board;

(b) stipulations to uncontested facts;

(c) the extent to which discovery shall be conducted, in light of the special discovery and evidentiary rules set forth above in R-23(d);

(d) exchange and premarking of those documents which each Party believes may be offered at the hearing;

(e) the identification and availability of witnesses, including experts, and such matters with respect to witnesses including their biographies and expected testimony as may be appropriate;

(f) whether, and the extent to which, any sworn statements and/or depositions may be introduced;

(g) the extent to which hearings will proceed on consecutive days;

(h) whether a stenographic or other official record of the proceedings shall be maintained;

(i) the possibility of utilizing mediation or other non-adjudicative methods of dispute resolution; and

(j) the procedure for the issuance of subpoenas.

By agreement of the Parties and/or order of the Disputes Board Chair, the pre-hearing activities and the hearing procedures that will govern the Disputes Board's proceedings will be memorialized in a scheduling and procedure order (each, a "Scheduling and Procedure Order"). Nothing in any Schedule and Procedure Order shall conflict with the procedures established under Appendix 1 to Exhibit 20 to the DBA.

**L-3. Management of Proceedings**

(a) The Disputes Board shall take such steps as they may deem necessary or desirable to avoid delay and to achieve a just, speedy and cost-effective resolution of Large, Complex Commercial Cases, provided, however, that no action by the Disputes Board under this L-3 shall conflict with the procedures established under Appendix 1 to Exhibit 20 to the DBA.

(b) The Parties shall cooperate in the exchange of documents, exhibits and information within such Party's control if the Disputes Board(s) consider such production to be consistent with the goal of achieving a just, speedy and cost-effective resolution of a Large, Complex Commercial Case.

(c) The Parties may conduct discovery, subject to any limitations deemed appropriate and set forth in the discovery control plan and/or the Scheduling and Procedure Order. If the Parties cannot agree on production of documents and other information, the Disputes Board, consistent with the expedited nature of arbitration, may establish the extent of the discovery.

(d) The Parties shall exchange copies of all exhibits they intend to submit at the hearing 10 Business Days prior to the hearing unless the Disputes Board Chair determines otherwise.

(e) The exchange of information pursuant to this rule, as agreed by the Parties and/or directed by the Disputes Board Chair, shall be included within the Scheduling and Procedure Order.

(f) The Disputes Board is authorized to resolve any disputes concerning the exchange of information.

(g) Generally hearings will be scheduled on consecutive days or in blocks of consecutive days in order to maximize efficiency and minimize costs.

# EXHIBIT 21

# OPERATING PROCEDURES

## 1. GENERAL

Nothing in these Operating Procedures supersedes the Contract Documents or the Disputes Review Panel Agreement unless mutually agreed by the Parties.

These procedures are for the purpose of providing guidelines for operation of the DRP. They are based on the DBC and current practice of Dispute Review Panels, and are intended to be flexible to meet circumstances that may arise during the life of the Project.

The DRP will assist the parties in facilitating the timely resolution of disputes, claims and other controversies arising out of the work on the Project.

The parties should not default in their normal responsibility to settle issues by indiscriminately referring disputes to the DRP. The DRP will encourage the parties to resolve issues without resorting to the Dispute Review Panel procedure.

As provided in Section 4.9 of the General Conditions, except for their participation in the DRP's activities, neither the DB Contractor nor TxDOT will solicit or receive advice or consultation on job site construction from the DRP or its members on matters dealing with the conduct of the work or resolution of problems. During hearings and site visits, no Panel member will express any opinion concerning the merit of any facet of a controversy or a potential dispute.

The parties will furnish to each of the Panel members all documents necessary for the DRP to perform its functions including regular written reports, baseline CPM and updates and other relevant data.

The DRP encourages the use of e-mail to transmit agenda, reports and documents of reasonable size.

It must be emphasized and firmly understood that individual Board members are not the "representative of" or "advocate for" the party which nominated them. The entire DRP must function as an objective, impartial, and independent body at all times. In order to avoid any suggestion of partiality, there must be no individual communication concerning the project between Panel members and employees of the DB Contractor or TxDOT or of their agents and/or sub-contractors during the life of the Project. The Parties will direct any matters needing attention between meetings of the DRP to the Chairman of the DRP who shall be the only person to deal directly with the designated contact persons for the TxDOT and the DB Contractor.

The DRP will at all times be impartial, unbiased and neutral in all of its actions. There will be no ex parte communication, rendering of advice or other consultations between any Panel member and TxDOT or any DB Contractor-Related Entities.

## 2. FREQUENCY OF MEETINGS

The DRP will meet initially at 3-month intervals and at such other times as requested by the Parties. If conditions warrant, the Chairman, in consultation with the Parties, may reduce or increase the time between meetings to better

serve the Parties. Factors to be considered include work progress, occurrence of unusual events and the number and complexity of potential Disputes. The ensuing DRP meeting will be scheduled at each DRP regular meeting.

The DRP requests cooperation of the Parties to the end that no changes be requested to scheduled meeting dates unless absolutely necessary and unavoidable.

In the event that a member of the DRP is unable to attend a scheduled meeting, the Panel Chairperson will attempt to reschedule the meeting. Should rescheduling not be possible, the other two members will attend the meeting without the third.

## 3. AGENDA FOR MEETINGS

The Panel Chairperson will develop an agenda for each meeting and submit the draft agenda to the Parties 14 calendar days prior to the scheduled meeting date for review and suggested changes.

The Chairman will send the approved agenda, a memo confirming the DRP meeting and the DRP member travel schedules to the Parties and the DRP members.

The agenda will provide an opportunity for the DRP to hear a round table discussion by the Parties on the status of the work, a brief discussion of any issues and include ample time for a site visit.

At the conclusion of the meeting, the DRP will conduct a field observation of active sections of the Work accompanied by representatives of both the DB Contractor and TxDOT. The Parties will point out all areas of the Project that are subject to a potential issue.

## 4. MINUTES OF MEETINGS

The Parties may request the Panel Chairperson to prepare a summary of regular meetings, and if no request is made, the Panel Chairperson at his or her discretion may prepare a summary of regular meetings. If minutes are prepared, the Minutes will be circulated to all parties for comments, additions and corrections. Minutes as so amended will be adopted at the next meeting.

## 5. PROCEDURES FOR DISPUTE HEARINGS

### 5.1 Procedure to Take a Dispute to the DRP

After the parties have diligently attempted to negotiate to settle a Dispute pursuant to Section 4.9.5 of the General Conditions, either Party may refer it to the DRP. After all requirements of the DBC are met, the referring Party transmits a written notice meeting the requirements of Section 4.9.5.3 of the General Conditions to the Panel and the other Party.

The scope of the hearing and subsequent recommendation can be merit (entitlement) only, merit with guidelines for quantum if merit is found, or merit with quantum amount if merit is found. DRPs usually hear entitlement and, if appropriate, give guidelines for quantum. If the Parties cannot then negotiate quantum, the DRP considers quantum and issues an appropriate recommendation following a second hearing.

All hearings will be held at the job site except as agreed by the Parties.

The Panel, in a meeting or conference call with the Parties, will determine whether the hearing should be in conjunction with the next meeting or at a specially scheduled meeting, and agree on a date and time required for documentation and hearing preparation. Then the Panel Chairperson, in conference with the parties, will set dates for completion of each of the documents described below.

Pursuant to Section 4.9.8 of the General Conditions, discovery shall only be permitted at the discretion of the Panel.

The parties may submit documentary evidence for the hearing, which shall be exchanged by the Parties in accordance with Section 4.9.8 of the General Conditions. The Panel may also request that the Parties jointly prepare a statement of dispute and stipulated facts and a common reference document.

**1. Statement of Dispute and Stipulated Facts**

An agreed simple statement of the dispute on a single page ideally limited to one paragraph.

**2. Common Reference Document (CRD)**

A common set of exhibits prepared jointly by the parties to facilitate DRP review and understanding of the referring Party's written notice and other Party's response, and to minimize confusion during the hearing. The CRD should include stipulations to as many facts, dates, quantities, etc., as possible. The CRD should include all documents that either Party wants to use in support of their position. The Parties are encouraged to include visual aids, exhibits, charts or summaries of documents in order to facilitate the DRP's understanding of the issues, and to avoid the submission of voluminous records that are not necessary for the DRP's understanding and consideration.

