

**CAPITAL MAINTENANCE AGREEMENT
FOR THE
US 77 FROM KINGSVILLE TO DRISCOLL**



**By and Between
The Texas Department of Transportation
and
[Maintenance Contractor]**

Dated as of: _____, 2013

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US 77 FROM KINGSVILLE TO DRISCOLL
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LIST OF EXHIBITS

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1	Abbreviations and Definitions
2	Maintenance Specification
3	Maintenance Contractor's Proposal Commitments
4	Maintenance Price
5	Job Training and Small Business Mentoring Plan
6	Form of Maintenance Performance Bond
7	Form of Maintenance Payment Bond
8	Form of Retainage Bond
9	Form of Guaranty
10	Insurance Requirements
11	Form of Draw Request and Certificate
12	Form of Change Order
13	Authorized Representative
14	List of Reference Information Documents
15	Disputes Board Agreement

CAPITAL MAINTENANCE AGREEMENT
US 77 FROM KINGSVILLE TO DRISCOLL PROJECT

This **CAPITAL MAINTENANCE AGREEMENT** ("Capital Maintenance Agreement") is made and entered into as of [____], 2013, by and between **THE TEXAS DEPARTMENT OF TRANSPORTATION** ("TxDOT") and [____], a [____] ("Maintenance Contractor").

RECITALS

A. The State of Texas desires to facilitate private sector ~~investment and~~ participation in the development of the State's transportation system via design-build agreements, and to accomplish this purpose, the Texas Legislature has enacted Transportation Code, Chapter 223, Subchapter E (the "Code"), and TxDOT has adopted Sections 27.1-27.9 of Title 43, Texas Administrative Code (the "Rules"), to accomplish that purpose.

B. TxDOT wishes to enter into agreements with a ~~private sector~~-DB Contractor to ~~develop~~, design, construct, and maintain improvements along US 77 ~~in Kleberg and Nueces Counties from E. Corral Avenue in the northern portion of Kingsville in Kleberg County to just south of County Road 12, south of the City of Driscoll, including new mainlanes and new frontage roads associated improvements in Nueces County~~ (the "Project").

C. Pursuant to the Code and the Rules, TxDOT issued a Request for Qualification (as amended, the "RFQ") on June 1, 2012.

D. TxDOT received six qualification statements for the Design-Build Agreement and Capital Maintenance Agreement on June 21, 2012 and subsequently shortlisted four proposers ~~for the design-build delivery model.~~

E. On September 5, 2012, TxDOT issued to the shortlisted proposers a Request for Proposals (as subsequently amended by addenda, the "RFP") to ~~develop~~, design, construct and maintain the Project ~~as set forth herein~~.

F. On [____], ~~December 14, 2012~~, TxDOT received responses to the RFP, including the response of DB Contractor (the "Original" Proposal).

G. On January 28, 2013, TxDOT issued to the shortlisted proposers a Request for Proposal Revisions and Best and Final Offers ("Request for BAFOs") as an addendum to the RFP.

H. On February 14, 2013, TxDOT received responses to the Request for BAFOs, including the response of DB Contractor (the "Proposal Revision" or "BAFO").

~~G-I.~~ An RFP evaluation committee, comprised of TxDOT personnel, determined that DB Contractor was the proposer which best met the selection criteria contained in the RFP and that the Original Proposal as modified by the BAFO (the "Proposal") was the one which provided the best value to the State of Texas.

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

~~I.K.~~ Concurrently herewith TxDOT and DB Contractor are entering into a Design-Build Agreement providing for the ~~development,~~ design and construction of the Project (the "Design-Build Agreement"). ~~Together, the Design-Build Agreement and Capital Maintenance Agreement constitute a Design-Build contract under the Code.~~

~~J.L.~~ The Design-Build Agreement provides, among other things, that DB Contractor (hereinafter referred to, for the purposes of this Capital Maintenance Agreement as "Maintenance Contractor") shall provide to TxDOT certain maintenance, repair, upkeep and renovation services in connection with the Project.

~~M.~~ The Design-Build Agreement, this Capital Maintenance Agreement and the other Contract Documents collectively constitute a comprehensive design-build agreement, as contemplated under the Code and the Rules, and are entered into in accordance with the provisions of the RFP.

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

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

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

1.1 Definitions

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

1.2 CMA Documents; Order of Precedence

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

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

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

- (b) this Capital Maintenance Agreement (including all exhibits, except Exhibits 2 and 3, subject to Section 1.2.4);
- (c) Exhibit 2 (Maintenance Specification) and all attachments thereto; and
- (d) Maintenance Contractor's Proposal Commitments as set forth in Exhibit 3.

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

1.2.4 Notwithstanding the order of precedence among CMA Documents set forth in Section 1.2.2, if a CMA Document contains differing provisions on the same subject matter than another CMA Document, the provisions that establish the higher quality, manner or method of performing the Maintenance Services or use more stringent standards will prevail. Further, in the event of a conflict among any standards, criteria, requirements, conditions, procedures, specifications or other provisions applicable to the Project or Maintenance Services established by reference to a described manual or publication within a CMA Document or set of CMA Documents, the standard, criterion, requirement, condition, procedure, specification or other provision offering higher quality or better performance will apply, unless TxDOT in its 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.

1.2.5 Portions of the Design-Build Agreement and Technical Provisions are referenced in the CMA Documents for the purpose of defining requirements of the CMA Documents applicable to design and construction. The Design-Build Agreement and Technical Provisions shall be deemed incorporated in the CMA Documents to the extent that they are so referenced, with the same order of priority as the CMA Document in which the reference occurs.

1.3 Interpretation of CMA Documents

In the CMA Documents, where appropriate: the singular includes the plural and vice versa; references to statutes or regulations include all statutory or regulatory provisions consolidating, amending or replacing the statute or regulation referred to; the words "including," "includes" and "include" shall be deemed to be followed by the words "without limitation"; unless otherwise indicated references to sections, appendices or schedules are to this Capital Maintenance Agreement; words such as "herein," "hereof" and "hereunder" shall refer to the entire document in which they are contained and not to any particular provision or section; words not otherwise defined that have well-known technical or construction industry meanings, are used in accordance with such recognized meanings; references to Persons include their respective permitted successors and assigns and, in the case of Governmental Entities,

Persons succeeding to their respective functions and capacities; and words of any gender used herein shall include each other gender where appropriate. Unless otherwise specified, lists contained in the CMA Documents defining the Project or the Maintenance Services shall not be deemed all-inclusive. Maintenance Contractor acknowledges and agrees that it had the opportunity and obligation, prior to submission of its Proposal, to review the terms and conditions of the CMA Documents and to bring to the attention of TxDOT any conflicts or ambiguities contained therein. Maintenance Contractor further acknowledges and agrees that it has independently reviewed the CMA Documents with legal counsel, and that it has the requisite experience and sophistication to understand, interpret and agree to the particular language of the provisions of the CMA Documents. Accordingly, if an ambiguity in, or there is a dispute regarding, the interpretation of the CMA Documents, they shall not be interpreted or construed against the Person which prepared them, and, instead, other rules of interpretation and construction shall be used. TxDOT's interim or final answers to the questions posed during the Proposal process for this Capital Maintenance Agreement shall in no event be deemed part of the CMA Documents and shall not be relevant in interpreting the CMA Documents except to the extent they may clarify provisions otherwise considered ambiguous. On plans, as-built drawings, working drawings, and standard plans, calculated or stated dimensions shall take precedence over scaled dimensions.

1.4 Referenced Standards and Specifications

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

1.4.2 In interpreting referenced standards, the following apply:

- (a) References to the project owner shall mean TxDOT.
- (b) Cross-references to measurement and payment provisions contained in the referenced standard shall be deemed to refer to the measurement and payment provisions contained in the CMA Documents.

1.5 Reference Information Documents

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

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

1.5.3 TxDOT does not represent or warrant that the information contained in the Reference Information Documents is complete or accurate or that such information is in conformity with the requirements of the CMA Documents, Governmental Approvals or Laws.

Maintenance Contractor shall have no right to additional compensation based on any incompleteness or inaccuracy in the Reference Information Documents.

