

## EXHIBIT 16

### CAPACITY IMPROVEMENTS, FACILITY EXTENSIONS AND TECHNOLOGY ENHANCEMENTS

#### **A. Capacity Improvements**

This Part A sets forth the criteria, requirements and provisions in respect of Capacity Improvements.

#### **1. GP Capacity Improvements**

##### **1.1 Developer's Scope of Work**

1.1.1 The GP Capacity Improvements (including any portions thereof) are part of the mandatory scope of Developer's Work and obligations respecting the Project, on and subject to the terms and conditions of this Agreement, including those set forth in Exhibit 7 to the Agreement and this Exhibit 16. In the event that the Developer is required to implement only a portion of the GP Capacity Improvements, as and to the extent permitted hereunder, references in this Exhibit 16 to the implementation and construction of such GP Capacity Improvements shall be deemed to be references to such portions, unless the context otherwise requires.

1.1.2 Notwithstanding the foregoing, if a partial termination occurs pursuant to Section 19.14 of the Agreement, then the 3B Ultimate Capacity Improvement shall thereupon cease to be within the scope of Developer's Work and TxDOT shall have no right or obligation to have Developer design, construct, operate or maintain the 3B Ultimate Capacity Improvement, whether by Change Order, Directive Letter or otherwise.

##### **1.2 Notices and Schedule for Delivery of GP Capacity Improvements**

1.2.1 Developer shall design, build and achieve Service Commencement for the GP Capacity Improvements (or portions thereof), subject to the following conditions precedent:

- (a) TxDOT takes such actions on its part set forth in Section 1.3 below that are necessary to enable Developer to carry out Developer's procurement and selection of the GP Capacity Improvements Design-Build Contractor as provided in Section 1.3 below, and TxDOT approves the price for the GP Capacity Improvements Design-Build Contract;
- (b) TxDOT issues NTP GP not later than a date that enables the originally scheduled Service Commencement Date under the GP Capacity Improvements Design-Build Contract to occur before a Service Commencement Deadline of December 31, 2030, provided that this condition precedent is subject to change as provided in Section 1.2.2 below;

- (c) TxDOT makes the deposit respecting the GP Public Funds Amount with the trustee under the Facility Trust Agreement required under Part D, Section 2.1 of Exhibit 7; and
  - (d) TxDOT shall have obtained all approvals required under NEPA in respect of the GP Capacity Improvements and shall have procured, at its own cost and expense, all Facility Right of Way required in respect of the implementation of the GP Capacity Improvements.
- 1.2.2 Developer shall achieve Service Commencement for the GP Capacity Improvements by not later than December 31, 2030; provided that the conditions precedent set forth in Section 1.2.1 above are satisfied not later than a date that enables the originally scheduled Service Commencement Date under the GP Capacity Improvements Design-Build Contract to occur on or before a Service Commencement Deadline of December 31, 2030. Such December 31, 2030 Service Commencement Deadline shall be extended day for day by any TxDOT delay in satisfying the conditions precedent set forth in Section 1.2.1 above beyond the date that enables the originally scheduled Service Commencement Date under the GP Capacity Improvements Design-Build Contract to occur on December 31, 2030.
- 1.2.3 TxDOT may require an earlier or later Service Commencement Deadline for the GP Capacity Improvements by satisfying the conditions precedent set forth in Section 1.2.1 above earlier or later than contemplated for a December 31, 2030 Service Commencement Deadline.
- 1.2.4 In the Notice to Commence Design-Build Procurement, TxDOT shall preliminarily indicate the Service Commencement Deadline for the GP Capacity Improvements. During the course of the procurement of the GP Capacity Improvements Design-Build Contractor, TxDOT will receive and consider input and recommendations from Developer and proposers regarding the preliminary Service Commencement Deadline for the GP Capacity Improvements. TxDOT will then set the Service Commencement Deadline for the GP Capacity Improvements, expressed as a number of days after satisfaction of the conditions precedent set forth in Section 1.2.1 above, Developer shall incorporate such Service Commencement Deadline into the terms and conditions of the final form of GP Capacity Improvements Design-Build Contract presented to proposers prior to submission of proposals, and shall be obligated to achieve Service Commencement for the GP Capacity Improvements by such Service Commencement Deadline.
- 1.2.5 In the Notice to Commence Design-Build Procurement, TxDOT shall request that Developer commence the procurement process set forth in Section 1.3 below and shall designate all or any portion of the GP Capacity Improvements to be designed and constructed. If TxDOT designates less than the entirety of the GP Capacity Improvements, then TxDOT shall have the right to issue a Notice to Commence Design-Build Procurement for any other portion or the remainder of the GP Capacity Improvements at any later time or times; and in each such case all references in this Section 1 to “GP Capacity Improvements” shall be read in context to mean the 3A Ultimate Capacity Improvement or the 3B Ultimate Capacity Improvement, or portion thereof, as the case may be.