To the greatest extent possible, the Parties should assemble all documents in chronological order. Large documents (submittals, daily records, photographs, etc.) may be included as appendices. It facilitates DRP review and is helpful during the hearing if the documents are assembled in subsections with a descriptive tab on each, e.g.:

A. Correspondence, in chronological order.
B. Contract Documents: Portions of specifications, drawings, geotechnical reports, change orders, etc. that are pertinent to the dispute.
C. Job Records: Pertinent shift, daily and weekly reports, diary pages, submittals, schedules, drawings, pictures, etc.
D. Reports: Any reports prepared specifically for the dispute by outside parties, consultants, etc.
E. Other

A master index should be prepared and all pages should be numbered sequentially (e.g., Bates stamp) in the lower right hand corner.

Other than the list of representatives described below, the Parties may not send the DRP any further exhibits or correspondence regarding the Dispute, without prior approval, between the time of submittal of the above pre-hearing documentation and the hearing.

### 5.2 List of Representatives

At least two weeks prior to the hearing date, the Parties exchange and submit to the DRP a list of the representatives and, if permitted by the Panel, testifying witnesses that each party intends to have present at the hearing. Only a limited number of representatives from each party should attend the hearing. The list of representatives and, if permitted, witnesses should contain the following information: the person's name, title, professional affiliation, and, if the person is a testifying witness, a brief summary of the matters that the person will address.

### 5.3 Presentation of Dispute

The hearing will be informal. The DRP will conduct the proceedings. The referring Party will make an initial presentation of its case, followed by the respondent. Then, one or more rebuttals to any assertion by the other party may be presented until the Panel determines that all aspects of the Dispute have been adequately covered. The Panel members may ask questions, request clarification, or ask for additional data. In large or complex cases, the hearing may be continued as necessary in order to consider and fully understand all the evidence presented by both parties.

One person for each party should be designated as the primary presenter, although other individuals may give portions of the presentations as required.

The Board members will control the hearings and guide the discussion of issues by questioning the Parties or focusing their presentation in order to expeditiously obtain all information that the DRP deems necessary to make its findings and recommendations.

Only one person, who has been recognized by the Panel Chairperson, may speak at a time. The Parties should address the Panel members, not each other. Except in summation, repetitious discussion is discouraged.

No questions or interruptions by one party will be allowed during the other party's presentation. Dialogue between the parties will be allowed only in exceptional situations and with the approval of the Panel Chairperson. At its discretion, the DRP may permit questioning of one party by another party if it facilitates the clarification of an issue. The Panel Chairperson will control and limit such questioning and response.

Panel members may interrupt to ask presenters to repeat statements that were not understood and may request pauses when presentations are too fast for adequate note taking. The DRP may also interrupt presentations when necessary to clarify a point or receive an explanation, which might be lost if left to a later time. The DRP may ask for additional factual documentation.

Documents and/or exhibits that were not included with the pre-hearing submissions will usually be inadmissible. If the DRP decides to permit their introduction, the hearing will be extended as necessary for the other Party to review the new information and to consider its position and present a rebuttal. If necessary the hearing may be adjourned and reconvened at a future date.

In exceptional cases a hearing transcript by a court reporter may be utilized if requested by either Party and if the DRP deems that a transcript will expedite its deliberations. No audio or video recording will be permitted. In the event that only one party requests a court reporter, that Party shall bear the cost, including the furnishing of one copy of the transcript to the non-requesting Party and to each Panel member. Otherwise the cost shall be shared equally.

Paper reproductions of overheads and computer screens such as Power Point, shall be provided to the DRP members prior to their use in the hearing.

### 5.4 Redundant Evidence and Oral Statements

The DRP may limit the presentation of documents or oral statements when it deems them to be irrelevant or redundant, or when it determines such material is of no added value to the DRP in understanding the facts and circumstances of the dispute and arriving at its findings and recommendations.

### 5.5 Disputes Involving Subcontractors

The DRP will not consider Disputes between Subcontractors and the DB Contractor unless they are actionable by the DB Contractor against TxDOT and actually "passed-through" to TxDOT.

The DB Contractor must clearly identify the portions of the Dispute in all pre-hearing submissions that involve a Subcontractor(s) and the identity of the Subcontractor(s). The DB Contractor must ensure that all Subcontractor documents are timely exchanged and submitted to the DRP as part of the DB Contractor's package, all as above described.

At any hearing regarding a Dispute that includes one or more Subcontractor Disputes, the DB Contractor will have a senior Subcontractor representative with direct and actual knowledge of the Dispute present. Such representative may assist in or make the presentation of the Subcontractor issues and answer questions.

### 5.6 DRP Deliberations

After the Dispute hearing is concluded, the DRP will meet to formulate findings and its recommendations for resolution of the Dispute. All deliberations will be conducted in private and will be confidential. The DRP may request post-hearing submittals including exhibits, job records, and written responses to DRP post-hearing questions directed in writing to either of the Parties. All such post-hearing submittals and written answers to directed questions sent to the DRP are to be simultaneously sent to the other Party.

### 5.7 Recommendation

Written recommendations will be forwarded to the Parties in accordance with the provisions of Section 4.9.11 of the General Conditions.

The DRP will make every reasonable attempt to formulate a unanimous recommendation but in the event that is not possible, a minority or dissenting recommendation will be prepared and included with the majority recommendation. All DRP recommendations will include information and expanded rationales to aid the parties in fully understanding them.

If requested by either Party following delivery of the recommendation, the DRP shall meet with TxDOT and the DB Contractor to provide additional clarification of its recommendation.

Pursuant to Section 4.9.13 of the General Conditions, DRP recommendations will not be admissible as evidence in any subsequent dispute resolution proceedings.

## 6. OTHER

The DRP reserves the right, with the agreement of the Parties, to revise the above procedures depending upon the circumstances of any particular Dispute.

# EXHIBIT 22

## DISPUTES REVIEW PANEL AGREEMENT

THIS DISPUTES REVIEW PANEL AGREEMENT ("Agreement") is made and entered into this ____ day of _____, 20__, among: the Texas Department of Transportation, hereinafter referred to as "TxDOT", _____, hereinafter referred to as "DB Contractor", and the three members of the Disputes Review Panel, hereinafter referred to as the "Panel", consisting of _____, _____, and _____ hereinafter referred to as the "Panel Chairperson". TxDOT, DB Contractor, and the members of the Panel may be referred to individually herein as a "Party" or collectively as the "Parties". All capitalized terms used in this Agreement and not defined or modified herein shall have the same meaning as set forth in the Design-Build Contract, dated _____ between TxDOT and DB Contractor (the "DBC").

WHEREAS, TxDOT is now engaged in the development of the I-635 LBJ East Project ("Project"); and

WHEREAS, the DBC provides for DB Contractor to develop, design and build the Project and further provides for the establishment and operation of a Panel to assist in resolving certain disputes, claims and other controversies as specified therein; and

WHEREAS, the Panel is comprised of three members, one who was selected by TxDOT, one who was selected by DB Contractor, and the Panel Chairperson who was selected by the first two members and approved by TxDOT and DB Contractor.

NOW THEREFORE, in consideration of the terms, conditions, covenants and agreements contained herein, or attached and incorporated and made a part hereof, the Parties agree as follows:

### I. DESCRIPTION OF WORK

The DBC provides for establishment of the Panel to assist in the resolution of Disputes between TxDOT and DB Contractor. The purpose of the Panel is to fairly and impartially consider the Disputes placed before it, and to provide written Panel Recommendations to both TxDOT and DB Contractor, for resolution of these Disputes. The members of the Panel shall perform the services necessary to participate on the Panel in accordance with the scope of work set forth herein.

### II. SCOPE OF SERVICES

The scope of services of the Panel includes the following.

A. Adopting Operating Procedures:

At the first regular meeting after the effective date of this Agreement, the Panel will meet with DB Contractor and TxDOT to establish the rules and procedures ("Operating Procedures") which will govern the Panel's participation in the Project as set forth in Section 4.9 of the General Conditions. In establishing the Operating Procedures, the Parties shall first consider the Form of Operating Procedures included in Appendix _ to the Design-Build Agreement and make any revisions necessary to the effective operation of the Panel and efficient resolution of Disputes. The agreed upon Operating Procedures shall not conflict with any provisions of the DBC. The Panel may establish any internal rules and procedures not covered in the DBC.

B. Conducting Regular Progress Meetings:

All regular meetings are expected to be held at or near the Project site. The regular progress meetings shall be held no less frequently than quarterly through Final Acceptance, although TxDOT and DB Contractor may request more frequent meetings, consistent with the construction activities and the matters under consideration and Dispute. Each meeting is expected to consist of a round table discussion and a field inspection of the work being performed on the Project. A member of TxDOT's staff is expected to conduct the round table discussion, and the round table discussion attendees are expected to include selected personnel from TxDOT and DB Contractor. The agenda for each meeting will be set by the Panel in accordance with Section 4.9.3.2 of the General Conditions.