1.6 Explanations; Omissions and Misdescriptions

Maintenance Contractor shall not take advantage of or benefit from any apparent Error in the CMA Documents. Should it appear that the Maintenance Services to be done or any matter relative thereto is not sufficiently detailed or explained in the CMA Documents, Maintenance Contractor shall request in writing such further written explanations from TxDOT as may be necessary and shall comply with the explanation provided. Maintenance Contractor shall promptly notify TxDOT in writing of all Errors which it may discover in the CMA Documents, and shall obtain specific instructions in writing from TxDOT regarding any such Error before proceeding with the Maintenance Services affected thereby. The fact that the CMA Documents omit or misdescribe any details of any Maintenance Services that are necessary to carry out the intent of the CMA Documents, or that are customarily performed, shall not relieve Maintenance Contractor from performing such omitted Maintenance Services (no matter how extensive) or misdescribed details of the Maintenance Services, and they shall be performed as if fully and correctly set forth and described in the CMA Documents, without entitlement to a Change Order hereunder except as specifically allowed under Section 10.

1.7 Computation of Periods

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

1.8 Standard for Approvals

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

1.9 Professional Services Licensing Requirements

Maintenance Contractor shall be fully responsible for furnishing the professional services of the Project as provided in this Capital Maintenance Agreement through itself and/or subcontracts as or with licensed and/or registered professional service firm(s). The terms and provisions of this Section 1.9 shall control and supersede every other provision of all CMA Documents.

1.10 TxDOT Monetary Obligations

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

forth in the CMA Documents, notwithstanding any contrary provisions of the CMA Documents. The CMA Documents do not create a debt under the Texas Constitution.

SECTION 2. TXDOT'S OPTION RIGHTS; COMMENCEMENT OF CAPITAL MAINTENANCE AGREEMENT

2.1 TxDOT Option Rights

2.1.1 After the Initial Maintenance Term, this Capital Maintenance Agreement gives TxDOT the right to exercise, in its sole and absolute discretion, up to two consecutive option periods described in Section 4, requiring Maintenance Contractor to provide Maintenance Services for the Project in accordance with the terms and conditions of the CMA Documents.

2.1.2 TxDOT shall have no liability to Maintenance Contractor in the event that TXDOT elects, in its sole and absolute discretion, not to exercise either of the options under this Capital Maintenance Agreement.

2.2 Commencement of Capital Maintenance Agreement

No later than 90 days prior to the date that is one year after Final Acceptance of the Project to be constructed under the Design-Build Agreement (the commencement of the Initial Maintenance Term), TxDOT shall issue Maintenance NTP1 to the Maintenance Contractor.

SECTION 3. SCOPE OF MAINTENANCE SERVICES

3.1 General Obligations

3.1.1 Maintenance Contractor shall furnish all Maintenance Services throughout the term of this Capital Maintenance Agreement, as further described herein. All costs associated with providing the Maintenance Services are included in the Maintenance Price set forth in Exhibit 4, as such may be adjusted in accordance with Section 10. Except for damage caused by a Maintenance Contractor-Related Entity, and subject to Section 10.1.1.2 below, Maintenance Contractor shall not be responsible for repair of damage to the Project caused by collision (motor vehicle, aircraft or railroad train), vandalism, or other destructive acts of third parties.

3.1.2 Maintenance Contractor shall provide all personnel, labor, materials, supplies, parts, equipment, public and employee safety devices, components, tools, utilities and other items and services required to undertake and complete the Maintenance Services, regardless of whether the Maintenance Services are considered to constitute ordinary, preventive or replacement maintenance. Maintenance Contractor shall bear the risk of loss, damage, theft and vandalism of such materials, supplies, parts, equipment, devices, components, tools, utilities and other items.

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

3.1.4 Maintenance Contractor shall perform the Maintenance Services in accordance with the CMA Documents, the Governmental Approvals, applicable Laws and Good Industry Practice, and shall cooperate and coordinate the Maintenance Services with TxDOT, Governmental Entities, Utility Owners and other third parties during performance of any Maintenance Services that will or may affect any of their respective facilities or rights.

3.1.5 Maintenance Contractor acknowledges and agrees that, although certain provisions in the CMA Documents include Performance Requirements, such Performance Requirements shall not otherwise limit Maintenance Contractor's obligation to perform the Maintenance Services in a safe, reasonable, and prudent manner, and, in doing so, Maintenance Contractor shall employ Good Industry Practice, and shall conduct its commercial affairs in a manner consistent with good faith and fair dealing.

3.1.6 Maintenance Contractor shall be responsible for obtaining any required permits and required consents from any other Persons in connection with the performance of Maintenance Services required under this Capital Maintenance Agreement.

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

3.1.8 Whenever Maintenance Contractor becomes aware of any Defect in a Maintained Element or of any maintenance activity that Maintenance Contractor considers should be performed but with regards to which Maintenance Contractor believes falls outside of its scope of responsibility for Maintenance Services, Maintenance Contractor shall immediately notify TxDOT of such Defect or maintenance activity.

3.2 Capital Asset Replacement Work

3.2.1 General Requirements

3.2.1.1 Maintenance Contractor shall perform Maintenance Services: (a) when required by Maintenance Contractor's approved Maintenance Management Plan and updates thereto as described in the CMA Documents; and (b) when a Performance Requirement is not met and the required level of performance cannot be achieved by means of routine or preventative maintenance.

3.2.1.2 Not later than 60 days after each anniversary of the Initial Maintenance Term Commencement Date, Maintenance Contractor shall deliver to TxDOT a written report of the Capital Asset Replacement Work performed in the immediately preceding year. The report shall describe: (a) by location, the Maintained Element, as listed in the Capital Asset Replacement Work Submittal, and any other Project component for which Capital Asset Replacement Work was performed; (b) the type of Capital Asset Replacement Work performed; (c) each specific item replaced; (d) any warranty information associated with any replacement item; (e) the dates of commencement and completion of such Capital Asset Replacement Work; and (f) such other information as is reasonably requested by TxDOT.

3.2.2 Capital Asset Replacement Work Submittal

3.2.2.1 As part of the Maintenance Management Plan required under Section 1900 of Exhibit 2, Maintenance Contractor shall prepare and submit, for TxDOT's review and approval, a Capital Asset Replacement Work Submittal. The Capital Asset Replacement Work Submittal shall meet the requirements set forth in Section 1900 of Exhibit 2.

3.2.2.2 Not later than 120 days before each anniversary of the Initial Maintenance Term Commencement Date thereafter, Maintenance Contractor shall prepare and submit, for TxDOT's review and approval, either: (a) a revised Capital Asset Replacement Work Submittal for the upcoming year or (b) the then-existing Capital Asset Replacement Work Submittal, accompanied by a written statement that Maintenance Contractor intends to continue in effect the then-existing Capital Asset Replacement Work Submittal without revision for the upcoming year (in either case, referred to as the "updated Capital Asset Replacement Work Submittal"). Maintenance Contractor shall make revisions as reasonably indicated by experience and then-existing conditions respecting the Project, changes in technology, changes in Maintenance Contractor's planned means and methods of performing the Capital Asset Replacement Work, and other relevant factors. The updated Capital Asset Replacement Work Submittal shall show the revisions, if any, to the prior Capital Asset Replacement Work Submittal and include an explanation of reasons for revisions. If no revisions are proposed, Maintenance Contractor shall include an explanation for the lack of.

3.2.2.3 TxDOT shall review the annual Capital Asset Replacement Work Submittal and meet with Maintenance Contractor within 30 Days after its submittal to discuss revisions and clarifications or to resolve any disagreements. Within 15 Days after such meeting, Maintenance Contractor shall resubmit the updated Capital Asset Replacement Work Submittal to TxDOT. TxDOT will either approve or disapprove the Capital Asset Replacement Work Submittal within 15 Days, with comments, objections, recommendations or disapprovals noted in writing. If TxDOT disapproves the Capital Asset Replacement Work Submittal, within ten days after receiving written notice of comments, objections, recommendations or disapprovals from TxDOT, Maintenance Contractor shall submit to TxDOT a revised initial or updated Capital Asset Replacement Work Submittal rectifying such matters and, for matters with which Maintenance Contractor disagrees, a written notice setting forth those comments, objections, recommendations and disapprovals that Maintenance Contractor disputes, which notice shall give details of Maintenance Contractor's grounds for dispute. If Maintenance Contractor fails to give such notice within such time period, it shall be deemed to have accepted the comments, objections and recommendations and the initial or updated Capital Asset Replacement Work Submittal, as applicable, shall thereupon be deemed revised to incorporate the comments and recommendations and to rectify the objections or disapprovals. After timely delivery of any dispute notice by Maintenance Contractor, Maintenance Contractor and TxDOT shall endeavor in good faith to reach agreement as to the matters listed in the notice. If no agreement is reached as to any such matter within 30 days after Maintenance Contractor delivers its notice, either Party may refer the Dispute to the disputes resolution procedures applicable to this Capital Maintenance Agreement.