### 1.3 Procurement of GP Capacity Improvements Design-Build Contract

1.3.1 TxDOT shall request Developer to procure the GP Capacity Improvements Design-Build Contractor by issuing to Developer a Notice to Commence Design-Build Procurement. Within the number of days set forth below after TxDOT delivers to Developer a Notice to Commence Design-Build Procurement, and before Developer commences a competitive procurement of the GP Capacity Improvements Design-Build Contractor for the final design and construction of the GP Capacity Improvements, it shall submit to TxDOT:

- (a) The proposed form of GP Capacity Improvements Design-Build Contract (within 60 days);
- (b) A list of not less than five nor more than seven design-build contractors that Developer recommends be invited to submit qualifications for designing and constructing the GP Capacity Improvements, of which no more than one may be an Affiliate, together with brief explanations of the reasons Developer believes each is potentially qualified for such Work (within 30 days);
- (c) A detailed proposal for the method to conduct a competitive procurement of the GP Capacity Improvements Design-Build Contract, consistent with Section 1.3.3 below (within 60 days);
- (d) A proposed reasonable, logic-driven preliminary schedule for Developer to procure and select the GP Capacity Improvements Design-Build Contractor, with a non-binding target not exceeding six months from TxDOT's approval under Section 1.3.2 below, and proposed key deadlines for performing and completing the GP Capacity Improvements, including deadlines for commencement of construction, Service Commencement and Final Acceptance of the GP Capacity Improvements (within 60 days);
- (e) Proposed per diem liquidated damages to TxDOT for failure to achieve the Service Commencement Deadline or deadline for Final Acceptance of the GP Capacity Improvements, which shall be reasonably related to the per diem damages TxDOT will suffer as a result of such failure, with the level of liquidated damages under Section 17.4.1 and Exhibit 18 of the Agreement, as inflated due the changes in the CPI, serving as a non-binding guide for what may be reasonable (within 30 days);
- (f) A proposed long stop date for the GP Capacity Improvements, with the 18-month period set forth in Exhibit 9 to this Agreement serving as a non-binding guide for what may be reasonable for Work comparable in type, size and scope to the Segment 3B Facility Segment (within 60 days);
- (g) Proposed terms and conditions for lane rentals and traffic maintenance during construction of the GP Capacity Improvements, consistent with the approach to lane rentals and traffic maintenance under the FA Documents. The proposed terms and conditions shall balance the potential increase in the pricing for the GP Capacity Improvements design and construction due to lane rentals against the need to maintain

reasonable levels of service and mitigate congestion on the Facility and Related Transportation Facilities during such construction (within 60 days);

- (h) Proposed insurance amounts and coverages, consistent with the terms and conditions for insurance amounts and coverages set forth in Section 16.1 and Exhibit 17 of the Agreement (within 30 days); and
- (i) Proposed forms and amounts of P&P Bonds or a P&P Letter of Credit, consistent with then applicable Law, with the forms and amounts, as inflated due to the changes in the CPI, established for the Segment 3B Facility Segment serving as a non-binding guide for what may be reasonable for Work comparable in price to the Segment 3B Facility Segment (within 60 days).