C. Advisory Opinions:

If requested by TxDOT and DB Contractor, the Panel shall provide TxDOT and DB Contractor with an oral advisory opinion after concurrent submissions by TxDOT and DB Contractor of brief written summaries of the issue(s) in Dispute, pertinent facts and circumstances, and relevant provisions of the Contract Documents. The submissions from TxDOT and DB Contractor shall meet the requirements of and advisory opinions shall be provided in accordance with Section 4.9.6 of the General Conditions and any applicable provisions of the Operating Procedures.

D. Conducting Hearings on Disputes:

Upon receipt by the Panel of a Dispute, either from TxDOT or DB Contractor, the Panel shall convene a hearing to review and consider the Dispute in accordance with the procedures set forth in Section 4.9 of the General Conditions of the DBC and the Operating Procedures. Both TxDOT and DB Contractor shall be given a full and adequate opportunity to present their evidence at these hearings in accordance with Section 4.9 of the General Conditions of the DBC.

It is expressly understood that all Panel members are to act impartially and independently in the consideration of facts and conditions surrounding any dispute. Ex parte contact with representatives of TxDOT or DB Contractor is prohibited and is grounds for removal of the Panel member from the Panel.

## III. PANEL RESPONSIBILITIES

The Panel is organized in accordance with Section 4.9 of the General Conditions of the DBC for the purposes described therein. A copy of Section 4.9 is attached hereto as Appendix 1 and is incorporated by reference herein. The Panel is intended to provide recommendations for resolving disputes, claims and other controversies between TxDOT and DB Contractor, arising under the DBC. The Panel will conduct hearings regarding Disputes under the DBC, including determining compensation payable with respect to such Disputes. If requested by TxDOT and DB Contractor, the Panel may provide Panel Recommendations on merit only, with compensation to be determined later if TxDOT and DB Contractor are unable to resolve the Dispute.

The Panel Recommendations shall be based on the pertinent provisions of the General Conditions and other Contract Documents and the facts and circumstances involved in the Dispute. Panel Recommendations shall be furnished in writing to TxDOT and DB Contractor.

Each Panel member represents, warrants and covenants on his/her behalf that he/she:

(a) Has been provided with a copy of the DBC and other Contract Documents and has taken the time necessary to become familiar with and understand Section 4.9 of the General Conditions;

(b) Satisfies the requirements for Panel membership set forth in Section 4.9 of the General Conditions;

(c) Shall not seek or accept other employment by TxDOT, any firm under contract with TxDOT, the DB Contractor, any Guarantor or any DB Contractor-Related Entity during the term of this Agreement or within one calendar year after his/her termination, withdrawal, or the termination of this Agreement;

(d) Shall not discuss employment, nor make any agreement regarding employment with TxDOT, the DB Contractor, any Guarantor or any DB Contractor-Related Entity during the term of this Agreement;

(e) Shall not take any other action that would result in disqualification from service as a Panel member; and

(f) Shall immediately notify TxDOT and the DB Contractor if circumstances arise which impair his/her qualification as a Panel member.

The Panel members shall conduct all Panel business in accordance with this Agreement and Section 4.9 of the General Conditions. In the event of any conflict between this Agreement and Section 4.9 of the General Conditions, Section 4.9 of the General Conditions shall control.

All Panel members are to act independently in the consideration of facts and conditions surrounding any Dispute. The Panel members acknowledge that neither TxDOT nor DB Contractor are permitted to seek the Panel members' advice or consultation, ex parte, although either TxDOT or DB Contractor may seek such advice or consultation from the entire Panel, at a Panel meeting, after first giving notice to all parties who might thereafter be parties before the Panel in a Dispute involving that matter. A Panel member who has ex parte contact with TxDOT or DB Contractor or their representatives shall be subject to removal from the Panel for cause.

Each Panel member further covenants to TxDOT and the DB Contractor that he/she:

(a) Shall be bound by and perform his/her obligations in accordance with the procedures set forth in Section 4.9 of the General Conditions;

(b) Shall protect the confidentiality of information provided by TxDOT and DB Contractor; and

(c) Shall disclose during the term of this Agreement any potential conflicts of interest related to such Panel member as described in Section 4.9.2.5 of the General Conditions.

## IV. DB CONTRACTOR RESPONSIBILITIES

Except for its participation in the Panel's activities as provided in the DBC and in this Agreement, DB Contractor shall not solicit advice or consultation from the Panel or its members on matters dealing with the conduct of the work or the resolution of problems.

The DB Contractor shall furnish to each Panel member one copy of all documents it has, other than those furnished by TxDOT, which are pertinent to the performance of the Panel.

## V. TxDOT'S RESPONSIBILITIES

Except for its participation in the Panel's activities as provided in the DBC and in this Agreement, TxDOT shall not solicit advice or consultation from the Panel or its members on matters dealing with the conduct of the work or resolution of problems.

TxDOT shall furnish the following:

A. Contract Documents and Other Documents

TxDOT shall furnish each Panel member one copy of (a) the DBC and all related Contract Documents, including, but not limited to, the Design-Build Standard Specifications, any modifications or amendments to the Contract Documents, (b) Project Schedule Updates, and (c) other documents, as agreed by TxDOT and DB Contractor that are pertinent to the performance of the DBC, and necessary to the Panel's work.

B. Coordination

TxDOT will, in cooperation with DB Contractor, coordinate the operations of the Panel.

C. Services

TxDOT and DB Contractor will arrange for or provide conference facilities at the Project Office or TxDOT's facilities, and will provide secretarial and copying services.

## VI. TIME FOR BEGINNING AND COMPLETION

The Panel shall begin operation upon execution of this Agreement and written authorization by TxDOT, and shall terminate its activities upon later of (a) completion of all work required to be performed by DB Contractor under the DBC (including, unless the DBC is terminated earlier, work required pursuant to the Warranties) or (b) conclusion of any proceedings before the Panel.

Except for choosing a Panel Chairperson by the Party-appointed members, the Panel members shall not begin any work under the terms of this Agreement until authorized in writing by TxDOT.

## VII. PAYMENT

Invoices of the Panel members for services performed and all direct expenses of the Panel incurred without mark-up shall be paid by DB Contractor subject to approval by TxDOT and DB Contractor. Payments shall constitute full compensation for work performed and services rendered, and for all materials, supplies and incidentals necessary to serve on the Panel. TxDOT shall reimburse the DB Contractor for one half of these fees and expenses.

A. Payment for Services and Expenses

The Party-appointed members will be reimbursed for their time and expenses devoted to choosing the Panel Chairperson.

Direct expenses will be reimbursed at the actual cost to the Panel member. These expenses may include, but are not limited to, travel expenses from the Panel member's point-of-departure to the initial point-of-arrival (including automobile mileage at the standard IRS rate in effect at the time the trip is taken, parking, airfare, automobile rental, food and lodging), printing, long distance telephone, postage and courier delivery. Billing for these expenses shall include an itemized listing supported by copies of the original bills, invoices, expense accounts and miscellaneous supporting date. All expenses shall be subject to TxDOT standard requirements.

B. Payments

Each Panel member may submit invoices for payment for work completed not more often than once per month during the progress of work. Such invoices shall be in a format approved by TxDOT and DB Contractor, and accompanied by a general description of activities performed during that period. The value of work accomplished for payment shall

be established from the billing rate and hours expended by the Panel member together with direct expenses. Satisfactorily submitted invoices shall be paid within 30 days.

C. Inspection of Cost Records

The Panel members shall keep, available for inspection by representatives of TxDOT or DB Contractor for a period of four years after final payment, the cost records and accounts pertaining to this Agreement.

## VIII. ASSIGNMENT

Panel members shall not assign any of the work of this Agreement.

## IX. TERMINATION OF AGREEMENT

This Agreement may be terminated by mutual agreement of TxDOT and DB Contractor at any time upon not less than four weeks' prior written notice to the Panel members.

Panel members may withdraw from the Panel by providing four weeks' prior written notice to the other Parties. Panel members may be terminated for or without cause as specified in the DBC.

Each of TxDOT and DB Contractor shall be entitled to replace the Panel member selected by such Party without cause and without agreement of the other Parties (other than approval of the replacement). The Panel Chairperson may be replaced without cause only with the agreement of TxDOT and DB Contractor.

Should the need arise to appoint a replacement Panel member, the replacement member shall be appointed in the same manner as the original member was appointed. The selection of a replacement Panel member shall begin promptly upon notification of the necessity for a replacement and shall be completed within 20 days. This Agreement will be amended to indicate changes in Panel membership.

## X. LEGAL RELATIONS

The Parties hereto mutually understand and agree that each Panel member, in the performance of its duties on the Panel, is acting in the capacity of an independent agent and not as an employee of either TxDOT or DB Contractor.