3.2.2.4 All portions of the initial or updated Capital Asset Replacement Work Submittal that have been agreed to by the Parties shall govern. Until resolution of any portion of the initial or updated Capital Asset Replacement Work Submittal that is in Dispute, the treatment of that portion in the immediately preceding approved Capital Asset Replacement Work Submittal shall remain in effect and govern.

3.3 Traffic Control and Operations

Maintenance Contractor shall perform the Maintenance Services in a manner that recognizes that the safety of the public, convenience of the traveling public and providing a safe work environment for all maintenance workers are of prime importance. Maintenance Contractor shall perform its traffic control and operations in accordance with the CMA Documents, including this Section 3.3.

3.3.1 Traffic Management and Control Plans

3.3.1.1 Maintenance Contractor shall be responsible for the safety of traffic and the public associated with the performance of the Maintenance Services, and shall perform all Maintenance Services that affect traffic operations in accordance with Section 1800 of Exhibit 2.

3.3.1.2 Within 60 days after issuance by TxDOT of Maintenance NTP1 and periodically thereafter as required under the CMA Documents, Maintenance Contractor shall prepare and submit, for TxDOT's review and approval, a Traffic Management Plan. The Traffic Management Plan shall be prepared in accordance with and contain the information required under Section 1802 of Exhibit 2.

3.3.1.3 Within 30 days after TxDOT's approval of the Traffic Management Plan, Maintenance Contractor shall prepare and submit, for TxDOT's review, traffic control plans as described in Section 1803 of Exhibit 2.

3.3.2 Traffic Operation Restrictions

3.3.2.1 Maintenance Contractor shall keep the number of lane closures to an absolute minimum and shall keep each lane closure to the shortest time necessary for safe and efficient operations. The requirements for and restrictions on lane closures are set forth in Section 1800 of Exhibit 2 and Attachment 6 to Exhibit 2.

3.3.2.2 Should Emergencies occur during the Maintenance Contractor's performance of traffic management, including structural failures, Maintenance Contractor shall repair any damage to the Maintained Elements to ensure that the roadway is opened as soon as possible; provided, however, Maintenance Contractor shall not be required to repair any damage caused by vehicle accidents to the Maintained Elements unless TxDOT issues a Change Order or Directive Letter therefor in accordance with Section 10. TxDOT has the authority to deny a lane closure in the case of an emergency, evacuation, a special event or any other public activities.

3.4 Requirements Applicable to Design and Construction Work

3.4.1 To the extent that Maintenance Contractor performs any design or construction work for Capital Asset Replacement Work, Unplanned Capital Maintenance, or Change Orders, Maintenance Contractor shall comply with the requirements and specifications for design and construction set forth in the Technical Provisions and in the applicable sections of the Design-Build Agreement, except as otherwise approved in advance in writing by TxDOT.

3.4.2 In connection with the performance by Maintenance Contractor of any Unplanned Capital Maintenance or Change Orders, Maintenance Contractor shall procure and maintain (a) the insurance deemed appropriate by TxDOT in its sole discretion (subject to Section 7.3.11) and (b) payment and performance bonds each in the full amount of the Unplanned Capital Maintenance or Change Order as determined by TxDOT in its sole discretion; provided, however, that subject to applicable Law, TxDOT may, in its sole discretion, lower the level of bonding required. In the event the insurance and payment and performance bonds are procured for such design and construction work, Maintenance Contractor shall be entitled to reimbursement (without profit or mark-up) in accordance with Section 7.8 for any actual payments made by Maintenance Contractor for the premiums, except to the extent that: (a) the design and construction work arises from the acts, omissions, negligence, intentional

misconduct, or breach of applicable Law, contract, or Governmental Approval by any Maintenance Contactor-Related Entity; or (b) the design and construction work arises from a failure to meet the Performance Requirements of this Capital Maintenance Agreement; or (c) the premiums result from the claim or performance history of any Maintenance Contactor-Related Entity.

3.5 Coordination

3.5.1 Coordination with TxDOT Maintenance Crews

3.5.1.1 Maintenance Contractor shall coordinate its activities and maintenance with the activities and maintenance undertaken by TxDOT's maintenance personnel and contractors that will be performing maintenance activities not within the scope of the Maintenance Services.

3.5.1.2 Except as otherwise provided in Section 10, Maintenance Contractor shall not be entitled to a Change Order arising out of the activities and maintenance undertaken by TxDOT's maintenance personnel and contractors.

3.5.2 Coordination with Third Parties

3.5.2.1 Maintenance Contractor shall fully cooperate with third parties, including TxDOT's separate contractors, performing work or activities at or adjacent to the Project, and shall schedule the Maintenance Services as reasonably necessary to accommodate the work or activities of such third parties.

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

3.6 Transition Requirements

At the expiration of the Maintenance Term or any earlier termination of this Capital Maintenance Agreement, Maintenance Contractor shall ensure and certify that the Maintenance Elements meet the Asset Condition Score requirements. The Maintenance Contractor shall develop a Maintenance Transition Plan as set forth in Section 3.6.1.

3.6.1 Maintenance Transition Plan

3.6.1.1 Submission and Approval

Maintenance Contractor, within 240 Days after issuance by TxDOT of Maintenance NTP1, shall submit to TxDOT, for TxDOT's review and approval, a Maintenance Transition Plan as described in Section 0208 of Exhibit 2.

3.6.1.2 Capital Asset Replacement Work under Audit Inspections

Maintenance Contractor shall diligently perform and complete all Capital Asset Replacement Work required to be performed and completed based on the required adjustments and changes to the Capital Asset Replacement Work Submittal resulting from the

Audit Inspections. Maintenance Contractor shall complete all such Capital Asset Replacement Work:

- (a) Prior to the expiration of the Maintenance Term, as extended by the issuance of Maintenance NTP2 or Maintenance NTP3, as applicable; or
- (b) If the Capital Maintenance Agreement is terminated for any reason prior to the expiration of the Maintenance Term, within 90 days after the effective date of termination. If Maintenance Contractor, despite diligent efforts, is unable to complete such Capital Asset Replacement Work prior to such period or TxDOT elects, at its sole discretion, to perform such Capital Asset Replacement Work, then in lieu of Maintenance Contractor's completion of such Capital Asset Replacement Work, Maintenance Contractor shall reimburse TxDOT, within ten days of delivery of an invoice therefor, for TxDOT's Recoverable Costs of completing such Capital Asset Replacement Work. In lieu of reimbursement, TxDOT may elect, in its sole discretion, to deduct such amounts from any amounts payable to Maintenance Contractor under this Capital Maintenance Agreement.

3.7 Waste Disposal and Hazardous Materials

3.7.1 General Requirements

3.7.1.1 Maintenance Contractor shall manage, store, contain, transport, and dispose of, or cause the disposal of, all waste, residue, construction debris, materials, Hazardous Materials, Recognized Environmental Conditions, and supplies that are produced, used or generated as a result of the activities of any Maintenance Contractor-Related Entity in accordance with all applicable Laws and Governmental Approvals. The foregoing obligations also apply to Hazardous Materials and Releases of Hazardous Materials arising out of, related to, or associated with the actions, omissions, negligence, intentional misconduct, or breach of applicable Law, contract or Governmental Approval by any Maintenance Contractor-Related Entity. Maintenance Contractor's personnel handling Hazardous Materials shall be appropriately trained in Hazardous Materials handling and disposal. Maintenance Contractor shall provide evidence of such personnel's training to TxDOT.

3.7.1.2 For any Hazardous Materials which are Maintenance Contractor's responsibility under this Capital Maintenance Agreement, Maintenance Contractor shall be solely responsible for all costs of Hazardous Materials Management and for restoring the real property affected thereby to its condition prior to the Release of Hazardous Materials, including, to the extent required, any grading and reinforcement necessary to restore the weight-bearing and functional capacity of the Project. If, within a reasonable time (as determined by TxDOT) after a Release of Hazardous Materials for which Maintenance Contractor is responsible, Maintenance Contractor has not taken action under Section 3.7.1.1, TxDOT may undertake such action itself. In such event, Maintenance Contractor shall reimburse TxDOT for TxDOT's Recoverable Costs it incurs as a result of Maintenance Contractor's failure, and shall do so within ten Business Days of receipt of an invoice therefor. In lieu of reimbursement, TxDOT may elect, in its sole discretion, to deduct such amounts from any amounts payable to Maintenance Contractor under this Capital Maintenance Agreement.