1.3.2 At either Party's request, the Parties shall meet and confer to discuss the proposals, documents and information submitted and the potential impact of the same, or changes to the same, on pricing and scheduling of the GP Capacity Improvements. The list of design-build contractors, procurement and selection schedule, preliminary design schedule, deadlines for commencement of construction, Service Commencement and Final Acceptance, the liquidated damages for failure to achieve the Service Commencement Deadline or deadline for Final Acceptance, the long stop date, the insurance amounts and coverages, and the forms and amounts of the P&P Bonds or a P&P Letter of Credit shall be subject to TxDOT's prior written approval in its good faith discretion, taking into consideration the non-binding target and guides described in Section 1.3.1 above and based on the comparable parameters set forth in the Agreement, to the extent applicable. Without limiting the foregoing, TxDOT shall have the right to remove firms from Developer's list of design-build contractors, except for the Affiliate (if any) unless it is not qualified for the work. TxDOT shall issue its list of design-build contractors to be removed and determination of the foregoing terms and conditions within 30 days after TxDOT receives a complete Submittal from Developer. If TxDOT's removal of firms from the list reduces the list to less than five design-build contractors, Developer shall submit to TxDOT within 15 days thereafter names of additional design-build contractors, together with brief explanations of the reasons Developer believes each is potentially qualified for such Work, to expand the list to from five to seven firms. TxDOT shall have the right to remove newly listed firms. The Parties shall continue this process until an approved list of at least five design-build contractors is achieved.

1.3.3 Promptly after the list of design-build contractors is finalized and the terms and conditions of the procurement are determined in accordance with Section 1.3.2, Developer shall commence and thereafter diligently conduct a competitive procurement to procure the GP Capacity Improvements Design-Build Contractor. The method for Developer to conduct a competitive procurement of the GP Capacity Improvements Design-Build Contractor shall incorporate, and be consistent with, the following terms and conditions.

- (a) Developer shall procure the GP Capacity Improvements Design-Build Contractor through an open, competitive procurement. Developer shall conduct the procurement such that no firm receives an unfair competitive advantage.

- (b) Developer shall solicit qualifications via a request for qualifications, in form and content approved by TxDOT. Financial qualifications, experience of the design-build contractor and its proposed Key Personnel for the GP Capacity Improvements design and construction, and technical capability shall be the primary evaluation factors.
- (c) Developer shall recommend at least three proposers for short-listing, and shall recommend more if their evaluation and scoring fall within a reasonable competitive range. Recommendations shall be subject to TxDOT's approval. Developer shall make all evaluation notes and scoring available to TxDOT for review.
- (d) No later than commencement of the solicitation of proposals from the short-listed design-build contractors, Developer shall make readily available to each of them the preliminary design and drawings for the GP Capacity Improvements at the level TxDOT has approved pursuant to Section 1.5.1 below.
- (e) Developer shall implement all necessary measures to assure that any proposer that is an Affiliate of Developer receives no more relevant information than is contemporaneously made available to all other proposers on an equal basis; and evaluation and scoring of such an Affiliate shall be on same basis as all other proposers. Developer shall document such measures and make such documentation available to TxDOT upon request.
- (f) Developer shall solicit fixed price, lump sum proposals from the shortlisted proposers via a request for proposals, in form and content approved by TxDOT. The request for proposals shall include the final form of the GP Capacity Improvements Design-Build Contract. It shall set forth risk allocations consistent with the risk allocations in the FA Documents.
- (g) Developer shall require that all proposals include a proposed Schedule of Values for all Payment Activities for the GP Capacity Improvements and a monthly draw down schedule. The provisions of Part C, Section 2 of Exhibit 7 shall apply, *mutatis mutandi*, to such Schedule of Values.
- (h) During the course of the procurement of the GP Capacity Improvements Design-Build Contractor, the Parties shall consider and evaluate comments, questions and requests made by proposers, and Developer will make recommendations regarding the same that shall be subject to TxDOT's approval.
- (i) Eighty percent (80%) of the scoring shall be allocated to the net present value (at a discount rate prescribed by TxDOT) of the draw down schedule although the financial ability to comply with the proposed terms of the GP Capacity Improvements Design-Build Contract shall be evaluated on a "pass-fail" basis. The technical evaluation shall include "pass-fail" criteria as well as scoring criteria. The evaluation procedures, evaluation criteria and scoring methodology shall be subject to TxDOT's approval. Developer shall conduct the evaluations and scoring and make