The Panel members are absolved of any personal or professional liability arising from the activities and recommendations of the Panel. TxDOT and DB Contractor each agree to hold harmless each Panel member from such liability to the extent permitted by law.

## XI. MISCELLANEOUS

This Agreement shall be governed and construed in accordance with the laws of the State of Texas.

IN WITNESS WHEREOF, the Parties hereto have executed this Agreement as of the day and year first above written.

PANEL MEMBER

_____

By:

PANEL MEMBER

_____

By:

PANEL MEMBER

_____

By:

DB CONTRACTOR:

_____

By:

Title:_____

TEXAS DEPARTMENT OF TRANSPORTATION

_____

By:

Title:_____

# EXHIBIT 23

## MUNICIPAL UTILITY AMENDMENTS

The General Conditions are amended as follows: (i) underlined text is hereby added to the General Conditions and (ii) stricken text is hereby deleted therefrom.

1. Section 4.5 of the General Conditions is hereby revised as follows:

**4.5 Utilities**

DB Contractor is responsible for causing, in accordance with the Project Schedule, all Utility Adjustment Work necessary to accommodate the design and construction of the Project. All Utility Adjustment Work performed by DB Contractor shall comply with the Contract Documents. DB Contractor shall coordinate, monitor, and otherwise undertake the necessary efforts to cause Utility Owners performing Utility Adjustment Work to perform such work timely, in coordination with the Work, and in compliance with the standards applicable to the Professional Services and Construction Work and other applicable requirements specified in the Contract Documents. However, regardless of the arrangements made with the Utility Owners and except as otherwise provided in Section 4.6, DB Contractor shall continue to be the responsible party to TxDOT for timely performance of all Utility Adjustment Work so that upon completion of the Work, all Utilities that might impact or be impacted by the Project (whether located within or outside the Project ROW) are compatible with the Project. DB Contractor agrees that (a) the Price (as it may be modified hereunder) covers all of the Utility Adjustment Work to be furnished, performed or paid for by DB Contractor, (b) it is feasible to obtain and perform all necessary Utility Adjustments within the time deadlines of the Contract Documents (as they may be modified pursuant to Section 4.6), and (c) the Price includes contingencies deemed adequate by DB Contractor to account for the potential risks of additional costs and delays relating to Utility Adjustments, except to the extent that an adjustment to the Price is permitted under this Section 4.5 and in accordance with Section 4.6.

The Utility Adjustment Work for the City Utilities is included in the Work (including all requirements to be included in the City Utility Agreements) and the Price includes all costs associated with the City Reimbursable Utility Adjustments and DB Contractor's Utility coordination and permitting costs associated with all City Utilities.

DB Contractor shall not be required to enter into a PUAA with the City Utility Owners. DB Contractor and TxDOT will negotiate in good faith with each of the City Utility Owners the applicable City Utility Agreement setting the terms and price of the Utility Adjustment Work for the applicable City Utilities, based on the draft agreements included in the RID. Notwithstanding anything to the contrary in the Contract Documents, DB Contractor shall comply with the requirements for all Utility Adjustment Work for City Utilities in accordance with the requirements set forth in the applicable City Utility Agreement, without any right to any additional increase in the Price. If any of the City Utility Owners elects not to use DB Contractor to perform the applicable Utility Adjustments, TxDOT and DB Contractor will enter into a reductive Change Order removing such Utility Adjustments from the Work and decreasing the Price by: (a) with respect to City of Dallas Reimbursable Utility Adjustments, $[*insert amount from Form P-2.1, Line 32*], (b) with respect to City of Garland Reimbursable Utility Adjustments, $[ *insert amount from Form P-2.1, Line 33*] and (c) with respect to City of Mesquite Reimbursable Utility Adjustments, $[ *insert amount from Form P-2.1, Line 34*].

The term "**City Utility Delay**" shall mean a delay to a Critical Path that is directly attributable to the failure to cooperate in good faith with TxDOT and DB Contractor in performing Utility Adjustment Work within the time period reasonably scheduled by DB Contractor for performance of such work by an applicable City Utility Owner, where the applicable City Utility Agreement has not yet been executed. Subject to the restrictions and limitations set forth in Section 4.6 and Section 4.5.5.3, DB Contractor shall bear 100% of the risk of such delay prior to and during the 90-day period commencing on the later of (i) the first day of any such delay and (ii) the day on which TxDOT has determined that the applicable City Utility Owner failed to cooperate in good faith, and, in either case, DB Contractor has complied with all other requirements for a Change Order under this Design-Build Contract, including Section 4.6, and the risk of delay after such 90-day period shall be borne equally by each Party (i.e., any affected Completion Deadline shall be extended by one day for every two full days of City Utility Delay occurring after expiration of the 90-day period). If a City Utility Delay is concurrent with another delay that is DB Contractor's responsibility hereunder, DB Contractor shall not be entitled to a time extension on account of such City Utility Delay. If a City Utility Delay is concurrent with another City Utility Delay or with a Utility Owner Delay by another Utility Owner, only one of the delays shall be counted. If a City Utility Delay is concurrent with any other delay for which DB Contractor is entitled to a time extension under Section 4.6, the delay shall be deemed a City Utility Delay and the provisions of this Section 4.5 shall apply.

**4.5.1 New Utilities and Unidentified Utilities**

DB Contractor's entitlement to Change Orders for additional compensation or extension of time on account of New Utilities and omissions or inaccuracies in the Utility Strip Map shall be limited as set forth in this Section 4.5.1 and Section 4.6.9.2. DB Contractor shall use its best efforts to minimize costs for which DB Contractor is entitled to compensation pursuant to this Section 4.5.1, and to minimize any delay for which DB Contractor is entitled to an extension in the Completion Deadline pursuant to this Section 4.5.1 and Section 4.6.9.2, subject to DB Contractor's obligation to comply with all applicable requirements of the Contract Documents, including the Utility Accommodation Rules (UAR).

**4.5.2 Utility Enhancements**

DB Contractor shall be responsible for addressing any requests by Utility Owners that DB Contractor design or construct a Betterment or Utility Owner Project (collectively, "Utility Enhancements").

**4.5.2.1** If a Utility Owner requests that DB Contractor design or construct a Betterment, then subject to Section 4.5.3.4, DB Contractor (or TxDOT and DB Contractor, if the Utility Owner is a City Utility Owner) shall use its best efforts to negotiate in good faith an agreement with the Utility Owner providing for DB Contractor to perform such work at the Utility Owner's expense, with payments to be made directly by the Utility Owner to DB Contractor (or by the applicable City Utility Owner to TxDOT for payment to DB Contractor if the Utility Owner is a City Utility Owner). Any such agreement shall be set forth in the applicable Utility Agreement. Any such Betterment shall be deemed added to the scope of the Work only upon execution by the Utility Owner and DB Contractor and approval by TxDOT (or execution by the applicable City Utility Owner and TxDOT, if the Utility Owner is a City Utility Owner) of a Utility Agreement identifying and providing for performance of such Betterment. Any change in the scope of the Work pursuant to this Section 4.5.2.1 shall not be treated as a TxDOT-Directed Change or extend the Completion Deadlines.

**4.5.2.2** The Price shall not be increased on account of any Betterment added to the Work. Instead, DB Contractor shall have the right to collect payment for such work directly from the Utility Owner,

subject to the provisions of the applicable Utility Agreement. The amount of compensation payable by the Utility Owner to DB Contractor or TxDOT for a Betterment shall be determined pursuant to the process set forth in the applicable Utility Agreement. DB Contractor shall submit to TxDOT a copy of each invoice delivered to a Utility Owner pursuant to this Section 4.5.2.2, concurrently with its delivery to the Utility Owner.

**4.5.2.3** If a Utility Owner (other than a City Utility Owner) requests that DB Contractor design or construct a Utility Owner Project, then subject to Section 4.5.3.4, DB Contractor shall use its best efforts to negotiate in good faith an agreement with the Utility Owner providing for DB Contractor to perform such work at the Utility Owner's expense, with payments to be made directly by the Utility Owner to DB Contractor. Any such agreement shall be a separate contract between DB Contractor and the Utility Owner; and any such Utility Owner Project shall be performed outside of this Design-Build Contract and the Work, without any impact on the Price and the Completion Deadlines and shall be subject to Section 4.5.8. The compensation payable by the Utility Owner to DB Contractor for a Utility Owner Project shall be determined in a manner acceptable to both DB Contractor and the Utility Owner. Notwithstanding the foregoing, for any Utility Owner Project where the Utility Owner is a City Utility Owner, DB Contractor shall use its best efforts to negotiate in good faith an agreement with the applicable City Utility Owner, providing for DB Contractor to perform such work at the applicable City Utility Owner's expense, which agreement upon approval by TxDOT may be incorporated as part of the initial applicable City Utility Agreement or an amendment thereto, with payments to be made by the applicable City Utility Owner to TxDOT and from TxDOT to DB Contractor pursuant to an increase in the Price solely for the costs of such Utility Owner Project included in a negotiated Change Order in accordance with Section 4.6 if such Utility Owner Project is included in an amendment to the applicable City Utility Agreement. DB Contractor shall not be entitled to a time extension for any Utility Owner Project negotiated in accordance with this Section 4.5.2.3.