3.7.2 Procedures for Hazardous Materials Management

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

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

3.7.2.2 Subject to the limitations and exceptions set forth in this [Section 3.7](#) and [Section 10](#) Maintenance Contractor shall be entitled to a Change Order as set forth in [Section 10.8.2](#) with respect to costs and/or delays directly attributable to the discovery of Hazardous Materials within the Project ROW.

3.7.3 Hazardous Material Generator

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

3.7.3.2 As between Maintenance Contractor and TxDOT, Maintenance Contractor shall be considered the generator of and assume generator responsibility only for Maintenance Contractor Releases of Hazardous Materials.

3.7.4 Hazardous Material Generator Liability of Maintenance Contractor

Hazardous Materials Management costs, including assessment, containment, and remediation expenses, on, arising from or related to Hazardous Materials for which Maintenance Contractor is deemed the generator under [Section 3.7.3.2](#) shall not be compensable to Maintenance Contractor or entitle Maintenance Contractor to schedule relief.

3.7.5 Hazardous Materials Brought to Project ROW by Maintenance Contractor

Maintenance Contractor shall be solely responsible for: (a) compliance with all Laws and Governmental Approvals applicable to Hazardous Materials brought onto the Site by any Maintenance Contractor-Related Entity; (b) use, containment, storage, management, transport and disposal of such Hazardous Materials in accordance with the CMA Documents; and (c) payment of all Losses associated with, arising out of or related to such Hazardous Materials.

3.7.6 Governmental Approvals Relating to Hazardous Materials Management

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

3.8 Governmental Approvals

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

3.8.2 If any Governmental Approvals required to be obtained by Maintenance Contractor must formally be issued in the name of TxDOT, TxDOT shall cooperate with Maintenance Contractor to obtain such Governmental Approvals as may be reasonably requested by Maintenance Contractor. Maintenance Contractor shall be responsible for preparing all documentation necessary for any application for a Governmental Approval.

3.9 Software Compatibility

Unless otherwise specifically stated in the CMA Documents, Maintenance Contractor is responsible for assuring that all software it uses for any aspect of the Project is compatible with software used by TxDOT. Prior to using any software or version of software not then in use by TxDOT, Maintenance Contractor must obtain written approval from TxDOT. In addition, Maintenance Contractor shall provide to TxDOT staff, at Maintenance Contractor's cost, working electronic copies of the software, any necessary licenses for TxDOT's use of the software, and any training reasonably necessary to assure that TxDOT is able to implement compatible usage of all software utilized by Maintenance Contractor.

SECTION 4. MAINTENANCE TERM

The term of this Capital Maintenance Agreement includes an initial five-year term and two additional options to extend the initial term. The maximum term of this Capital Maintenance Agreement, including both extensions thereof, is 15 years.

4.1 Initial Maintenance Term

The Initial Maintenance Term shall commence one year after Final Acceptance of the Project to be constructed in accordance with the Design-Build Agreement (the "Initial Maintenance Term Commencement Date"), and shall continue for a period of five years, unless terminated earlier in accordance with the terms of this Capital Maintenance Agreement.

4.2 Second Maintenance Term

4.2.1 TxDOT, in its sole and absolute discretion, shall have the option to extend the term of this Capital Maintenance Agreement for an additional five years (the "Second

Maintenance Term”). The Second Maintenance Term shall commence as of the expiration of the Initial Maintenance Term and shall continue for a period of five years, unless terminated earlier in accordance with the terms hereof.

4.2.2 If TxDOT elects to exercise its option rights for a Second Maintenance Term, TxDOT shall issue Maintenance NTP2 on or before 90 Days prior to the scheduled expiration of the Initial Maintenance Term. TxDOT shall have no liability to Maintenance Contractor for a failure to issue Maintenance NTP2.

4.3 Third Maintenance Term

4.3.1 If TxDOT issues Maintenance NTP2, TxDOT, in its sole and absolute discretion, shall have the option to extend the term of this Capital Maintenance Agreement for an additional term (the “Third Maintenance Term”). The Third Maintenance Term shall commence as of the expiration of the Second Maintenance Term and shall continue for a period of five years, unless terminated earlier in accordance with the terms hereof.

4.3.2 If TxDOT elects to exercise its option right for a Third Maintenance Term, TxDOT shall issue Maintenance NTP3 on or before 90 Days prior to the expiration of the Second Maintenance Term. TxDOT shall not be entitled to exercise the extension option for the Third Maintenance Term if it did not issue Maintenance NTP2. TxDOT shall have no liability to Maintenance Contractor for a failure to issue Maintenance NTP3.

SECTION 5. MANAGEMENT AND ADMINISTRATION

5.1 TxDOT Responsibility for Policy Decisions

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

5.2 Use of the Project

Maintenance Contractor shall not use the Project, the Project ROW or any of the premises provided by TxDOT for any purpose other than the performance of Maintenance Services. At the discretion of TxDOT, Maintenance Contractor may use the ROW for the temporary staging/storing of equipment for a reasonable period while maintenance activity is being conducted. Maintenance Contractor shall not be entitled to, and shall not purport to, grant the use of the Project or the Project ROW to anyone without the written approval of TxDOT.

5.3 Document Management Requirements

Maintenance Contractor shall establish and use a document and electronic communications management system in accordance with Section 0203 of Exhibit 2.

5.4 Key Maintenance Personnel; Qualifications of Employees

5.4.1 On or before 60 Days after TxDOT issues Maintenance NTP1, Maintenance NTP2 and Maintenance NTP3, if applicable, Maintenance Contractor shall update and obtain TxDOT's written approval of any changes to Key Maintenance Personnel as presented in the Proposal.

5.4.2 During the Maintenance Term, Maintenance Contractor shall promptly notify TxDOT in writing of any proposed changes in any Key Maintenance Personnel. Maintenance Contractor shall not change, or permit any change in, any Key Maintenance Personnel without the prior written consent of TxDOT. Before Maintenance Contractor replaces any Key Maintenance Personnel, TxDOT shall be given the opportunity to interview and approve the replacement candidate(s). Maintenance Contractor's request to replace any Key Maintenance Personnel shall include a proposed replacement, with equivalent or better qualifications, who shall be available within 30 Days after TxDOT's approval.

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

5.4.4 Maintenance Contractor shall designate in writing a field representative who shall have onsite field and office authority to represent and act for Maintenance Contractor. That representative shall be present at the job site at all times while Maintenance Services are actually in progress. Maintenance Contractor shall provide phone, e-mail addresses and pager numbers for all Key Maintenance Personnel. TxDOT requires the ability to contact the Key Maintenance Personnel 24 hours per Day, seven Days per week.

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

5.4.6 If any of the approved individuals filling the Key Maintenance Personnel roles are not available for the Maintenance Services and do not undertake or perform the Maintenance Services because such individual(s) has/have been replaced after approval thereof pursuant to Section 5.4.1, as appropriate, Maintenance Contractor acknowledges that TxDOT, the Maintenance Services and the Project will suffer significant and substantial Losses and that it is impracticable and extremely difficult to ascertain and determine the actual Losses which would accrue to TxDOT in such event. Therefore, if such individuals filling the Key Maintenance Personnel roles are not available or not actively involved in the prosecution and performance of the Maintenance Services, as determined by TxDOT in its sole discretion, and until individual has been replaced by an individual approved by TxDOT, Maintenance Contractor agrees to pay TxDOT a liquidated amount as follows as deemed compensation to TxDOT for such Losses:

POSITION	TOTAL LIQUIDATED	PER DAY LIQUIDATED
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	AMOUNT	AMOUNT
Capital Maintenance Manager	\$40,000	\$4,000

5.4.7 Maintenance Contractor understands and agrees that any damages payable in accordance with Section 5.4.6 are in the nature of liquidated damages and not a penalty and that such sums are reasonable under the circumstances existing as of the Effective Date. Maintenance Contractor shall pay to TxDOT within ten (10) Business Days after Maintenance Contractor's receipt of an invoice therefor from TxDOT. In lieu of reimbursement, TxDOT, in its sole discretion, shall have the right to deduct such liquidated damages from any amounts owed by TxDOT to Maintenance Contractor or to collect such liquidated damages from any bond or Guaranty furnished under this Capital Maintenance Agreement. Notwithstanding the foregoing, Maintenance Contractor shall not be liable for liquidated damages under Section 5.4.6 if: (a) Maintenance Contractor removes or replaces such personnel at the direction of TxDOT; (b) such individual is unavailable due to death, retirement, injury or no longer being employed by the applicable Maintenance Contractor-Related Entity (provided that moving to an affiliated company shall not be considered grounds for avoiding liquidated damages); or (c) Maintenance Contractor identifies the replacement for any Key Maintenance Personnel within 60 Days after issuance of Maintenance NTP1, Maintenance NTP2 or Maintenance NTP3, as applicable; provided, however, in each such case, Maintenance Contractor shall promptly propose to TxDOT a replacement for such personnel, approval of which individual shall be subject to TxDOT's written consent. Following any TxDOT-approved substitution or replacement of a Key Maintenance Personnel pursuant to the terms hereof, the new individual shall be considered a Key Maintenance Personnel for all purposes under this Capital Maintenance Agreement, including the provisions of this Section 5.4.6 relative to liquidated damages.