a recommendation for selection to TxDOT. The recommendation shall be subject to TxDOT's approval, and TxDOT shall approve so long as (i) there appear to be no material irregularities in the conduct of the procurement or in the evaluation and scoring of the responsive proposals, and (ii) TxDOT, in its sole discretion, accepts the pricing. Developer shall make all evaluation notes and scoring available to TxDOT for review. If TxDOT does not disapprove the selection within 30 days after TxDOT receives in writing Developer's recommendation together with all proposals and all evaluation notes and scoring, then Developer's recommendation for selection shall be deemed approved; provided that no deemed approval shall preclude TxDOT from exercising its rights under Section 1.4 below.

- (j) Developer shall inform all proposers in writing that Developer retains the right to cancel its procurement without fee, charge or penalty in the event pricing is not acceptable to TxDOT or TxDOT decides for any other reason not to proceed with the GP Capacity Improvements.
- (k) If TxDOT in its sole discretion accepts the pricing and issues an NTP GP following Developer's recommendation under clause (i) above, Developer shall promptly enter into the Capacity Improvements Design-Build Contract with the winning proposer.

- 1.3.4 Any Dispute regarding TxDOT's approval or disapproval under this Section 1.3, except for matters within the sole discretion of TxDOT, shall be resolved according to the Dispute Resolution Procedures. TxDOT's failure to render an approval or disapproval required by this Section 1.3, if not deemed to be one or the other, shall excuse Developer from further action that is dependent on TxDOT's approval or disapproval until such time as TxDOT cures such failure.
- 1.3.5 For the avoidance of doubt, if Developer follows the procedures required under Section 1.3 and is unable to procure any GP Capacity Improvement Design-Build Contract or GP Capacity Improvement Design-Build Contractor, such circumstance shall not constitute a Developer Default.
- 1.3.6 Nothing in this Section 1.3 is intended or shall be construed as an appointment or approval of Developer as an agent of TxDOT for the purpose of procuring or entering into a GP Capacity Improvements Design-Build Contract. The sole purpose of this Section 1.3 is to provide TxDOT with the most competitive pricing available for GP Capacity Improvements design and construction from well-qualified and experienced design-build contractors capable of meeting the obligations related to the GP Capacity Improvements hereunder in accordance with the terms of the Agreement. Developer and the selected Design-Build Contractor shall be the sole parties to the GP Capacity Improvements Design-Build Contract, and TxDOT shall owe no obligations to, and shall have no contractual relationship with, the GP Capacity Improvements Design-Build Contractor.
- 1.3.7 If TxDOT indicates that the GP Capacity Improvements are to be funded with federal-aid funds or are to be eligible for federal-aid funding, then Developer shall conduct such procurement in compliance with all applicable federal Laws

pertaining to procurement and contracting, which shall prevail in the case of any irreconcilable conflict between such Laws and the provisions of this Section 1.3.