**4.5.2.4** DB Contractor is fully responsible for coordinating its efforts with Utility Owners and for addressing requests by Utility Owners that DB Contractor design or construct Utility Enhancements. Any Betterment performed as part of a Utility Adjustment, whether by DB Contractor or by the Utility Owner, shall be subject to the same standards and requirements as if it were a necessary Utility Adjustment, and shall be addressed in the appropriate Utility Agreement. Under no circumstances shall DB Contractor proceed with any Utility Enhancement that is incompatible with the Project or that cannot be performed within the other constraints of applicable Law, the Governmental Approvals and the Contract Documents, including the Completion Deadlines. Under no circumstances will DB Contractor be entitled to any Price increase or time extension hereunder as the result of any Utility Enhancement, whether performed by DB Contractor or by the Utility Owner. DB Contractor may, but is not obligated to, design and construct Utility Enhancements. DB Contractor shall promptly notify TxDOT of any requests by Utility Owners that DB Contractor considers to be Betterments, and shall keep TxDOT informed as to the status of negotiations with Utility Owners concerning such requests. DB Contractor shall provide TxDOT with such information, analyses, and certificates as may be requested by TxDOT in order to determine compliance with this Section 4.5.2.

### 4.5.3 Utility Agreements

**4.5.3.1** As described in the Design-Build Specifications, DB Contractor is responsible for preparing and entering into Utility Agreements (other than the City Utility Agreements) with the Utility Owners, and TxDOT agrees to cooperate as reasonably requested by DB Contractor in pursuing Utility Agreements, including attendance at negotiation sessions and review of Utility Agreements. TxDOT is not providing any assurances to DB Contractor that the Utility Owners will accept,

without modification, the standard Utility Agreement forms specified in the Design-Build Specifications. DB Contractor is solely responsible for the terms and conditions of all PUAAs and UAAAs into which it enters (subject to the requirements of the Contract Documents, including Section 14.1.3 of the Design-Build Specifications). Utility Agreements ~~entered into by DB Contractor~~ shall not be considered Contract Documents. DB Contractor shall not be entitled to any increase in the Price or to any time extension on account of the terms of any Utility Agreement (including those related to any Betterment), except for the City Utility Agreements as described in this Section 4.5.

**4.5.3.2** TxDOT will not be a party to the Utility Agreements (other than the City Utility Agreements); however, DB Contractor shall cause the Utility Agreements (other than the City Utility Agreements) to designate TxDOT as an intended third-party beneficiary thereof and to permit assignment of DB Contractor's right, title and interest thereunder to TxDOT without necessity for Utility Owner consent. DB Contractor shall not enter into any agreement with a Utility Owner that purports to bind TxDOT in any way, unless TxDOT has executed such agreement as a party thereto. However, TxDOT's signature indicating approval or review of an agreement between DB Contractor and a Utility Owner, or its status as a third-party beneficiary, shall not bind TxDOT as a party to such agreement.

**4.5.3.3** If a conflict occurs between the terms of a Utility Agreement and those of the Contract Documents, the terms that establish the higher quality, manner or method of performing Utility Adjustment Work, establish better Good Industry Practice, or use more stringent standards shall prevail between DB Contractor and TxDOT.

**4.5.3.4** DB Contractor shall comply with and timely perform all obligations imposed on DB Contractor by any Utility Agreement.

**4.5.3.5** Each Utility Adjustment (whether performed by DB Contractor or by the Utility Owner) shall comply with the Adjustment Standards in effect as of the Proposal Due Date, together with any subsequent amendments and additions to those standards that (a) are necessary to conform to applicable Law or (b) are adopted by the Utility Owner and affect the Utility Adjustment pursuant to the applicable Utility Agreements. DB Contractor is solely responsible for negotiating any terms and conditions of its Utility Agreements that might limit a Utility Owner's amendments and additions to its Adjustment Standards after the Proposal Due Date. In addition, all Utility Adjustment Work shall comply with all applicable Laws, the applicable Utility Agreements, and all other requirements specified in the Contract Documents.

### 4.5.4 Failure of Utility Owners to Cooperate

**4.5.4.1** DB Contractor shall use best efforts to obtain the cooperation of each Utility Owner as necessary for the Utility Adjustment. DB Contractor shall notify TxDOT immediately if (a) DB Contractor is unable (or anticipates that it will be unable), after diligent efforts, to reach agreement with a Utility Owner on a necessary Utility Agreement within a reasonable time, (b) DB Contractor reasonably believes for any other reason that any Utility Owner would not undertake or permit a Utility Adjustment in a manner consistent with the timely completion of the Project, (c) DB Contractor becomes aware that any Utility Owner is not cooperating in a timely manner to provide agreed-upon work or approvals, or (d) any other dispute arises between DB Contractor and a Utility Owner with respect to the Project, despite DB Contractor's diligent efforts to obtain such Utility Owner's cooperation or otherwise resolve such dispute. Such notice may include a request that TxDOT assist in resolving the dispute or in otherwise obtaining the Utility Owner's timely cooperation. DB Contractor shall provide TxDOT with such information as TxDOT requests regarding the Utility

Owner's failure to cooperate and the effect of any resulting delay on the Project Schedule. After delivering to TxDOT any notice or request for assistance, DB Contractor shall continue to use diligent efforts to pursue the Utility Owner's cooperation.

**4.5.4.2** If DB Contractor requests TxDOT's assistance pursuant to Section 4.5.4.1, DB Contractor shall provide evidence reasonably satisfactory to TxDOT that (a) the Utility Adjustment is necessary, (b) the time for completion of the Utility Adjustment in the Project Schedule was, in its inception, a reasonable amount of time for completion of such work, (c) DB Contractor has made diligent efforts to obtain the Utility Owner's cooperation, and (d) the Utility Owner is not cooperating (the foregoing items (a) through (d) are referred to herein as the "conditions to assistance"). Following TxDOT's receipt of satisfactory evidence, TxDOT shall take such reasonable steps as may be requested by DB Contractor to obtain the cooperation of the Utility Owner or resolve the dispute; provided, however, that TxDOT shall have no obligation to prosecute eminent domain or other legal proceedings, or to exercise any other remedy available to it under applicable Law or existing contract, unless TxDOT elects to do so in its discretion. If TxDOT holds contractual rights that might be used to enforce the Utility Owner's obligation to cooperate and TxDOT elects in its discretion not to exercise those rights, then TxDOT shall assign those rights to DB Contractor upon DB Contractor's request; provided, however, that such assignment shall be without any representation or warranty as to either the assignability or the enforceability of such rights. DB Contractor shall reimburse TxDOT for TxDOT's Recoverable Costs in connection with providing such assistance to DB Contractor. Any assistance provided by TxDOT shall not relieve DB Contractor of its sole and primary responsibility for the satisfactory compliance with its obligations and timely completion of all Utility Adjustment Work, except as otherwise expressly set forth in this Section 4.5.4.

**4.5.4.3** If TxDOT objects in writing to a request for assistance pursuant to Section 4.5.4.1, based on DB Contractor's failure to satisfy one or both of the conditions to assistance described in Sections 4.5.4.2(a) and (b), then DB Contractor shall take such action as is appropriate to satisfy the conditions and shall then have the right to submit another request for assistance on the same subject matter. If TxDOT objects in writing to a request for assistance pursuant to Section 4.5.4.1 based on DB Contractor's failure to satisfy one or both of the conditions to assistance described in Sections 4.5.4.2(c) and (d), then DB Contractor shall take such action as DB Contractor deems advisable during the next 30 days to obtain the Utility Owner's cooperation and shall then have the right to submit another request for assistance on the same subject matter. Notwithstanding the foregoing, no resubmittal will be accepted unless all TxDOT objections have been addressed in accordance with the preceding two sentences. This process shall be followed until DB Contractor succeeds in obtaining the Utility Owner's cooperation or in otherwise resolving the dispute or until TxDOT determines, based on evidence DB Contractor presents, that the conditions to assistance have been satisfied. DB Contractor shall have the right to submit the question of the reasonableness of TxDOT's determination through the dispute resolution process described in Section 4.9, Section 4.10 and DBA Exhibit 20.