5.4.8 Maintenance Contractor acknowledges and agrees that the Key Maintenance Personnel positions are of critical importance to TxDOT and the Project. In addition to the approval rights of TxDOT set forth in this Section 5.4 and the liquidated damages set forth in Section 5.4.6, if an individual in a Key Maintenance Personnel position leaves that position for a reason other than as set forth in clauses (a)-(c) of Section 5.4.7, TxDOT shall have the right to terminate this Capital Maintenance Agreement for default under Section 12, unless Maintenance Contractor provides TxDOT a replacement acceptable to TxDOT within 30 Days after the earlier of: (a) the date on which such individual has left his/her position; or (b) Maintenance Contractor or TxDOT becomes aware that such individual intends to leave his/her position.

5.5 Maintenance Management Plan

5.5.1 On or before 60 days after the date of issuance of Maintenance NTP1, Maintenance Contractor shall prepare and submit, for TxDOT's review and approval, a Maintenance Management Plan. The Maintenance Management Plan shall meet the requirements set forth in Section 1903 of Exhibit 2, and comply with the Capital Maintenance Agreement Documents, applicable Government Approvals, and applicable Law. Following the delivery of the initial Maintenance Management Plan, Maintenance Contractor shall submit to TxDOT, for TxDOT's review and approval, a Maintenance Management Plan update meeting the requirements of Section 1903 of Exhibit 2 by each anniversary of the Initial Maintenance Term Commencement Date.

5.5.2 The Maintenance Management Plan and each update shall show the timing of and methodology for performing the various Maintenance Services. The duration and

number of working days of any Maintenance Services set forth in the Maintenance Management Plan that require lane closures shall be subject to the written approval of TxDOT.

5.5.3 TxDOT shall review the Maintenance Management Plan and each update and shall meet with Maintenance Contractor within 30 Days after its submittal to discuss revisions and clarifications or to resolve any disagreements. Within 15 Days after such meeting, Maintenance Contractor shall resubmit the Maintenance Management Plan to TxDOT. TxDOT will either approve or disapprove the Maintenance Management Plan within 15 Days, with comments, objections, recommendations or disapprovals noted in writing. If TxDOT disapproves the Maintenance Management Plan, within ten days after receiving written notice of comments, objections, recommendations or disapprovals from TxDOT, Maintenance Contractor shall submit to TxDOT a revised initial or updated Maintenance Management Plan rectifying such matters and, for matters Maintenance Contractor disagrees with, a written notice setting forth those comments, objections, recommendations and disapprovals that Maintenance Contractor disputes, which notice shall give details of Maintenance Contractor's grounds for dispute. If Maintenance Contractor fails to give such notice within such time period, it shall be deemed to have accepted the comments, objections and recommendations and the initial or updated Maintenance Management Plan, as applicable, shall thereupon be deemed revised to incorporate the comments and recommendations and to rectify the objections or disapprovals. After timely delivery of any such notice, Maintenance Contractor and TxDOT shall endeavor in good faith to reach agreement as to the matters listed in the notice. If no agreement is reached as to any such matter within 30 days after Maintenance Contractor delivers its notice, either Party may refer the Dispute to the disputes resolution procedures applicable to this Capital Maintenance Agreement.

5.5.4 All portions of the initial or updated Maintenance Management Plan that have been agreed to by the Parties shall govern. Until resolution of any portion of the initial or updated Maintenance Management Plan that is in Dispute, the treatment of that portion in the immediately preceding approved Maintenance Management Plan shall remain in effect and govern.

5.6 Maintenance Services Quality Control Plan

5.6.1 On or before 60 Days after issuance of Maintenance NTP1 by TxDOT, Maintenance Contractor shall prepare and submit a Maintenance Services quality control plan ("Maintenance Services QCP") meeting the requirements of this Section 5.6. The Maintenance Services QCP is intended to: (a) place the responsibility for the quality of all design, construction, maintenance and repair associated with the Maintenance Services on Maintenance Contractor; and (b) allow TxDOT to oversee the Maintenance Services.

5.6.2 Subject to revision to address the Maintenance Services and the specific design and construction work that will be undertaken in connection therewith, the Maintenance Services QCP must be consistent with the design and construction quality control/quality assurance requirements set forth in Section 0204 of Exhibit 2 and apply Good Industry Practice.

5.6.3 TxDOT shall review the Maintenance Services QCP and meet with Maintenance Contractor within 30 Days after its submittal to discuss revisions and clarifications or to attempt to resolve any disagreements. Within 15 Days after such meeting, Maintenance Contractor shall resubmit the final Maintenance Services QCP to TxDOT. TxDOT will either approve or disapprove the Maintenance Services QCP within 15 Days, with objections or corrections noted in writing. If TxDOT disapproves the Maintenance Services QCP, Maintenance Contractor shall resubmit the Maintenance Services QCP within ten Days to the

satisfaction of TxDOT in order to resolve TxDOT's issues and concerns. The foregoing process shall continue until TxDOT has approved the Maintenance Services QCP.

5.6.4 The Maintenance Contractor shall have a quality control manager ("Maintenance QC Manager") who is responsible for independently overseeing and performing quality control for the Maintenance Services in accordance with the Maintenance Services QCP. The Maintenance Services QCP shall demonstrate the Maintenance QC Manager's functional independence from the Maintenance Contractor work forces. The Maintenance QC Manager is considered Key Maintenance Personnel.

5.6.5 The Maintenance QC Manager shall submit an annual report to TxDOT by each anniversary of the Initial Maintenance Term Commencement Date. This annual report shall include the following elements:

- (a) An assessment of the actual Maintenance Services achievements versus the planned goals established in the Maintenance Management Plan, as well as corrective actions and measures to be taken in the ensuing year to ensure that any shortcomings are corrected; and
- (b) An assessment of compliance with the various traffic control requirements and limitations contained in Section 3.3, above, and the traffic control plans developed in accordance with Section 1803 of Exhibit 2, as well as any corrective measures taken to correct any breach or violation of such requirements and limitations and any corrective measures necessary to prevent any future breach or violation of such requirements and limitations.

5.7 Inspection and Testing

5.7.1 Maintenance Contractor Inspection and Testing

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

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

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

5.7.3 Obligation to Uncover Finished Construction Work

Maintenance Contractor shall inform TxDOT in writing of any construction work to be performed under this Capital Maintenance Agreement that is to be covered, to allow

adequate opportunity to TxDOT to inspect and test such work. Maintenance Contractor shall remove or uncover such portions of the finished work as directed by TxDOT. After examination by TxDOT and any other Persons designated by TxDOT, Maintenance Contractor shall restore the work to the standard required by the CMA Documents. If the work exposed or examined is not in conformance with the requirements of the CMA Documents, then uncovering, removing and restoring of such work and any delay to occasioned thereby shall be at Maintenance Contractor's cost. Furthermore, any construction work done or materials used without adequate notice to and opportunity for prior inspection by TxDOT or without inspection in accordance with CMA Documents may be ordered uncovered, removed or restored at Maintenance Contractor's cost, even if such work proves acceptable and conforming after uncovering. Except with respect to the construction work done or materials used without providing TxDOT adequate notice as described in the foregoing sentence, if the work exposed or examined under this Section 5.7.3 is in conformance with the requirements of the CMA Documents, Maintenance Contractor shall be entitled to recover the reasonable and documented cost of such efforts.