#### 1.4 Election to Discontinue or Revise

- 1.4.1 If the design-build price of the winning proposer is not acceptable to TxDOT in its sole discretion, or if the estimate or calculation of any other portion of the GP Public Funds Amount is unacceptable to TxDOT in its sole discretion, and TxDOT has not yet issued a NTP GP, then TxDOT may elect to discontinue efforts at that time to build the GP Capacity Improvements, or may revise the scope, terms and conditions and have Developer request revised design-build proposals in accordance with the applicable terms and procedures under Section 1.3 above.
- 1.4.2 If TxDOT elects to discontinue efforts at that time, it shall reimburse Developer for its reasonable costs incurred to prepare the preliminary design as required under Section 1.5.1 below and to conduct the competitive procurement as required under Section 1.3 above. TxDOT shall pay such reimbursement to Developer not later than 30 days after TxDOT elects to discontinue its efforts and receives from Developer documentation, in form reasonably required by TxDOT, of the costs incurred. TxDOT shall own all right, title and interest in and to the preliminary design upon such payment. Discontinuation shall not preclude TxDOT from issuing a new Notice to Commence Design-Build Procurement at any later date in accordance with the terms hereof.

#### 1.5 Terms Applicable to GP Capacity Improvements

Except to the extent otherwise expressly set forth therein, the provisions in the Agreement and the other FA Documents relating to amendment of the Lease and Memorandum of Lease, Design Work, Construction Work and GP Capacity Improvements Design-Build Contractor, including the mandatory terms and provisions of Contracts set forth in Sections 10.2.3, 10.3.2 and 10.3.3 of the Agreement, shall apply, *mutatis mutandi*, as appropriate in the circumstances to the GP Capacity Improvements, GP Capacity Improvements Design-Build Contractor and GP Capacity Improvements Design-Build Contract, subject to the following provisions.

- 1.5.1 Any deviations in the form and content of the GP Capacity Improvements Design-Build Contract from the foregoing requirements, whether during the procurement or after selection and prior to execution, shall be subject to TxDOT's prior written approval in its sole discretion. Such approval may take the form of TxDOT's general written approval of the GP Capacity Improvements Design-Build Contract at the time TxDOT accepts the pricing thereunder and issues an NTP GP pursuant to Section 1.3.3(k).
- 1.5.2 Developer shall be responsible, subject to its right for reimbursement, for furnishing the design of the GP Capacity Improvements consistent with the design for the Facility, and for furnishing the level of preliminary design and drawings that TxDOT approves as necessary and sufficient to enable proposers for the GP Capacity Improvements Design-Build Contract to efficiently price their proposals for the GP Capacity Improvements Design-Build Contract.

- 1.5.3 TxDOT shall be responsible for the acquisition of Facility Right of Way required for the GP Capacity Improvements. Developer shall have no responsibility for acquisition of Facility Right of Way required for the GP Capacity Improvements, but shall cooperate and coordinate with TxDOT as reasonably requested to facilitate TxDOT's acquisition thereof. Deadlines under the schedule for the GP Capacity Improvements design and construction shall be subject to (a) TxDOT's approval so that they take into account time periods TxDOT determines it will require to make available parcels to be acquired, and (b) extensions for TxDOT delays in making available such parcels that affect the Critical Path. For this purpose, "make available" and "making available" have the same meaning as set forth in clause (c) of the definition of TxDOT-Caused Delay.
- 1.5.4 For the avoidance of doubt, the Milestone Schedule does not apply to GP Capacity Improvements. Instead, the Parties shall reasonably approve a separate Milestone Schedule consistent with the deadline to achieve Service Commencement for the GP Capacity Improvements established pursuant to Section 1.2.5 above.
- 1.5.5 The GP Capacity Improvements Design-Build Contract shall contain a provision limiting cumulative progress or other payments at any given time to not more than the cumulative amount set forth in the draw down schedule included in the proposal described in Section 1.3.3(g) above.
- 1.5.6 Certain provisions in the Agreement and FA Documents may be adjusted, as provided in Sections 1.3.1 and 1.3.2 above.