### 4.5.5 Delays by Utility Owners

**4.5.5.1** DB Contractor shall bear 100% of the risk of Critical Path delays caused by a Utility Owner's failure to timely comply with the requirements of an executed Utility Agreement ~~that has been executed by DB Contractor and such Utility Owner~~.

**4.5.5.2** The term "Utility Owner Delay" means a delay to a Critical Path that is directly attributable to a Utility Owner's (other than a City Utility Owner) failure to cooperate with DB Contractor in performing Utility Adjustment Work within the time period reasonably scheduled by DB Contractor

for performance of such work, where DB Contractor and such Utility Owner have not yet executed a Utility Agreement addressing such Utility Adjustment Work. DB Contractor shall bear 100% of the risk of each Utility Owner Delay prior to and during the first 90 days of any such Utility Owner Delay, provided that such 90-day period shall not commence until TxDOT has received evidence required by Section 4.5.4.2 that is reasonably satisfactory to TxDOT and DB Contractor has complied with all other requirements for a Change Order under this Design-Build Contract, including Section 4.6. The risk of any Utility Owner Delay after such 90-day period shall be borne equally by each Party (i.e., any affected Completion Deadline shall be extended by one day for every two full days of Utility Owner Delay occurring after expiration of the 90-day period). If a Utility Owner Delay is concurrent with another delay which is DB Contractor's responsibility hereunder, DB Contractor shall not be entitled to a time extension on account of such Utility Owner Delay. If a Utility Owner Delay is concurrent with another Utility Owner Delay by the same Utility Owner or by another Utility Owner, or with a City Utility Delay, only one of the delays shall be counted. If a Utility Owner Delay is concurrent with any other delay for which DB Contractor is entitled to a time extension under Section 4.6, the delay shall be deemed a Utility Owner Delay and the provisions of this Section 4.5.5 shall apply.

**4.5.5.3** No Change Order for delay to a Critical Path shall be allowable pursuant to Section 4.5.5.2 or, with respect to City Utility Delays, Section 4.5 unless all of the following criteria are met:

(i) the general requirements and conditions for Change Orders set forth in Section 4.6 have been met;

(ii) DB Contractor has provided evidence reasonably satisfactory to TxDOT that (i) DB Contractor took advantage of Float time available early in the Project Schedule for coordination activities with respect to the affected Utility and (ii) DB Contractor has made diligent efforts to obtain the Utility Owner's cooperation but has been unable to obtain such cooperation;

(iii) if applicable, DB Contractor has provided a reasonable Utility Adjustment plan to the Utility Owner;

(iv) DB Contractor or the Utility Owner has obtained, or is in a position to timely obtain, all applicable approvals, authorizations, certifications, consents, exemptions, filings, leases, licenses, permits, registrations, opinions and rulings required by or with any Person in order to design and construct such Utility Adjustment;

(v) no other circumstance exists that would delay the affected Utility Adjustment even if the Utility Owner were cooperative; and

(vi) the delay is allowable under Section 4.6.5.3.

**4.5.5.4** Except as set forth in Section 4.5.5.2 with respect to certain Utility Owner Delays and Section 4.5 with respect to City Utility Delays, DB Contractor shall not be entitled to an extension of any Completion Deadline on account of any delays caused by a Utility Owner. DB Contractor shall not be entitled to any increase of the Price or reimbursement of any additional costs which it may incur as a result of any delays caused by a Utility Owner, regardless of whether DB Contractor is entitled to an extension of any Completion Deadlines on account of such delays pursuant to Section 4.5.5.2, or, with respect to City Utility Delays, Section 4.5. Any action or inaction by TxDOT as described in Section 4.5.4.2 shall have no bearing on the restriction set forth in this Section 4.5.5.4.

### 4.5.6 Utility Adjustment Costs

**4.5.6.1** Subject to Section 4.5.1, DB Contractor is responsible for all costs of the Utility Adjustment Work, including costs of acquiring Replacement Utility Property Interests and costs with respect to relinquishment or acquisition of Existing Utility Property Interests, but excluding costs attributable to Betterments and any other costs for which the Utility Owner is responsible under applicable Law. DB Contractor shall fulfill this responsibility either by performing the Utility Adjustment Work itself at its own cost (except that any assistance provided by any DB Contractor-Related Entity to the Utility Owner in acquiring Replacement Utility Property Interests shall be provided outside of the Work, in compliance with Section 14.2.4 of the Design-Build Specifications), or by reimbursing the Utility Owner for its Utility Adjustment Work (however, DB Contractor has no obligation to reimburse Utility Adjustment costs for any Service Line Utility Adjustment for which the affected property owner has been compensated pursuant to Section 4.4.2). DB Contractor is solely responsible for collecting directly from the Utility Owner any reimbursement due to DB Contractor for Betterment costs or other costs incurred by DB Contractor for which the Utility Owner is responsible under applicable Law.

**4.5.6.2** For each Utility Adjustment, the eligibility of Utility Owner costs (both indirect and direct) for reimbursement by DB Contractor, as well as the determination of any Betterment or other costs due to DB Contractor, shall be established in accordance with applicable Law and the applicable Utility Agreements, all of which shall incorporate by reference 23 CFR Part 645 Subpart A.

**4.5.6.3** For each Utility Adjustment, DB Contractor shall (a) compensate the Utility Owner for the market value of each Existing Utility Property Interest relinquished pursuant to Section 14.2.4 of the Design-Build Specifications, to the extent TxDOT would be required to do so by applicable Law and provided that TxDOT has approved the Utility Owner's claim or (b) reimburse the Utility Owner's reasonable acquisition costs for a Replacement Utility Property Interest. The Utility Owner will determine which method of compensation is satisfactory. DB Contractor shall pay any compensation due to the Utility Owner and all costs and expenses associated therewith (including any incurred by TxDOT on DB Contractor's behalf for eminent domain proceedings or otherwise) in accordance with Section 4.4.2. DB Contractor shall be responsible for all eligible costs of right of way engineering, surveying, appraisals, administration, acquisition, environmental permitting and related services for compensating the Utility Owner or replacing each Existing Utility Property Interest, including all costs and expenses associated with negotiation and condemnation action. DB Contractor shall also carry out the duties in Section 14.2.4.2 of the Design-Build Specifications.

**4.5.6.4** If for any reason DB Contractor is unable to collect any amounts owed to DB Contractor by any Utility Owner, then (a) TxDOT shall have no liability for such amounts; (b) DB Contractor shall have no right to collect such amounts from TxDOT or to offset such amounts against amounts otherwise owing to DB Contractor from TxDOT; and (c) DB Contractor shall have no right to stop work or to exercise any other remedies against TxDOT on account of such Utility Owner's failure to pay DB Contractor.

**4.5.6.5** If any local Governmental Entity is participating in any portion of Utility Adjustment costs, DB Contractor shall coordinate with TxDOT and such local Governmental Entity regarding accounting for and approval of those costs.

**4.5.6.6** DB Contractor shall maintain a complete set of records for the costs of each Utility Adjustment (whether incurred by DB Contractor or by the Utility Owner), in a format compatible with the estimate attached to the applicable Utility Agreement and in sufficient detail for analysis. For both Utility Owner costs and DB Contractor costs, the totals for each cost category shall be shown in

such manner as to permit comparison with the categories stated on the estimate. DB Contractor also shall indicate in these records the source of funds used for each Utility Adjustment. All records with respect to Utility Adjustment Work shall comply with the record keeping and audit requirements of the Contract Documents. This Work includes the deliverables identified in the final closeout procedures of Section 14.5.3 of the Design-Build Specifications.

**4.5.7 FHWA Utility Requirements**

**4.5.7.1** Unless TxDOT advises DB Contractor otherwise, the following provisions apply to Utility Adjustments.

**4.5.7.2** The Project will be subject to 23 CFR Part 645 Subpart A (including its requirements as to plans, specifications, estimates, charges, tracking of costs, credits, billings, records retention, and audit) and 23 CFR Section 635.410 (Buy America) and FHWA associated policies. DB Contractor shall comply (and shall require the Utility Owners to comply) with 23 CFR Part 645 Subpart A and 23 CFR Section 635.410. DB Contractor acknowledges, however, that without regard to whether such compliance is required, (a) it is not anticipated that DB Contractor will be eligible for FHWA reimbursement of any Utility Adjustment outlays and (b) DB Contractor will not have any share in any reimbursement from FHWA or other federal financing or funding that TxDOT may receive on account of Utility Adjustments.

**4.5.7.3** DB Contractor shall prepare and deliver to TxDOT the Alternate Procedure List in appropriate format, together with all other documentation required by FHWA or TxDOT for compliance with the FHWA Alternate Procedure.

**4.5.7.4** Promptly upon determining that any Utility Owner not referenced on the Alternate Procedure List is impacted by the Project, DB Contractor shall submit to TxDOT all documentation required by FHWA or TxDOT to add these Utilities to the Alternate Procedure List.

**4.5.7.5** TxDOT will forward the approved list to DB Contractor.

**4.5.8 Applications for Utility Permits**

**4.5.8.1** It is anticipated that during the Work, Utility Owners will apply for utility permits to install Utilities that would cross or longitudinally occupy the Project ROW, or to modify, upgrade, relocate or expand existing Utilities within the Project ROW for reasons other than accommodation of the Project. The provisions of this Section 4.5.8 shall apply to all such permit applications. TxDOT shall provide DB Contractor with a copy of each such permit application received after the Effective Date, within 30 days after TxDOT's receipt of such application.

**4.5.8.2** For all such utility permit applications pending as of or submitted after the Effective Date, DB Contractor shall furnish the most recent Project design information or as-built plans, as applicable, to the applicants, and shall assist each applicant with information regarding the location of other proposed and existing Utilities.

**4.5.8.3** DB Contractor shall assist TxDOT in deciding whether to approve a permit described in Section 4.5.8.1. Within a time period that will enable TxDOT to timely respond to the application, DB Contractor shall analyze each application and provide to TxDOT a recommendation (together with supporting analysis) as to whether the permit should be approved, denied, or approved subject to conditions. As part of the recommendation process, DB Contractor shall furnish to TxDOT Utility No Conflict Sign-Off Forms, signed by both DB Contractor's Utility Design Coordinator (UDC) and

DB Contractor's Utility Manager (UM), using the standard forms included in the Contract Documents. DB Contractor shall limit the grounds for its recommendation to the grounds on which TxDOT is legally entitled to approve or deny the application or to impose conditions on its approval. However, TxDOT shall have the right to issue Utility permits in its discretion. Applications for Utility permits and associated coordination described in this Section 4.5.8 shall not be subject to a Change Order and are not considered a New Utility or Unidentified Utility as described in Section 4.5.1.

**4.5.9 Security for Utility Adjustment Costs; Insurance**

**4.5.9.1** Upon request from a Utility Owner entitled to reimbursement of Utility Adjustment costs, DB Contractor shall, at its sole cost, provide security for such reimbursement by way of a payment bond, letter of credit or retention account, in such amount and on such terms as are negotiated in good faith between DB Contractor and the Utility Owner (or between TxDOT, DB Contractor and the applicable City Utility Owner, where the Utility Owner is a City Utility Owner).

**4.5.9.2** DB Contractor may satisfy a Utility Owner's requirement that DB Contractor provide liability insurance by naming such Utility Owner as an additional insured on the insurance provided by DB Contractor or any Subcontractor pursuant to Section 3.5.

**4.5.10 Additional Restrictions on Change Orders for Utility Adjustments**

**4.5.10.1** In addition to all of the other requirements and limitations contained in this Section 4.5 and in Section 4.6 the entitlement of DB Contractor to any Change Order under this Section 4.5 shall be subject to the restrictions and limitations set forth in this Section 4.5.10.

**4.5.10.2** DB Contractor shall provide documentation satisfactory to TxDOT showing that the required analysis was performed and an appropriate determination made regarding the need for the Utility Adjustment, and shall also bear the burden of proving that the amount of any additional costs or time incurred by DB Contractor are both necessary and reasonable.

**4.5.10.3** As part of the Work, DB Contractor is responsible for causing all Utility Adjustment Work and Incidental Utility Adjustment Work to occur, for reimbursing the Utility Owners for their costs of performing or furnishing Utility Adjustment Work and Incidental Utility Adjustment Work, and, subject to Section 4.5.5.2, for scheduling all Utility Adjustment Work and Incidental Utility Adjustment Work (whether performed by DB Contractor or the affected Utility Owner) so as to meet the Completion Deadlines herein. Accordingly, if a Utility Owner performs or furnishes Utility Adjustment Work or Incidental Utility Adjustment Work that was initially anticipated to be performed or furnished by DB Contractor, or if DB Contractor performs or furnishes Utility Adjustment Work or Incidental Utility Adjustment Work that was initially anticipated to be performed or furnished by the Utility Owner, there shall be no resulting time extension and no resulting change in the Price. The foregoing shall not affect TxDOT's right to any credit that may be owing under Section 4.6.

**4.5.10.4** DB Contractor shall not be entitled to a Change Order for any costs or delays that are attributable to (a) any errors, omissions, inaccuracies, inconsistencies or other defects in designs furnished by any Utility Owner, including any failure of such designs to comply with the requirements of Section 14.3 of the Design-Build Specifications or (b) any defect in construction performed by any Utility Owner or other failure of such construction to comply with the requirements of Section 14.4 of the Design-Build Specifications.

**4.5.10.5** DB Contractor shall not be entitled to a Change Order for any costs or delays resulting from the performance of Incidental Utility Adjustment Work by DB Contractor or any Utility Owner (including with respect to New Utilities for which DB Contractor is otherwise entitled to a Change Order under Section 4.5.1 and 4.6.9.2).

**4.5.10.6** Any Change Order increasing the Price pursuant to this Section 4.5 shall include only the incremental costs arising from the circumstances giving rise to such Change Order.

**4.5.10.7** DB Contractor shall not be entitled to any increase in the Price for any costs of coordinating with Utility Owners (including with respect to New Utilities for which DB Contractor is otherwise entitled to a Change Order under Section 4.5.1).

**4.5.10.8** Any information with respect to Utilities provided in the Reference Information Documents is for DB Contractor's reference only, has not been verified, and shall not be relied upon by DB Contractor. Without limiting the generality of the foregoing, DB Contractor acknowledges that such information does not identify most of the Service Lines that may be impacted by the Project and that there may be other facilities impacted by the Project that are not identified in such information. DB Contractor shall verify all information with respect to Utilities included in the Reference Information Documents and shall perform its own investigations as provided in Sections 14.3.1 and 14.4.2 of the Design-Build Specifications. Accordingly, there shall be no changes in the Price and no time extensions on account of any inaccuracies in the Reference Information Documents with respect to any Utilities. Except as provided in Section 4.5.1, DB Contractor shall not be entitled to any increase in the Price or time extension as a result of any of the following:

(a) any increase in the extent or change in the character of the Utility Adjustment Work necessary to Adjust any Utility from that anticipated by DB Contractor;
(b) any difference in the cost to Adjust a Utility from that anticipated by DB Contractor;
(c) any inaccuracy in the information included in the Reference Information Documents as to the existence, location, ownership, type, or any other characteristic of any Utility;
(d) any inaccuracy in the Reference Information Documents as to whether any Utility is located within privately owned property or public right of way; or
(e) any inaccuracy in the Reference Information Documents as to the existence or nature of any rights or interest relating to the occupancy of any real property by any Utility.

**4.5.10.9** Inasmuch as DB Contractor is both furnishing the design of and constructing the Project, DB Contractor may have opportunities to reduce the costs of certain portions of the Work, which may increase the costs of certain other portions of the Work. In considering each such opportunity, DB Contractor shall consider the impact of design changes on Utility Adjustments to the extent practical. Accordingly, except as otherwise provided in Section 4.6 with respect to TxDOT-Directed Changes, the following provisions shall apply with respect to any increase or decrease in the cost of the Work and any delay associated with design changes during the course of the Project which either reduce the nature or extent of or eliminate any Utility Adjustment, or result in unanticipated Utility Adjustments or an increase in the nature or extent of anticipated Utility Adjustments:

(a) DB Contractor shall not be entitled to extension of any Completion Deadline on account of delays resulting from any such design changes.

(b) DB Contractor shall not be entitled to any increase in the Price for any such additional costs that DB Contractor incurs (including both additional costs of Utility Adjustment Work and the costs of any additional Work on other aspects of the Project undertaken in order to avoid or minimize Utility Adjustments).

(c) If TxDOT incurs any such additional costs, then DB Contractor shall reimburse TxDOT for such costs within 10 days after receipt of TxDOT's invoice therefor, or in TxDOT's discretion, TxDOT may deduct the amount of reimbursement due from any payment due to DB Contractor under this Design-Build Contract.

(d) TxDOT shall not be entitled to a credit on account of reductions in the cost of the Work due to any such avoided or minimized Utility Adjustments.

**4.5.10.10** If DB Contractor elects to make payments to Utility Owners or to undertake any other efforts which are not required by the terms of the Contract Documents, DB Contractor shall not be entitled to a Change Order in connection therewith. DB Contractor shall promptly notify TxDOT of the terms of any such arrangements.

**4.5.10.11** Except as specified in this Section 4.5 or in Section 4.6, DB Contractor shall not be entitled to any Change Order with respect to any Utility Adjustments, including any act or omission of any Utility Owner that may result in a delay to the Project Schedule or in DB Contractor's incurring costs not included in the Price.

2. Section 4.6.3.1.1(c) of the General Conditions is hereby amended as follows:

(c) delays relating to <u>any City Utility Delay to the extent permitted by Section 4.5 and other delays relating to</u> Utilities, to the extent permitted by Sections 4.5.1, 4.5.5 and 4.6.9.2.

# EXHIBIT 24

## REMAINING PROJECT ROW

**ROW Acquisition**

Parcels to be acquired by DB Contractor:

**2374-01-189**: 11 and 32
**2374-01-151**: None.
**2374-02-115**: 67, 75, 77, 77(E), 118, 119, 120, 121, 106(E) and 113

**Relocation Assistance**

Parcels for which DB Contractor is responsible for relocation:

**2374-01-189**: 11, 32 and 34
**2374-01-151**: 93, 94, 103 and 114OAS
**2374-02-115**: 67, 68, 124OAS, 125OAS and 126OAS

The General Conditions are amended as follows: (i) underlined text is hereby added to the General Conditions and (ii) stricken text is hereby deleted therefrom.

1. Section 4.4.1.1 of the General Conditions is hereby revised as follows:

**4.4.1.1** All Project ROW, including Additional Properties but excluding temporary interests in property for Project Specific Locations, shall be acquired by DB Contractor in the name of the State. DB Contractor shall undertake and complete the acquisition of all **Remaining** Project ROW, including Additional Properties, in accordance with Item 15 of the Design-Build Specifications, the approved Right of Way Acquisition Management Plan and all applicable Laws relating to such acquisition, including the Uniform Act. DB Contractor shall also be responsible for submitting the completed files in accordance with the closeout procedures as defined by TxDOT in Section 15.2.11 of the Design-Build Specifications.

2. Section 4.4.1.3 of the General Conditions is hereby revised as follows:

**4.4.1.3** TxDOT shall (a) provide review and approval or disapproval of Acquisition Packages and Condemnation Packages for **Remaining** Project ROW, (b) except as provided below, undertake eminent domain proceedings, if necessary, for **Remaining** Project ROW in accordance with the procedures and time frames established in Item 15 of the Design-Build Specifications and the approved Right of Way Acquisition Management Plan, and (c) provide review and approval for the following Submittals: payment Submittals, relocation Submittals, administrative settlement Submittals and closing Submittals for **Remaining** Project ROW in accordance with the procedures and time frames established in the Design-Build Specifications and the approved ROW Acquisition Management Plan. TxDOT shall also provide review and approval for final closeout procedures established in Section 15.2.12 of the Design-Build Specifications.

3. Section 4.4.2.1 of the General Conditions is hereby revised as follows:

**4.4.2.1** For real property needed for ROW within the Schematic ROW, TxDOT shall be responsible for (a) the purchase price of such real property, (b) any market rental consideration paid in connection with PUAs in accordance with Section 15.4.1 of the Design-Build Specifications, (c) relocation

assistance payments required in connection with such real property and (d) title insurance for such real property. Subject to the immediately preceding sentence and Section 4.4.2.6, DB Contractor shall be responsible for the performance and the costs of all right of way engineering, surveying, appraisals, administration, acquisition, relocation assistance, environmental permitting (other than certain mitigation requirements expressly excluded under Section 4.7.1) and related services for all such parcels **that are Remaining Project ROW (excluding the Additional Properties)**, including all costs and expenses of negotiation. If TxDOT incurs and pays any such costs and expenses on DB Contractor's behalf, DB Contractor shall reimburse TxDOT within 10 days of TxDOT's submittal to DB Contractor of an invoice for such TxDOT costs and expenses. Alternatively, TxDOT may deduct the amount of such costs and expenses from any sums owed by TxDOT to DB Contractor pursuant to this Design-Build Contract. For any parcels within the Schematic ROW that require acquisition by eminent domain, DB Contractor shall be responsible for the performance of support services for the condemnation proceedings described in Item 15 of the Design-Build Specifications; provided, however, that DB contractor shall be entitled to reimbursement for DB Contractor's reasonable out-of-pocket costs for providing such services to the extent allowed in accordance with DBA Exhibit 11. Such costs may be included in any Draw Request after the services are provided and incurred by DB Contractor. DB Contractor's responsibility for such support services shall terminate upon Final Acceptance of the Project. Notwithstanding the foregoing, TxDOT shall be responsible for the legal costs for the Office of the Attorney General or fees for private counsel retained as directed by the Office of the Attorney General in connection with any condemnation actions, except for such legal fees and costs that arise out of the acts, omissions, negligence, intentional misconduct, or breach of applicable Law, contract or Governmental Approval of a DB Contractor-Related Entity in the performance of its obligations under the Contract Documents.

4. Section 4.4.5 of the General Conditions is hereby revised as follows:

**4.4.5 Negotiations and Condemnation Proceedings**

**4.4.5.1** Negotiations for any **Remaining** Project ROW shall be undertaken as set forth in the Contract Documents, including Section 15.4.1 of the Design-Build Specifications. DB Contractor shall obtain TxDOT's written approval of any offer to be extended to an owner of any interest in **Remaining** Project ROW prior to making such offer, in accordance with Section 15.3.6 of the Design-Build Specifications. DB Contractor shall notify TxDOT in writing, for its concurrence, of the failure of negotiations with respect to the acquisition of any parcel included in the **Remaining** Project ROW and shall submit to TxDOT for approval a Condemnation Package for the parcel as described in Section 15.4.4 of the Design-Build Specifications. TxDOT shall have 10 Business Days either to (a) approve the Condemnation Package or (b) provide its comments or request for additional information to DB Contractor if TxDOT determines that the Condemnation Package is incomplete or otherwise deficient. DB Contractor shall incorporate any suggested changes and provide any additional information requested by TxDOT and shall resubmit the Condemnation Package to TxDOT for review and approval. TxDOT shall have 10 Business Days to approve or provide comments to DB Contractor on any resubmittals.

**4.4.5.2** Condemnation proceedings for any **Remaining** Project ROW will be brought by TxDOT within a reasonable time following approval by TxDOT of a complete Condemnation Package for the parcel as described in Section 15.4.4 of the Design-Build Specifications. TxDOT will deliver the petition for the parcel to DB Contractor within 105 days from the date of approval of the Condemnation Package. TxDOT will provide the payment for the parcel within 45 days from the date the Special Commissioners' award is filed with the court. Subject to the cost reimbursement provisions in Exhibit 11 to the DBA, DB Contractor shall cooperate in all respects with TxDOT and shall cause all expert witnesses, appraisers, surveyors, land planners and other consultants utilized by DB

Contractor in connection with the acquisition of the **Remaining** Project ROW subject to condemnation to be available to and assist TxDOT in connection with the condemnation proceedings, including discovery, depositions, prehearing preparation, Special Commissioner's hearing, jury trial, or other proceedings. Counsel engaged for settlement and condemnation proceedings shall be from the Office of the Attorney General representing TxDOT.

**4.4.5.3** Except as provided in Section 4.4.2.5, DB Contractor shall be entitled to a Change Order in accordance with Section 4.6.9.5 for delays to the Critical Path due to **(a)** failure of TxDOT to make available the portion of the **Remaining** Schematic ROW or any Additional Properties that must be acquired due to a TxDOT-Directed Change, Relief Event, or a Necessary Basic Configuration Change, described in a condemnation packet within 365 days after approval of the Condemnation Package, **and (b) failure of TxDOT to make available the portion of the Schematic ROW that is not the Remaining Project ROW within 365 days after NTP1, in each case** excluding any delay caused in whole or in part by an act, omission, negligence, intentional misconduct, or breach of applicable Law, contract or Governmental Approval by any DB Contractor-Related Entity in performing the services required under the Contract Documents; provided, however, that the risk of delay following the expiration of **any** such 365-day period, on an individual parcel basis, shall be borne equally by each Party for the first 100 days thereafter (i.e., for each parcel, DB Contractor shall be entitled to one day of time extension for every two days of delay). Following the expiration of the first 100 days after the initial 365-day period, DB Contractor shall be entitled to one day of time extension for each day of eligible delay. The term "make available," as used herein, means to make available for (a) relocation of occupants and personal property, for occupied parcels, (b) demolition, for unoccupied, improved parcels, or (c) construction, for unoccupied, unimproved parcels. DB Contractor through due diligence shall initiate, cooperate and be responsible for all efforts necessary for the processing of the administrative portion of the condemnation action, up to and including the deposit of the award of Special Commissioners.