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

5.8.1 Oversight and Acceptance

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

5.8.2 No Estoppel

Maintenance Contractor shall not be relieved of its obligations to perform the Maintenance Services in accordance with the CMA Documents, or any of its Warranty or indemnity obligations, as the result of oversight, spot checks, audits, reviews, tests or inspections performed by any Persons, approvals or acceptances made by any Persons, or any failure of any Person to take such action. TxDOT shall not be precluded or estopped, by any measurement, estimate or certificate made at any time, or by making any payment, from showing that any such measurement, estimate or certificate is incorrectly made or untrue, or from showing the true amount and character of the Maintenance Services performed and materials furnished by Maintenance Contractor, or from showing that the Maintenance Services do not conform in fact to the requirements of the CMA Documents. Notwithstanding any such measurement, estimate or certificate, or payment made in accordance therewith, TxDOT shall not be precluded or estopped from recovering from Maintenance Contractor and its Guarantor(s) or Surety(ies) such damages as TxDOT may sustain by reason of Maintenance Contractor's failure to comply with the terms of the CMA Documents.

5.9 Nonconforming Work

5.9.1 Correction of Nonconforming Work

Subject to Section 5.9.2, Nonconforming Work shall be corrected so as to conform to the requirements of the CMA Documents, at Maintenance Contractor's cost. The fact

that TxDOT may not have discovered the Nonconforming Work shall not relieve the Maintenance Contractor of its responsibilities to correct such Nonconforming Work. If Maintenance Contractor fails to correct any Nonconforming Work within the period set forth in Attachment 1 to Exhibit 2, then TxDOT may cause the Nonconforming Work to be corrected. Maintenance Contractor shall reimburse TxDOT, within ten days of delivery of an invoice, for TxDOT's Recoverable Costs of remedying or removing and replacing such Nonconforming Work.

5.9.2 Agreement to allow Nonconforming Work to remain uncorrected

If TxDOT agrees to allow any Nonconforming Work to remain uncorrected, TxDOT shall be entitled to reimbursement of a portion of the Maintenance Price in an amount equal to the greatest of: (a) the amount deemed appropriate by TxDOT to provide compensation for known impacts to all affected Persons (including TxDOT) such as future maintenance and/or other costs relating to the Nonconforming Work, (b) the amount of the Maintenance Price allocated to such Maintenance Services, (c) 100% of Maintenance Contractor's cost savings associated with its failure to perform the Maintenance Services in accordance with the requirements of the CMA Documents or (d) a percentage, to be determined in TxDOT's sole discretion, of the cost to correct such Nonconforming Work. Such reimbursement shall be payable to TxDOT within ten Days after Maintenance Contractor's receipt of an invoice therefor. Alternatively, TxDOT, in its sole discretion, may deduct the amount of such costs and expenses from any sums owed by TxDOT to Maintenance Contractor pursuant to this Capital Maintenance Agreement. Maintenance Contractor acknowledges and agrees that TxDOT shall have sole discretion regarding the correction or non-correction of Nonconforming Work and shall have sole discretion with regard to the amount payable in connection therewith. Payment, reimbursement or deduction of the amounts owing to TxDOT under this Section 5.9.2 shall be a condition precedent to allow applicable Nonconforming Work to remain uncorrected. Where such Nonconforming Work is allowed to remain uncorrected in accordance with this Section 5.9.2 and such Nonconforming Work requires that a Performance Requirement different to that set forth in Attachment 1 to Exhibit 2 is necessary, TxDOT shall establish such different Performance Requirement for such Nonconforming Work.

SECTION 6. CONTRACTING AND LABOR PRACTICES

6.1 DBE Requirements

6.1.1 Maintenance Contractor shall comply with the TxDOT Disadvantaged Business Enterprise (DBE) program in effect as of the date on which Maintenance NTP1 is issued by TxDOT, including undertaking good faith efforts to encourage DBE participation in the Maintenance Services and maintaining and submitting documentation as required by the TxDOT DBE program. Maintenance Contractor shall submit the documentation required under TxDOT's DBE program within 90 days following issuance of the Maintenance NTP1. The purpose of the DBE Program is to ensure that DBEs and HUBs have an equal opportunity to participate in the performance of contracts financed in whole or in part with federal or State funds. In the event of any conflict between 49 CFR Part 26 and TxDOT DBE Rules, the former shall prevail.

6.1.2 In the event of any change in the DBE program after the date of issuance of Maintenance NTP1 that would materially impact Maintenance Contractor's cost of compliance, as demonstrated by Maintenance Contractor to TxDOT's reasonable satisfaction, TxDOT shall either: (a) adjust the Maintenance Price to reflect the cost increase demonstrated by the Maintenance Contractor as a result of the change in the DBE program; or (b) require

compliance with the TxDOT DBE program requirements in effect as of the Proposal Due Date instead of the DBE program in effect on the date of issuance of the Maintenance NTP1.

6.2 Non-Discrimination; Equal Employment Opportunity

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

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

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

6.3 Subcontracts

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

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

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

6.3.4 Each Subcontract shall:

- (a) Set forth a standard of professional responsibility or a standard for commercial practice equal to prudent industry standards for work of similar scope and scale and shall set forth effective procedures for claims and change orders.
- (b) Require the Subcontractor to carry out its scope of work in accordance with this Capital Maintenance Agreement, the Governmental Approvals and applicable Law, including the applicable requirements of the TxDOT DBE program.
- (c) Set forth warranties, guaranties and liability provisions of the contracting party in accordance with good commercial practice for work of similar scope and scale.
- (d) Be fully assignable without cost or modification to TxDOT, such assignability to include the benefit of all Subcontractor warranties, indemnities, guarantees and professional responsibility and include express requirements that: (i) it will maintain usual and customary books and records for the type and scope of operations of business in which it is engaged (e.g., constructor, equipment supplier, designer, service provider); (ii) permit audit thereof by Maintenance Contractor, and provide progress reports to Maintenance Contractor appropriate for the type of work it is performing sufficient to enable Maintenance Contractor to provide the reports it is required to furnish TxDOT under this Capital Maintenance Agreement; and (iii) allow TxDOT to assume the benefit of Maintenance Contractor's rights with liability only for those remaining obligations of Maintenance Contractor accruing after the date of assumption by TxDOT.
- (e) Not be assignable by the Subcontractor without Maintenance Contractor's prior written consent.
- (f) With respect to any Subcontract which, when aggregated with all Subcontracts between Maintenance Contractor and such Subcontractor for the same year, is in excess of \$100,000: (i) be terminable by the Subcontractor only for cause; and (ii) include an indemnity from the Subcontractor in favor of Maintenance Contractor and the Indemnified Parties against any and all Losses arising out of, related to or associated with, the actions, omissions, negligence, intentional misconduct, or breach of applicable Law or contract by the Subcontractor or any of its officers, employees, agents or representatives.
- (g) Expressly require the Subcontractor to participate in meetings between Maintenance Contractor and TxDOT, upon TxDOT's request, concerning matters pertaining to such Subcontract or its work, provided that all direction to such Subcontractor shall be provided by Maintenance Contractor, and provided further that nothing in this clause (g) shall limit the authority of TxDOT to give such direction or take such action which, in its opinion, is necessary to remove an immediate and present threat to the safety of life or property.

- (h) Expressly provide that all Liens, claims and charges of the Subcontractor and its subcontractors, suppliers or other vendors at any time shall not attach to any interest of TxDOT in the Project or the Site.
- (i) Be consistent in all other respects with the terms and conditions of this Capital Maintenance Agreement to the extent such terms and conditions are applicable to the scope of work of such Subcontractors, including Section 14.7.1, and include all provisions required by this Capital Maintenance Agreement.

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

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

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

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

6.4 Job Training and Small Business Mentoring Plan

Maintenance Contractor's "Job Training and Small Business Mentoring Plan" applicable to the Maintenance Services is set forth in Exhibit 5. The purpose of the Job Training and Small Business Mentoring Plan is to ensure that inexperienced and untrained workers have a reasonable opportunity to participate in the performance of the Maintenance Services through apprenticeships, training and similar measures to maintain and grow a diverse, skilled work force. Maintenance Contractor shall perform and comply with all requirements set forth in of the Job Training and Small Business Mentoring Plan.