## 1.6 Compensation for GP Capacity Improvements

TxDOT shall compensate Developer for the GP Capacity Improvements on the terms and conditions set forth in Part D of Exhibit 7.

## 1.7 No TxDOT Liability

The decision to issue or not to issue a Notice to Commence Design-Build Procurement or a NTP GP shall be made by TxDOT in its sole discretion. The failure by TxDOT to issue a Notice to Commence Design-Build Procurement or a NTP GP shall not be a TxDOT Default, shall not be treated as a Compensation Event or Relief Event, and shall not otherwise entitle Developer to any Claim against TxDOT for compensation or any other relief.

## 1.8. Traffic Flow Monitoring

- 1.8.1 Before Service Commencement of each of Segment 3A and Segment 3B, Developer shall install and maintain continuous electronic devices capable of measuring vehicle speeds and traffic volume at approximately 1/2 mile intervals (each a "Measuring Point") along the Facility on the General Purpose Lanes adjacent to Segments 3A and 3B (it being understood that no such measuring shall be required in respect of the IH 35W/IH 820 interchange or any Additional Ultimate Capacity Improvement) in accordance with the Technical Provisions. For the avoidance of doubt, the minimum number of Measuring Points per direction in the General Purpose Lanes adjacent to Segment 3A shall be 13, and

the minimum number of Measuring Points in the General Purpose Lanes adjacent to Segment 3B shall be 9.

- 1.8.2 Developer shall use data generated by the electronic devices described in Section 1.8.1 above to derive GP Hourly Average Speeds in miles per hour and traffic volume for the General Purpose Lanes on each segment and each direction.
- 1.8.3 In the event that one or more of the electronic devices installed at the Measuring Points stops recording data or incorrectly records data during any 30 minute period or longer for each hour on any day, then the data for the affected hour(s) shall be disregarded and replaced with the data obtained by such electronic devices during the same hour(s) for the same day during the immediately preceding week. If there is no data available for such hour(s) on the immediately preceding week, then the data obtained by such electronic devices for the same hour(s) for the same day during the week prior to such immediately preceding week shall be used. If no data is available for such week, then the data obtained by such electronic devices for the same hour(s) for the same day for the latest available week shall be used. Notwithstanding anything to the contrary herein, in no event shall any hour affected by the occurrence of Incidents, weather conditions or events or activities that temporarily decrease speeds (including the implementation of any Capacity Improvements and any other events or activities related to the construction or operation of free roads, connecting roads, service roads, frontage roads, turnpikes, managed lanes, HOT/HOV lanes, light rail, freight rail, bus lanes, or other transportation facilities by TxDOT or any other Person that, directly or indirectly, temporarily decrease speeds) be included in the calculations of GP Hourly Average Speeds or traffic volume.
- 1.8.4 From and after the Service Commencement Date for each Facility Segment (excluding GP Capacity Improvements), Developer shall measure daily and report monthly to TxDOT the GP Hourly Average Speeds and traffic volume for each day of the month. Developer shall submit each such report no later than the 15<sup>th</sup> day of the following month.
- 1.8.5 In addition, Developer shall deliver to TxDOT, by January 30 of each year, an annual report of the GP Hourly Average Speeds and traffic volume for the prior year. Developer shall present in its annual report (a) a summary of the number of Hourly Average Speeds under 60 mph; under 50 mph; under 40 mph and under 35 mph for each month of the prior calendar year, and (b) trend-lines for Hourly Average Speeds and traffic volume.
- 1.8.6 Developer shall have the accuracy of the reports for the previous year verified by a traffic and revenue consultant reasonably approved by TxDOT.
- 1.8.7 TxDOT will use the data in the monthly and annual reports for its planning purposes and in deciding when (if at all) to issue Notice to Commence Design-Build Procurement.

## **2. Other Capacity Improvements**

### **2.1 Scope**

The rights and obligations of the Parties to design and construct the Additional Ultimate Capacity Improvements and any other Capacity Improvements, except for the GP Capacity Improvements, are set forth in this Section 2. Nothing in this Section 2 shall be deemed to apply to the GP Capacity Improvements.

## 2.2 Design and Construction

2.2.1 TxDOT shall have the right to develop a Capacity Improvement at any time or times in accordance with the terms of this Section 2.2. TxDOT may elect to:

- (a) Require Developer to design and construct the Capacity Improvement through the Change Order or Directive Letter provisions of the Agreement, as provided in Section 14.1 of the Agreement, subject, however, to TxDOT's rights under Sections 2.2.4(a) and 2.4.2 below; or
- (b) Procure design and/or construction agreements to develop the Capacity Improvement through a request for proposals, invitation for bids or any other procurement process it deems appropriate.

2.2.2 Developer shall have no right to perform design or construction work for such Capacity Improvements unless TxDOT elects to issue a Change Order or Directive Letter for such Work.

2.2.3 If any Capacity Improvements are developed by TxDOT other than pursuant to a Change Order or Directive Letter, then:

- (a) Such Capacity Improvements shall be designed and constructed in accordance with TxDOT's Standard Specifications for the TxDOT Works;
- (b) The provisions in the Agreement and the other FA Documents relating to the TxDOT Works (including, without limitation, with respect to the conditions for TxDOT Substantial Completion) shall apply, *mutatis mutandi*, as appropriate in the circumstances to such Capacity Improvements, provided that nothing in the Milestone Schedule, and no provisions regarding a deadline for Substantial Completion, long stop date or partial termination, shall apply;
- (c) TxDOT shall deliver to Developer, at least 180 days prior to the commencement of construction of such Capacity Improvement, a written notice defining in reasonable detail the scope of the construction works and a related construction schedule;
- (d) TxDOT shall use reasonable efforts to minimize impacts to the Managed Lanes during construction, in each case in a manner consistent with the arrangements agreed between Developer and TxDOT with respect to the Segment 3B Facility Segment as set forth in the Agreement;
- (e) TxDOT shall notify the Developer at least 90 days prior to Substantial Completion of such Capacity Improvements;
- (f) Developer shall cooperate with TxDOT and its contractors and provide such information regarding the Facility, including maintenance records, as

reasonably requested by TxDOT in connection with the implementation of such Capacity Improvement; and

- (g) In the case of the Additional Ultimate Capacity Improvements, TxDOT shall substantially complete the same on or before 48 months after delivery to Developer of the written notice pursuant to clause (c) above.

2.2.4 If any Capacity Improvements are developed pursuant to a Change Order or Directive Letter, then provisions in the Agreement and the other FA Documents relating to Design Work and Construction Work shall apply, *mutatis mutandi*, as appropriate in the circumstances to such Capacity Improvements, subject to the following provisions.

- (a) TxDOT shall have the right, but not the obligation, to apply the provisions of Section 1.3 above to Developer's procurement and selection of a design-build contractor for the Design Work and Construction Work for such Capacity Improvements. If TxDOT exercises such right, then (i) the terms set forth in Section 1.4 above (concerning discontinuation or revision) shall apply to such Capacity Improvements, and (ii) Developer shall be responsible for furnishing the level of preliminary design and drawings that TxDOT approves as necessary and sufficient to enable proposers for the design-build Contract for such Capacity Improvements to efficiently price their proposals, subject to the same reimbursement rights afforded to the Developer in respect of the GP Capacity Improvements.
- (b) Developer shall be responsible for furnishing the design of the Capacity Improvements consistent with the design for the Facility.
- (c) TxDOT shall be responsible for the acquisition of Facility Right of Way required for the GP Capacity Improvements. Developer shall have no responsibility for acquisition of Facility Right of Way required for the Capacity Improvements, but shall cooperate and coordinate with TxDOT as reasonably requested to facilitate TxDOT's acquisition thereof. Deadlines under the schedule for the Capacity Improvements design and construction shall be subject to (i) TxDOT's approval so that they take into account time periods TxDOT determines it will require to make available parcels to be acquired, and (ii) extensions for TxDOT delays in making available such parcels that affect the Critical Path. For this purpose, "make available" and "making available" have the same meaning as set forth in clause (c) of the definition of TxDOT-Caused Delay.
- (d) For the avoidance of doubt, the Milestone Schedule does not apply to Capacity Improvements.

## 2.3 Operations and Maintenance

Developer shall be responsible for O&M Work for the Capacity Improvements commencing on the date of Substantial Completion for such Capacity Improvements.

## 2.4 Compensation

- 2.4.1 In the event TxDOT exercises its right to develop a Capacity Improvement under this Section 2, design and construction of such Capacity Improvement shall be at TxDOT's sole cost and expense.
- 2.4.2 If any such Capacity Improvements are developed pursuant to a Change Order or Directive Letter, then, Developer shall be entitled to compensation for Developer's reasonable cost of the Design Work and Construction Work, as determined according to the procedures set forth in Section 14.1 of the Agreement. If, however, TxDOT exercises its right under Section 2.2.4(a) above, then the pricing for the Design Work and Construction Work for such Capacity Improvements shall be determined in the same manner as provided for Component A in Part D of Exhibit 7, in lieu of the procedures for pricing the Change Order set forth in Section 14.1 of the Agreement.
- 2.4.3 Developer's right to compensation for any revenue impacts or any impacts to the cost of O&M Work in respect of the Capacity Improvements, both during the Construction Work and thereafter, are as follows:
- (a) Developer shall have no right to any such compensation respecting the Additional Ultimate Capacity Improvements, whether developed pursuant to Section 2.2.1(a) or 2.2.1(b) above, except as otherwise provided with respect to Compensation Event (r);
  - (b) Developer's right to any such compensation respecting Capacity Improvements that are Unplanned Revenue Impacting Facilities shall be as set forth in Section 11.3 of the Agreement; and
  - (c) Developer shall have the right to such compensation respecting Capacity Improvements other than the Additional Ultimate Capacity Improvements and Capacity Improvements that are Unplanned Revenue Impacting Facilities, in accordance with Section 14.1 of the Agreement if TxDOT develops the same pursuant to Section 2.2.1(a) above, and in accordance with Section 13 of the Agreement if TxDOT develops the same pursuant to Section 2.2.1(b) above.
- 2.4.4 The provisions of this Section 2.4 supersede any contrary provisions in Section 14.1.3 of the Agreement.

### **3. Exceptions**

Developer shall have no obligation to undertake a Capacity Improvement pursuant to Section 1 or 2 above if the same is subject to obtaining a separate record of decision or other separate action thereon under NEPA and a no action alternative is selected for which no further NEPA Approval or other approval is required.

#### **B. Facility Extensions**

No Facility Extensions are required.

#### **C. Technology Enhancements**

Developer shall have no obligation to undertake Technology Enhancements during the last 15 years of the Term in the following circumstances:

- (a) The costs incurred to implement such Technology Enhancements cannot be reasonably recovered (including a reasonable rate of return on equity invested) over the remaining Term;
- (b) Developer submits to TxDOT a reasonable analysis demonstrating item (a) above, and setting forth reasonably detailed cost and financial information for such Technology Enhancements, including information on cost subsidies from TxDOT; and
- (c) Developer does not receive from TxDOT, within 60 days after TxDOT receives such analysis, written notice under which TxDOT commits to subsidize such cost, to the extent necessary to enable Developer to recover such costs (including a reasonable rate of return on equity invested). TxDOT's commitment to subsidize such cost may take the form of a commitment to pay as costs of such improvements are incurred or to pay an upfront lump sum payment, in either case to the extent necessary to enable Developer to realize a reasonable rate of return on its own additional equity invested.