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

6.5 State Use Program

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

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

6.6 Prevailing Wages

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

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

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

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

SECTION 7. BONDS, PERFORMANCE GUARANTEES AND INSURANCE

7.1 Maintenance Payment and Performance Bonds and Retainage Bonds

7.1.1 On or before 60 Days after issuance by TxDOT of Maintenance NTP1, Maintenance Contractor shall provide to TxDOT, and shall maintain at all times, (i) a Maintenance Performance Bond and a Maintenance Payment Bond, in the forms attached as Exhibit 6 and Exhibit 7 respectively that shall guarantee the performance of the Maintenance Services and shall also guarantee payment to Persons performing certain work for Maintenance Contractor under this Capital Maintenance Agreement; and (ii) a Retainage Bond in the form attached as Exhibit 8. The Retainage Bond shall be in the amount of 4% of the Maintenance Price, and is to be used as a guaranty for the protection of any claimants and TxDOT for overpayments, Liquidated Damages, and other deductions or damages owed by the Maintenance Contractor in connection with this Capital Maintenance Agreement.

7.1.2 Each bond required hereunder shall be issued by a Surety authorized to do business in the State with a rating of at least A minus (A-) or better and Class VIII or better by A.M. Best Company or rated in the top two categories by two nationally recognized rating agencies, or as otherwise approved by TxDOT in its sole discretion. If any bond previously provided becomes ineffective, or if the Surety that provided the bond no longer meets the requirements hereof, Maintenance Contractor shall provide a replacement bond in the same form issued by a surety meeting the foregoing requirements, or other assurance satisfactory to TxDOT, in its sole discretion. If the Maintenance Price is increased in connection with a Change Order, TxDOT may, in its sole discretion, require a corresponding proportionate increase in the amount of each bond or alternative security.

7.1.3 The Maintenance Performance Bond and the Maintenance Payment Bond shall each have a term equal or greater to the then-current Maintenance Term. During each such period, the amount of each bond shall be equal to 100% of the aggregate sum of the remaining annual Maintenance Price for all years of the applicable Maintenance Term, using the current annual Maintenance Price as the annual Maintenance Price for each year remaining in the Maintenance Term; provided however, the amount of each bond shall not be less than 100% of the then current annual Maintenance Price. Separate Maintenance Performance Bonds and Maintenance Payment Bonds shall be provided by Maintenance Contractor in the amount of any outstanding Unplanned Capital Maintenance as determined under Section 3.4.2.

7.1.4 On or before 60 Days after issuance by TxDOT of Maintenance NTP2 and Maintenance NTP3 pursuant to Section 4.2 and Section 4.3, respectively, Maintenance Contractor shall either (1) provide a Maintenance Performance Bond, a Maintenance Payment Bond and a Retainage Bond in connection with the Second Maintenance Term (or a Third Maintenance Term following a Second Maintenance Term) or (2) provide evidence of renewal, and, if applicable, adjusting the amount, of the existing bonds.

7.1.5 TxDOT will release the Maintenance Performance Bond upon expiration of the Warranty Period, provided that no outstanding claims are then pending against Maintenance Contractor hereunder.

7.1.6 TxDOT will release the Maintenance Payment Bond upon the latest to occur of: (a) receipt of (i) evidence satisfactory to TxDOT that all Persons eligible to file a claim against the Maintenance Payment Bond have been fully paid and (ii) unconditional releases of Liens and stop notices from all Subcontractors who filed preliminary notice of a claim against the Maintenance Payment Bond, or (b) expiration of the statutory period for Subcontractors to file a claim against the Maintenance Payment Bond if no claims have been filed.

7.1.7 Performance by a Surety or a Guarantor of any of the obligations of Maintenance Contractor shall not relieve Maintenance Contractor of any of its obligations hereunder.

7.1.8 In the event any of the bonds required herein for the Second Maintenance Term or Third Maintenance Term become commercially unavailable, Maintenance Contractor may substitute a letter of credit or other form of security for the Maintenance Services acceptable to TxDOT, in its sole discretion.

7.2 Guaranty

7.2.1 _____ are the Guarantors of Maintenance Contractor's obligations under the CMA Documents. Such guaranty, in the form attached as Exhibit 9, shall assure

Texas Department of Transportation
US 77 from Kingsville to Driscoll
~~November 15, 2012~~
January 28, 2013

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Capital Maintenance Agreement

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performance of Maintenance Contractor's obligations hereunder and shall be maintained in full force and effect throughout the duration of this Capital Maintenance Agreement.

7.2.2 Maintenance Contractor shall report to TxDOT, on a yearly basis upon each anniversary of the Initial Maintenance Term Commencement Date, the Tangible Net Worth of Maintenance Contractor, its equity members, and any Guarantors.

7.2.3 If at any time during the course of this Capital Maintenance Agreement the total combined Tangible Net Worth of Maintenance Contractor, its equity members and any Guarantors, is less than \$20,000,000, Maintenance Contractor shall provide one or more guarantees so that the combined Tangible Net Worth of the Maintenance Contractor, its equity members and any Guarantors is at least \$20,000,000. Each such guaranty shall be in the form attached as Exhibit 9, together with appropriate evidence of authorization, execution, delivery and validity thereof, and shall guarantee the Guaranteed Obligations. Each guaranty must be provided by: (a) a parent corporation, affiliate, or a shareholder of Maintenance Contractor, or (b) a parent corporation, affiliate, or a shareholder of an equity member of Maintenance Contractor. The minimum Tangible Net Worth amount described above shall be adjusted annually based on changes in the Engineering News Record Construction Cost Index (ENR CCI), commencing on the first anniversary of the Initial Maintenance Term Commencement Date and continuing annually thereafter during the term of this Capital Maintenance Agreement.

7.3 General Insurance Requirements

Maintenance Contractor shall procure and keep in effect, or cause to be procured and kept in effect, the insurance policies in accordance with the requirements in this Section 7.3 and Exhibit 10.

7.3.1 Qualified Insurers

Each of the insurance policies required hereunder shall be procured from an insurance carrier or company that, at the time coverage under the applicable policy commences is:

- (a) Authorized to do business in the State and has a current policyholder's management and financial size category rating of not less than "A – VII" according to A.M. Best's Insurance Reports Key Rating Guide; or
- (b) Otherwise approved in writing by TxDOT.

7.3.2 Premiums, Deductibles and Self-Insured Retentions.

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

7.3.3 Primary Coverage

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

7.3.4 Verification of Coverage

7.3.4.1 Within 10 days of TxDOT issuing Maintenance NTP1, Maintenance Contractor shall deliver to TxDOT a certificate of insurance and written evidence of insurance for each required policy of insurance. The certificate and evidence must be consistent in all respects. The evidence of insurance shall be on the most recent ACORD form, without disclaimer. Each required certificate must meet the requirements of Texas Insurance Code Chapter 1811 and, to the extent permitted under applicable Laws, state the identity of all carriers, named insureds and additional insureds, state the type and limits of coverage, deductibles and termination provisions of the policy, include as attachments all additional insured endorsements, and be signed by an authorized representative of the insurance company shown on the certificate or its agent or broker. Each required evidence of insurance must be personally and manually signed by a representative or agent of the insurance company shown on the evidence of insurance with proof that the signer is an authorized representative or agent of such insurance company and is authorized to bind it to the coverage, limits and termination provisions shown on the evidence. The evidence of insurance must be original, state the signer's company affiliation, title and phone number, state the identity of all carriers, named insureds and additional insureds, state the type and limits of coverage, list deductibles, include the required subrogation waiver, contain conforming termination provisions of the policy and other essential policy terms, list and describe all endorsements, include as attachments all additional insured endorsements, and otherwise be in form reasonably satisfactory to TxDOT.

7.3.4.2 Maintenance Contractor shall promptly deliver to TxDOT a certificate of insurance and copies of all endorsements with respect to each renewal policy, as necessary to demonstrate the maintenance of the insurance coverages required under this Capital Maintenance Agreement. Such certificate shall be delivered prior to the expiration date of any policy and shall bear a notation evidencing payment of the premium therefor.

7.3.4.3 Upon TxDOT's request, Maintenance Contractor shall deliver to TxDOT: (a) a complete certified copy of each insurance policy or modification, or renewal or replacement insurance policy and all endorsements thereto and (b) satisfactory evidence of payment of the premium therefor.

7.3.5 Subcontractor Insurance Requirements

Maintenance Contractor's obligations regarding Subcontractor's insurance are set forth in Exhibit 10. Maintenance Contractor shall cause each Subcontractor to provide such insurance in the manner and in the form consistent with the requirements contained in this Capital Maintenance Agreement.

7.3.6 Policies with Insureds in Addition to Maintenance Contractor

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

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

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

7.3.6.3 All endorsements adding additional insureds to required insurance policies, shall contain no limitations, conditions, restrictions or exceptions to coverage in addition to those that apply under the insurance policy generally, and shall state that the interests and protections of each additional insured shall not be affected by any misrepresentation, act or omission of a named insured or any breach by a named insured of any provision in the policy which would otherwise result in forfeiture or reduction of coverage. To the fullest extent of coverage allowed under Chapter 151 of the Texas Insurance Code, Maintenance Contractor (if applicable) and TxDOT shall be included as additional insureds under the CGL policy using ISO Additional Insured Endorsements CG 20 10 10 01 and CG 20 37 10 01, or endorsements providing equivalent coverage, including products-completed operations. The commercial general liability/builder's third-party liability insurance shall include completed operations liability coverage.

7.3.7 Additional Terms and Conditions

7.3.7.1 Each insurance policy shall be endorsed to state that coverage cannot be canceled, not renewed, voided, suspended, materially changed, adversely modified, or reduced in coverage or in limits (including for non-payment of premium) except after 30 days' prior written notice (or ten days in the case of cancellation or non-renewal for non-payment of premium) by registered or certified mail, return receipt requested, has been given to TxDOT and each other insured or additional insured party; provided that Maintenance Contractor may obtain as comparable an endorsement as possible if it establishes unavailability of this endorsement as set forth in Section 7.3.4.1. Such endorsement shall not include any limitation of liability of the insurer for failure to provide such notice.

7.3.7.2 The commercial general liability insurance policy and any builder's third party liability insurance policy (if furnished by Maintenance Contractor in lieu of commercial general liability insurance) shall cover liability arising out of the acts or omissions of Maintenance Contractor's employees engaged in the Maintenance Services and employees of Subcontractors.

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

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

7.3.8 Waivers of Subrogation

TxDOT waives all rights against the Maintenance Contractor-Related Entities, and Maintenance Contractor waives all rights against the Indemnified Parties, for any claims to the extent covered by insurance obtained pursuant to this Section 7.3, except such rights as they may have to the proceeds of such insurance. If Maintenance Contractor is deemed to self-insure a claim or loss under Section 7.4.3, then Maintenance Contractor's waiver shall apply as if it carried the required insurance. Maintenance Contractor shall require all Subcontractors to provide similar waivers in writing each in favor of all other Persons enumerated above. Subject to Section 7.3.4.1, each policy, including workers' compensation if permitted under the applicable workers' compensation insurance Laws, shall include a waiver of any right of subrogation against the Indemnified Parties or the insurers consent to the insured's waiver of recovery in advance of loss. However, no waiver of subrogation rights under any policy providing professional liability coverage to the insureds shall be required of any Party.

7.3.9 No Recourse

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

7.3.10 Support of Indemnifications

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

7.3.11 Inadequacy or Unavailability of Required Coverages

If, in the future, through no fault of Maintenance Contractor, any of the coverages required in this Section 7.3 (or any of the required terms of such coverages, including policy limits) become unavailable as determined under a commercial reasonableness standard, TxDOT will work with Maintenance Contractor to find commercially reasonable alternatives to the required coverages that are acceptable to TxDOT.

7.3.12 Defense Costs

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

7.3.13 Contesting Denial of Coverage

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

7.3.14 Umbrella and Excess Policies

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

7.4 Prosecution of Insurance Claims

7.4.1 Unless otherwise directed by TxDOT in writing with respect to TxDOT's insurance claims, Maintenance Contractor shall be responsible for reporting and processing all potential claims by TxDOT or Maintenance Contractor against the insurance policies required hereunder. Maintenance Contractor agrees to report timely to the insurer(s) under such insurance policies any and all matters which may give rise to an insurance claim by Maintenance Contractor or TxDOT or another Indemnified Party and to promptly and diligently pursue such insurance claims in accordance with the claims procedures specified in such insurance policies, whether for defense or indemnity or both. Maintenance Contractor shall enforce all legal rights against the insurer under the applicable insurance policies and applicable Laws in order to collect thereon, including pursuing necessary litigation and enforcement of judgments, provided that Maintenance Contractor shall be deemed to have satisfied this obligation if a judgment is not collectible through the exercise of lawful and diligent means.

7.4.2 TxDOT agrees to promptly notify Maintenance Contractor of TxDOT's incidents, potential claims against TxDOT, and matters which may give rise to an insurance claim against TxDOT, to tender to the insurer TxDOT's defense of the claim under such insurance policies, and to cooperate with Maintenance Contractor as necessary for Maintenance Contractor to fulfill its duties hereunder.

7.4.3 If in any instance Maintenance Contractor has not performed its obligations respecting insurance set forth in this Capital Maintenance Agreement or is unable to enforce and collect any such insurance for failure to assert claims in accordance with the terms of the insurance policies or to prosecute claims diligently, then for purposes of determining Maintenance Contractor's liability and the limits thereon or determining reductions in compensation due from TxDOT to Maintenance Contractor on account of available insurance, Maintenance Contractor shall be treated as if it has elected to self-insure up to the full amount of insurance coverage which would have been available had Maintenance Contractor performed such obligations and not committed such failure. Nothing in the CMA Documents shall be construed to treat Maintenance Contractor as electing to self-insure where Maintenance Contractor is unable to collect due to the bankruptcy or insolvency of any insurer which at the time the insurance policy is written meets the rating qualifications set forth in Section 7.4.1.

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

other Indemnified Party has a good faith belief that more rapid reporting is needed to preserve the claim.

7.4.5 Unless otherwise directed by TxDOT in writing, Maintenance Contractor shall be responsible for reporting and processing all potential claims by TxDOT or Maintenance Contractor against the insurance required to be provided under Section 7.3. Maintenance Contractor agrees to report timely to the insurer(s) any and all matters which may give rise to an insurance claim and to promptly and diligently pursue any and all insurance claims on behalf of TxDOT, whether for defense or indemnity or both. TxDOT agrees to promptly notify Maintenance Contractor of TxDOT's incidents, potential claims, and matters which may give rise to an insurance claim by TxDOT, to tender its defense or the claim to Maintenance Contractor, and to cooperate with Maintenance Contractor as necessary for Maintenance Contractor to fulfill its duties hereunder.

7.5 Insurance and Commencement of Maintenance Services

Maintenance Contractor shall not commence the Maintenance Services under this Capital Maintenance Agreement until it has obtained the insurance required under Section 7.3, has furnished original certificates of insurance evidencing the required coverage as required under Section 7.3.4 and such insurance has been approved in writing by TxDOT, and Maintenance Contractor shall not allow any Subcontractor (nor shall such Subcontractor be entitled) to commence work under its Subcontract until the insurance required of the Subcontractor pursuant to this Section 7 has been obtained and approved by Maintenance Contractor. A delay in securing such certificates of insurance or approvals shall not provide Maintenance Contractor any relief or entitlement to a Change Order.

7.6 TxDOT's Right to Remedy Breach by Maintenance Contractor Regarding Insurance

If Maintenance Contractor or any Subcontractor fails to provide insurance as required herein, TxDOT shall have the right, but not the obligation, to purchase such insurance or to suspend Maintenance Contractor's right to proceed until proper evidence of insurance is provided. TxDOT's Recoverable Costs shall, at TxDOT's sole option, be deducted from amounts payable to Maintenance Contractor or reimbursed by Maintenance Contractor upon demand. Nothing herein shall preclude TxDOT from exercising its rights and remedies under Section 12 as a result of the failure of Maintenance Contractor or any Subcontractor to satisfy its insurance obligations herein.

7.7 Disclaimer Regarding Insurance

Maintenance Contractor and each Subcontractor have the responsibility to make sure that their insurance programs fit their particular needs, and it is their responsibility to arrange for and secure any insurance coverage which they deem advisable, whether or not specified herein.

7.8 Premiums

Except for premiums that are Maintenance Contractor's responsibility under Section 3.4.2, Maintenance Contractor shall be entitled to reimbursement for the costs of bonds, letters of credit and insurance premiums, as follows: