

**COMPREHENSIVE AGREEMENT
RELATING TO THE U.S. ROUTE 460 CORRIDOR IMPROVEMENTS PROJECT
DATED AS OF [DATE]
BY AND AMONG
VIRGINIA DEPARTMENT OF TRANSPORTATION,
an Agency of the Commonwealth of Virginia
AND
[CONCESSIONAIRE]**

Addendum #1

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This COMPREHENSIVE AGREEMENT RELATING TO THE U.S. ROUTE 460 CORRIDOR IMPROVEMENTS PROJECT (the “Agreement”) is made and entered into as of [DATE] by and between:

1. the VIRGINIA DEPARTMENT OF TRANSPORTATION (the “Department”), an agency of the Commonwealth of Virginia (the “State” or “Commonwealth”), the address of which Department is 1401 East Broad Street, Richmond, Virginia 23219; and
2. [], a [] company (the “Concessionaire”), the address of which is [].

ARTICLE 1.

RECITALS

A. On March 25, 1995 the Governor of the Commonwealth signed into law, effective July 1, 1995, the Public-Private Transportation Act, which was amended and re-enacted by Chapters 504 and 562 of the 2005 Acts of Assembly and signed into law by the Governor, effective July 1, 2005 (as amended, the “PPTA”).

B. The PPTA grants the Department the authority to allow private entities to develop and/or operate qualifying transportation facilities if the Department determines there is a need for the facilities and private involvement would provide the facilities to the public in a timely and cost-effective fashion.

C. In 2000, the Virginia Transportation Act designated existing U.S. Route 460 as a “high priority corridor” between Interstate 295 in Petersburg and the Route 58 bypass in Suffolk.

D. The Department began a location study for improvements to U.S. Route 460 in 2003. That same year, Chapter 953 was enacted by the Virginia General Assembly and signed into law by the Governor, requiring the Department to issue a solicitation for proposals for improvements to the U.S. Route 460 corridor, under the PPTA, within 90 days of the Commonwealth Transportation Board’s (“CTB”) approval of the Draft Environmental Impact Statement (“DEIS”) for such improvements.

E. The Department prepared a DEIS in the Spring of 2005, which proposed several new alignments for U.S. Route 460, which was approved by the FHWA.

F. On November 17, 2005, the CTB: (1) selected the preferred alignment for the new highway, triggering the requirements of Chapter 953 that the Department issue a solicitation for proposals for the development and operation of a new U.S. Route 460 within that alignment; and (2) directed the Department to study an alignment shift in Isle of Wight County.

G. Accordingly, the Department issued a Solicitation for Proposals (“SFP”) on February 15, 2006, for the development and/or operation of the new U.S. Route 460, and received conceptual proposals from three offerors.

H. On January 18, 2007, the CTB selected the modified alignment as the preferred alignment, known as Modified CBA-1.

I. From March through May 2007, the Independent Review Panel appointed by the Secretary of Transportation of the Commonwealth held a series of four meetings to review the conceptual proposals, all of which were approved for further consideration in accordance with the PPTA by the Independent Review Panel on May 23, 2007.

J. The CTB authorized the Department to proceed with the procurement of the Project on July 19, 2007.

K. On September 12, 2008, FHWA issued a Record of Decision for the Project.

L. On December 31, 2008, the Department issued a Request for Detailed Proposals and, following evaluation by the Department and approvals by the Transportation Commissioner, the Concessionaire, as proposed by the successful offeror, was selected to develop and operate the Project (as more particularly described in the Agreement).

NOW, THEREFORE, in consideration of the covenants contained herein and for other good and valuable consideration, the receipt and adequacy of which are hereby acknowledged, the parties hereto agree as follows:

ARTICLE 2.

DEFINITIONS

All capitalized terms used in this Agreement, but not expressly defined in this Agreement, have the respective meanings set forth in Exhibit A attached to this Agreement.

ARTICLE 3.

BASIC ROLES AND RESPONSIBILITIES

Section 3.01 Basic Agreement.

(a) The parties agree that the Project shall be developed, designed, financed, constructed, operated, and maintained in accordance with this Agreement and the other Project Agreements.

(b) The Concessionaire shall provide appropriate oversight, management and reporting of all phases of the Project and its Contractors such that the Project is delivered, operated and maintained in accordance with, and fit for the purpose intended by, this Agreement and the other Project Agreements.

(c) The Concessionaire shall perform, or cause to be performed, the Work in accordance with applicable Law, Governmental Approvals and this Agreement.

(d) The Concessionaire may retain Contractors to perform certain of its responsibilities under this Agreement, subject to the terms and conditions of this Agreement. In any such event, the Concessionaire shall remain fully and primarily responsible for the performance of such third parties.

(e) The Department shall be entitled to exercise such oversight of the activities of the Concessionaire and its Contractors, as the Department deems appropriate, but shall also be entitled to rely upon the Concessionaire to directly manage, oversee, and resolve disputes involving its Contractors, without the involvement of the Department.

Section 3.02 Parties to the Transaction.

(a) The parties to this Agreement are the Department and the Concessionaire.

(b) The Concessionaire is [describe legal organization and ownership, along with same information regarding the owners].

(c) In addition to its obligations under this Agreement, the Concessionaire shall be accountable for delivering on the undertakings described in, and for delivery to the Department of executed copies of, the Project Agreements described in Section 3.02(d).

(d) The following Project Agreements (all as more particularly described by this Agreement), shall be executed on or before the dates set forth below:

(i) Independent Engineer Agreement on or before the Agreement Date.

(ii) EPD Escrow Agreement on or before the Agreement Date.

(iii) Design-Build Contract on or before the Agreement Date.

(iv) Guarantees required by the Department under the Request for Detailed Proposals on or before the Agreement Date *[This provision will be deleted if no guarantees are required pursuant to the Request for Detailed Proposals]*.

(v) In the event that the Concessionaire intends to retain an O & M Contractor, Operations and Maintenance Agreement, not later than 30 days prior to the Service Commencement Date.

(vi) Initial Project Financing Agreements within the time periods required under Section 7.02.

(vii) Either: (1) the Financial Close Security in the amount of the greater of \$165 million or 25% of the Committed Investment, to secure the Concessionaire's obligations under this Agreement to achieve Financial Close by the Financial Close Deadline, on or before the Agreement Date; or (2) if Financial Close has been achieved in accordance with the requirements of Section 7.02 (c), as of the Agreement Date, the Performance Security, in compliance with Section 8.13.

Section 3.03 Nature of Parties' Interests Under Certain Project Agreements.

Neither this Agreement nor any of the other Project Agreements grant to the Concessionaire any fee title, leasehold estate, easement or other real property interest of any kind in or to the Project or the Project Right of Way. The Concessionaire's interests under this Agreement are limited to the Permit granted by this Agreement under Section 4.01.

ARTICLE 4.

GRANT OF CONCESSION; TERM; PVR CALCULATION

Section 4.01 Grant of Permit.

Pursuant to the PPTA and subject to the terms and conditions of this Agreement, the Department grants to the Concessionaire the exclusive right, and the Concessionaire accepts the obligation: (a) to finance, develop, design and construct the Project, and (b) from and after the Service Commencement Date and until the end of the Term, to manage, operate, maintain and improve the Project and to establish, impose, charge, collect, use and enforce payment of tolls and related charges (the "Permit").

Section 4.02 Term and Term Extension.

(a) This Agreement shall take effect on the Agreement Date, and shall remain in effect until the first to occur of:

(i) The date that is 94 years after the Service Commencement Date;

(ii) The date that is 94 years after the Guaranteed Substantial Completion Date, as the same may be extended by Delay Events pursuant to Article 13;

(iii) The date that is the later of (A) 30 years after the Agreement Date; or (B) 72 months after the month "*m*" in which the following equation holds true:

$$PVR_m \geq 95\% MPVR$$

where:

PVR_m is the cumulative value of the PVR at the conclusion of calendar month m ; and

$MPVR$ is the Maximum PVR;

(iv) The effective date of termination of this Agreement by either party pursuant to Article 21; or

(v) The date that is 99 years after the Agreement Date.

(b) The period of time described in Section 4.02(a) is the “Term”. The first to occur of the dates specified in Sections 4.02(a)(i) and (ii) is the “Maximum Term”. In the event the Maximum Term is reached, the Concessionaire shall not have any right or Claim to compensation for the outstanding difference between the PVR_m , calculated in the last month of the Term, and the amount of the MPVR.

(c) Commencing on the date the Concessionaire achieves 95% of the Maximum PVR and up to six months prior to the end of the Term, the Department, in its sole discretion and upon written notice to the Concessionaire, shall have the right to initiate negotiations with the Concessionaire to extend the Term. Any such extension shall be on the same terms and conditions set forth in this Agreement except for (i) the length of the extended Term, (ii) provisions respecting PVR and the Maximum PVR, (iii) the Department’s Reimbursable Costs and Permit Fees, (iv) the parties’ respective rights to share Gross Revenues and gain from Refinancings, (v) provisions respecting any Project Enhancements the Department or the Concessionaire may desire to include in the scope of the Work, and (vi) provisions that may be irrelevant or obsolete due to passage of time or completion of performance. In the event the Department delivers such written notice, the parties shall promptly enter into good faith, diligent negotiations on an Open Book Basis including the right of the Department to review all data, books and records regarding revenue, costs, expenses, Major Maintenance, cost of capital, return on equity, and other such Project-related information. If despite such good faith, diligent negotiations the parties are unable to reach agreement on amendments to this Agreement for extension of the Term within 90 days after commencing such negotiations, then either party thereafter shall have the right to cease and withdraw from such negotiations by delivering to the other party written notice of such election. Neither the initiation nor the conduct of such negotiations shall (A) constitute a waiver or release of, or have any effect on, the rights and obligations of the parties under this Agreement, including the exercise of remedies available under this Agreement, or (B) create any right or Claim of the Concessionaire to an extension of the Term, which shall only be created if and when the parties execute and deliver a written instrument extending the Term.

Section 4.03 PVR Calculation.

(a) The Concessionaire shall calculate the PVR at the end of each calendar month during the Term using the following equation:

$$PVR_m = \sum_{i=1}^m \frac{MGR_i}{\prod_{n=1}^i (1+r_n)^{(i/n)}}$$

where:

PVR_m is the cumulative value of the PVR at the conclusion of calendar month m ;

The calendar month m which includes the Service Commencement Date is $m = 1$;

MGR_i is the Monthly Gross Revenue earned in month “ i ” of the Term, as expressed in nominal U.S. dollars;

The calendar month i which includes the Agreement Date is $i = 1$;

r_n is the PVR Discount Rate;

The calendar month n which includes the Agreement Date is $n = 1$.

(b) The PVR Discount Rate r_n shall equal the Initial PVR Discount Rate, unless otherwise determined in accordance with [Section 7.02](#) or [Section 7.07](#), in which case the updated rate shall apply retroactively for the entire Term.

Section 4.04 Maximum PVR Adjustments.

The Maximum PVR shall not be subject to adjustment for any reason, except as may be approved by mutual written agreement of the parties.

Section 4.05 Quiet Enjoyment.

The Department agrees that, during the Term, the Concessionaire shall be entitled to, and shall have, the quiet possession and enjoyment of the Project and the Project Right of Way, for the purposes expressly provided by this Agreement, and subject to (a) the exercise by the Department of its rights under this Agreement; (b) the performance by the Concessionaire of its obligations under this Agreement; and (c) the other provisions of this Agreement. The Department shall, at all times during the Term, defend the Department’s title or real property interest to the Project and Project Right of Way against any Person claiming any interest adverse to the Department, the State in the Project or the Project Right of Way, or any portion thereof, except where such adverse interest arises as a result of the act, omission, negligence, misconduct or violation of Applicable Law of or by the Concessionaire or any other Concessionaire Party.

ARTICLE 5.

TOLLING

Section 5.01 Tolling of the Project.

(a) From and after the Service Commencement Date and continuing during the Term, the Concessionaire shall have the right to charge, collect and enforce the payment of Toll Revenues, and to implement a system for the collection and enforcement of Toll Revenues, in accordance with the terms of this Agreement. The Concessionaire shall have no right to charge or collect Toll Revenues, except as expressly authorized by this Agreement.

(b) The Concessionaire's rights to collect, and enforce the collection of, Toll Revenues are limited by, and conditioned on, compliance with applicable Law and all other provisions in this Agreement, including the following:

(i) Subject to Section 33.1-252 of the Code of Virginia (or successor statutory provisions enacted subsequent to the Agreement Date), vehicles exempted from tolls thereunder, as well as Additional Exempt Vehicles, shall be entitled to use the Project free of charge;

(ii) Vehicles (other than vehicles referred to in the preceding clause (i)) shall be entitled to use the Project subject to payment of the applicable tolls;

(iii) The toll rates shall be the same for persons using the Project under like conditions, and for this purpose "like conditions" may take into consideration any of the variables selected in the Toll Rates Schedule attached as Exhibit B-5 (*provided*, that the Concessionaire may adopt and implement discount programs for different classes or groups of persons using the Project under like conditions, subject to the provisions of Section 25.01); and

(iv) Pursuant to Section 33.1-223.2:12.B of the Code of Virginia (or successor statutory provisions enacted subsequent to the Agreement Date), the Concessionaire must allow access to the Project by vehicles equipped with transponders used as part of the E-ZPass network (and any successor to E-ZPass utilized on State Highways at that time) via dedicated high speed open road toll collection systems. Nothing in this subsection, however, shall be construed to prohibit use of non-automated toll collection in some lanes of the Project.

(c) The foregoing authorization to impose, charge, collect and enforce the payment of electronic tolls includes the right, to the extent permitted by applicable Law, and subject to the requirement to be interoperable with the E-ZPass network (and any successor to E-ZPass utilized on State Highways at that time), to impose, charge, collect and enforce, with respect to electronic tolling accounts managed by or on behalf of the Concessionaire, the following incidental charges:

- (i) reasonable administrative fees for account maintenance, account statements and customer service;
- (ii) reasonable fees, penalties and interest for toll violations, including costs of collection in accordance with applicable Law; and
- (iii) other incidental fees and charges reasonable and customary in connection with the services being provided at that time by the Concessionaire.

The amount of any such incidental charges shall not exceed the amount reasonably necessary for the Concessionaire to recover its reasonable out-of-pocket and documented costs and expenses, directly incurred with respect to the items, services and work for which they are levied.

(d) Except as otherwise provided in this Agreement, beginning on the Service Commencement Date and through the end of the Term, the Concessionaire shall have the exclusive right, title, entitlement and interest in and to Toll Revenues, subject to the provisions of any electronic toll collection agreement that might then be in effect between the Concessionaire and the Department as contemplated by Section 5.03 (d) of this Agreement.

(e) Gross Revenues shall be used first to pay all due and payable operations and maintenance costs, specifically including all amounts due to the Department under this Agreement, before they may be used and applied for any other purpose.

(f) The Concessionaire shall not use Gross Revenues to make any Distributions or to pay non-competitive fees and charges to Affiliates, unless and until the Concessionaire first pays the following: (i) any amounts due to the Department pursuant to the terms of this Agreement, including any compensation due under Article 6; (ii) current and delinquent operating and maintenance costs (including any payments to Affiliates made solely in accordance with the applicable Affiliate Contracts entered into in accordance with Section 25.02(h)), (iii) current and delinquent debt service and other current and delinquent amounts, due under any Concessionaire Debt; (iv) all taxes affecting the Project that are currently due and payable or delinquent; (v) all current and delinquent deposits to any Major Maintenance Reserve Fund and the Handback Reserve Fund and any other reserves required by the Project Financing Agreement; and (vi) all current and delinquent costs and expenses for Major Maintenance. If the Concessionaire makes any Distribution or payment to an Affiliate in violation of this provision, the same shall be deemed to be held in trust by such Person for the benefit of the Department and the Collateral Agent, and shall be payable to the Department or the Collateral Agent on demand. If the Department collects any such amounts held in trust, it shall make them available for any of the purposes set forth above and, at the request of the Collateral Agent, deliver them to the Collateral Agent.

(g) The Concessionaire shall have no right to use Gross Revenues to pay any debt, obligation or liability unrelated to this Agreement, the Project, or the Concessionaire's services under this Agreement. The foregoing restriction in this Section 5.01(g) does not apply to or affect the Concessionaire's right to make Distributions in accordance with the Concessionaire's

governing instruments and this Agreement and the ability of the recipients thereof to apply the same in their sole discretion, subject to compliance with Section 5.01(f).

Section 5.02 Toll Rates.

(a) The toll rates throughout the first calendar year following Service Commencement shall be the Initial Toll Rates set forth on the Toll Rates Schedule attached as Exhibit B-5.

(b) After the first calendar year following Service Commencement, toll rates may change in accordance with the Toll Rate Adjustment Policy attached as Exhibit B-5 and the terms and conditions of this Agreement. The Concessionaire shall notify the Department of the toll rates charged to every category of user pursuant to the Toll Rate Adjustment Policy attached as Exhibit B-5. The Concessionaire shall provide to the Department at least 120 days prior notice of any planned toll rate increase, and to the general public, through website notice, notices published in newspapers of general circulation in the areas where the Project is located, and through other reasonable means, at least 30 days prior notice. No toll rates may be increased without such notices and notice periods.

Section 5.03 Additional Provisions Respecting Tolls.

(a) The Concessionaire acknowledges and agrees that it shall not be entitled to receive from the Department any compensation, return on investment or other profit for providing the services contemplated by this Agreement and the other Project Agreements, other than Concessionaire Damages and other payments, including any payments provided by Article 21, to the extent specified in this Agreement.

(b) Nothing in this Agreement shall obligate or be construed as obligating the Department, or any assignee thereof, to continue or cease collecting tolls after the end of the Term.

(c) From and after the Service Commencement Date through the end of the Term, the Concessionaire shall operate and maintain a toll collection system with respect to the Project which shall be interoperable with the E-ZPass network and any successor to E-ZPass utilized on State Highways at that time. If the Department (or its successor) intends to change any State interoperability or compatibility standards, requirements or protocols for toll collection systems, it will endeavor to coordinate with the Concessionaire prior to the implementation of such changes so as to minimize the loss of Toll Revenues, disruption and cost to the Concessionaire, but the Department shall not be liable in any event for any such resulting loss of Toll Revenues, disruption or cost. If the Concessionaire selects an ETTM System other than the system then utilized on other State Highways, it will coordinate with the Department prior to the implementation or any change of such system to ensure interoperability and compatibility with the system then utilized on other State Highways in accordance with the Technical Requirements.

(d) The Department has implemented and presently maintains a toll transaction processing system for the clearing and disbursement of electronic toll collections in Virginia. So long as the Department is providing such services during the Term, the Concessionaire may elect to enter into an agreement with the Department for such services in accordance with the form of electronic toll collection agreement then currently in use by the Department. In consideration of such services the Concessionaire shall pay the Department its customary charges for such services in effect from time to time. The Concessionaire may, at its sole discretion and cost, engage and contract with an electronic toll collection services provider other than the Department (which may be an Affiliate of the Concessionaire, to the extent permitted by Section 25.02(h)). If the Concessionaire elects to contract with another party for these services, the Department will provide the same data access as is transmitted throughout the E-ZPass network, provided the Concessionaire establishes a membership with the E-ZPass Interagency Group, to the extent such access is permitted by applicable Law, agreements and arrangements.

(e) The Department has implemented and presently maintains a processing system for the enforcement of penalties for toll violations in Virginia for electronic toll collection systems on roads. The Concessionaire may, but is not obligated to, enter into an agreement with the Department to obtain the benefits of such enforcement system, in accordance with a violation processing services agreement in the form then currently in use by the Department. In consideration of such services, the Concessionaire shall pay the Department its customary charges for such services in effect from time to time. For purposes of identifying and apprehending toll violators of the Project, to the extent permitted under applicable Law, agreements and arrangements, the Department shall make available to the Concessionaire, upon the Concessionaire's request, the benefits of any agreements or arrangements which the Department then has in place with other state authorities or agencies that provide access to records in their possession relating to vehicle and vehicle owner data.

(f) The Concessionaire understands and agrees that, notwithstanding anything to the contrary in this Agreement or any other Project Agreement, the risk of enforcement and collection of tolls and related charges (including user fees and civil penalties and administrative fees) remains with the Concessionaire, and that the Department does not, and shall not be deemed to, guarantee collection or collectability of such tolls and related charges to the Concessionaire or any other Person.

Section 5.04 User Confidentiality.

The Concessionaire shall comply with all applicable Law related to confidentiality and privacy of users of the Project.

Section 5.05 Emergency Suspension of Tolls.

In the event that toll collection on the Project or a portion of the Project is suspended pursuant to Section 33.1-252 of the Code of Virginia (or under other comparable, applicable Law), the Concessionaire shall comply with such decision or order so long as it is in effect, and the Department shall have no liability to the Concessionaire for the loss of Gross Revenues or the

increase in costs or expenses attributable to any such decision or order for the period of time it is in effect, provided that, for any such emergency suspension of toll collection which remains in effect for a period of 10 or more consecutive days, the Concessionaire shall be entitled to an adjustment in the PVR, as determined by the Department in its sole discretion.

ARTICLE 6.

PAYMENTS TO THE DEPARTMENT

Section 6.01 Department's Reimbursable Costs and Permit Fees.

The Concessionaire agrees to pay the Department's Reimbursable Costs and Permit Fees, as set forth in Exhibit E, to the Department, as compensation for the Department's grant to Concessionaire of the Permit.

Section 6.02 Base Case Financial Model Updates.

(a) A duplicate of the Initial Base Case Financial Model is attached as Exhibit B-6. The Initial Base Case Financial Model is subject to revision with the Department's prior written consent, only to reflect any outcomes of any audit undertaken prior to Financial Close; *provided*, that in no event shall the outcomes of such model audit result in an increase in the Maximum PVR. The Initial Base Case Financial Model shall serve as the first Base Case Financial Model under this Agreement.

(b) The Concessionaire shall also provide to the Department a Base Case Financial Model Update only in the following events:

(i) upon Financial Close in accordance with Section 7.02 and reflecting the actual debt structure and Initial Financing Agreements entered into at that time;

(ii) upon completion of a Refinancing undertaken in accordance with Section 7.07;

(iii) within 60 days after the determination of Concessionaire Damages due to occurrence of a Compensation Event;

(iv) within 60 days after the determination of a Positive Net Revenue Impact or Net Cost Saving under Section 14.04 due to occurrence of a Compensation Event or Nonconforming Work;

(v) within 60 days after the granting of a Force Majeure Extension pursuant to Section 13.02; and

(vi) within 60 days after the parties agree that amendments to this Agreement or the other Project Agreements (including Department Changes during the Work Period pursuant to Section 8.10) have a material effect on future costs or Gross Revenues.

(c) The Department shall have the right to dispute any Base Case Financial Model Update. To the extent that the Concessionaire and Department cannot agree on the changes

within 90 days of the Concessionaire delivering the Base Case Financial Model Update to the Department, the disagreement will be resolved in accordance with the dispute procedures of Section 22.01.

(d) In the event of a dispute, the Base Case Financial Model then in effect shall remain in effect pending resolution of the dispute or until a new Base Case Financial Model is issued and not disputed. If a Base Case Financial Model Update has not been challenged, or if any such challenge has been so resolved, the Base Case Financial Model Update shall serve as the current Base Case Financial Model and shall be submitted to the Escrow Agent in accordance with Section 19.05(n).

(e) In no event shall the Financial Model Formulas used in the Base Case Financial Model be changed except with the prior written approval of both the Department and the Concessionaire, each in its sole discretion.

Section 6.03 Deposit and Use of Department's Reimbursable Costs, Permit Fee and Other Payments.

The Department shall deposit all the Department's Reimbursable Costs, Permit Fees and its share of Positive Net Revenue Impacts or Net Cost Savings received pursuant to this Agreement in a concession payments account in accordance with Section 33.1-23.03:9(A) of the Code of Virginia (the "Project Enhancement Account"), and shall use such amounts in accordance with Section 33.1-23.03:9(B) of the Code of Virginia to pay or finance costs of programs or projects reasonably related to or benefiting users of the Project and as otherwise permitted by applicable Law.

Section 6.04 Payments Under the Independent Engineer Agreement.

The Concessionaire shall reimburse the Department all fees, costs and other charges associated with the Independent Engineer in accordance with the terms of the Independent Engineer Agreement.

ARTICLE 7.

PROJECT FINANCING; LENDER RIGHTS AND REMEDIES

Section 7.01 Concessionaire Responsibility for Project Financing; No Department Liability for Concessionaire Debt.

(a) The Concessionaire is solely responsible for obtaining and repaying all financing, at its own cost and risk and without recourse to the State, the CTB or any other agency, instrumentality or political subdivision of the State, necessary to develop and operate the Project and any Concessionaire Project Enhancements. The Concessionaire also bears the risk of any changes in the interest rate, payment provisions or the other terms of its Financial Plan Memorandum set forth in Exhibit F to this Agreement, except with respect to discount rate calculations for PVR in accordance with Section 4.03.

(b) None of the State, the Department, the CTB or any other agency, instrumentality or political subdivision of the State has any liability whatsoever for payment of the principal sum of any Concessionaire Debt, any other obligations issued or incurred by the Concessionaire in connection with this Agreement or the Project, or any interest accrued thereon or any other sum secured by or accruing under any Financing Assignment. Except for a violation by the Department of its express obligations to Lenders set forth in this Article 7, no Lender or Collateral Agent is entitled to seek any damages or other amounts from the Department due to the Department's breach of this Agreement, whether for the Concessionaire Debt or any other amount; provided that the foregoing shall not affect any rights or Claims of a Lender as a successor to the Concessionaire's Interest by foreclosure of the security interests in or liens on the Concessionaire's Interest or transfer in lieu of foreclosure. The Department's review of any Financing Assignments or other project financing documents is not a guarantee or endorsement of the Concessionaire Debt, any other obligations issued or incurred by the Concessionaire in connection with this Agreement or the Project, or any traffic and revenue study, and is not a representation, warranty or other assurance as to the ability of the Concessionaire to perform its obligations with respect to the Concessionaire Debt or any other obligations issued or incurred by the Concessionaire in connection with this Agreement or the Project, or as to the adequacy of the Gross Revenues to provide for payment of the Concessionaire Debt or any other obligations issued or incurred by the Concessionaire in connection with this Agreement or the Project.

(c) Each bond or promissory note evidencing Concessionaire Debt must include a conspicuous recital on its face to the effect that payment of the principal thereof and interest thereon does not constitute a Claim against the Department's fee simple title to or other property interest and estate in and to the Project or the Project Right of Way, the Department's interest hereunder, or any part thereof, is not an obligation of the State, the Department, CTB or any other agency, instrumentality or political subdivision of the State, moral or otherwise, and neither the full faith and credit nor the taxing power of the State, the Department, CTB or any other

agency, instrumentality or political subdivision of the State is pledged to the payment of the principal thereof and interest thereon.

Section 7.02 Financial Close.

(a) If the Concessionaire has not entered into the Initial Project Financing Agreements on or before the Agreement Date, then the following provisions shall apply.

(b) Unless the Concessionaire or the Department elects to terminate this Agreement pursuant to Section 21.05(b), the Concessionaire shall be unconditionally obligated to enter into the Initial Project Financing Agreements and complete closing for all the initial Concessionaire Debt, in a total amount, which when combined with all Committed Investments acceptable to the Collateral Agent, is sufficient to fund all capital requirements described in the Financial Plan Memorandum attached to this Agreement as Exhibit F, by not later than the Financial Close Deadline.

(c) Except to the extent expressly permitted in writing by the Department, the Concessionaire shall not be deemed to have achieved Financial Close until all of the following conditions have been satisfied:

(i) The Concessionaire has delivered to the Department for review and comment drafts of those proposed Initial Project Financing Agreements that will contain the material commercial terms relating to the initial Concessionaire Debt not later than 15 days prior to the proposed date for Financial Close;

(ii) Concurrent with its delivery to the Lenders, but not later than [30] days prior to the proposed date of Financial Close, the Department has received the results of an independent audit of the Initial Base Case Financial Model required by the Concessionaire's Lenders, co-addressed to the Department. The Department intends to rely on the results of such audit [subject to the same terms of liability as accepted by the Lenders];

(iii) All applicable parties have entered into and delivered the Initial Project Financing Agreements (except to the extent that such documents are not required to be executed on such date) meeting the requirements of Sections 7.01 and 7.03(a) and the Concessionaire has delivered to the Department true and complete copies of the executed Initial Project Financing Agreements (other than minor ancillary documents normally delivered after financial closing and containing no new material commercial terms); and

(iv) The Concessionaire shall have delivered to the Department documentation of the Performance Security in compliance with Section 8.13.

(d) If for any reason the Concessionaire fails to achieve Financial Close by the Financial Close Deadline, then the Department shall have the damage and termination remedies set forth in Sections 20.03(a) and 21.05, after delivering written notice of such Concessionaire

Default to the Concessionaire and the Concessionaire's failure to cure the same within the cure period set forth in Section 20.01(a); *provided*, however, that the Concessionaire shall not be deemed to be in Concessionaire Default and the Department will not be entitled to such liquidated damage remedies (but nevertheless shall be entitled to terminate this Agreement in accordance with Section 21.05(b)) if such failure is directly attributable to the issuance of a temporary restraining order or other form of injunction by a court with jurisdiction that prohibits prosecution of any portion of the Work that remains pending on the Financial Close Deadline.

(e) Within two Business Days after the date of delivery of the Performance Security to the Department, the Department shall return to the Concessionaire the original of the Financial Close Security.

(f) The Concessionaire shall deliver copies of any Initial Project Financing Agreements that are ancillary supporting documents (e.g., UCC filing statements) to the Department within 30 days after the date of Financial Close.

(g) The Department will participate in the economic benefits and risks of changes in those Initial Benchmark Interest Rates used in the Initial Base Case Financial Model through the potential adjustment of the Initial PVR Discount Rate upward or downward upon Financial Close in accordance with the provisions in this Section 7.02(g). The Department and the Concessionaire will mutually verify the actual market values of the applicable Benchmark Interest Rates at the time of Financial Close. If at the time of Financial Close, the Benchmark Interest Rates differ from the Initial Benchmark Interest Rates, then the Initial PVR Discount Rate will be adjusted (subject to the exceptions in Section 7.02(h)), by:

(i) First updating the values of the Initial Benchmark Interest Rates used in the Initial Base Case Financial Model to instead equal the actual market values of the respective Benchmark Interest Rates as of the time of Financial Close, while holding all other aspects of the model (including the Maximum PVR and the debt structure) constant except for the Equity IRR; and

(ii) Then solving the updated model for the lowest possible PVR Discount Rate that restores the value of the model's Equity IRR to the Initial Equity IRR, while again holding all other aspects of the model constant.

(h) The new value of the PVR Discount Rate determined in Section 7.02(g)(ii) shall become the PVR Discount Rate in accordance with Section 4.03(b), provided that the PVR Discount Rate shall not be adjusted upwards under this Section 7.02(h):

(i) After the Financial Close Deadline.

(ii) By an amount greater than 100 basis points if the date of Financial Close occurs more than 90 days after the Agreement Date.

(iii) To a level that would result in a projected Term greater than the Maximum Term, given the Monthly Gross Revenue projected in the initial Base Case Traffic Model and/or any updates to such model provided to Lenders in support of the Financial Close.

(iv) In the event that the Concessionaire elects to implement a different debt structure at Financial Close than the debt structure contemplated in the Initial Base Case Financial Model (e.g. a bond financing structure instead of a bank loan financing structure), to a level that would otherwise result in the Concessionaire achieving under the new debt structure an Equity IRR that is more than 25 basis points higher than the Initial Equity IRR.

Section 7.03 Project Financing Agreements; Department's Rights and Protections.

(a) From time to time during the Term, the Concessionaire has the right, at its sole cost and expense, to pledge, hypothecate or assign the Concessionaire's Interest (but not less than the entire Concessionaire's Interest) as security for any Concessionaire Debt, such debt to be issued on such terms and conditions as may be acceptable to any Lender and the Concessionaire, subject to the following terms and conditions (such pledge, hypothecation, assignment, or other security instrument, including the Initial Project Financing Agreements, being referred to in this Agreement as a "Financing Assignment"):

(i) No Person other than an Institutional Lender is entitled to the benefits and protections accorded by a Financing Assignment, except that lenders of Concessionaire Debt may be Persons other than Institutional Lenders so long as any Financing Assignment securing such Concessionaire Debt made by such Person is held by an Institutional Lender acting as Collateral Agent, and PABs may be issued, acquired and held by parties other than Institutional Lenders so long as an Institutional Lender acts as indenture trustee for the PABs;

(ii) No Financing Assignment shall encumber less than the entire Concessionaire's Interest; *provided*, that the foregoing does not preclude subordinate Financing Assignments;

(iii) The Concessionaire is strictly prohibited from pledging or encumbering the Concessionaire's Interest, or any portion thereof, to secure any indebtedness, and no Financing Assignment shall secure any indebtedness, (A) that is issued by any Person other than the Concessionaire, any special purpose company that directly or indirectly owns the Concessionaire and has no assets except as are directly related to the Project, or any special purpose subsidiary wholly owned by such company, or the PABs Issuer, or (B) the proceeds of which are used in whole or in part for any purpose other than the Project Purposes or any other purpose permitted in Section 7.03(a)(xiv) below;

(iv) No Financing Assignment or other instrument purporting to mortgage, pledge, encumber, or create a Lien on or against the Concessionaire's Interest shall extend to or affect the Department's fee simple title to or other property interest and estate in and

to the Project or the Project Right of Way. the Department's interests hereunder, or any part thereof;

(v) Any number of permitted Financing Assignments may be outstanding at any one time, and any Financing Assignment permitted hereunder may secure two or more separate loans from two or more separate Lenders; *provided*, that each such loan and the Financing Assignment securing the same complies with the provisions of this Article 7;

(vi) The Department shall not have any obligation to any Lender or Collateral Agent pursuant hereto, except as expressly set forth in Sections 7.04, 7.05, 7.06 and 7.08 or in any other instrument or agreement signed by the Department in favor of such Lender or Collateral Agent and unless the Concessionaire and/or the Collateral Agent have notified the Department of the existence of such Financing Assignment;

(vii) Each Financing Assignment shall require that if the Concessionaire is in default under the Concessionaire Debt secured by the Financing Assignment or under the Financing Assignment and the Lender or Collateral Agent gives notice of such default to the Concessionaire, then the Collateral Agent shall also give concurrent notice of such default to the Department. Each Financing Assignment also shall require that the Collateral Agent deliver to the Department, concurrently with delivery to the Concessionaire or any other Person, every notice of election to sell, notice of sale or other notice required by Law or by the Financing Assignment in connection with the exercise of remedies under the Financing Assignment;

(viii) No Financing Assignment shall grant to a Lender any right to apply funds in the Major Maintenance Reserve Fund, the Handback Reserve Fund or any other reserve contemplated by this Agreement, except to the express purposes for which the reserve is established;

(ix) Each Financing Assignment shall provide that the Concessionaire may, without condition or qualification, issue additional Concessionaire Debt, secured by the Concessionaire's Interest, for the limited purpose of funding Safety Compliance Orders;

(x) Each Financing Assignment shall expressly state that the Collateral Agent and the Lenders shall not name or join the Department, the CTB or the State or any officer thereof in any legal proceeding seeking collection of the related debt or other obligations secured thereby or the foreclosure or other enforcement of the Financing Assignment except to the extent: (A) joining the Department is required as a necessary party in order to give the court jurisdiction over the dispute with the Concessionaire and to enforce Lender's remedies against the Concessionaire and (B) the complaint against the Department states no Claim against the Department for a lien or security interest on, or to foreclose against, the Department's fee simple title to or other property interest and estate in and to the Project or the Project Right of Way, the Department's interests hereunder, or any part thereof, or for any liability of the Department;

(xi) Each Financing Assignment shall expressly state that neither the Lenders nor the Collateral Agent shall seek any damages or other amounts from the Department due to the Department's breach of this Agreement, whether for Concessionaire Debt or any other amount, except damages for a violation by the Department of its express obligations to Lenders set forth in Sections 7.04, 7.05, 7.06 and 7.08; *provided*, that the foregoing shall not affect any rights or Claims of a Lender as a successor to the Concessionaire's Interest by foreclosure or transfer in lieu of foreclosure;

(xii) Each Financing Assignment shall expressly state that the Lenders and the Collateral Agent shall respond to any request from the Department or Concessionaire for consent to a modification or amendment of this Agreement within a reasonable period of time;

(xiii) No Financing Assignment may secure Concessionaire Debt that prohibits prepayment or defeasance; *provided*, that the foregoing does not preclude imposition of Breakage Costs in order to prepay or defease;

(xiv) Each Financing Assignment may only secure Concessionaire Debt that satisfies the requirements set forth in Section 7.01 and the proceeds of which are used exclusively for the purpose of (A) developing or operating the Project or any Project Enhancements, (B) paying reasonable fees, development costs and expenses incurred by the Concessionaire with the closing of this Agreement and the Initial Project Financing Agreements not otherwise reimbursed, (C) making Distributions, but only from the proceeds of Refinancings permitted pursuant to Section 7.07, and (D) any Refinancing of pre-existing Concessionaire Debt that conforms to the provisions of this Section 7.03(a), including use of proceeds to pay the reasonable costs of closing the Refinancing (including lender fees, but excluding any amounts paid to Affiliates);

(xv) Each Financing Assignment shall expressly permit the Department to use and apply the Contingency Amount, as well as funds in the Major Maintenance Reserve Fund and the Handback Reserve Fund, without condition or qualification, for the purposes permitted by this Agreement; and

(xvi) In the case of a Refinancing, the Concessionaire's right is subject to Section 7.07.

(b) The Department shall have no obligation to join in, execute or guarantee any Financing Assignment.

(c) Notwithstanding the enforcement of any security interest created by a Financing Assignment, the Concessionaire shall remain liable to the Department for the payment of all sums owing to the Department under this Agreement and the other Project Agreements and the performance and observance of all of the Concessionaire's covenants and obligations under this Agreement and the other Project Agreements.

(d) No Lender or Collateral Agent shall, by virtue of its Financing Assignment, acquire any greater rights to or interest in the Project or Gross Revenues than the Concessionaire has at any applicable time under this Agreement, other than the provisions in Sections 7.04, 7.05, 7.06 and 7.08 for the specific protection of the Lenders and the Collateral Agent. The Lender and the Collateral Agent shall acknowledge and agree in the Financing Assignment that they shall have no further lien or security interest in Gross Revenues otherwise established pursuant to the Financing Assignment following the termination or expiration of the Term (including termination as a consequence of Concessionaire Default), and any such lien or security interest shall be deemed automatically extinguished at such time.

(e) All rights acquired by the Lenders or the Collateral Agent under any Financing Assignment shall be subject to the provisions of this Agreement and any Development Contract and to the rights of the Department hereunder and thereunder.

(f) No Financing Assignment shall be binding upon the Department in the enforcement of its rights and remedies as provided herein and by Law, unless and until the Department has received a copy (certified as true and correct by the Collateral Agent or by the administrative agent identified in the Initial Project Financing Agreements) of the original thereof and a copy of a specimen bond, promissory note or other evidence of indebtedness (certified as true and correct by the Collateral Agent or by the administrative agent identified in the Initial Project Financing Agreements) secured by such Financing Assignment, together with written notice of the address of the Collateral Agent to which notices may be sent. If applicable, after the recordation or filing thereof, the Collateral Agent shall provide to the Department a copy of the Financing Assignment bearing the date and instrument number or book and page of such recordation or filing. In the event of an assignment of any such Financing Assignment by the Collateral Agent, such assignment shall not be binding upon the Department unless and until the Department has received a certified copy thereof, together with written notice of the assignee thereof to which notices may be sent (and the assignee shall, if such assignment is required to be recorded, after such recordation deliver to the Department a copy thereof bearing the date and instrument number or book and page of such recordation).

(g) No Financing Assignment, including relating to a Refinancing, shall be valid or effective, and no Lender shall be entitled to the rights, benefits and protections of this Article 7, unless the Financing Assignment complies with this Section 7.03. No Financing Assignment relating to any Refinancing shall be valid or effective, and no Lender shall be entitled to the rights, benefits and protections of this Article 7, unless the Refinancing is in compliance with Section 7.07. No Lender shall be entitled to the rights, benefits and protections of this Article 7 unless the Financing Assignments in favor of the Lender are senior or first tier subordinate Liens on the entire Concessionaire's Interest. Unless and until such non-compliance is remedied, the Financing Assignment shall be neither valid nor effective, and the Lenders thereunder shall be entitled to none of the rights, benefits and protections of this Article 7.

Section 7.04 Notices to Collateral Agent; No Amendments.

As long as any Financing Assignment of record created in accordance with this Article 7 shall remain unsatisfied and the Department has received the notices and documents specified in Section 7.03(f), the following provisions shall apply with respect to any such Financing Assignment, the Collateral Agent and the related Lender or Lenders.

(a) The Department shall promptly provide the Collateral Agent with a copy of any notice it sends to the Concessionaire concerning a potential breach of this Agreement or a Concessionaire Default.

(b) The Financing Assignments may provide that while the Financing Assignments are in existence the Concessionaire shall not agree to any modification of or amendment to this Agreement that in any way could have a material adverse effect on the rights or interests of the Lender(s) under such Financing Assignments or to any voluntary surrender or termination of this Agreement, in each case, without the Collateral Agent's consent, which shall not be unreasonably withheld or delayed, except if such modification or amendment is required by Law. Such consent shall be deemed to have been given in the event the Collateral Agent fails to respond within 30 days of delivery of a request for consent if the request states that such deemed consent will be given at the end of such time period. Such restrictions shall not affect the Department's rights to amend this Agreement as specifically set forth in this Agreement.

Section 7.05 Collateral Agent's Right to Cure.

As long as any Financing Assignment of record created in accordance with this Article 7 shall remain unsatisfied and the Department has received the notices and documents specified in Section 7.03(f), the following provisions shall apply with respect to any such Financing Assignment and the related Lender or Lenders.

(a) Should any event or condition occur which would either immediately or, following the applicable cure period or the giving of notice or both, enable the Department to terminate or suspend its obligations under this Agreement (a "Termination Event"), the Department shall not terminate this Agreement until it first gives written notice of such Termination Event to the Collateral Agent, and provides the Collateral Agent a reasonable opportunity to cure such Termination Event, as provided below:

(i) If such Termination Event results from the Concessionaire's failure to pay a monetary obligation, the Collateral Agent may cure such Termination Event by paying all amounts due within 30 days (such 30-day period to be in addition to any cure period provided to the Concessionaire herein) after receipt of written notice thereof from the Department to the Collateral Agent.

(ii) If such Termination Event results from other than the Concessionaire's failure to pay a monetary obligation, and is not a failure to achieve Substantial Completion by the Guaranteed Substantial Completion Date or Outside Substantial Completion Date, the Collateral Agent may, within 45 days (such 45-day period to be in addition to any cure period provided to the Concessionaire herein) after receipt of written notice thereof from

the Department to the Collateral Agent, remedy such Termination Event or cause the same to be remedied by an entity to be designated by the Collateral Agent reasonably acceptable to the Department; *provided*, that if the Termination Event is such that it cannot be remedied within such 45-day period despite the exercise of diligent efforts commencing promptly after delivery of the written notice of the Termination Event, or if possession is necessary in order to effect such cure, such 45-day period shall be extended if the Collateral Agent shall have commenced a cure within such period or shall have commenced the appropriate legal or other action to foreclose the Liens of the relevant Financing Assignment so as to take possession of the Concessionaire's Interest and shall thereafter diligently continue to pursue such remedy to completion, but in all events the cure period shall be not more than 180 days after written notice is provided pursuant to this Section 7.05(a); *provided, further*, that any failure to effect such cure within such 180-day period where possession is necessary in order to do so and the Collateral Agent has diligently taken the foregoing actions shall not limit the rights of the Collateral Agent and the Lenders to New Agreements as provided in Section 7.06(e).

(iii) If the Termination Event is an insolvency, bankruptcy or a similar proceeding with respect to the Concessionaire, or liquidation of the Concessionaire or its properties, then the Department shall have the right to terminate this Agreement without providing a cure period to any Lender, and the Lenders shall be entitled to New Agreements as provided in Section 7.06(e).

(iv) If the Concessionaire fails to achieve Substantial Completion by the Guaranteed Substantial Completion Date, as the same may be extended pursuant to this Agreement, then the Collateral Agent shall have until the Outside Substantial Completion Date, as the same may be extended pursuant to this Agreement, to achieve or cause the Concessionaire to achieve Substantial Completion. If the Termination Event is failure to achieve Substantial Completion by the Outside Substantial Completion Date, as the same may be extended pursuant to this Agreement, then such failure shall constitute a material Concessionaire Default and the Department may proceed to terminate this Agreement and the Project Agreements to which it is a party without further notice to, or opportunity to cure by, the Collateral Agent or any other Lender.

(v) If the Collateral Agent is prohibited by any process, stay or injunction issued by any court, the time specified above for curing any Termination Event shall be extended for the period of such prohibition, but not in excess of 180 days. The foregoing shall not apply to or result in any cure period or extension of cure period in connection with Section 7.05(a)(iii) or (iv).

(b) If the Collateral Agent's right to cure a Termination Event has not expired, and the Collateral Agent is acting to cure such Termination Event in accordance with this Section 7.05, then the Department shall not exercise its right to terminate this Agreement by reason of such Termination Event. In furtherance of the foregoing, the Department shall permit the Collateral Agent and its Substituted Concessionaire the same access to the Project as is permitted

to the Concessionaire hereunder. The Department shall accept any such performance by the Collateral Agent as though the same had been done or performed by the Concessionaire.

(c) Any payment to be made or action to be taken by the Collateral Agent hereunder as a prerequisite to keeping this Agreement in effect shall be deemed properly to have been made or taken by the Collateral Agent if such payment is made or action is taken by a Substituted Concessionaire approved by the Department. The Department's approval of a proposed Substituted Concessionaire may be withheld only if the Department reasonably determines that the proposed Substituted Concessionaire does not have the financial resources, qualifications or experience to timely perform the Concessionaire's obligations under this Agreement and the other Project Agreements. To be qualified, the proposed Substituted Concessionaire and its Affiliates (i) shall not then be debarred or prohibited from participating in state or federally-funded projects, (ii) shall not have been indicted, convicted, pled guilty or *nolo contendere* to a violation of Law involving fraud, conspiracy, collusion, bribery, perjury, material misrepresentation, or any other violation that shows a similar lack of moral or ethical integrity, and (iii) shall not then be barred or restricted from owning or operating the Project under applicable Law, including the Foreign Investment and National Security Act of 2007, 50 USC App. 2170 (HR556). The Department will approve or disapprove a proposed Substituted Concessionaire within 30 days after it receives from the Collateral Agent a request for approval together with such information, evidence and supporting documentation concerning the financial resources, qualifications and experience of the proposed Substituted Concessionaire as the Department may request in good faith.

(d) Any curing of any Termination Event by the Collateral Agent shall not be construed as an assumption by the Collateral Agent of any obligations, covenants or agreements of the Concessionaire under any Project Agreement, except with respect to the work, services or actions taken or performed by or on behalf of the Collateral Agent.

(e) Notwithstanding the foregoing provisions of this Section 7.05, nothing in this Section 7.05 shall preclude or delay the Department from exercising (i) any remedies for a Concessionaire Default, other than termination of this Agreement, or (ii) its right to terminate this Agreement for failure of the Concessionaire to achieve Substantial Completion by the Outside Substantial Completion Date, as it may be extended pursuant to this Agreement.

Section 7.06 Other Rights of Collateral Agent.

(a) The Collateral Agent may exercise its rights and remedies under a Financing Assignment with respect to the Concessionaire's Interest. The exercise by the Collateral Agent of its rights with respect to any Project Agreement under the Financing Assignment, whether by judicial proceedings or by virtue of any power contained in the Financing Assignment or this Agreement, or by any transfer from the Concessionaire to the Collateral Agent in lieu of foreclosure, shall not require the consent of the Department or constitute a breach of any provision of or a default under this Agreement or any other Project Agreement.

(b) Upon any transfer of all the Concessionaire's Interest pursuant to the exercise of remedies of the Collateral Agent under a Financing Assignment, whether through foreclosure or transfer in lieu of foreclosure, or upon a final determination by a court of competent jurisdiction that the Collateral Agent has become a mortgage-in-possession, the following provisions will apply:

(i) The Collateral Agent or Substituted Concessionaire, as transferee, shall succeed to all the Concessionaire's Interest, subject to all rights and remedies of the Department under this Agreement and the other Project Agreements, and shall be obligated to pay and perform or cause to be paid and performed in a professional and competent manner all the corresponding terms and conditions of this Agreement applicable after the date of such transfer and shall cure any outstanding defaults hereunder and under any other Project Agreements, it being understood that such transferee shall not be required to cure any non-monetary default that by its nature is not capable of cure by an entity other than the Concessionaire, including the bankruptcy or insolvency of the Concessionaire.

(ii) The Collateral Agent or a Substituted Concessionaire, as transferee, will acquire the entire Concessionaire's Interest, and will succeed to all of the right, title and interest and obligations of the Concessionaire thereunder and may thereafter perform as if it were the Concessionaire under the Project Agreements, subject to all rights and remedies of the Department under this Agreement and the other Project Agreements.

(iii) Once the Collateral Agent transfers ownership of the entire Concessionaire's Interest to a Substituted Concessionaire in accordance with the provisions of this Agreement, the Collateral Agent shall cease to be liable for any of the Concessionaire's obligations under this Agreement accruing thereafter.

(c) Nothing in this Section 7.06 shall limit the Collateral Agent's step-in rights (or similar right to take from the Concessionaire temporary possession of the Project) under the Financing Assignment and related documents; *provided* that if at the time the Collateral Agent exercises such right Department has not declared a Concessionaire Default of a type that requires possession of the Project in order to cure, then any such step-in right shall not be exercised for longer than a 180-day period without the Department's reasonable written consent; and, *provided further*, that for the avoidance of doubt, the Collateral Agent's step-in or similar rights are conditioned, however, on compliance of the Financing Assignment with Section 7.03 and are subject to Section 14.03 and Article 21.

(d) The exercise by the Collateral Agent of its rights with respect to any Project Agreement under the Financing Assignment, whether by judicial proceedings or by virtue of any power contained in the Financing Assignment or this Agreement, or by any conveyance from the Concessionaire to the Collateral Agent in lieu of foreclosure, shall not require the consent of the Department or constitute a breach of any provision of or a default under this Agreement or any other Project Agreement.

(e) Without prejudice to the cure rights of a Collateral Agent under Section 7.05, if a trustee or person exercising the powers of trustee in any bankruptcy, insolvency or similar proceeding with respect to the Concessionaire rejects or disaffirms this Agreement, and if the Collateral Agent satisfies all the conditions precedent set forth below, then the Department will terminate this Agreement and execute and deliver to the Collateral Agent or its Substituted Concessionaire a new comprehensive agreement and, if necessary, a new development contract (together the “New Agreements”). In addition, if a Termination Event occurs that cannot be cured by the Collateral Agent without having possession of the Project, if the Department terminates this Agreement by reason of such Termination Event after expiration, without cure, of the maximum 180-day period set forth in Section 7.05(a)(ii), and if the Collateral Agent satisfies all the conditions precedent set forth below, the Department will execute and deliver to the Collateral Agent or its Substituted Concessionaire the New Agreements. The New Agreements shall run for the remainder of the Term of this Agreement and the original Development Contract, if any. The New Agreements shall otherwise contain the same covenants, terms and conditions and limitations as this Agreement and any Development Contract (except for any requirements which have been fulfilled by the Concessionaire or its successors prior to termination and except that Sections 24.02 and 26.05(a) shall be revised to be particular to the Collateral Agent or its Substituted Concessionaire). The right of the Collateral Agent (or its Substituted Concessionaire) to the New Agreements is subject to its satisfaction of the following conditions precedent:

(i) The Collateral Agent (or its Substituted Concessionaire) delivers to the Department, within 30 days after the effective date of such rejection or disaffirmation, or within 30 days after the Department’s termination following the lapse of the 180-day period, as applicable, a written request for and commitment to enter into the New Agreements, and two sets of such New Agreements, duly executed and acknowledged by the Collateral Agent (or its Substituted Concessionaire);

(ii) The Collateral Agent (or its Substituted Concessionaire) pays or causes to be paid to the Department, at the time of the Department’s execution and delivery of the New Agreements, all amounts which, at the time of the execution and delivery thereof, would have been past-due or due and payable in accordance with the provisions of this Agreement or the Development Contract but for such termination;

(iii) Provided the Department furnishes a statement or invoice for such costs, the Collateral Agent (or its Substituted Concessionaire) pays or causes to be paid to the Department all reasonable costs and expenses (including legal fees, expert witness fees, court costs and disbursements), taxes, fees, charges and other sums paid or incurred by the Department in connection with such defaults and termination, the recovery of possession from the Concessionaire, and in connection with the preparation, execution and delivery of the New Agreements and related agreements and documents specified in such statement or invoice, including all reasonable costs and expenses paid or incurred by the Department to manage, design, permit, build, construct, equip, install, operate, maintain, repair and insure the Project since cessation of the Concessionaire’s performance of such duties; and

(iv) The Collateral Agent (or its Substituted Concessionaire), at the time of such written request, cures all then-existing defaults under this Agreement and any Development Contract curable by the payment of money, or, if such defaults cannot be cured by the payment of money, the Collateral Agent (or its Substituted Concessionaire) commits to the Department in the written commitment delivered under clause (i) above, without qualification or condition, to complete cure of all such other defaults promptly and diligently after execution of the New Agreements and receipt of possession of the Project, and in any event not later than 120 days after the date it obtains possession.

The provisions of this Section 7.06(e) shall survive the termination of this Agreement and shall continue in full force and effect thereafter to the same extent as if this Section were a separate and independent contract made by the Department and the Lender or Collateral Agent.

(f) The Department shall give the Collateral Agent notice of any condemnation proceedings against the Department or the Concessionaire affecting the Project. The Collateral Agent shall have the right to intervene and be made a party to any such condemnation proceedings, and the Department and the Concessionaire do hereby consent that the Collateral Agent may be made such party or an intervener.

(g) If the Collateral Agent, on behalf of holders of more than one Financing Assignment, shall make written requests upon the Department for New Agreements in accordance with Section 7.06(e), the Department shall grant the New Agreements to, as applicable, the holder whose Financing Assignment was the earliest to be recorded or filed (unless otherwise agreed in writing by such holder); and thereupon the written requests of each holder whose Financing Assignment was recorded or filed later shall be deemed to be void.

Section 7.07 Refinancing Requirements.

(a) Notice of Refinancing.

(i) The Concessionaire shall provide to the Department written notice of any proposed Refinancing at least 75 days prior to the proposed date for closing the Refinancing.

(ii) The Concessionaire shall provide to the Department concurrently with such written notice full details of the proposed Refinancing, including details of any material changes in the Concessionaire's obligations (including, for the avoidance of doubt, contingent obligations) to the Lenders, and outline details of the changes and/or replacements, as the case may be, to the Initial Project Financing Agreements and Financing Assignments contemplated by the Refinancing.

(iii) The Concessionaire shall provide the Department the final proposed Project Financing Agreements and Financing Assignments in connection with the Refinancing promptly upon their receipt by the Concessionaire, and at least 30 days before the proposed date for closing the Refinancing.

(iv) For any Unplanned Refinancing, the Concessionaire shall also provide the Pre-Refinancing Model and Post-Refinancing Model at least 30 days before the proposed date for closing the Unplanned Refinancing.

(v) For any Unplanned Refinancing, the Concessionaire shall provide the Department with final executed copies and a final version of the Post-Refinancing Model adjusted to reflect the new Refinancing Payment and the targeted Equity IRR (final subject to Department review in accordance with Section 7.07(d)) within 30 days following closing on the Refinancing.

(b) Department Approval Rights for Refinancings. Any Refinancing of Concessionaire Debt shall be subject to the Department's prior approval, which approval shall not be unreasonably withheld or delayed; *provided*, that no such approval shall be required if the Concessionaire first demonstrates to the Department that either: (i) the proposed Refinancing is a Planned Refinancing, (ii) the proposed Refinancing refinances existing Concessionaire Debt and does not increase the principal amount of Concessionaire Debt then outstanding other than by an amount equal to reasonable costs of closing the Refinancing, including lender fees, and the amount of any required reserves, or (iii) the proposed Refinancing has been assigned a rating (which may include a non-public rating) by a Rating Agency (without regard to bond insurance, if any) which is no lower than BBB minus or Baa3 or equivalent rating; and no portion of the proceeds of the Refinancing will be used to make Distributions or to pay non-capital costs and expenses (other than related costs of issuance and any required reserves). With respect to any proposed Refinancing for which the Department's approval is required, the Department shall not unreasonably withhold or delay its consent. Without limiting other reasonable grounds for withholding consent, the Department may withhold consent if it reasonably determines that:

(A) the information disclosed to it is not a true and complete disclosure of all relevant aspects of the Refinancing;

(B) any change or series of changes in the obligations of the Concessionaire due to the Refinancing would or reasonably could be expected to result in a material increase in the Department's liabilities, obligations or risks; or

(C) the Refinancing would have or reasonably could be expected to have a material adverse effect on the ability of the Concessionaire to perform its obligations under this Agreement and the other Project Agreements.

(c) Other Requirements.

(i) Every Refinancing shall be subject to the provisions of Sections 7.01 and 7.03 and the other provisions of this Agreement pertaining to Concessionaire Debt and Financing Assignments.

(ii) Any reimbursement agreement and related documents that the Concessionaire enters into in connection with obtaining a letter of credit shall, if they

encumber the Concessionaire's Interest, constitute a Financing Assignment and be treated as a Refinancing for all purposes under this Agreement. No such reimbursement agreement and related documents shall encumber less than the entire Concessionaire's Interest.

(iii) In connection with the consummation of any proposed Refinancing, the Department shall, promptly upon the reasonable request of the Concessionaire or the Collateral Agent or any Lender and such requesting party's agreement to cover any costs incurred by the Department in connection with the requested action, review the Concessionaire's written analysis of whether the Department is required to approve such Refinancing and confirm whether the Department believes its approval is required for such Refinancing.

(iv) If the Department renders any assistance or performs any requested activity in connection with the Refinancing, then the Concessionaire shall reimburse the Department for all reasonable costs and expenses incurred by the Department in connection with such assistance or activity, at the time of the closing of the Refinancing transaction.

(d) Refinancing and PVR Discount Rate Adjustment.

(i) At least 30 days prior to any Refinancing the Concessionaire will prepare and submit: (A) a Pre-Refinancing Model demonstrating the Pre-Refinancing Equity IRR; and (B) a Post-Refinancing Model that can easily and accurately be solved to adjust the Post-Refinancing Equity IRR by incorporating a Refinancing Payment. At least 30 days after any Refinancing, the Concessionaire will provide the Department with the final version of the Post-Refinancing Model. The Department and its authorized Representatives shall have the right to fully audit these models and verify all inputs and calculations and/or to request that the Concessionaire have an independent audit conducted and provided to the Department before and/or after the proposed Refinancing, and, if warranted, to require adjustments to such models and/or the Refinancing Payment as applicable.

(ii) The Pre-Refinancing Equity IRR shall be determined by solving the Pre-Refinancing Model for the Equity IRR, while keeping the PVR Discount Rate and Maximum PVR constant.

(iii) The Post-Refinancing Equity IRR shall be determined by solving the base case of the Post-Refinancing Model for the Equity IRR, while keeping the PVR Discount Rate and Maximum PVR constant.

(iv) If the Post-Refinancing Equity IRR is less than or equal to the Pre-Refinancing Equity IRR, no adjustment will be made to the PVR Discount Rate and no Refinancing Payment will be required.

(v) If the Post-Refinancing Equity IRR is greater than the Pre-Refinancing Equity IRR, the Refinancing Payment will be incorporated into the financial analysis and adjusted follows: (A) first, a targeted Equity IRR shall be calculated as the mean of the Post-Refinancing Equity IRR and Pre-Refinancing Equity IRR, (B) then the Post-Refinancing Model shall be solved for the lowest possible Refinancing Payment that lowers the value of the model's Equity IRR to the targeted Equity IRR, while again holding all other aspects of the model constant.

(vi) No Refinancing Payment will be required if: (A) the Refinancing is solely undertaken to mitigate the effects of a Compensation Event or Force Majeure Event; and (B) the offsetting benefits of any improvements in the Weighted Average Cost of Debt are taken into account when calculating the Concessionaire Damages and/or Net Cost Impact as applicable, and such offsetting benefits do not result in a net increase in the Equity IRR despite the Compensation Event or Force Majeure Event, in which case there shall be a pro rata adjustment downward in the PVR Discount Rate.

Section 7.08 Consents and Estoppel Certificates.

(a) At any time and from time to time, within 15 days after written request of any Lender or proposed Lender, the Department, without charge, shall (1) consent to (A) the exercise by any Lender of its rights under and in accordance with this Article 7 in the event of a Concessionaire Default and (B) a pledge and hypothecation by the Concessionaire of the Concessionaire's Interest to any Lender or proposed Lender and (2) certify to its best knowledge by written instrument duly executed and acknowledged, to any Lender or proposed Lender as follows:

(i) As to whether this Agreement has been supplemented or amended, and if so, the substance and manner of such supplement or amendment, attaching a copy thereof to such certificate;

(ii) As to the validity and force and effect of this Agreement, in accordance with its terms;

(iii) As to the existence of any Concessionaire Default;

(iv) As to the existence of events which, by the passage of time or notice or both, would constitute a Concessionaire Default;

(v) As to then accumulated amount of Performance Points, cured and uncured;

(vi) As to the existence of any Claims by the Department regarding this Agreement;

(vii) As to the Agreement Date;

(viii) As to the PVR Discount Rate and PVR that the Concessionaire has most recently reported to the Department;

(ix) As to whether a specified acceptance, approval or consent of the Department called for under this Agreement has been granted;

(x) Whether the Lender and its Concessionaire Debt and Financing Assignments, or the proposed Lender and its proposed Concessionaire Debt and Financing Assignments, meet the conditions and limitations set forth in Sections 7.01 and 7.03; and

(xi) As to any other matters of fact within the Department's knowledge about the Agreement, Project Agreement to which the Department is a party, the Concessionaire, the Project or the Work as may be reasonably requested.

(b) The Department shall deliver the same certified, written instrument to a Substituted Concessionaire or proposed Substituted Concessionaire within 15 days after receiving its written request, provided that the request is delivered to the Department either before the Substituted Concessionaire or proposed Substituted Concessionaire succeeds to the Concessionaire's Interest or within 60 days after the Substituted Concessionaire has succeeded to the Concessionaire's Interest.

(c) Any such certificate may be relied upon by, and only by, the Lender, proposed Lender, Substituted Concessionaire or proposed Substituted Concessionaire to whom the same may be delivered, and the contents of such certificate shall be binding on the Department.

Section 7.09 Committed Investment.

The Concessionaire shall cause its Equity Members to make cash deposits with the Concessionaire totaling, in the aggregate, at least the Committed Investment, as identified in the Initial Base Case Financial Model, no later than one year after the scheduled date for Final Acceptance as set forth in the Initial Baseline Schedule. The Concessionaire shall deliver proof of such deposits in a form reasonably satisfactory to the Department.

Section 7.10 Limitation on Beneficiaries.

Notwithstanding anything contained herein to the contrary, the provisions of this Article 7 that are binding on the Department shall inure only to the benefit of the Lenders who qualify for such benefits and create no rights in favor of the Concessionaire, except that: (a) the provisions of Section 7.08 also inure to the benefit of a Substituted Concessionaires or proposed Substituted Concessionaire to the extent set forth in Section 7.08(b), and (b) the provisions of Sections 7.02, 7.03, 7.07 and 7.09 inure to the benefit and create rights in favor of, and are binding upon, the Concessionaire.

ARTICLE 8.

DESIGN AND CONSTRUCTION OF THE PROJECT

Section 8.01 General Obligations of the Concessionaire.

(a) The Concessionaire shall furnish or cause to be furnished all design, construction and other services, provide or cause to be provided all materials, equipment and labor and undertake all efforts necessary or appropriate (excluding those services and efforts which this Agreement specifies will be undertaken by the Department) to perform the Work during the Work Period reasonably inferable from this Agreement and the Project Agreements, including the Technical Requirements.

(b) The Department makes no warranties or representations as to any surveys, data, reports or other information provided by the Department or other Persons, concerning surface or subsurface conditions, including the presence of Utilities, Hazardous Substances, contaminated groundwater, archeological, paleontological and cultural resources, and endangered and threatened species, affecting the Project Right of Way or surrounding locations. The Concessionaire acknowledges that such information is for the Concessionaire's reference only and has not been verified by the Department, and that the Concessionaire shall need to conduct all surveys, studies and assessments as it deems appropriate for the Project.

(c) Except as expressly provided otherwise in this Agreement, the Concessionaire shall bear the risk of all conditions occurring on, under or about the Project Right of Way, including (i) physical conditions of an unusual nature that differ materially from those ordinarily encountered in the area, (ii) changes in surface topography, (iii) variations in subsurface moisture content, (iv) Utility facilities, (v) the presence or discovery of Hazardous Substances, including contaminated groundwater, (vi) the discovery at, near or on the Project Right of Way of any archeological, paleontological or cultural resources, and (vii) the discovery at, near or on the Project Right of Way of any species listed as threatened or endangered under federal or State endangered species Law.

(d) The Concessionaire shall be responsible for coordinating and scheduling the Work with other separate contractors working in the Project Right of Way, and the Department shall not be liable for any delays, disruptions or damages caused by such contractors.

(e) The Concessionaire shall be responsible for any damage to the Work or the Project and any fines or penalties assessed by any Governmental Authorities caused by the failure of any Concessionaire Party to comply with the requirements of this Agreement and applicable Law.

(f) The Concessionaire shall achieve Substantial Completion not later than [insert time from the Concessionaire's Detailed Proposal], subject only to the extensions permitted by Section 13.01 for Delay Events during the Work Period (the "Guaranteed Substantial Completion Date").

(g) Within 90 days following the issuance of the Substantial Completion Certificate, the Concessionaire shall perform all remaining Work required for Final Acceptance as provided in Section 8.11(b).

Section 8.02 Conditions Precedent to Work.

(a) Conditions Precedent to Commencement of Design Work. The Concessionaire shall not commence any design Work unless and until the Department determines that the following conditions have been satisfied (or that the Department will waive such conditions) and has delivered notice to that effect to the Concessionaire (such notice being referred to as the “Design Work Commencement Approval”):

(i) the Concessionaire shall have delivered to the Department and obtained its approval of the schedule of submissions described in Section 8.05(a);

(ii) the Department has approved the following Project Development Plans: (A) Concessionaire Management Plan; (B) Document Management Plan; (C) Quality Management System Plan; (D) Design Management Plan; (E) Public Information and Communication Plan; and (F) DBE/SWAM Plan;

(iii) there exists no court order which restrains, enjoins, challenges or delays performance of the Work;

(iv) the Concessionaire certifies to the Department that all representations and warranties of the Concessionaire set forth in Section 24.02 remain true in all material respects;

(v) All insurance policies required under Section 18.01 for the Work Period, except with respect to the builder’s risk insurance, have been obtained and shall be in full force and effect, and the Concessionaire has delivered to the Department duplicate originals or copies thereof certified by the Concessionaire’s insurance broker to be true and correct copies of the originals; and

(vi) there exists no Concessionaire Default for which the Concessionaire has received notice from the Department, and the Concessionaire certifies to the Department that there exists no condition, which with the lapse of time or delivery of notice to the Concessionaire, or both, would constitute a Concessionaire Default; and

(vii) if Financial Close has not yet been achieved, the Financial Close Security shall remain in effect; if Financial Close has been achieved, the Concessionaire shall have delivered the documentation of the Performance Security and the Performance Security shall remain in effect in compliance with Section 8.13.

The delivery of Design Work Commencement Approval shall not constitute authorization to commence construction activities.

(b) Conditions Precedent to Commencement of Construction. In addition to the conditions set forth in Section 8.02(a), the Concessionaire shall not commence construction of any Construction Segment unless and until the Department determines that the following conditions have been satisfied (or that the Department will waive such conditions) and has delivered notice to that effect to the Concessionaire (such notice being referred to as the “Construction Segment Approval”):

(i) the Concessionaire has delivered to the Department correct and complete copies of all Design Public Hearing Documentation, ETTM System Design Documentation, and Construction Documentation relating to the applicable Construction Segment pursuant to the Agreement and Technical Requirements, and the Concessionaire has received from the Department any prior written approvals thereof required by this Agreement and Federal Requirements;

(ii) all Governmental Approvals (including any applicable Department approvals and federal approvals and agreements) necessary for the construction of the applicable Construction Segment have been acquired (and copies provided to the Department), and the Concessionaire has satisfied all applicable pre-construction requirements of the Governmental Approvals;

(iii) all rights of access or other property rights necessary for the commencement of construction within the applicable portion of a Construction Segment have been obtained;

(iv) Either the Financial Close Security or the Performance Security, whichever is then required to be in effect, shall remain in effect;

(v) the Department has approved the following: (A) Baseline Schedule; (B) Construction Management Plan; (C) Transportation Management Plan; (D) Environmental Management Plan; (E) ROW Acquisition and Relocation Plan; (F) Health, Safety and Security Plan; and (G) Utilities Plan; and

(vi) The builder’s risk insurance policy required under Section 18.01(a)(vii) has been obtained and shall be in full force and effect, and the Concessionaire has delivered to the Department a duplicate original or copy thereof certified by the Concessionaire’s insurance broker to be a true and correct copy of the original.

Section 8.03 Issuance of Design Work Commencement or Construction Segment Approvals.

(a) The Concessionaire shall deliver notice to the Department upon the satisfaction of the applicable conditions set forth in Section 8.02 and request that the Department issue a Design Work Commencement Approval or Construction Segment Approval, as applicable, for such Work. The Department shall endeavor to respond to such request, within 21 days following delivery of such request to the Department, by delivery to the Concessionaire of either the

requested Design Work Commencement Approval or Construction Segment Approval, as applicable, or notice of the conditions that the Department believes to be lacking. If the Concessionaire has not received a response within such 21-day period, such failure by the Department to respond shall be deemed a waiver of the Concessionaire's obligation to obtain the Department's approval of such request, but shall not be deemed a waiver of the other conditions set forth in Section 8.02, including compliance with the Technical Requirements, Governmental Approvals and applicable Law.

(b) Upon receipt (or deemed waiver) of the Design Work Commencement Approval or Construction Segment Approval, as applicable, the Concessionaire shall promptly begin and diligently pursue the applicable portion of the Work so as to achieve Substantial Completion on or before the Guaranteed Substantial Completion Date and to achieve Final Acceptance on or before 90 days following issuance of the Substantial Completion Certificate.

(c) All the conditions precedent set forth in Section 8.02 are for the sole benefit of the Department. The Department may waive any condition precedent; *provided*, that no person or entity shall be entitled to assume that the Department will waive or refuse to waive any condition precedent in the absence of strict compliance therewith. Unless the Department waives in writing (as distinguished from a deemed waiver) a condition precedent that requires action by the Concessionaire to be satisfied, the Concessionaire shall remain bound to use diligent efforts to satisfy the condition precedent.

Section 8.04 Design-Build Contract and Amendments.

The Concessionaire shall provide the Department a true and complete copy of the Design-Build Contract and with notice and true and complete copies of all proposed and executed Design-Build Contract change orders, amendments, modifications or replacements. The Concessionaire shall deliver to the Department such copies of the Design-Build Contract and such notices and copies of other executed documents within ten days after execution. The Concessionaire shall deliver to the Department such notices and copies of such proposed documents within five days after delivering or receiving the same.

Section 8.05 Project Design and Construction Documentation.

(a) The Concessionaire shall submit to the Department accurate and complete copies of all Design Public Hearing Documentation and Construction Documentation relating to the Work. The Concessionaire shall make such submittals in accordance with a schedule of submissions to be provided to the Department within 30 days after the Agreement Date and updated periodically as necessary, so as to facilitate the Department's coordination and review of such documents.

(b) Pursuant to the schedule of submissions provided under Section 8.05(a), the Concessionaire shall provide the Department the following interim design submissions for approval: (i) Design Public Hearing Documentation; (ii) Design Documentation for field inspection and right-of-way ("FI/RW"); and (iii) Construction Documentation issued for construction in accordance with the Technical Requirements.

(c) The Concessionaire shall complete quality assurance reviews of all Design Public Hearing Documentation, Design Documentation and Construction Documentation before such submittals are provided to the Department to ensure the submittals are accurate and complete and comply with the requirements of this Agreement, including the Technical Requirements, Governmental Approvals and applicable Law. In the event that the Department determines that the Design Public Hearing Documentation or Construction Documentation is not in compliance in any respect, the Department shall be entitled to cease all further review of such documentation and within the time provided below shall notify the Concessionaire that such documentation is not in compliance. Whenever the Department is entitled to prior review and comment on or affirmative approval of the Design Public Hearing Documentation and Construction Documentation and other items submitted in accordance with this Agreement or the Technical Requirements, the Department shall respond within 21 days after the Department's acknowledgement of receipt or such later date as may be specified by the Technical Requirements. In the event that the Department fails to respond in such time, such failure by the Department to respond (i) shall not constitute a Department Default or approval, and (ii) shall constitute a waiver of the Concessionaire's obligation to obtain prior approval of the applicable submission. If the Department has responded, the Concessionaire shall respond to all of the Department's comments and objections and, to the extent Department approval is required pursuant hereto, make modifications to the Design Public Hearing Documentation and

Construction Documentation necessary to fully reflect and resolve all such comments and objections, and resubmit such documentation to the Department for its review and approval in accordance with the foregoing procedures.

(d) Section 8.05(c) shall not apply to the Department's approval of the Concessionaire's Right of Way Acquisition and Relocation Plan, Deviations pursuant to Section 8.10, or any other matter where the Department has sole discretion to approve or disapprove under this Agreement. Any failure of the Department to respond to the Concessionaire regarding the Department's approval of such documents or matters within 21 days after delivery of the Concessionaire's request to the Department shall be deemed disapproval by the Department.

(e) On or about the time of the scheduled submissions that require Department review and comment or approval, the Concessionaire shall meet with the Department and shall identify during such meetings, among other things, the evolution of the design and any significant Deviations or other changes from the Technical Requirements, or, if applicable, previous design submissions. Minutes of the meetings will be maintained by the Concessionaire and provided to all attendees for review.

(f) Construction Documentation shall set forth in detail drawings and specifications describing the requirements for construction of the Work, in full compliance with the Technical Requirements, Governmental Approvals, and applicable Law. The Construction Documentation shall be consistent with the latest set of interim design submissions; as such submissions may have been modified in a design review meeting, as agreed upon in writing, and shall be submitted after Concessionaire has obtained all requisite Governmental Approvals associated with the Work contained in such documents. Concessionaire shall proceed with construction in accordance with the approved Construction Documentation, the Technical Requirements, Governmental Approvals and applicable Law.

(g) Following the Department's initial approval pursuant to this Section, the Concessionaire shall have the right to amend, supplement or otherwise modify the Design Public Hearing Documentation, Design Documentation or the Construction Documentation or any part thereof, without the further approval of the Department; *provided*, however, that the Department's approval shall be required with respect to amendments, supplements or modifications that: (i) constitute a change in the scope of the Work or Deviations from the Technical Requirements, or (ii) result in increases in the time to complete the Work beyond the Guaranteed Substantial Completion Date or (iii) except to the extent directly attributable to a Compensation Event, impose on the Department any new or increased costs, liabilities or obligations. The Concessionaire shall provide the Department notice of all proposed amendments, supplements and amendments regardless of whether the Department's consent is required and shall reimburse the Department, upon demand, for all the Allocable Costs it incurs to review and consider proposed amendments, supplements or modifications that are subject to the Department's review and comment or approval.

Section 8.06 Construction Management and Coordination.

(a) The Initial Baseline Schedule attached as Exhibit B-2 shall be the basis for monitoring the Concessionaire's performance of the Work until such time as a Baseline Schedule has been submitted to and approved by the Department in accordance with the Technical Requirements. The Baseline Schedule shall provide for a Guaranteed Substantial Completion Date consistent with Section 8.01(f). In the event that the Concessionaire fails to provide to the Department an approved Baseline Schedule pursuant to this Section, the Department shall be entitled to withhold any and all Construction Segment Approvals pursuant to Section 8.02(b).

(b) As part of, and in conjunction with, the monthly meetings required under the Technical Requirements, the Concessionaire shall provide the Department with any proposed update of the Baseline Schedule in accordance with the Technical Requirements.

(c) The Concessionaire shall, whenever required by the Department, provide in writing a general description of the arrangements and methods that the Concessionaire proposes to adopt for the execution of the Work. No significant alteration to the Baseline Schedule, or to such arrangements and methods, shall be made without informing the Department and any alterations made shall reflect the requirement for coordination of the Work with the actions and obligations of the Department and the work to be carried out by the Department's separate contractors, if any. If any alteration affects any such actions, obligations or work, it shall not be made without the prior approval of the Department.

(d) The parties further agree to abide by the terms and procedures set forth in the Technical Requirements pertaining to project management and coordination matters.

Section 8.07 Governmental Approvals and Third Party Agreements.

(a) The Concessionaire shall obtain and maintain in full force and effect (except as provided by Section 8.07(b)) and comply with all Governmental Approvals and third party approvals and agreements, necessary for the development, design, construction, management, operation and maintenance of the Project and any Project Enhancements throughout the Term, including those required in connection with a Compensation Event; *provided* that any Governmental Approvals necessitated by a Department Project Enhancement or Department Change shall be governed by the provisions of Section 12.02 or 14.03, as applicable. The Concessionaire shall deliver to the Department true and complete copies of all new or amended Governmental Approvals and third party approvals and agreements promptly upon receipt of the same.

(b) The Department obtained FHWA approval of the Final Environmental Impact Study ("FEIS") on June 6, 2008, and the Record of Decision ("ROD") on September 12, 2008, related to the Project (the FEIS and ROD, hereinafter referred to as the "NEPA Documents"). The Concessionaire shall be responsible for compliance with all aspects and conditions of the NEPA Documents applicable to the Project scope.

(c) In the event the Concessionaire's design differs from the schematic upon which the NEPA Documents were based, including differences due to any Alternative Technical Concepts ("ATCs") approved by the Department as described in Exhibit B-4, as between the Department and the Concessionaire, the Concessionaire shall be fully responsible for all necessary actions, and shall bear all risk of delay and all risk of increased cost, resulting from or arising out of any associated change in the Project location and design, including (i) conducting all necessary environmental studies and preparing all necessary environmental documents in compliance with applicable Environmental Laws, (ii) obtaining and complying with all necessary new Governmental Approvals (including any modifications, renewals and extensions of the NEPA Documents and other existing Governmental Approvals), and (iii) bearing all risk and cost of litigation. Further, if the Concessionaire cannot satisfy any conditions of approval for an ATC, the Concessionaire shall be required to perform the Work as though it had not received approval of such ATC. The foregoing provisions shall not apply, however, in the case of a Department Change or Department Project Enhancement. The Department and FHWA will independently evaluate all environmental studies and documents and fulfill the other responsibilities assigned to them by 23 CFR Part 771.

(d) The Department shall provide reasonable assistance and cooperation to the Concessionaire, as requested by the Concessionaire, in obtaining Governmental Approvals relating to the Project or any Project Enhancements and any revisions, modifications, amendments, supplements, renewals, reevaluations and extensions of existing Governmental Approvals. The Concessionaire shall fully reimburse the Department for the Allocable Costs it incurs in providing such assistance and cooperation, including those incurred pursuant to Section 8.07(c) to conduct further or supplemental environmental studies and to fulfill the other responsibilities assigned to the Department by 23 CFR Part 771.

(e) The Concessionaire shall comply with all conditions imposed by and undertake all actions required by and all actions necessary to maintain in full force and effect all Governmental Approvals, including performance of all environmental mitigation measures required by the Technical Requirements, the NEPA Documents or Governmental Approvals.

(f) The Concessionaire shall not enter into any agreement with any Governmental Authority with jurisdiction over any Governmental Approval, Utility Owner, railroad, property owner or other third party having regulatory jurisdiction over any aspect of the Project or Work or having any property interest affected by the Project or the Work that in any way purports to obligate the Department, or states or implies that the Department has an obligation, to the third party to carry out any activity during or after the end of the Term, unless the Department otherwise approves in writing in its sole discretion. The Concessionaire has no power or authority to enter into any such agreement with a third party in the name or on behalf of the Department.

Section 8.08 Acquisition of Project Right of Way and Utility Relocations.

(a) The Concessionaire shall perform or cause to be performed all activities and services necessary for the acquisition of all Project Right of Way and Utility Relocations

necessary for the construction of the Project, including all appraisals, appraisal reviews, negotiations with landowners and utility owners, relocation assistance and advisory services, and legal services, in accordance with the Technical Requirements. Such activities and services, including the purchase price or administrative settlements for acquiring Project Right of Way, relocation benefits, and payments to Utility Owners, shall be at the Concessionaire's sole expense. All Project Right of Way shall be acquired in the name of the State.

(b) The Concessionaire shall use its best efforts to settle Claims with landowners amicably. If, despite the Concessionaire's best efforts, it is unable to reach a settlement with any landowners within a reasonable period of time, as a last resort, the Department will undertake any necessary condemnation proceedings in accordance with the Technical Requirements, provided that the Concessionaire shall reimburse the Department for all Allocable Costs incurred by the Department. The Department shall not be liable for any delays, disruptions or damages caused by any Utility Owner.

Section 8.09 Public Information.

Prior to and during the construction thereof, the Concessionaire will provide information to the public concerning the Project, any Project Enhancements or any other construction activities in accordance with the Technical Requirements.

Section 8.10 Concessionaire Requests for Deviations from Technical Requirements.

(a) The Concessionaire may request the Department to approve Deviations by submitting to the Department a written change request in a form approved by the Department. At a minimum, the following information shall be submitted with each such change request: (i) a statement that the request is submitted pursuant to this Section; (ii) a statement concerning the basis for the request, benefits to the Department and an itemization of the contract items and requirements affected by the request; (iii) a detailed estimate of the time and/or cost savings and impacts on Gross Revenues; (iv) proposed specifications and recommendations as to the manner in which the requested changes are to be accomplished; and (v) the time by which the request must be approved so as to obtain the maximum cost-effectiveness. The Department may consider and approve or disapprove, in its sole discretion, any such request, and the Concessionaire shall bear the burden of persuading the Department that the Deviation sought constitutes sound and safe engineering consistent with Good Industry Practice and achieves the Department's applicable safety standards and criteria. No Deviation shall exist or be effective unless and until approval thereof is expressly provided in writing by the Department. Approval of a submission containing a Deviation shall not constitute approval of the Deviation unless and until the Department expressly and specifically approves the Deviation in writing pursuant to the terms of this Section 8.10(a). The Department's decision shall not be subject to the dispute resolution procedures of Section 22.01.

(b) The Concessionaire shall be solely responsible for payment of any increased costs, for any losses of Gross Revenues, and for any schedule delays or other impacts resulting from the implementation of a Deviation that has been approved by the Department.

Section 8.11 Substantial Completion and Final Acceptance.

(a) Substantial Completion.

(i) The Department will issue a written certificate of Substantial Completion at such time as Substantial Completion occurs for the entire Project.

(ii) Substantial Completion shall occur upon satisfaction of the following criteria for the entire Project:

(A) All lanes of traffic (including ramps, interchanges, overpasses, underpasses, and other crossings) set forth in the Construction Documentation are in their final configuration and available for normal and safe use and operation;

(B) All major safety features are installed and functional, such major safety features to include shoulders, guard rails, striping and delineations, concrete traffic barriers, bridge railings, cable safety systems, metal beam guard fences, safety end treatments, terminal anchor sections and crash attenuators;

(C) All required illumination is installed and functional in accordance with the Technical Requirements;

(D) All required signs and signals are installed and functional in accordance with the Technical Requirements;

(E) The need for temporary traffic controls or for lane closures at any time has ceased (except for any then required for routine maintenance, and except for temporary lane closures during hours of low traffic volume in accordance with and as permitted by a Department-approved traffic management plan solely in order to complete Punch List items);

(F) The ETTM System is completed, has passed all demonstration and performance testing in accordance with the Construction Documentation and Technical Requirements, including demonstration of interoperability with the E-ZPass network or any successor to E-ZPass then utilized on State Highways, and is ready for normal operation;

(G) The TMS (if any) and safety features for TMS components are installed and functional; and

(H) The Concessionaire has otherwise completed the construction Work in accordance with this Agreement, including the Technical Requirements, and with the Construction Documentation, such that the Project is in a physical condition that it can be used for normal and safe vehicular travel in all lanes and at all points of entry and exit, subject only to Punch List items.

(iii) The Parties shall disregard the status of the landscaping and aesthetic features included in the Construction Documentation in determining whether Substantial Completion has occurred, except to the extent that its later completion will affect public safety or satisfaction of the criterion in Section 8.11(a)(ii).

(iv) The Concessionaire shall provide the Department and the Independent Engineer with written notice of anticipated Substantial Completion at least 21 days prior to the anticipated Substantial Completion Date. During such 21-day period, the Concessionaire, the Independent Engineer and the Department shall meet, confer and exchange information on a regular basis with the goal being the Department's orderly, timely inspection and review of the Project and final Construction Documentation and the Department's issuance of a Substantial Completion Certificate. In addition, the Independent Engineer shall conduct an inspection of the Project, the final Construction Documentation, and such other matters as may be necessary to determine whether Substantial Completion is achieved and, not later than five days following the expiration of such 21-day period, shall deliver a written report of findings and recommendations to the Department and the Concessionaire. The Department may jointly with the Independent Engineer or independently conduct such inspection, review and investigation within such period.

(v) Following its notice of anticipated Substantial Completion pursuant to Section 8.11(a)(iv), the Concessionaire shall deliver a subsequent notice to the Department and the Independent Engineer when the Concessionaire believes that it has achieved Substantial Completion.

(vi) If the Department disapproves the issuance of a Substantial Completion Certificate, then the Department shall provide a written notice to the Concessionaire specifying its reasons for such disapproval, and the Concessionaire shall have a reasonable opportunity to correct the defects or deficiencies in the Work to which the Department's disapproval relates. The Department may jointly with the Independent Engineer or independently inspect, review and investigate the Work and the corrective work. If the Department and the Concessionaire cannot, despite good faith efforts, agree as to Substantial Completion, such dispute shall be resolved in accordance with the dispute resolution procedures set forth in Section 22.01. The Concessionaire shall provide further notice to the Department if the Department has not approved or disapproved the issuance of a Substantial Completion Certificate within 21 days after delivery of the notice by the Concessionaire pursuant to Section 8.11(a)(v). If the Department has not notified the Concessionaire of such approval or disapproval within 15 days after such further

Concessionaire notice, and if the delay is not a result of a Concessionaire Party action or inaction, but is due solely to the negligence or bad faith of the Department, then a Substantial Completion Certificate shall be deemed to be issued upon expiration of such 15-day period, but shall not be deemed a waiver of the other conditions set forth in Section 8.11(a)(ii).

(vii) If the Department approves the issuance of a Substantial Completion Certificate, the Department shall provide with its Substantial Completion Certificate a Punch List of items to be completed to achieve Final Acceptance.

(b) Final Acceptance.

(i) The Concessionaire shall provide the Department and the Independent Engineer with written notification when it has determined that the following conditions to Final Acceptance have been satisfied: (A) all requirements for Substantial Completion have been satisfied; (B) all Punch List items have been completed and delivered; (C) the Concessionaire has delivered correct and complete copies of all as-built drawings of the Project to the Department; (D) all work that the Concessionaire is obligated to perform for or on behalf of third parties has been accepted by such third parties (other than disputed items); (E) the Concessionaire has paid for all work by third parties that the Concessionaire is obligated to pay (other than disputed amounts); (F) the Concessionaire has delivered to all necessary Governmental Authorities and to the Department all required certifications from the engineer of record and architect of record for the Project; (G) the Concessionaire has made all deliveries of Work Product to the Department that are then required to be made under this Agreement; and (H) all utilities have been identified and conflicts have been resolved and those utilities with compensable rights or other claims related to relocation or coordination with the Ultimate Configuration have been relocated and their claims and compensable rights have been satisfied or shall be satisfied by the Concessionaire.

(ii) During the 21-day period following delivery of such notice, the Concessionaire, the Department and the Independent Engineer shall meet, confer and exchange information with the goal being the Department's and the Independent Engineer's orderly, timely inspection of the Project and Final Acceptance by the Department in writing (such written acceptance the "Final Acceptance Certificate"), and the Independent Engineer shall conduct an inspection of the Punch List items, a review of the final drawings and such other investigation as may be necessary to evaluate whether the conditions to Final Acceptance have been satisfied. The Independent Engineer shall submit to the Department and the Concessionaire a report of its findings and recommendations prior to the expiration of such 21-day period. The Department may jointly with the Independent Engineer or independently conduct such inspection, review and investigation within such period.

(iii) Within five days following the expiration of such 21-day period and the Department's receipt of the Independent Engineer's report, the Department shall issue a

Final Acceptance Certificate or shall notify the Concessionaire why Final Acceptance has not been achieved; *provided*, that if the Department has failed to issue a Final Acceptance Certificate or to notify the Concessionaire why Final Acceptance had not been achieved within 21 days after the expiration of the 21-day period described in Section 8.11(b)(ii), a Final Acceptance Certificate shall be deemed to be issued. Deemed issuance shall not, however, excuse the Concessionaire from satisfying all the conditions set forth in Section 8.11(b)(i).

(iv) The Concessionaire shall prepare and adhere to a timetable for planting and establishing the vegetative ground cover landscaping, which timetable shall provide for vegetative ground cover landscaping to be planted and established by six months after Substantial Completion, subject to weather conditions affecting successful planting and growth.

(c) All the conditions precedent set forth in Sections 8.11(a) and (b) are for the sole benefit of the Department. The Department may waive any condition precedent; *provided*, that no person or entity shall be entitled to assume that the Department will waive or refuse to waive any condition precedent in the absence of strict compliance therewith. Unless the Department waives in writing a condition precedent that requires action by the Concessionaire to be satisfied, the Concessionaire shall remain bound to use diligent efforts to satisfy the condition precedent. The Department's issuance (or deemed issuance) of the Substantial Completion Certificate or Final Acceptance Certificate shall not constitute a waiver by the Department of any then-existing Concessionaire Default.

Section 8.12 Contractor Warranties; Defective Design and Construction.

(a) If and to the extent the Concessionaire obtains general or limited warranties from any Contractor in favor of the Concessionaire with respect to design, materials, workmanship, construction, equipment, tools, supplies, software or services, the Concessionaire also shall cause such warranty to be expressly extended to the Department and any third parties for whom Work is being performed or equipment, tools, supplies or software is being supplied by such Contractor; provided that the foregoing requirement shall not apply to standard, pre-specified manufacturer warranties of mass-marketed materials, products (including software products), equipment or supplies where the warranty cannot be extended to the Department using commercially reasonable efforts. The Department agrees to forebear from exercising remedies under any such warranty so long as the Concessionaire or a Lender is diligently pursuing remedies thereunder. To the extent that any Contractor warranty would be voided by reason of the Concessionaire's negligence or failure to properly incorporate material or equipment into the Work, the Concessionaire shall be responsible for correcting such defect.

(b) Contractor warranties are in addition to all rights and remedies available under this Agreement or applicable Law or in equity, including Claims against the Performance Security, and shall not limit the Concessionaire's liability or responsibility imposed by this Agreement or applicable Law or in equity with respect to the Work, including liability for

Nonconforming Work, design defects, patent and latent construction defects, strict liability, breach, negligence, willful misconduct or fraud.

(c) In the event of the occurrence of a defect or deficiency in the Work of design and construction, including in any materials and equipment furnished as part of the construction, and including any Nonconforming Work, the Department shall be entitled, in addition to any other remedies:

(i) to demand that the Concessionaire rectify such defect or deficiencies at its sole expense, it being understood that, in such event, the Concessionaire shall be permitted to draw on the Performance Security provided by the Concessionaire or any Contractor liable for such Work, to the extent of the cost of any work performed by the Concessionaire;

(ii) to suspend any affected portion of the Work of design and construction, by delivery of a written order to the Concessionaire, which order the Department shall lift after the Concessionaire fully cures or corrects such defects or deficiencies;

(iii) to rectify such defects or deficiencies itself and to obtain reimbursement of its Allocable Costs from the Concessionaire or, where the Contractor providing such Performance Security is liable for such Work from a draw on the Performance Security provided under Section 8.13; *provided*, however, that (A) the Department shall not seek reimbursement from the Concessionaire or such Performance Security unless it has requested rectification of, and the Concessionaire and Contractor have failed to promptly rectify, the defects or deficiencies, and (B) the Concessionaire shall be permitted to draw on the Performance Security provided by any Contractor liable for such Work to the extent of any amounts reimbursed by the Concessionaire; or

(iv) to seek performance or reimbursement pursuant to any applicable guaranty.

Section 8.13 Performance Security.

(a) Performance Security. The Concessionaire shall, as a condition precedent to Financial Close and commencement of Work pursuant to Section 8.02(a), obtain and deliver Performance Security in an amount equal to \$125 million securing the Concessionaire's obligation to design and construct the Project. Such Performance Security shall only be in the form of a letter of credit, substantially in compliance with Exhibit G. The Concessionaire shall maintain such Performance Security in effect until Final Acceptance of the Project and resolution of all Claims arising out of such Work during the Work Period. The Performance Security shall be subject to draw due to breach or failure to perform the Concessionaire's obligations respecting such Work during the Work Period. In the event of draws on the Performance Security, the amount of the Performance Security which the Concessionaire is required to maintain will be reduced by the cumulative amount of such draws.

(b) Alternate Performance Security. Alternately, the Concessionaire may elect to deliver a letter of credit that is Performance Security for each Design-Build Contractor's and each other prime Contractor's obligations to perform under their respective Contracts for the design and construction Work during the Work Period; and each such letter of credit shall be subject to draw due to the Contractor's breach or failure to perform such obligations. If the Concessionaire elects the alternate, the amount of each such letter of credit shall be in the same ratio to the total amount of Performance Security required under Section 8.13(a) as the relevant contract price bears to the total fixed price for the design and construction Work; provided that the aggregate face amount of such letters of credit must at least equal the amount set forth in Section 8.13(a). The provisions and requirements of Section 8.13(d) shall apply, except as permitted otherwise in Section 8.13(c) and except that the letter of credit shall expressly provide an original expiry date not earlier than six months after the Final Acceptance Date indicated in the Initial Baseline Schedule. If the Contractor is undertaking any warranty obligations under its Contract, then, notwithstanding any foregoing provisions to the contrary, such letter of credit shall also secure such warranty obligations and shall expressly provide for successive automatic renewals of at least six months each, taking effect no later than 30 days prior to the expiry date, until the period for asserting warranty Claims expires and all outstanding warranty Claims are satisfied.

(c) Collateral Agent as Beneficiary; Department as Transferee Beneficiary. Notwithstanding Section 8.13(d)(i)(G), the Concessionaire may name the Collateral Agent as the beneficiary of each letter of credit delivered under Section 8.13(a) or 8.13(b) instead of the Department, or may transfer the beneficiary's rights under any letter of credit delivered under Section 8.13(b) from the Concessionaire to the Collateral Agent rather than the Department. However, the foregoing right is available to the Concessionaire only if the Collateral Agent is restricted in making draws on such letter of credit solely for the purpose of causing the Concessionaire to perform the design and construction Work during the Work Period (or, if the Concessionaire makes the election under Section 8.13(b), causing the Contractor to perform its Work obligations during the Work Period and any warranty obligations) and the Concessionaire delivers to the Department, concurrently with the issuance of such letter of credit, transfer documents reasonably satisfactory to the Department that:

(i) Name the Department as automatic and exclusive transferee beneficiary under such letter of credit upon Final Acceptance; and

(ii) Prior thereto, permit the Department to automatically exercise rights as the transferee beneficiary and to make drawings thereunder if the Department determines that:

(A) (1) the Concessionaire has breached or failed to perform the design and construction Work during the Work Period (or, if the Concessionaire makes the election under Section 8.13(b), the Contractor has breached or failed to perform its design and construction Work obligations during the Work Period or any warranty obligations), and (2) the Collateral Agent has failed to draw on such letter of credit for the purpose of causing the

performance of such obligations within ten days after the Department delivers written notice of such breach to the Concessionaire and the Collateral Agent; or

(B) (1) the letter of credit will expire within 45 days, (2) the Department has not received a certified copy of a replacement or extension of the letter of credit with required transfer documents, and (3) the Department has no actual knowledge of a prior, full draw on the expiring letter of credit by the Collateral Agent.

(iii) include a certified copy of the letter of credit and a present, executed transfer and assignment of the beneficiary rights from the Collateral Agent to the Department; and that expressly authorize such transfer without condition and permit draw without presentation of the original letter of credit.

(d) Letters of Credit - General Provisions. Wherever the Concessionaire has the option or obligation to deliver to the Department a letter of credit, including the Financial Close Security, Performance Security and the O & M Security, the following provisions shall apply except to the extent expressly provided otherwise in this Agreement:

(i) The letter of credit shall:

(A) Be an irrevocable, unconditional standby letter of credit payable in U.S. dollars;

(B) Be issued by a financial institution that is not an Affiliate, has a credit rating of "A" or better according to Standard & Poors Rating Services, a division of The McGraw-Hill Companies, Inc., and has an office in the United States at which the letter of credit can be presented for payment by facsimile or by electronic means. If the bank issuing the letter of credit fails to maintain such credit rating, or fails to maintain such an office in the United States, the Concessionaire shall deliver a substitute letter of credit issued by a qualified financial institution within 30 days of the date that the prior financial institution failed to meet either such requirement or otherwise furnish additional security acceptable to the Department as may be required from time to time to protect the interests of the Department;

(C) Be in form approved by the Department in its good faith discretion;

(D) Be payable immediately, conditioned only on written presentment from the Department to the issuer of a sight draft drawn on the letter of

credit and a certificate stating that the Department has the right to draw under the letter of credit in the amount of the sight draft, up to the amount due to the Department, without requirement to present the original letter of credit;

(E) Provide an expiration date not earlier than one year from date of issue;

(F) Allow for multiple draws; and

(G) Name the Department beneficiary, and not provide dual or multiple beneficiaries.

(ii) If the Concessionaire has failed to pay or perform when due the duty, obligation or liability under any Project Agreement for which the letter of credit is held, the Department shall have the right to draw on the letter of credit as and when provided in Section 20.02(j).

(iii) The Department shall have the right to draw on the letter of credit, without prior notice to the Concessionaire, if the Concessionaire for any reason fails to deliver to the Department a new or replacement letter of credit, on the same terms, or at least a one year extension of the expiration date of the existing letter of credit, by not later than 45 days before such expiration date, unless the applicable terms of the Project Agreements expressly require no further letter of credit with respect to the duty, obligation or liability in question. If the Department makes such a draw on the letter of credit, the Department shall be entitled to draw on the full face amount of the letter of credit and shall retain such amount as cash security to secure the obligations under the letter of credit, without payment of interest to the Concessionaire.

(iv) Draw on letters of credit shall not be conditioned on prior resort to any other security of the Concessionaire. The Department shall use and apply draws on letters of credit (or cash security held from draws on letters of credit) toward satisfying the relevant obligation of the Concessionaire (or, if applicable, any other Person for which the letter of credit is performance security). If the Department receives proceeds of a draw in excess of the relevant obligation, the Department shall promptly refund the excess to the Concessionaire (or such other Person) after all relevant obligations are satisfied in full.

(v) The Concessionaire's sole remedy in connection with the improper presentment or payment of sight drafts drawn under letters of credit shall be to obtain from the Department a refund of the proceeds which are misapplied, interest thereon at the Bank Rate from the date of improper draw until repaid and, subject to Section 26.10, reimbursement of the reasonable costs the Concessionaire incurs as a result of such misapplication; *provided*, that at the time of such refund the Concessionaire increases the amount of the letter of credit to the amount (if any) then required under applicable provisions of this Agreement. The Concessionaire acknowledges that the presentment of

sight drafts drawn upon a letter of credit could not under any circumstances cause the Concessionaire injury that could not be remedied by an award of money damages, and that the recovery of money damages would be an adequate remedy. Accordingly, the Concessionaire covenants (A) not to request or instruct the issuer of any letter of credit to refrain from paying any sight draft drawn under the letter of credit and (B) not to commence or pursue any legal proceeding seeking, and the Concessionaire irrevocably waives and relinquishes any right, to enjoin, restrain, prevent, stop or delay any draw on any letter of credit.

(vi) The Concessionaire shall obtain and furnish all letters of credit and replacements thereof at its sole cost and expense, and shall pay all charges imposed in connection with the Department's presentment of sight drafts and drawing against letters of credit or replacements thereof.

(vii) In the event the Department makes a permitted assignment of its rights and interests under this Agreement, the Concessionaire shall cooperate so that concurrently with the effectiveness of such assignment, either replacement letters of credit for, or appropriate amendments to, the outstanding letters of credit shall be delivered to the assignee naming the assignee as beneficiary, at no cost to the Concessionaire.

(viii) The Department acknowledges that if the letter of credit is performance security for a Person other than the Concessionaire (e.g., a Contractor), the Department's draw may only be based on the underlying obligations of such Person.

(e) Letters of Credit – Special Provisions. Any terms and conditions applicable to a particular letter of credit which the Concessionaire or a Lender is required to or may provide under this Agreement are set forth in the provisions of this Agreement describing such letter of credit.

Section 8.14 Project Recovery Schedule.

(a) If, at any time prior to Substantial Completion, the Project Schedule Update indicates that Substantial Completion will occur more than 60 days later than then-current Guaranteed Substantial Completion Date, the Concessionaire shall consult with the Design-Build Contractor and the Collateral Agent, and shall prepare a Project Recovery Schedule. The Concessionaire shall submit its proposed Project Recovery Schedule to the Department concurrent with the next Monthly Progress Report. The Project Recovery Schedule shall include a recovery plan that: (i) details the actions proposed to improve progress, and (ii) sets forth a revised Baseline Schedule for which the projected Substantial Completion Date shall be materially improved compared to that indicated in the prior Project Schedule Update and in any case to a date not later than the Outside Substantial Completion Date. The Concessionaire shall respond to the Department's Project Recovery Schedule review comments, following the process outlined in Section 8.05(c), until the Department has approved the Project Recovery Schedule. The Concessionaire shall continue to monitor progress of the work on a monthly basis, and shall repeat the process described in this Section and the Technical Requirements, whenever the

Project Schedule Update indicates that actual progress projects that Substantial Completion will occur more than 60 days later than then-current Guaranteed Substantial Completion Date.

(b) The Department's approval of any actions pursuant to this Section 8.14 shall not affect or reduce the Concessionaire's obligation to pay delay liquidated damages in accordance with Section 20.03(c) for the period after the Guaranteed Substantial Completion Date.

ARTICLE 9.

PROJECT MANAGEMENT; OPERATIONS AND MAINTENANCE

Section 9.01 Conditions Precedent to Service Commencement of the Project.

(a) The Concessionaire shall not initiate Service Commencement of the Project until all of the following conditions have been satisfied:

(i) The Department has issued (or waived) the Substantial Completion Certificate, or it has been determined pursuant to the dispute resolution procedures set forth herein that the Department should have issued such certificate;

(ii) The Department has approved the Life Cycle Maintenance Plan, the Operations and Maintenance Plan, and the updated Performance Requirements Baseline Tables;

(iii) The Concessionaire and the Department have agreed in writing to a Punch List;

(iv) The Concessionaire has received and delivered to the Department copies of all Governmental Approvals necessary to operate the Project and has satisfied all conditions and requirements thereof which must be satisfied before the Project can be lawfully opened for regular public use, all such Governmental Approvals remain in full force and effect, and there exists no uncured material violation of the terms and conditions of any such Governmental Approval;

(v) All insurance policies required under Section 18.01 for the Operating Period have been obtained and shall be in full force and effect (with coverage as of the Service Commencement Date), and the Concessionaire has delivered to the Department duplicate originals or copies thereof certified by the Concessionaire's insurance broker to be true and correct copies of the originals;

(vi) The Concessionaire shall not then be in receipt of any notice of Concessionaire Default under this Agreement, except as to any such noticed default that has been cured or for which Service Commencement will effect its cure, and there exists

no event or condition that, with notice or lapse of time, would constitute a Concessionaire Default;

(vii) All Operations and Maintenance Agreements and agreements relating to toll collection and violation enforcement are in full force and effect;

(viii) The Concessionaire has implemented the Maintenance Management System in accordance with the Technical Requirements;

(ix) The Concessionaire has certified to the Department in writing that the conditions set forth in subsections (iv), (v) (vi) and (viii) have been satisfied as of the date of such certification;

(x) Subject to the provisions of Section 9.01(b), the Department issues, or is deemed to have issued, a written notice (the “Service Commencement Notice”), evidencing its concurrence with the Concessionaire that the foregoing conditions of this Section 9.01 have been satisfied; and

(xi) The Concessionaire has delivered documentation of the O & M Security in compliance with Section 9.01 (d).

(b) If the Department determines that any of the conditions to Service Commencement set forth in Section 9.01(a) has not been satisfied, it shall notify the Concessionaire in writing setting forth, as applicable, why the conditions to Service Commencement have not been satisfied. If the Concessionaire and the Department, despite good faith efforts, cannot reach agreement as to such matters, such dispute shall be resolved in accordance with the dispute resolution procedures set forth in Section 22.01. In the event that the Department has not notified the Concessionaire of a determination that any such condition has not been satisfied, or has not issued the Service Commencement Notice, within 21 days after the date on which the conditions set forth in Section 9.01(a)(i), (ii), (iii) and (vii) are satisfied and the Department receives the certificate from the Concessionaire pursuant to Section 9.01(a)(ix), the Concessionaire shall give notice of such delay to the Department. If the Department has not either notified the Concessionaire of such non-satisfaction or issued the Service Commencement Notice within 15 days after such Concessionaire notice, and if the delay is not a result of a Concessionaire Party action or inaction, but is due solely to the bad faith or negligence of the Department, then such Service Commencement Notice shall be deemed to have been issued upon expiration of such 15-day period, but shall not be deemed a waiver of the other conditions set forth in Section 9.01(a).

(c) All the conditions precedent set forth in Section 9.01(a) are for the sole benefit of the Department. The Department may waive any condition precedent; *provided*, that no person or entity shall be entitled to assume that the Department will waive or refuse to waive any condition precedent in the absence of strict compliance therewith. Unless the Department waives in writing a condition precedent that requires action by the Concessionaire to be satisfied, the Concessionaire shall remain bound to use diligent efforts to satisfy the condition precedent. The

Department's issuance (or deemed issuance) of the Service Commencement Notice shall not constitute a waiver by the Department of any then-existing Concessionaire Default.

(d) O & M Security. The Concessionaire shall, as a condition precedent to Service Commencement, obtain and deliver O & M Security in an amount equal to 110% of the annual cost of O&M, securing the Concessionaire's obligation to operate and maintain the Project following Service Commencement. Such O & M Security shall only be in the form of a letter of credit, substantially in compliance with Exhibit G-1. The Concessionaire shall maintain such O & M Security in effect until the expiration of the Term and resolution of all Claims arising under this Agreement. The O & M Security shall be subject to draw due to breach or failure to perform the Concessionaire's obligations under this Agreement during the Term. In the event of draws on the O & M Security, the amount of the O & M Security which the Concessionaire is required to maintain shall be maintained at all times at a minimum amount equal to 110% of annual cost for O & M. In addition, the amount of the O & M Security shall be increased, in the event of and with respect to Project Enhancements and Major Maintenance, by an amount equal to 15% of the fixed price for the Work as established by the relevant Contract or other lesser amount specified by the Department.

Section 9.02 Concessionaire Obligation to Manage and Operate.

(a) At all times during the Term, the Concessionaire shall cause the Project to be managed, maintained and operated in accordance with all applicable Law, all Governmental Approvals, the terms, conditions and standards set forth in this Agreement, including the operations and maintenance requirements set forth in the Technical Requirements, and in accordance with Good Industry Practice. Without limiting the foregoing, the Concessionaire agrees to be responsible for the following, at its sole cost and expense:

(i) the management and control of traffic on the Project, including incident response services and temporary partial or full closures of the Project, subject to the Department's rights to assume control as expressly provided in this Agreement;

(ii) the maintenance and repair of the Project and all systems and components thereof, including the ETTM System, which the Concessionaire may upgrade, modify, change and replace, as applicable, in accordance with this Agreement and the operations and maintenance requirements set forth in the Technical Requirements;

(iii) the operation of the Project, the ETTM Facilities and the ETTM System and otherwise carrying out the collection and enforcement of tolls and other incidental charges respecting the Project;

(iv) the maintenance, compliance with and renewal of Governmental Approvals necessary and incidental to the foregoing activities; and

(v) traffic management, and maintenance and repair responsibilities under Section 9.03(a) in accordance with the Technical Requirements.

Section 9.03 Operations, Maintenance and Tolling; O&M Contractor.

(a) The Concessionaire may contract with one or more operations and maintenance Contractors (each an “O&M Contractor”) with the expertise, qualifications, experience, competence, skills and know-how to perform the operations and maintenance obligations of the Concessionaire in accordance with this Agreement. Notwithstanding its use of an O&M Contractor, the Concessionaire remains ultimately responsible for the operation and maintenance of the Project during the Term in accordance with this Agreement. The O&M Contractor shall be subject at all times to the direction and control of the Concessionaire, and any delegation to an O&M Contractor does not relieve the Concessionaire of any of its obligations, duties or liability under this Agreement. The Concessionaire shall immediately notify the Department upon the termination, replacement, removal or resignation of an O&M Contractor. Any agreement between the Concessionaire and any O&M Contractor shall by its terms terminate, without penalty, at the election of the Department upon five days’ notice to such O&M Contractor upon the termination of this Agreement. The O&M Contractor shall have no interest in or rights under this Agreement or the Project.

(b) Each O&M Contractor and its Contract shall comply with Section 25.02. In addition, the material terms of the proposed Contract of the O&M Contractor must be consistent with the corresponding duties and obligations of the Concessionaire under this Agreement and the other Project Agreements.

Section 9.04 Procedures Relating to Maintenance Work.

(a) The Concessionaire shall perform all maintenance obligations with respect to the Project in accordance with the Technical Requirements.

(b) Every year after the Service Commencement Date, the Concessionaire shall conduct an annual assessment of the physical condition of the Project (except as otherwise provided in the Technical Requirements), and prepare a comparative analysis of such conditions to the conditions as previously reported (or, with respect to any Project Enhancements, their condition upon completion thereof), such analysis to take into account any changes in federal requirements and changes to safety standards. The condition of each Asset shall be assessed using the Department’s Maintenance Rating Program in accordance with the Technical Requirements. If any Asset is determined by the Concessionaire, the Department or the Independent Engineer to fall below a rating of 90%, the Concessionaire shall, within 90 days of such assessment, develop and submit to the Department a plan to restore such Asset to a condition that will enable the Asset to meet all applicable Performance Requirements, and such plan shall also include a budget, timeline and identification of the funding sources that will be utilized to restore such Asset.

(c) No later than 90 days before the beginning of each calendar year after the Service Commencement Date, the Concessionaire shall annually prepare and deliver to the Department for its review and approval a full five-year period maintenance plan on a rolling basis that describes life cycle asset maintenance for the Project (each a “Life Cycle Maintenance Plan”). The Life Cycle Maintenance Plan shall include a description of all Major Maintenance to be undertaken during such five-year period, by component, item or discrete project (each a “Task”), the estimated costs and timing relating to each Task, and such other information as may be reasonably requested by the Department. The Life Cycle Maintenance Plan shall reasonably demonstrate and incorporate a schedule of maintenance, repair, reconstruction, rehabilitation, restoration, renewal and replacement activity necessary to meet the Performance Requirements set forth in the Technical Requirements and other standards and requirements set forth in this Agreement. The Concessionaire shall reasonably consider any changes or additions proposed by the Department to the proposed Life Cycle Maintenance Plan and shall modify the Life Cycle Maintenance Plan to reflect those changes and additions which are consistent with the standards and requirements of this Agreement. The Department shall deliver its comments, approval or disapproval to the Concessionaire within 45 days after the Concessionaire has delivered each proposed Life Cycle Maintenance Plan to the Department in accordance with the first sentence of this Section 9.04(c).

(d) In the event of any disagreement or dispute relating to a Life Cycle Maintenance Plan, the Department and the Concessionaire shall endeavor in good faith to resolve any such disagreement or dispute within 60 days after it is provided to the Department. Any disagreements or disputes raised by the Department with respect to the Life Cycle Maintenance Plan must be based on whether it and the underlying assumptions are reasonable, realistic and consistent with Good Industry Practice, Project experience and condition, the Technical Requirements and applicable Law. If no agreement is reached within such 60-day period as to any such matter, either party may submit the dispute to the disputes resolution procedures set forth in Section 22.01. Until resolution of any disagreement or dispute relating to a Life Cycle Maintenance Plan, the treatment of the disputed Tasks in the most recently-approved Life Cycle Maintenance Plan shall remain in effect and govern the requirements relating to such Tasks.

(e) If the Concessionaire fails to complete any or all of the Tasks in accordance with this Agreement and the applicable Life Cycle Maintenance Plan, the Department may, at its option, but is not obligated to, either (i) notify the Concessionaire that the Department will carry out such Task or correct such defective work using Department personnel, materials and equipment or (ii) procure the services for such Task or corrective work by one or more contractors. Upon such notice or such determination by the Department of the tentative winning contract award(s), as the case may be, the Department shall be entitled to demand that the Concessionaire pay to the Department an amount equal to the Department’s good faith estimate of the Allocable Costs it will incur to complete such Task or corrective work, plus an additional 10% contingency, and its third-party costs incurred to procure such contract(s). The Concessionaire shall make such payment to the Department not later than 30 days after demand by the Department for such payment. If the Department’s Allocable Costs to complete such Tasks and any third-party costs incurred to procure such contract(s), are greater or less than the

amount the Concessionaire previously paid to the Department under this Section 9.04, the Concessionaire shall pay to the Department an amount equal to such excess or the Department shall reimburse the excess funds paid by the Concessionaire, as applicable. The Concessionaire or the Department shall make such payment not later than 30 days after the Department has finalized its calculation of the Allocable Costs to complete such Tasks and any third-party costs to procure such contract(s) and demand has been made for such payment.

Section 9.05 Major Maintenance Reserve Fund.

Starting four years before the scheduled date of each Task of Major Maintenance, the Concessionaire shall make annual deposits into the Major Maintenance Reserve Fund in an amount equal to 27.5% of the amount anticipated to be required to pay in full all costs and expenses related to such Task as set forth in the Life Cycle Maintenance Plan, until an amount equal to 110% of such anticipated costs and expenses has been deposited into the Major Maintenance Reserve Fund. Alternately, the Concessionaire may deliver to the Department, at the same time annual deposits are required, a letter of credit in favor of the Department as beneficiary and in compliance with Section 8.13(e) for the then-required cumulative amount of the annual deposits. If the Major Maintenance Reserve Fund is in the form of cash reserves, such reserves shall be held by a third party mutually agreed upon by the Concessionaire and the Department. The Department shall have the right to draw upon the Major Maintenance Reserve Fund or letter of credit only in the event that the Concessionaire fails to properly perform such Task in accordance with this Agreement and the applicable Life Cycle Maintenance Plan. The Department may make draws in the amount required to address such failures up to the full amount of the Major Maintenance Reserve Fund or letter of credit. Following the Department's determination that the Task has been properly performed in accordance with this Agreement, amounts deposited in the Major Maintenance Reserve Fund with respect to such Task shall be released to the Concessionaire, or, at the Concessionaire's election, credited toward deposits required to be made to the Major Maintenance Reserve Fund for other Tasks.

Section 9.06 Police and Enforcement Services.

(a) The Concessionaire may engage the Virginia State Police to provide toll enforcement services (including the identification and apprehension of toll violators). The Concessionaire shall not engage or permit the engagement of private security services to provide traffic patrol or traffic law enforcement services on the Project; *provided*, however, that the foregoing does not preclude the Concessionaire from engaging private security firms or employing other appropriate security devices, vehicle occupancy detection equipment or other automated technology to protect, collect and enforce the payment of Toll Revenues or to identify toll violators, subject to compliance with Law, nor does it limit the Concessionaire's right to enforce any private rights and civil remedies available to it respecting toll violations. Notwithstanding the foregoing, the Concessionaire shall not permit any private security firms to stop vehicles, apprehend road users, or engage in any other direct enforcement activity on the Project Right of Way.

(b) The Department shall not have any responsibility or liability to the Concessionaire resulting from or otherwise relating to the failure of the Virginia State Police or any other public agencies to provide policing services contemplated by this Section 9.06 or any of the acts or omissions of the Virginia State Police or such agencies with respect to such services.

(c) The parties further understand and agree that, as the Project will constitute part of the State Highway System, the Virginia State Police and other public agencies shall have access to the Project and jurisdiction to enforce the laws and regulations of the Commonwealth as they apply to the Project.

ARTICLE 10.

CONCESSIONAIRE PROJECT AND QUALITY MANAGEMENT; DEPARTMENT OVERSIGHT AND OTHER SERVICES

Section 10.01 Project and Quality Management.

(a) The Concessionaire shall provide oversight and management of the Project to control the scope, quality, cost, and on-time delivery of the Work. If the Work does not satisfy the applicable performance or quality standards, the Concessionaire, at its sole cost and expense, shall increase and improve its management and oversight efforts such that repair or replacement of Nonconforming Work and satisfaction of applicable performance or quality standards do not require any increase in the Department's limited oversight of the Project.

(b) In accordance with this Agreement and the Technical Requirements, the Concessionaire shall be responsible for all quality assurance and quality control activities necessary to manage the development, design, construction, operation and maintenance of the Project and any Project Enhancement undertaken by the Concessionaire pursuant to Section 12.01 or 12.02.

(c) The Concessionaire shall prepare and submit to the Department for its review and approval the Project Development Plans in accordance with the requirements and times set forth in the Technical Requirements.

(d) The Concessionaire shall require each of its Contractors and suppliers at every level to comply with the requirements of the Project Development Plans, and shall implement the procedures in the Project Development Plans to assure such compliance.

Section 10.02 Right to Oversee Work.

The Department shall have the right at all times during the Term to carry out Oversight Services with respect to all aspects of the design, permitting, financing, acquisition, construction, installation, equipping, maintenance, repair, preservation, modification, operation, management

and administration of the Project, as the case may be, and any Change Orders or Project Enhancements. During the Work Period, Oversight Services shall include services with respect to transportation management plans relevant to the Project (the “TMP”). The Concessionaire shall fully cooperate with the Department to facilitate its conduct of Oversight Services. In the course of performing Oversight Services, the Department shall use reasonable efforts to minimize the effect and duration of any disruption to or impairment of the Work or the Project. The Department shall perform Oversight Services in cooperation with the Independent Engineer so as to minimize to the extent reasonably possible duplication or inefficiencies in the performance of such Oversight Services.

Section 10.03 Department Access and Inspection.

The Department and its duly authorized agents and the Independent Engineer shall have unrestricted access at all times to enter upon, inspect, sample, measure and physically test any part of the Project or the Project Right of Way, as well as any materials, supplies, machinery and equipment to be incorporated into or used in construction, operation or maintenance of the Project. The Department shall also have the right, upon reasonable advance written notice to the Concessionaire, to inspect financial or other records relating to the Project. If at any time the Concessionaire has failed to perform any of its construction, operating or maintenance obligations in any material respect then, in addition to other remedies available under this Agreement (including Section 11.06(a) and Articles 20 and 21) and the other Project Agreements, the Department is entitled to increase the level of its monitoring of the Project and the Concessionaire’s compliance with its construction, operation and maintenance obligations under this Agreement, until such time as the Concessionaire has demonstrated to the Department’s reasonable satisfaction that it will perform and is capable of performing its construction, operation and maintenance obligations under this Agreement. The Concessionaire shall compensate the Department for all Allocable Costs incurred by the Department as a result of such increased level of monitoring.

Section 10.04 Compensation for Oversight Services.

(a) The Department shall be compensated for all its Oversight Services under Section 10.01, Section 10.02, including Oversight Services relating to the design, inspection or permitting for the Project, any Project Enhancement pursuant to Section 12.01 or 12.02 or any Safety Compliance Orders pursuant to Section 12.04.

(b) Such compensation shall be (i) in lump sum, fixed payments equal to the Department’s Initial Reimbursable Cost set forth in Part A of Exhibit E and the Department’s Annual Reimbursable Cost set forth in Part B of Exhibit E plus (ii) the Department’s Allocable Costs, together with all out-of-pocket expenses incurred, including the cost of all legal, expert witness and other support services, and awards of litigation expenses for Oversight Services not included in the Department’s Reimbursable Costs. If the costs of Oversight Services within the scope of the Department’s Reimbursable Costs exceeds the Department’s Reimbursable Costs, the Department shall bear the excess.

(c) The Department shall prepare and submit to the Concessionaire the Department's invoices reasonably documenting amounts owing to the Department for Oversight Services not within the scope of the Department's Reimbursable Costs. The Concessionaire shall pay each invoiced amount no later than 30 days after the Department prepares and delivers an invoice reasonably documenting the amount of such Oversight Services provided.

Section 10.05 Limitations on the Concessionaire's Right to Rely.

(a) The Concessionaire expressly acknowledges and agrees that the Department's rights, if any, under the Project Agreements to review, comment, approve, disapprove, object, reject, accept, consent, certify, concur, monitor, test, inspect, spot check, audit or perform other Oversight Services with respect to designs, plans, specifications, work plans, the Project Development Plans, construction, equipment, installation, plans for maintenance, traffic management, policing, Project management, books, records, reports or statements, documents pertaining to Concessionaire Debt and Financing Assignments, Contractors, architects, engineers or other consultants of the Concessionaire:

(i) exist solely for the benefit and protection of the Department,

(ii) do not create or impose upon the Department any standard or duty of care toward any Concessionaire Party, all of which are hereby disclaimed,

(iii) may not be relied upon, nor may the Department's exercise or failure to exercise any such rights be relied upon, by the Concessionaire in determining whether the Concessionaire has satisfied the standards and requirements set forth in this Agreement or any other Project Agreement, and

(iv) may not be asserted, nor may the Department's exercise or failure to exercise any such rights be asserted, against the Department by the Concessionaire as a defense, legal or equitable, to the Concessionaire's obligation to fulfill such standards and requirements.

(b) To the maximum extent permitted by Law, and subject to the provisions of this Agreement, the Concessionaire hereby releases and discharges the Department from any and all duty and obligation to cause permitting, Project Right of Way acquisition (except as otherwise provided by Section 14.01 for Department-Caused Delay related to the Department's failure to timely provide a certificate of take for recordation to the Concessionaire), Utility Relocation, construction, equipping, operations, maintenance, policing, renewal, replacement, traffic management or other management of or for the Project or the Project Right of Way, by the Department, to satisfy the standards and requirements set forth in the Project Agreements. The Department shall be entitled to remedies for Nonconforming Work and to identify additional Work which must be done to bring the Work and Project into compliance with requirements of the Agreement, regardless of whether previous review, comment, objection, rejection, approval, disapproval, acceptance, certification, concurrence, monitoring, testing, inspection, spot checking, auditing or other oversight were conducted or given by the Department or the Independent Engineer.

(c) No rights of the Department described in Section 10.05(a), no exercise or failure to exercise such rights, no failure of the Department to meet any particular standard of care in the

exercise of such rights, no issuance of permits or certificates of completion or acceptance and no Final Acceptance of the Project or any Project Enhancement shall:

(i) relieve the Concessionaire of its responsibility for the selection and the competent performance of all Contractors, architects, engineers and other Consultants (except those hired by the Department);

(ii) relieve the Concessionaire of any of its obligations or liabilities under the Project Agreements;

(iii) be deemed or construed to waive any of the Department's rights and remedies under the Project Agreements; or

(iv) be deemed or construed as any kind of representation or warranty, express or implied, by the Department.

(d) Notwithstanding Sections 10.05(a), (b) and (c), (i) the Concessionaire shall be entitled to rely on specific approved Deviations and interpretative engineering decisions the Department gives under this Agreement in accordance with the Technical Requirements, any Development Contract, and applicable Law, (ii) the Department is not relieved from any liability arising out of a knowing, intentional material misrepresentation under any written statement the Department delivers, and (iii) the Department is not relieved from its obligations under any Development Contract.

Section 10.06 Role of Independent Engineer.

The Independent Engineer shall have the rights and responsibilities set forth in this Agreement, the Independent Engineer Agreement and other Project Agreements. Further, the Department reserves the right to designate the Independent Engineer to perform the Oversight Services on behalf of the Department.

ARTICLE 11.

PERFORMANCE POINTS MONITORING

Section 11.01 Performance Points System.

(a) Description of the System.

(i) Exhibit H to this Agreement sets forth a table for the identification of certain Concessionaire breaches or failures to perform its obligations under this Agreement that may result in the assessment by the Department of Performance Points. The Performance Points system is used by the Department to measure the Concessionaire's performance of certain obligations under the Agreement. The accumulation of

Performance Points by the Concessionaire may trigger the remedies to the Department set forth or referenced in this Article 11.

(ii) The inclusion in Exhibit H of a breach or failure to perform shall not determine whether such breach or failure is material.

(iii) The Department may exercise any of its remedies under this Article 11 without prejudice to any other rights or remedies it has under this Agreement, including any rights the Department may have to declare a Concessionaire Default upon the occurrence of any of the breaches or failures listed in Exhibit H, and to exercise the remedies set forth in Article 20.

(b) Notification of Breach or Failure.

(i) The Concessionaire shall notify the Department in writing of the occurrence of any breach or failure specified in Exhibit H within three days after the Concessionaire first obtains knowledge of the breach or failure (“Concessionaire’s Initial Notice”). The Concessionaire’s Initial Notice shall describe the breach or failure in reasonable detail. Thereafter, the Department may deliver to the Concessionaire a written determination assessing Performance Points in accordance with Section 11.02. This Section 11.01(b)(i) shall not apply if the Concessionaire first obtains knowledge of a breach or failure through a notice from the Department under Section 11.01(b)(ii).

(ii) If the Department determines any breach or failure described in Exhibit H has occurred, the Department may deliver to the Concessionaire written notice thereof describing the breach or failure in reasonable detail, assessing Performance Points in accordance with Section 11.02, and describing the basis for the Department’s assessment of Performance Points (the “Department’s Initial Notice”).

Section 11.02 Assessment of Performance Points and Liquidated Damages.

(a) General Terms. The Department may assess Performance Points subject to the following terms and conditions:

(i) Exhibit H sets forth the maximum number of Performance Points the Department may assess for each breach or failure.

(ii) Where a single act or omission gives rise to more than one breach or failure as specified in Exhibit H, the Department may assess Performance Points for only one of the specified breaches or failures. In such circumstances, the breach or failure specified in Exhibit H with the highest maximum number of Performance Points shall apply.

(b) Categories.

(i) For breaches or failures classified as “Category A” in Exhibit H, Performance Points shall be assessed only at the end of the applicable cure period if the Concessionaire has failed to cure within the specified timeframe. Additional Performance Points may be assessed again at the end of each subsequent cure period (and each such assessment of Performance Points shall constitute a separate and distinct act or omission giving rise to a new breach or failure to perform), until the breach or failure is cured. The applicable cure period shall be deemed to start upon the date the Concessionaire first obtained knowledge or reason to know of the breach or failure. For breaches or failures identified by the Department via the Department’s Initial Notice, the cure period shall be deemed to start not later than the date of delivery of such notice to the Concessionaire.

(ii) For breaches or failures classified as “Category B” in Exhibit H, the Performance Points shall be assessed as of the date of either the Concessionaire’s Initial Notice or the Department’s Initial Notice, as applicable. If the breach or failure is not then cured within the applicable cure period, additional uncured Performance Points shall be assessed at the end of the first and each subsequent cure period (and each such assessment of Performance Points shall constitute a separate and distinct act or omission giving rise to a new breach or failure to perform), until the breach or failure is cured. The applicable cure period shall be deemed to start upon the date the Concessionaire first obtained knowledge or reason to know of the breach or failure. For breaches or failures identified by the Department via the Department’s Initial Notice, the cure period shall be deemed to start not later than the date of delivery of such notice to the Concessionaire.

(iii) For breaches or failures classified as “Category C” in Exhibit H, the Performance Points shall be assessed as of the date of either the Concessionaire’s Initial Notice or the Department’s Initial Notice, as applicable. Continuation of such a breach or failure shall not be treated as a new or separate breach or failure.

(iv) For breaches or failures classified as “Category D” in Exhibit H, the Performance Points shall be assessed as of the date of either the Concessionaire’s Initial Notice or the Department’s Initial Notice, as applicable. Moreover, the Concessionaire hereby agrees as follows:

(A) the breaches or failures classified as “Category D” in Exhibit H will result in damages to the Department that will vary with the exact nature of the breach or failure and are difficult to determine and accurately specify;

(B) for breaches or failures classified as “Category D” in Exhibit H, the Concessionaire shall pay to the Department as compensation the amount of liquidated damages set forth in Exhibit H; and

(C) any sums that are payable to the Department under this Section 11.02(b)(iv) are in the nature of liquidated damages and not a penalty, are fair and reasonable, and represent a reasonable estimate of fair compensation for the losses that may be anticipated from the breaches or failures classified as “Category D” in

Exhibit H. Such losses may include harm and detriment to the traveling public and users of the Project, including additional wear and tear on vehicles and increased costs of congestion, travel time and accidents, potential harm to the credibility and reputation of the Department's transportation improvement program, including the PPTA program, and increased costs incurred by the Department in order to provide additional oversight. The Concessionaire further acknowledges that such losses would be difficult and impracticable to measure and prove.

Section 11.03 Determination of Assessment of Performance Points.

(a) The Department shall deliver to the Concessionaire a written determination setting forth the number of Performance Points and the amount of liquidated damages, if any, the Department, in its sole discretion, has assessed to the Concessionaire ("Department's Written Determination") pursuant to the terms of this Section 11.03.

(b) For breaches or failures classified as "Category A" or "Category B" in Exhibit H, the Department shall deliver to the Concessionaire the Department's Written Determination promptly following receipt of notice of the Concessionaire's cure of the breach or failure pursuant to Section 11.04, or, if the breach or failure remains uncured, following the Department's finding that the Concessionaire's cumulative total of cured and uncured Performance Points equals or exceeds the level described in Section 11.06.

(c) For breaches or failures classified as "Category C" or "Category D" in Exhibit H, the Department shall deliver to the Concessionaire the Department's Written Determination promptly following either the Department's receipt of the Concessionaire's Initial Notice or issuance of the Department's Initial Notice, as applicable.

Section 11.04 Notification of Cure.

(a) When the Concessionaire determines it has cured any breach or failure classified as "Category A", "Category B" or "Category D" in Exhibit H for which the Concessionaire has issued the Concessionaire's Initial Notice or received the Department's Initial Notice pursuant to Section 11.01(b), the Concessionaire shall deliver a written certification of cure to the Department within five days of its determination. The Concessionaire's written certification of cure shall identify the breach or failure at issue and describe, with specificity, what steps were undertaken to cure it.

(b) The Department, if it so elects, shall then promptly verify the cure through inspection or other means and once verified provide to the Concessionaire a written certification of cure. If applicable, the Department's written certification of cure shall set forth the total number of cured Performance Points assessed to the Concessionaire for each such breach or failure to perform.

Section 11.05 Accumulation of Performance Points.

(a) The Department shall monitor the total number of cured and uncured Performance Points assessed by it for the duration of the Term.

(b) The cumulative total of Performance Points assessed by the Department shall be monitored by the parties daily and tracked in rolling 365 day cycles for each breach or failure beginning on the date either the Concessionaire's Initial Notice or the Department's Initial Notice, as applicable. At the end of 365 days from the date a specific breach or failure to perform is cured, the Performance Points assessed for such breach or failure will be subtracted from the cumulative total number of Performance Points the Concessionaire has been assessed.

Section 11.06 Impact of Performance Points.

(a) The Monitoring Period. If the Concessionaire accumulates 125 or more assessed Performance Points (regardless of whether cured after assessment) in any 365-day cycle that includes more than 180 days during the Work Period, or maintains 55 or more uncured Performance Points at any time during the Work Period, or if the Concessionaire accumulates 200 or more assessed Performance Points (regardless of whether cured after assessment) in any 365-day cycle that includes 180 days or less during the Work Period, or maintains 55 or more uncured Performance Points at any time exclusively during the Operating Period, the Department may increase the level of monitoring of the Project in accordance with Section 10.03 for a period of not less than 90 days (the "Monitoring Period"). The Concessionaire shall compensate the Department for its Allocable Costs incurred in performing its increased oversight during the Monitoring Period. Such Allocable Costs shall not include monies paid in the form of liquidated damages to the Department by the Concessionaire pursuant to Section 11.02(b)(iv).

(b) The Performance Improvement Plan.

(i) If the Concessionaire accumulates 200 or more assessed Performance Points (regardless of whether cured after assessment) in any 365-day cycle that includes more than 180 days during the Work Period, or maintains 55 or more uncured Performance Points at any time during the Work Period, or if the Concessionaire accumulates 200 or more assessed Performance Points (regardless of whether cured after assessment) in any 365-day cycle that includes 180 days or less during the Work Period, or maintains 55 or more uncured Performance Points at any time exclusively during the Operating Period, the Department may require the Concessionaire to prepare and submit (at the Concessionaire's sole cost and expense) a proposed Performance Improvement Plan for the Department's approval. The Performance Improvement Plan shall be delivered to the Department within 30 days of its request, and shall be subject to the Department's approval in its good faith discretion. The Performance Improvement Plan shall set forth a schedule and describe specific actions the Concessionaire will undertake to improve its performance as demonstrated by reducing the frequency with which it is assessed Performance Points and the amount of assessed Performance Points, and by its incurring no new uncured Performance Points following implementation of the Performance Improvement Plan. The Department may require that such actions include: (A) improvements to the Concessionaire's quality management practices, plans (including

Project Development Plans) and procedures; (B) changes in the Concessionaire's organizational and management structures; (C) increased monitoring and inspections; (D) changes in key personnel; and (E) replacement of Contractors. The Concessionaire shall respond to the Department's comments and objections to the Performance Improvement Plan by submitting revisions thereto to the Department within ten days after receipt of the Department's comments and objections.

(ii) The Concessionaire shall diligently implement the approved Performance Improvement Plan in accordance with the implementation schedule contained in the Performance Improvement Plan. If, after 180 days following the implementation of the approved Performance Improvement Plan, the Concessionaire can demonstrate that: (A) the Performance Improvement Plan has steadily reduced the number and frequency of assessed Performance Points accumulated as compared to the period prior to the implementation of the approved Performance Improvement Plan; (B) the Concessionaire is complying in all material respects with the course of action described in the approved Performance Improvement Plan; and (C) the Concessionaire has been assessed no uncured Performance Points since the implementation of the approved Performance Improvement Plan, then the total number of accumulated, cured Performance Points assessed to the Concessionaire over the course of the 180 day period shall be reduced by 50%, the points removed being those assessed earliest.

Section 11.07 Disputes Regarding the Assessment of Performance Points.

(a) The Concessionaire may object to the assessment of Performance Points (but not the number of Performance Points assessed within the maximum set forth in Exhibit H) by delivering to the Department written notice of its objection within ten days after receipt of the Department's Written Determination assessing the Performance Points at issue. Such notice shall set forth with specificity the grounds for the Concessionaire's objection.

(b) The Department shall consider the Concessionaire's objections and Representatives of the Department and the Concessionaire will meet to discuss the matter within 30 days after the Concessionaire has provided its written objection. If, at the conclusion of this 30 day period, the Concessionaire still objects to the Department's decision, it may pursue dispute resolution under Section 22.01, in which case it must prove that the Department lacked grounds for the assessment under the terms of this Agreement.

(c) If for any reason the Concessionaire fails to deliver its written notice of objection within the time period specified in Section 11.07(a), the Concessionaire shall have waived its right to dispute the Department's assessment of Performance Points or liquidated damages.

ARTICLE 12.

PROJECT ENHANCEMENTS AND SAFETY COMPLIANCE ORDERS

Section 12.01 Project Enhancements by the Concessionaire.

The Concessionaire shall have the right, at its sole cost and expense, at any time after the Service Commencement Date, to design, develop, construct, operate and maintain Concessionaire Project Enhancements within the Project Right of Way, including any fundamental change in the dimensions, character, quality, location or position of all or any part of the Project; *provided*, that the Concessionaire shall not undertake any such Project Enhancements unless all aspects thereof are approved in writing by the Department in its sole discretion, and the Concessionaire has entered into a Development Contract with the Department with respect to such Concessionaire Project Enhancement.

Section 12.02 Project Enhancements by the Department.

(a) Subject to Section 12.02(c), the Department shall have the right from time to time before or after the Service Commencement Date to design, develop, construct, operate and maintain Department Project Enhancements. The Department shall have the right to design, develop, construct, operate and maintain Department Project Enhancements through one or more of the following mechanisms, as the Department selects from time to time in its sole discretion:

- (i) use by the Department of its own personnel, materials and equipment;
- (ii) contracting with third parties through requests for proposals, competitive bids, negotiations or any other lawful procurement process; and
- (iii) authorizing and directing the Concessionaire during the Term to undertake the Department Project Enhancements, including all necessary traffic and revenue studies and all necessary planning, design, engineering, permitting, financial, right-of-way acquisition services, Utility Relocation, construction, installation, project management, operation, maintenance, repair and other work and services.

(b) If the Department uses its own personnel or contracts with third parties to develop a Project Enhancement, the Department shall coordinate such development with the Concessionaire so as to minimize to the extent reasonably feasible the disruption to the Concessionaire's construction, operation and maintenance of the Project and the generation of Gross Revenues. If the Department uses its own personnel or contracts with third parties to develop a Project Enhancement, the Department shall have the right to issue a Department Change adding to the scope of Work during the Operating Period the management, operation, maintenance, repair and other Work and services of and for the Project Enhancement or any portion thereof. In such case:

- (i) The Project Enhancement shall be deemed a part of the Project and shall become subject to all the terms and provisions of this Agreement as of the date the Concessionaire is required to assume such responsibility under the Department Change or Directive Letter; and

(ii) Such Department Change will constitute a Compensation Event entitling either the Concessionaire to compensation, as more particularly provided in Section 14.01, or the Department to a share of Positive Net Revenue Impact and/or Net Cost Saving as more particularly provided in Section 14.04, as the case may be.

(c) If the Department issues a Department Change authorizing and directing the Concessionaire to undertake Department Project Enhancements pursuant to Section 12.02(a)(iii), then:

(i) The Concessionaire shall have the right and obligation, on and subject to all the terms and conditions of this Agreement:

(A) to solicit, negotiate, enter into and enforce performance of Contracts for all necessary work and services as described in Section 12.02(a)(iii);

(B) to obtain or cause to be obtained payment and performance bonds or letters of credit, insurance policies, guarantees, indemnities, revenue subsidies and other risk management and credit instruments as may be required by the Department in connection with the Department Project Enhancements;

(C) to use diligent efforts to cause all Governmental Approvals to be obtained for, and thereafter cause to be designed and constructed, such Department Project Enhancements, subject to prior written approval of the designs and plans therefor, and any changes thereto, by the Department in its sole discretion;

(D) to show all such completed Department Project Enhancements on final, as-built plans and specifications submitted to the Department; and

(E) after completion, to collect tolls (on behalf and for the account of the Department), manage, operate, maintain and repair such Department Project Enhancements, subject to the Department's right at any time to assume responsibility for all or any portion of such functions;

(ii) The Project Enhancement shall be deemed a part of the Project and shall become subject to all the terms and provisions of this Agreement as of the date the Concessionaire is required to assume such responsibility under the Department Change; and

(iii) Such Department Change will constitute a Compensation Event entitling either the Concessionaire to compensation, as more particularly provided in Section 14.01, or the Department to a share of Positive Net Revenue Impact and/or Net Cost Saving as more particularly provided in Section 14.04, as the case may be.

(d) The Department shall have the right to enter upon, or direct a third-party to enter upon, the Project and the Project Right of Way for any purpose relating to Department Project Enhancements under this Section 12.02 to the extent reasonably necessary.

Section 12.03 Development of Other Facilities.

(a) The CTB and the Department will have the unfettered right, each in its sole discretion, at any time and without liability, to finance, develop, approve, construct, expand, improve, modify, upgrade, add capacity to, reconstruct, rehabilitate, restore, renew and replace any existing and new transportation or other facilities other than the Project (including free roads, connecting roads, service roads, frontage roads, turnpikes, managed lanes, HOT/HOV lanes, light rail, freight rail, bus lanes, etc.) both within and outside the Project Right of Way, and whether adjacent to, nearby or otherwise located as to affect the Project, its operation and maintenance (including the costs and expenses thereof), its vehicular traffic and/or its revenues.

(b) The CTB and the Department will have the right, without liability, to make discretionary and non-discretionary distributions of federal and other funds for any transportation projects, programs and planning, and to exercise all its authority to advise and recommend on transportation planning, development and funding on any project of its choosing.

(c) In no event shall the taking of any action described in Section 12.03(a) or (b) by the CTB or the Department (i) constitute a default by the Department under this Agreement or (ii) entitle the Concessionaire to Concessionaire Damages or compensation, except to the extent provided in Section 12.02 with respect to any such existing and new transportation or other facilities that constitute Department Project Enhancements.

Section 12.04 Safety Compliance Orders.

(a) The Department may, but is not obligated to, issue Safety Compliance Orders to the Concessionaire at any time; *provided*, that no Safety Compliance Order may in any event order or direct the Concessionaire to do any act in violation of any applicable Law. The Concessionaire's compliance with a Safety Compliance Order shall not be deemed a default by the Concessionaire under the provisions of this Agreement or any other Project Agreements to which the Department and the Concessionaire are both parties.

(b) The Department shall use good faith efforts to inform the Concessionaire at the earliest practicable time of any circumstance or information relating to the Project which in the Department's reasonable judgment is likely to result in a Safety Compliance Order. Except in the case of an Emergency, the Department will consult with the Concessionaire, and may consult with the Independent Engineer, prior to issuing a Safety Compliance Order concerning the risk to public or worker safety, alternative compliance measures, cost impacts and the availability of Concessionaire resources to fund the Work to carry out the Safety Compliance Order. The Department may, in its discretion, request the Independent Engineer to monitor and inspect for the purposes of determining whether any circumstances exist that warrant issuance of a Safety

Compliance Order and giving the Department and the Concessionaire reports and recommendations related to such matters.

(c) Expeditiously after the Department issues a Safety Compliance Order, the Concessionaire shall proceed with the necessary environmental, design and construction work to carry out the Safety Compliance Order, at the Concessionaire's sole cost and expense.

(d) The Concessionaire shall have the right to dispute a Safety Compliance Order by providing written notice to the Department setting forth the Concessionaire's Claim that no condition exists to justify the disputed Safety Compliance Order and the Concessionaire's estimate of impacts on costs, Gross Revenues and the construction schedule, if applicable, attributable to such Safety Compliance Order. The Concessionaire shall bear the burden of proving by a preponderance of the evidence that no condition exists that justifies the disputed Safety Compliance Order, and shall nevertheless implement the Safety Compliance Order pending resolution of the dispute except to the extent the Department directs otherwise. However, if it is finally determined in accordance with the dispute resolution procedures in Section 22.01 that conditions warranting the Safety Compliance Order did not exist, then the Safety Compliance Order shall be treated as a Department Change.

ARTICLE 13.

DELAY EVENTS AND FORCE MAJEURE EVENTS

Section 13.01 Delay Events.

(a) If the Concessionaire is affected by a Delay Event, it shall give written notice to the Department within 15 days following the date on which the Concessionaire first became aware (or should have been aware, using all reasonable due diligence) that an event has occurred and that it is or will become a Delay Event, (*provided*, that in the case of the same Delay Event being a continuing cause of delay, only one notice shall be necessary). Such notice shall include (i) a detailed description of the Delay Event, (ii) details of the circumstances from which the Delay Event arises, and (iii) an estimate of the delay in the performance of obligations under this Agreement attributable to such Delay Event and information in support thereof, if known at that time. The Department may require the Concessionaire to provide such further supporting particulars as the Department deems necessary. The Concessionaire shall bear the burden of proving the occurrence of a Delay Event and the resulting impacts.

(b) If for any reason the Concessionaire fails to deliver such notice of a Delay Event within such 15 day period, the Concessionaire shall be deemed to have irrevocably and forever waived and released any Claim or right to time extensions or any other relief with respect to such Delay Event under this Agreement or any Project Agreement.

(c) Upon the occurrence of a Delay Event, the Concessionaire shall undertake immediate efforts to mitigate the effects of such Delay Event, including all steps that would

generally be taken in accordance with Good Industry Practice, subject to the provisions in Section 13.02 on the Concessionaire's repair of damage to the Project resulting from a Force Majeure event. The Concessionaire shall promptly deliver to the Department an explanation of the measures being undertaken to mitigate the delay and other consequences of the Delay Event. The Concessionaire shall notify the Department within ten days following the date on which it first became aware (or should have been aware, using all reasonable due diligence) that such a Delay Event has ceased.

(d) During the Work Period, extensions of key milestone and/or activities identified on the Baseline Schedule for Delay Events affecting the Work shall be based on Time Impact Analysis, using then current Baseline Schedule and taking into account impacts of the Delay Events on Critical Path items, in accordance with the Technical Requirements, and shall affect only the Guaranteed Substantial Completion Date, the Outside Substantial Completion Date and the deadline for Final Acceptance set forth in Section 20.01(g). For avoidance of doubt, the Outside Substantial Completion Date may be extended in accordance with the previous sentence by reason of a Delay Event that occurs during the period after the Guaranteed Substantial Completion Date. If the Department and the Concessionaire cannot agree upon the extension, then either party shall be entitled to refer the matter to the dispute resolution procedure in Section 22.01.

(e) Delay Events occurring after Service Commencement shall only excuse the Concessionaire from performance of obligations under this Agreement directly affected by such Delay Event, and shall not result in an extension of the Term, except through operation of the Maximum PVR as provided in Section 4.02(a)(iii) or except as provided in Section 13.02 in the case of a Force Majeure event.

(f) Notwithstanding the occurrence of a Delay Event, the Concessionaire shall continue its performance and observance under this Agreement of all of its obligations and covenants to be performed to the extent that it is reasonably able to do so and shall use its reasonable efforts to minimize the effect and duration of the Delay Event. Without limiting the foregoing, the occurrence of a Delay Event shall not excuse the Concessionaire from timely payment of monetary obligations under this Agreement, from compliance with applicable Laws, or from compliance with Technical Requirements, except temporary inability to comply with applicable Laws or Technical Requirements as a direct result of the Delay Event.

Section 13.02 Force Majeure Event.

(a) If a Force Majeure Termination Event occurs after Service Commencement that causes physical damage or destruction to the Project, the direct result of which causes the Project to remain unavailable for use by the traveling public for a period of 120 consecutive days, the Concessionaire shall elect either to terminate this Agreement pursuant to Section 21.03 or repair such damage and destruction and otherwise restore the Project to its pre-Force Majeure event condition. If the Concessionaire elects to restore the Project, then the Concessionaire shall be entitled to obtain compensation only to the extent provided in Section 14.01(j). If the Concessionaire elects to terminate but the Department elects to keep this Agreement in effect by

electing to treat the Force Majeure Termination Event as a Compensation Event pursuant to Section 21.03, then Section 14.01(j) shall not apply to the determination of the Concessionaire Damages to which the Concessionaire is otherwise entitled pursuant to Section 14.01.

(b) If any other Force Majeure event occurs (including a Force Majeure Termination Event that does not cause the Project to remain unavailable for use by the traveling public for a period of 120 consecutive days), then the Concessionaire shall repair such damage and destruction and otherwise restore the Project to its pre-Force Majeure event condition. Such event shall be treated as a Compensation Event, and the Concessionaire shall be entitled to obtain compensation only to the extent provided in Section 14.01(j).

(c) If a Force Majeure event occurs after Service Commencement that causes physical damage or destruction to the Project, the direct result of which causes the Project to remain unavailable for use by the traveling public for a period of 120 consecutive days, and this Agreement is not terminated, then the Concessionaire shall have the right to request an extension of the Maximum Term for a period of time determined under Sections 13.02(e) and (f) (a “Force Majeure Extension”). If the Concessionaire elects to request a Force Majeure Extension, the Concessionaire shall give written notice (“Force Majeure Extension Notice”) of such request to the Department within ten days following the end of such 120 consecutive day period. Such notice shall set forth (i) the details of the Force Majeure event, (ii) steps taken and to be taken by the Concessionaire to mitigate the impact of the Force Majeure event on the Project, (iii) the amount of time reasonably required to promptly restore the Project to at least the same condition as it would have been had the Force Majeure event not occurred; (iv) evidence of the Concessionaire’s ability to timely accomplish such restoration, including proof of its financial capacity to fund such restoration; and (v) the extension of the Maximum Term claimed by the Concessionaire in accordance with Section 13.02(e), including the documentation of the effect of the Force Majeure event and of all other factors affecting determination of the period of extension. Following its receipt of the Force Majeure Extension Notice, the Department shall be entitled to require the Concessionaire to submit any other information in support of the Concessionaire’s Claim that the Department may deem necessary.

(d) The Concessionaire shall not be entitled to request a Force Majeure Extension if the Project cannot be restored before the end of the existing Term (as forecasted by the Base Case Financial Model) to at least the same condition it would have been in had the Force Majeure event not occurred, or if, despite the Force Majeure event, the Maximum PVR is reasonably projected to be achieved within 90% of the Maximum Term.

(e) If the Concessionaire is entitled to a Force Majeure Extension, the parties shall determine the length of the extension of the Maximum Term as follows:

(i) The parties shall calculate the reasonably projected date when the Concessionaire would achieve the Maximum PVR, assuming no Force Majeure event occurred and no future Delay Event or Compensation Event will occur.

(ii) The parties shall next calculate the number of days between such projected date and the last day of the Maximum Term (such number of days being the “excess period”). If the projected date would not occur before the last day of the Maximum Term, then the excess period is deemed to be zero.

(iii) The parties shall adjust the last day of the Maximum Term (i.e. move it to a point earlier in time) by 50% of the excess period; provided that such adjustment shall not be to a date earlier than the date that is 90% of the Maximum Term.

(iv) The parties shall determine the extra period of time reasonably required to restore the Concessionaire to the same economic position it would have been had the event of Force Majeure not occurred, by calculating the Net Revenue Impact and Net Cost Impact of the Force Majeure event, except for such impacts that are recoverable from insurance or deemed self-insured under Section 18.06, and minus any cost-savings realized by the Concessionaire due to such Force Majeure event.

(v) The parties shall add such extra period of time to the last day of the Maximum Term as adjusted under clause (iii) above to determine a new potential last day of the Maximum Term.

(vi) The last day of the Maximum Term shall then be revised to be the earlier of (A) the date determined under clause (v) above or (B) the date that is ten years after the last day of the Maximum Term (as if there were no prior adjustments thereto).

(vii) The parties shall set forth such extension by executing a written amendment to this Agreement.

(f) If neither the Concessionaire nor the Department has exercised its right to terminate this Agreement due to the Force Majeure Termination Event, or if any other Force Majeure event occurs that damages or destroys the Project, then the Concessionaire shall diligently and promptly pursue the Work and restore any physical damage or destruction to the Project; *provided*, that the Concessionaire shall not undertake such Work unless all aspects thereof are approved in writing by the Department. Such Work shall be subject to the provisions of Article 8 (except Section 8.14). Failure to restore the Project within the time period identified by the Force Majeure Extension Notice or, in the absence of such notice, within a reasonable deadline established or approved by the Department in writing, shall constitute a Concessionaire Default.

(g) If the Department wishes to dispute any aspect relevant to the Force Majeure Extension Notice (including whether a Force Majeure event has occurred, the amount of time required for prompt restoration of the Project, the ability of the Concessionaire to restore the Project, or the length of the proposed extension of the Maximum Term), the Department shall deliver written notice of such dispute, setting forth the grounds of the dispute (the “Force Majeure Dispute Notice”), within 60 days following the receipt of the Concessionaire’s Force Majeure Extension Notice. If within 30 days following the Concessionaire’s receipt of the Force

Majeure Dispute Notice, either the Force Majeure Dispute Notice or the Force Majeure Extension Notice has not been withdrawn, either party may submit the matter to the dispute resolution procedure set forth in Section 22.01. The Concessionaire shall bear the burden of proving the occurrence of the Force Majeure event and all other aspects relevant to its Claims pursuant to this Section.

ARTICLE 14.

COMPENSATION EVENTS; CONTINGENCY AMOUNT; DEPARTMENT CHANGES; POSITIVE NET REVENUE IMPACTS

Section 14.01 Compensation Events.

(a) If the Concessionaire is affected by a Compensation Event, it shall give written notice to the Department within 30 days following the date on which the Concessionaire first became aware (or should have been aware, using all reasonable due diligence) that an event has occurred and that it is or will become a Compensation Event (a “Compensation Event Notice”). The Compensation Event Notice shall set forth (i) the Compensation Event and its date of occurrence in reasonable detail, (ii) the amount claimed as the Concessionaire Damages, and (iii) details of the calculation thereof including a written analysis and calculation of the estimated Net Cost Impact, if any, and estimated Net Revenue Impact.

(b) If, for any reason, the Concessionaire fails to deliver such written Compensation Event Notice within the foregoing time period, the Concessionaire shall be deemed to have irrevocably and forever waived and released any Claim or right to Concessionaire Damages or other adverse effects on Gross Revenues or on costs, expenses and liabilities attributable to such Compensation Event.

(c) After the Concessionaire submits a Compensation Event Notice, the Department shall be entitled to obtain (i) from the Independent Engineer a comprehensive report as to the Concessionaire’s estimate of the Net Cost Impact attributable to the Compensation Event and (ii) from a traffic and revenue consultant a traffic and revenue study, prepared in accordance with Good Industry Practice, analyzing and calculating the estimated Net Revenue Impact attributable to the Compensation Event. Within 90 days after receiving a Compensation Event Notice, the Department shall provide to the Concessionaire a copy of such reports as it has elected to obtain. Within 120 days after the delivery of the Compensation Event Notice, the Concessionaire and Department shall commence good faith negotiations to determine the Concessionaire Damages.

(d) For the purpose of any discounting, the parties shall use the PVR Discount Rate for calculating the weighted average cost of capital as incorporated into the Base Case Financial Model. In all cases the Concessionaire Damages shall be net of all insurance available to the Concessionaire, or deemed to be self-insured by the Concessionaire under Section 18.04, with respect to cost or revenue impacts of the Compensation Event. The Concessionaire shall bear, at its sole cost and expense, the first \$50,000 of Concessionaire Damages per occurrence with

respect to any Compensation Event occurring in calendar year 2009. For calendar year 2010, such \$50,000 deductible shall be adjusted for changes, if any, in the CPI between December 1 2008 and December 1, 2009. On January 1 of each calendar year thereafter, the deductible shall equal the immediately preceding calendar year deductible adjusted for changes, if any, in the CPI between December 1 of the second year preceding such January 1 and December 1 immediately preceding such January 1.

(e) The Concessionaire shall conduct all discussions and negotiations to determine any Concessionaire Damages, and shall share with the Department all data, documents and information pertaining thereto, on an Open Book Basis.

(f) If the Concessionaire and Department are unable to agree upon the amount of the Concessionaire Damages within 30 days after commencement of negotiations, then either party may request the dispute be resolved in accordance with Section 22.01.

(g) Following a determination of the Concessionaire Damages by mutual agreement or the dispute resolution procedures, the Department shall compensate for such Concessionaire Damages:

(i) through quarterly or other periodic payments of the Concessionaire Damages in accordance with a written payment schedule determined by mutual agreement or through the dispute resolution procedures, corresponding to when the Net Cost Impacts and Net Revenue Impacts that make up the Concessionaire Damages are anticipated to occur;

(ii) by a lump sum payment, payable as determined by mutual agreement or through the dispute resolution procedures;

(iii) by reducing Monthly Gross Revenue in each month in which Net Cost Impact is determined to have occurred or will occur by the amount of the Net Cost Impact determined for such month;

(iv) by extension of the Term as provided in Section 4.02(a)(iii) through operation of the Maximum PVR as necessary to recoup Net Revenue Impacts; or

(v) in such other manner as agreed upon by the parties in writing.

(h) The Department, in its sole discretion, shall be entitled to select one or any combination of the methods of compensation under Section 14.01(g)(i), (ii), (iii) and (iv), subject to the following terms and conditions.

(i) Each method shall be subject to the Department's right, in its sole discretion, to apply any available Contingency Amount to the Concessionaire Damages pursuant to Section 14.02.

(ii) Any election by the Department to pay all or a portion of the Concessionaire Damages pursuant to Section 14.01(g)(iii) shall be:

(A) subject to determination that the Concessionaire will have the continuing ability to satisfy debt coverage ratios then binding on the Concessionaire under its Financing Assignments if such method is used;

(B) subject to the ability of the Concessionaire, using diligent efforts, to raise additional Concessionaire Debt or equity to the extent necessary to currently fund the Net Cost Impacts of the Compensation Event; and

(C) available only to the extent that the Maximum PVR is reasonably capable of being achieved within 90% of the Maximum Term, *provided* that the Department, in its sole discretion, may elect to extend the Maximum Term to satisfy this condition.

(iii) Any election by the Department to pay all or a portion of the Concessionaire Damages pursuant to Section 14.01(g)(iv) shall be:

(A) subject to determination that the Concessionaire will have the continuing ability to satisfy debt coverage ratios then binding on the Concessionaire under its Financing Assignments if such method is used; and

(B) available only to the extent that the Maximum PVR is reasonably capable of being achieved within 90% of the Maximum Term, *provided* that the Department, in its sole discretion, may elect to extend the Maximum Term to satisfy this condition.

(iv) If any portion of the Concessionaire Damages is to pay for prior capital expenditures, the Department shall pay such portion in a lump sum, except to the extent (A) previously funded by the Concessionaire with non-callable Concessionaire Debt, (B) compensated pursuant to Section 14.01(g)(iii), or (C) otherwise approved in writing by the Concessionaire.

(v) If any portion of the Concessionaire Damages is to pay for costs of design or construction to be performed, or for other future capital expenditures, not compensated pursuant to Section 14.01(g)(iii), then the Department shall have no obligation to make advance payments and shall have the right to pay such portion of the Concessionaire Damages in quarterly progress payments in arrears and otherwise according to the Department's standard practices and procedures for paying its contractors and applicable Laws.

(vi) If any portion of the Concessionaire Damages is to pay for future non-capital costs or future Net Revenue Impacts not compensated pursuant to Section

14.01(g)(iii) or (iv), any periodic payments the Department chooses shall in no event be made less often than quarterly.

(vii) If the Department elects to make quarterly or other periodic payments, at any later time it may choose to complete compensation through the alternatives under Sections 14.01(g)(ii), (iii) and (iv), subject to the other terms and conditions of this Section 14.01(h).

(viii) If the Department does not make any lump sum or periodic payment of the Concessionaire Damages when due, it shall thereafter bear interest at the Bank Rate until the date the amount due is paid.

(i) The Concessionaire shall take all steps reasonably necessary to mitigate the amount of the Concessionaire Damages attributable to, and other consequences of, any Compensation Event, including all steps that would generally be taken in accordance with Good Industry Practice.

(j) The Concessionaire shall bear for each Force Majeure event described in Sections 13.02(a) and (b) (A) the amount of its deductible or self-insured retention under its then applicable insurance policy for such event, plus (B) all Net Revenue Impacts attributable to such event, plus (C) all Net Cost Impacts other than the costs to repair and replace damage or destruction to the Project in excess of the insurance deductible or self-insured retention. The foregoing, however, shall not affect the determination of Force Majeure Extensions under Section 13.02(c). If such Force Majeure event is within the scope of any insurance coverage described in Section 18.01(b) but the Concessionaire is excused from insuring such an event pursuant to Section 18.01(b), then the Concessionaire shall be deemed to have self-insured such risk in the amount of the deductible or self-insured retention under the most recent insurance policy the Concessionaire carried for such risk, inflated annually by the increase, if any, in the CPI between January 1 of the last year covered by such insurance policy to the date of the event. In addition, if the Project fails to meet design requirements under the Technical Requirements, which failure contributed to the adverse effects from the Force Majeure event, then the Department shall have no liability for any Concessionaire Damages arising from such Force Majeure event. In addition, if the Force Majeure event is one that results in a declaration by the President of the United States of a disaster area or other emergency situation rendering the Project eligible for FEMA funds (or funds from similar successor federal disaster aid programs), then the Department may, but is not obligated to, provide compensation from such funds consistent with the process set forth in this Section 14.01. If the Department provides compensation from the Contingency Amount and thereafter receives FEMA funds on account of the Force Majeure event, the Department may, in its sole discretion, pay all or any portion of the FEMA funds to the Concessionaire, whereupon the available Contingency Amount shall automatically increase by the amount of such payment.

(k) For Compensation Events involving (A) Hazardous Substances, (B) subsurface or latent physical conditions, and (C) archeological or paleontological resources, all as described in

the definition of Compensation Events, entitlement to Concessionaire Damages shall be limited as follows:

(i) The Department shall reimburse the Concessionaire for Allocable Costs incurred by the Concessionaire directly related to the management, treatment, handling, storage, remediation and removal of Hazardous Substances during the Work Period that are present on the Project Right of Way as of the Agreement Date, except for: (1) Hazardous Substances that were known by the Concessionaire to be present on or before the submission of its Detailed Proposal or should have been known by the Concessionaire to be present by undertaking reasonable investigation prior to submission of the Concessionaire's Detailed Proposal; (2) Hazardous Substances that are present at the time of acquisition on parcels acquired to accommodate an Alternative Technical Concept approved by the Department as set forth in Exhibit B-4 of the Agreement; (3) Hazardous Substances that are introduced to or brought onto the Project or on property within the Project Right of Way by any Concessionaire Party; (4) Allocable Costs incurred to rectify exacerbation, due to the negligence, recklessness or willful misconduct or failure to provide proper engineering controls of any Concessionaire Party, of the release, spreading, migration or toxicity of Hazardous Substances which are or become known or apparent to or reasonably suspected by any Concessionaire Party prior to such exacerbation; or (5) releases of Hazardous Substances by third parties after the Concessionaire has conveyed title to the underlying property to the Department. In no event shall the Concessionaire be entitled to recover Net Revenue Impacts relating to such Hazardous Substances. If the Concessionaire receives reimbursement from insurance proceeds with respect to Hazardous Substances that are compensable under this Section 14.01(k)(i), Concessionaire Damages shall be reduced by such amounts.

(ii) The Department shall reimburse the Concessionaire for Allocable Costs incurred by the Concessionaire directly related to the discovery of subsurface conditions or latent physical conditions described in clause (f)(ii) of the definition of Compensation Events during the Work Period, except for (A) subsurface conditions or latent physical conditions that were known by the Concessionaire on or before the submission of its Detailed Proposal or should have been known by the Concessionaire to be present by undertaking reasonable investigation prior to submission of the Concessionaire's Detailed Proposal; or (B) subsurface conditions or latent physical conditions affecting any parcels acquired to accommodate an Alternative Technical Concept approved by the Department as set forth in Exhibit B-4 of the Agreement. In no event shall the Concessionaire be entitled to recover Net Revenue Impacts relating to such subsurface or latent physical conditions.

(iii) The Department shall reimburse the Concessionaire for Allocable Costs incurred by the Concessionaire directly related to the discovery at, near or on the Project Right of Way of archeological, paleontological or cultural resources during the Work Period, except for (A) any such resources that were known by the Concessionaire on or before the submission of its Detailed Proposal or should have been known by the

Concessionaire to be present by undertaking reasonable investigation prior to submission of the Concessionaire's Detailed Proposal; and (B) any such resources affecting any parcels acquired to accommodate an Alternative Technical Concept approved by the Department as set forth in Exhibit B-4 of the Agreement. In no event shall the Concessionaire be entitled to recover Net Revenue Impacts relating to such archeological, paleontological or cultural resources.

(1) Without limiting the Concessionaire's rights with respect to non-monetary relief for Delay Events, the Concessionaire Damages as determined according to this Section 14.01 shall represent the sole right to compensation and damages for the adverse effects of a Compensation Event. As a condition precedent to the Department's obligation to compensate any portion of the Concessionaire Damages, the Concessionaire shall execute a full, unconditional, irrevocable release, in form reasonably acceptable to the Department, of any Claims, Losses or other rights to compensation or other monetary relief associated with such Compensation Event, except for the Claim and right to the subject Concessionaire Damages, the Concessionaire's right to non-monetary relief for a Delay Event, and the right to terminate this Agreement in accordance with Article 21 and to receive any applicable termination compensation.

Section 14.02 Liability for Contingency Compensation Events.

(a) As of the Agreement Date, the Concessionaire has planned and set aside contingency in the amount of \$50,000,000.00 (as adjusted pursuant to this Section 14.02, the "Contingency Amount") for Concessionaire Damages from Contingency Compensation Events. In the event that Contingency Compensation Events are determined to entitle the Concessionaire to Concessionaire Damages, the Concessionaire shall exclusively bear the first \$50,000,000.00 in the aggregate (in addition to the deductibles under Section 14.01(d)). Unless otherwise elected by the Department in its sole discretion, the Contingency Amount shall be the first source of compensation for Contingency Compensation Events. The Department shall be responsible for the next \$50,000,000.00 in excess of the Contingency Amount for Concessionaire Damages related to Contingency Compensation Events ("Contingency Compensation Event Limit"). The Concessionaire shall be solely responsible and liable for any Concessionaire Damages related to Contingency Compensation Events in excess of the Contingency Compensation Event Limit.

(b) The liability for Concessionaire Damages shall first be finally determined in accordance with this Agreement, either by mutual agreement or through the dispute resolution procedures. Thereafter, the Contingency Amount shall be debited for such Concessionaire Damages, except to the extent the same are satisfied through adjustment under Section 14.01(g)(iii), (iv) or (v) or the Department elects otherwise in its sole discretion.

(c) If funds remain available from the Contingency Amount following Final Acceptance and resolution of all outstanding Claims for compensation from Compensation Events eligible for payment from the Contingency Amount, then the Concessionaire shall retain all such unused Contingency Amount.

(d) The Concessionaire shall provide to the Department a monthly written report, not later than 15 days after the end of each month, setting forth the original Contingency Amount, the amount of each credit to and debit against the Contingency Amount during the immediately preceding month and on a cumulative basis, with each debit referenced to the applicable Contingency Compensation Event, and the remaining unused balance of the Contingency Amount.

Section 14.03 Department Changes.

(a) Department's Right to Issue Change Orders. The Department may, at any time and from time to time, authorize and/or require changes (1) in the Work pursuant to a Change Order or (2) in the terms and conditions of the Technical Requirements (including changes in the standards applicable to the Work); *provided* that the economic impact thereof shall be resolved in accordance with Section 14.01 or 14.04, whichever is applicable, and; *provided further* that the Department has no right to require any change that:

- (i) is not in compliance with applicable Law;
- (ii) would contravene an existing Governmental Approval and such contravention cannot be corrected by the issuance of a further or revised Governmental Approval;
- (iii) would cause an insured risk to become uninsurable;
- (iv) would materially and adversely affect the health or safety of users of the Project or others; or
- (v) is outside the general scope of this Agreement, except on terms mutually acceptable to the Department and the Concessionaire. For the avoidance of doubt, any Department Change for a Department Project Enhancement is within the general scope of this Agreement.

(b) Request for Change Proposal.

(i) If the Department desires to initiate a Department Change, then the Department shall issue a Request for Change Proposal. The Request for Change Proposal shall set forth the nature, extent and details of the proposed Department Change.

(ii) Within 21 days following Concessionaire's receipt of the Request for Change Proposal, the Concessionaire shall provide the Department with a preliminary written response, and within 60 days thereafter, with a definitive written response, as to whether, in the Concessionaire's opinion, the Department Change will result in Concessionaire Damages, Positive Net Revenue Impact and/or Net Cost Saving, and, if so: (A) a detailed assessment of the Net Revenue Impacts and Net Cost Impacts, including the estimated effect on length of time to realize the Maximum PVR, an estimate of any

Concessionaire Damages, Positive Net Revenue Impact and/or Net Cost Saving, and schedule impact of the proposed Department Change; (B) the effect of the proposed Department Change on the Baseline Schedule, taking into account the Concessionaire's duty to mitigate delay to the extent reasonably practicable; and (C) the effect of the proposed Department Change on traffic volume and traffic flow on the Project.

(iii) The Department shall be entitled to obtain a comprehensive report as to the proposed Department Change (including comments concerning the Concessionaire's estimate of the costs and other impacts) from the Independent Engineer and a traffic and revenue study relevant to such impacts from a traffic and revenue consultant acceptable to the Department.

(c) Following the Department's receipt of the reports from the Independent Engineer and the traffic and revenue consultant if requested by the Department, or within 21 days following the delivery of the Concessionaire's response to the Department pursuant to Section 14.03(b)(ii) if the Department has not requested such reports, the Concessionaire and the Department shall exercise good faith efforts to negotiate a mutually acceptable Change Order, including, as applicable, (i) adjustments to the Baseline Schedule, (ii) any Concessionaire Damages to which the Concessionaire may be entitled, and (iii) any compensation to the Department for Positive Net Revenue Impact and/or Cost Saving pursuant to Section 14.04 (taking into account the reports, if any, obtained by the Department).

(d) The Concessionaire shall perform the work required to implement the Department Change in a timely manner and in accordance with a budget mutually agreed upon by the Department and the Concessionaire; *provided that*:

(i) a Change Order setting forth the adjusted scope of Work shall have been mutually agreed upon between the Department and the Concessionaire and issued by the Department;

(ii) the Department and the Concessionaire shall have identified sufficient funds that may be made available to the Concessionaire to perform the work required to implement the Department Change, including pursuant to Section 14.01(h)(ii)(B), it being understood that the Concessionaire's reimbursable costs shall not exceed its Allocable Costs for the work;

(iii) the Baseline Schedule for the Work shall have been adjusted as agreed upon by the Department and the Concessionaire to reflect any projected delays in the timing of the Work as a result of the Department Change (taking into consideration the Concessionaire's duty to mitigate any delay to the extent reasonably practicable); and

(iv) the Concessionaire shall have obtained all relevant Governmental Approvals from all relevant Governmental Authorities required for such work.

(e) If the Department and the Concessionaire are unable to reach an agreement on a Change Order or have not yet reached such agreement, the Department may deliver to the Concessionaire a Directive Letter, directing the Concessionaire to proceed with the performance of the Work in question, notwithstanding such disagreement. Upon receipt of the Directive Letter, pending final resolution through the dispute resolution procedures of the relevant Change Order, the Concessionaire shall implement and perform the Work in question as directed by the Department and the Department shall make interim payments to the Concessionaire on a monthly basis for the reasonable documented Allocable Costs of the Work in question, subject to subsequent adjustment through the dispute resolution procedures set forth in Section 22.01 and to reimbursement of the Department if and when funding is arranged pursuant to Section 14.01(h)(ii)(B).

(f) If the Department and the Concessionaire are unable to reach agreement on a Change Order and the Department elects not to submit the matter to dispute resolution or to issue a Directive Letter, the Department shall have the right to perform the work required to implement such Department Change, without liability or obligation to the Concessionaire for impacts on the Project from performance of the Work except to the extent such implementation constitutes a Department Project Enhancement. The Concessionaire's refusal or failure to implement a Change Order agreed upon or issued in accordance with resolution of any dispute, or to implement a Directive Letter, shall constitute a Concessionaire Default.

(g) Technical Requirement Revisions Treated as Department Change.

(i) The Concessionaire and the Department anticipate that from time to time after the Agreement Date, the Department may adopt, through revisions to existing manuals and publications or new manuals and publications, changes, deletions, additions, supplements or other modifications to the Technical Requirements (the "Technical Requirement Revisions"). The Department shall have the right, in its sole discretion, to make Technical Requirement Revisions by delivering written notice to the Concessionaire, whereupon they shall constitute amendments to, and become part, of, the Technical Requirements and replace and supersede inconsistent provisions of the Technical Requirements; *provided*, that if the Department elects to adopt before the Substantial Completion Date Technical Requirement Revisions that pertain to design and construction of the Project, such revisions shall be considered Department Changes and handled pursuant to the Change Order procedures for a Department Change in this Section 14.03. In the absence of a Change Order relating to such Technical Requirement Revision, the Concessionaire shall not be obligated to (but may with the Department's approval) incorporate the same into its design and construction of the Project prior to the Substantial Completion Date.

(ii) If compliance with a changed, added or replacement Technical Requirement that takes effect after the Substantial Completion Date requires major repair, reconstruction, rehabilitation, restoration, renewal or replacement of any component of the Project, or a new component of the Project, the Concessionaire shall commence

performance of the major repair, reconstruction, rehabilitation, restoration, renewal, replacement or new improvement not later than the first to occur of (A) any deadline recommended or prescribed in the changed or added Technical Requirement, (B) the date when the Concessionaire first performs or (if earlier) is first obligated to perform Major Maintenance Work on such component, (C) the date the Department first undertakes the change, addition, replacement or new improvement on comparable State Highways; *provided* that, in the absence of a Department Change, clauses (A), (B) and (C) above shall not apply sooner than five years after the Substantial Completion Date in determining when the Concessionaire must implement the changed, added or replacement Technical Requirement.

(iii) Except as provided by this Section 14.03(g), the Department shall be entitled to revise the Technical Requirements as it deems appropriate in its sole discretion, without liability to the Concessionaire, including payment of Concessionaire Damages or adjustments to the Maximum PVR.

(h) Dispute Resolution. Either party is entitled to refer any dispute arising out of a proposed Department Change, other than the Department's adoption of Technical Requirement Revisions, in accordance with the dispute resolution procedures set forth in Section 22.01.

Section 14.04 Positive Net Revenue Impacts; Net Cost Savings.

(a) Whenever it believes a Positive Net Revenue Impact and/or a Net Cost Saving exists or will arise from a Compensation Event, a Deviation, or a Department waiver of Nonconforming Work, the Department at its election may, and the Concessionaire shall, deliver to the other party written notice thereof. The notice shall set forth (i) the Compensation Event and its date of occurrence in reasonable detail, the proposed or approved Deviation, or the Nonconforming Work, as the case may be, (ii) a preliminary estimate, if then known, of the amount of the Positive Net Revenue Impact and/or net saving or reduction in costs, and (iii) a brief, preliminary written analysis and calculation thereof.

(b) If the Concessionaire gives such a notice to the Department, the Department shall decide whether it desires to receive compensation for the Positive Net Revenue Impact or Net Cost Saving under this Section 14.04, or desires to finally determine the Net Cost Saving for purposes of adjusting Monthly Gross Revenue under Section 14.04(e), and shall notify the Concessionaire in writing of its decision. After the Department gives notice under Section 14.04(a) or gives notice under this clause (b) electing to receive compensation or finally determine Net Cost Saving, the parties shall follow the terms and procedures set forth in Section 14.01(c), (d), and (e), as if they applied to the determination of Positive Net Revenue Impact and Net Cost Saving.

(c) Following a determination of the Positive Net Revenue Impact and/or Net Cost Saving by mutual agreement or the dispute resolution procedures, the Department shall decide on the percentage share of each that it desires as compensation, in any event not to exceed 50%. The Concessionaire shall compensate the Department in an amount equal to the selected

percentage. Such compensation shall be in addition to amounts due the Department under Section 6.01. The Concessionaire, in its sole discretion, shall be entitled to select one or any combination of the following methods of compensation:

- (i) through monthly payments of the selected percentage of the Positive Net Revenue Impact and the selected percentage of the Net Cost Saving in accordance with a written payment schedule determined by mutual agreement or through the dispute resolution procedures;
- (ii) by a lump sum payment of the selected percentage, payable as determined by mutual agreement or through the dispute resolution procedures; or
- (iii) in such other manner as agreed upon by the parties in writing;

provided that the Concessionaire shall pay to the Department in a lump sum its selected percentage share of any Positive Net Revenue Impact and Net Cost Saving realized prior to the date of determination, together with interest thereon at the Bank Rate from the date realized to the date paid, within ten days after the amount is finally determined by mutual agreement or through the dispute resolution procedures.

(d) The Department shall deposit its share of Positive Net Revenue Impact and Net Cost Saving into the Project Enhancement Account pursuant to Section 6.03.

(e) The amount of any Net Cost Savings that the Concessionaire retains shall be treated as Monthly Gross Revenue for the purpose of PVR calculations.

ARTICLE 15.

INDEMNIFICATION

Section 15.01 Indemnities of the Concessionaire.

The Concessionaire shall indemnify, protect, defend and hold harmless each State Indemnatee from and against any Third Party Claims and Losses due to Third Party Claims, including attorneys' fees, expert witness fees and court costs, suffered or incurred by such State Indemnatee (except for such Losses to the extent caused by the negligence or willful misconduct of such State Indemnatee), that are based upon, arise out of, relate to, are occasioned by or are attributable to:

(a) Any failure by the Concessionaire to comply with, observe or perform any of the covenants, obligations, agreements, terms or conditions in this Agreement or, any breach by the Concessionaire of its representations or warranties set forth herein;

(b) The failure or alleged failure by any Concessionaire Party to comply with the Governmental Approvals, any applicable Environmental Laws or other Laws;

(c) Any actual or alleged misconduct, negligence or other culpable act, error or omission of a Concessionaire Party in connection with the Project;

(d) Errors, inconsistencies, defects or deficiencies in the design or construction of the Project or of Utility Relocations;

(e) Any actual or alleged patent or copyright infringement or other actual or alleged improper appropriation or use by a Concessionaire Party of trade secrets, patents, proprietary information, know-how, trade marked or service marked materials, equipment, devices or processes, copyright rights or inventions in connection with the Project;

(f) Any stop notices, liens and Claims filed in connection with the Work, and any other liability to Contractors, laborers and suppliers for failure to pay sums due for their work, services, materials, goods, equipment, machinery or supplies;

(g) Any dispute between the Concessionaire and a Utility Owner, or any Concessionaire Party's performance of, or failure to perform, the obligations under any agreement with a Utility Owner;

(h) (i) Any Concessionaire Party's breach of duty or obligation that the Department owes to a third party, including Governmental Authorities, under Law or under any agreement between the Department and a third party, where the Department has delegated performance of the duty or obligation to the Concessionaire pursuant to this Agreement, or (ii) the acts or omissions of any Concessionaire Party which render the Department unable to perform or abide by a duty or obligation that the Department owes to a third Person, including Governmental Authorities, under any agreement between the Department and a third Person, where the agreement is previously disclosed or known to the Concessionaire;

(i) Any Concessionaire Party's fraud, bad faith, arbitrary or capricious acts, willful misconduct, negligence or violation of Law or contract in connection with performance of real property acquisition services in connection with the Project;

(j) Inverse condemnation, trespass, nuisance or similar taking of or harm to real property committed or caused by a Concessionaire Party in connection with the Project;

(k) If applicable, any violation of any federal or state securities or similar law by any Concessionaire Party, or the Concessionaire's failure to comply with any requirement necessary to preserve the tax exempt status of interest paid on the PABs;

(l) Any Tax attributable to any Transfer of the Concessionaire's Interest or any part thereof;

(m) Any Claim for brokerage commissions, fees or other compensation by any Person who acted on behalf of the Concessionaire, its Affiliates or their respective Representatives in connection with this Agreement, any Transfer of the Concessionaire's Interest or any part thereof; or

(n) Any Claim for liability arising from or based on a violation of Law by any Concessionaire Party.

Section 15.02 Defense Procedures.

(a) In the event that any Third-Party Claim for which the Concessionaire may be required to indemnify a State Indemnitee hereunder is asserted in writing against the Department, it shall as promptly as practicable notify the Concessionaire in writing of such Claim, and such notice shall include a copy of the Claim and any related correspondence or documentation from the third party asserting the Claim; *provided*, that any failure to give such prompt notice shall not constitute a waiver of any rights of the Department, except to the extent that the rights of the Concessionaire are actually and materially prejudiced thereby. If any Third-Party Claim for which the Concessionaire may be required to indemnify a State Indemnitee hereunder is asserted in writing against a State Indemnitee other than the Department, a failure by such State Indemnitee to give the Concessionaire prompt notice in writing of such Claim together with a copy of the Claim and any related correspondence or documentation from the third party asserting the Claim, shall constitute a waiver of any rights of such State Indemnitee to indemnification to the extent, and only to the extent, that the rights of the Concessionaire are actually and materially prejudiced thereby.

(b) The Concessionaire shall be entitled and obligated to appoint counsel of its choice at the expense of the Concessionaire to represent a State Indemnitee in any action for which indemnification is sought (in which case the Concessionaire shall not thereafter be responsible for the fees and expenses of any separate counsel retained by that State Indemnitee except as set forth below); *provided*, that such counsel shall be satisfactory to such State Indemnitee. Notwithstanding the Concessionaire's appointment of counsel to represent a State Indemnitee in any action, such State Indemnitee shall have the right to employ separate counsel, and the Concessionaire shall bear the reasonable fees, costs and expenses of such separate counsel, if:

(i) the use of counsel chosen by the Concessionaire to represent the State Indemnitee would present such counsel with a conflict of interest;

(ii) the actual or potential defendants in, or targets of, any such action include both the State Indemnitee and the Concessionaire and the State Indemnitee shall have reasonably concluded that there may be legal defenses available to it and/or other State Indemnitees which are different from or additional to those available to the Concessionaire;

(iii) the Concessionaire shall not have employed counsel to represent the State Indemnitee within a reasonable time after notice of the institution of such action; or

(iv) the Concessionaire shall authorize the State Indemnitee to employ separate counsel at the Concessionaire's expense.

(c) The Concessionaire shall not be liable for any settlement or compromise by an affected State Indemnitee of a Third Party Claim except with the Concessionaire's prior written consent, which consent shall not be unreasonably withheld or delayed, or except where the settlement or compromise is approved by the court after the Concessionaire receives reasonable notice and the opportunity to be heard and such court approval has become final and nonappealable.

Section 15.03 Survival of Indemnities.

The indemnities of the Concessionaire shall survive the expiration or earlier termination of this Agreement and the other Project Agreements to which the Concessionaire is a party.

ARTICLE 16.

HAZARDOUS SUBSTANCES

Section 16.01 Management of Hazardous Substances.

(a) The Concessionaire shall be responsible for the management, treatment, handling storage, remediation and removal of all Hazardous Substances that are or come to be present and are discovered on, in, under or about the Project Right of Way during the Term in accordance with this Agreement and the Technical Requirements.

(b) If the Concessionaire encounters Hazardous Substances within the Project Right of Way that under applicable Law or requirement of a Governmental Authority must be handled, stored, monitored, treated, disposed of, removed, remediated or transported (collectively "Remedial Action"), the Concessionaire shall promptly notify the Department and shall develop a Remedial Action Plan described in the Technical Requirements. The Remedial Action Plan shall be consistent with the standards of due care and shall include (i) conducting such further investigations as may be necessary or appropriate to determine the nature and extent of the Hazardous Substances, (ii) taking reasonable steps, including in the case of excavation, construction, reconstruction or rehabilitation, modifications and/or construction techniques, to avoid or minimize excavation or dewatering in areas with Hazardous Substances, (iii) preparing and obtaining necessary Governmental Approvals for remedial action plans, including Department approval, and (iv) carrying out any remedial action, including, as necessary, off-site disposal of the Hazardous Substances. In the case of the Concessionaire's management, treatment, handling, storage, remediation and removal of Hazardous Substances that are compensable under this Agreement (including from the Contingency Amount), the Concessionaire shall provide the Department with its proposed Remedial Action Plan and cost estimate prior to undertaking such work for the Department's approval, which approval shall not be unreasonably withheld or delayed.

(c) Before any Remedial Action is taken that would inhibit the Department's ability to ascertain the nature and extent of the contamination, the Concessionaire shall afford the Department the opportunity to inspect areas and locations containing Hazardous Substances that must be remediated; *provided* that, in the case of a sudden release of Hazardous Substances, the Concessionaire may take the minimum action necessary to stabilize and contain the release, without prior notice or inspection, but shall immediately notify the Department of the sudden release and its location.

(d) The Concessionaire shall obtain all Governmental Approvals relating to Remedial Action. The Concessionaire shall be solely responsible for compliance with such Governmental Approvals and applicable Environmental Laws concerning or relating to Hazardous Substances. In carrying out Remedial Action compensable under this Agreement (including from the Contingency Amount), the Concessionaire shall take such steps and actions as are required and/or which constitute due care to protect and preserve the Department's potential Claims of contribution and indemnity, statutory or otherwise, against potentially responsible parties.

(e) The Concessionaire shall bear all costs and expenses for complying with the provisions of this Article 16, and otherwise complying with applicable Law, except as otherwise provided in this Agreement.

(f) The Concessionaire shall carry out the responsibilities of generator of any Hazardous Substances.

(g) Unless directed otherwise by the Department, the Concessionaire shall seek to recover costs from any available reimbursement program or from any third party responsible for generating or otherwise creating conditions that lead to the need for Remedial Action.

Section 16.02 Concessionaire Indemnifications Regarding Hazardous Substances.

(a) The Concessionaire shall indemnify, protect, defend and hold harmless and release each State Indemnitee from and against any and all Third Party Claims and Losses from Third Party Claims, including attorney's fees, expert witness fees and court costs, suffered or incurred by such State Indemnitee (except for such Losses to the extent caused by the willful misconduct of such State Indemnitee), that are based upon, arise out of, relate to, are occasioned by or are attributable to:

(i) Any Hazardous Substances originally introduced to or brought onto the Project or on property within the Project Right of Way by any Concessionaire Party;

(ii) Any Hazardous Substances on property within the Project Right of Way which were known by the Concessionaire prior to the submittal of its Detailed Proposal or should have been known by the Concessionaire by undertaking reasonable investigation prior to submission of its Detailed Proposal;

(iii) Failure of any Concessionaire Party to perform its obligations pursuant to this Article 16, or any other provisions of this Agreement or any other Project Agreement related to Hazardous Substances or to otherwise comply with applicable Environmental Laws and Governmental Approvals; and

(iv) Exacerbation, due to the negligence, recklessness or willful misconduct or failure to provide proper engineering controls of any Concessionaire Party, of the release, spreading, migration or toxicity of Hazardous Substances which are or become known or apparent to or reasonably suspected by any Concessionaire Party prior to such exacerbation.

(b) The Concessionaire shall provide defense with respect to such Third Party Claims, which defense shall be governed by the provisions of Section 15.02.

(c) The indemnities of the Concessionaire shall survive the expiration or earlier termination of this Agreement and the other Project Agreements to which the Concessionaire is a party.

ARTICLE 17.

COMPLIANCE WITH LAWS AND CHANGES IN LAWS

Section 17.01 Compliance with Law.

The Concessionaire shall keep fully informed of and comply and require its Contractors to comply with applicable Law, including any Change in Law and any Discriminatory Change in Law. The Concessionaire shall execute and file the documents, statements, and affidavits required under any applicable Law required by or affecting the Agreement or prosecution of the Work. The Concessionaire shall permit examination of any records made subject to such examination by such Law.

Section 17.02 Compliance with Federal Requirements.

(a) The Concessionaire shall comply and require its Contractors to comply with all Laws applicable to a transportation project that receives federal credit or funds including those Federal Requirements set forth in Exhibit I. Further, the Concessionaire shall comply and require its Contractors to comply with the provisions of any tolling agreement between the Department and FHWA that are applicable to the Work. In the event of any conflict between any applicable Federal Requirements and the other requirements of the Project Agreements, the Federal Requirements shall prevail, take precedence and be in force over and against any such conflicting provisions.

(b) The Concessionaire acknowledges and agrees that the USDOT will have certain approval rights with respect to the Project, including the right to provide certain oversight and

technical services with respect to the Work. The Concessionaire shall cooperate with USDOT and provide such access to the Project and information as USDOT may request in the exercise of USDOT's duties, rights and responsibilities in connection with the Project.

ARTICLE 18.

INSURANCE; GUARANTIES

Section 18.01 Insurance Coverage Required.

(a) Required Insurance During the Work Period.

The Concessionaire shall provide and maintain at its own expense, or cause the Design-Build Contractor to provide and maintain, during the Work Period the insurance coverages specified below; *provided* that, except as expressly provided otherwise below, the Concessionaire may cease carrying any such coverages as of the Operating Period to the extent it would be duplicative of insurance that is put into effect as of the Operating Period pursuant to Section 18.01(b). The applicable insurance policies to be maintained during the Work Period shall not include any design-build exclusion or similar exclusion that could compromise coverages because of the Concessionaire's use of the design-build delivery method.

(i) Workers' Compensation and Employer's Liability. The Concessionaire shall provide or cause to be provided worker's compensation and employer's liability insurance with Statutory Workers' Compensation (Coverage A) limits and Employer's Liability (Coverage B) limits of \$1,000,000 bodily injury by accident, each accident and \$1,000,000 Bodily Injury by Disease, each employee. If necessary coverage shall be extended to cover any claims under the United States Longshoreman's Act and Harbor Workers Act and Jones' Act as may be appropriate for the Work.

(ii) Commercial General Liability. The Concessionaire shall provide or cause to be provided commercial general liability insurance including coverage for premises and operations, independent contractors, personal injury, product and completed operations, explosion, collapse and underground, and broad form contractual liability with limits of at least \$2,000,000 per occurrence and \$4,000,000 million annual aggregate. The Department is to be named as an additional insured on a primary, non-contributory basis.

(iii) Automobile Liability. The Concessionaire shall provide or cause to be provided automobile liability insurance with a limit of at least \$2,000,000 million combined single limit for bodily injury and property damage covering all owned (if any), non-owned, hired or borrowed vehicles on-site or off. The Department is to be named as an additional insured on a primary, non-contributory basis.

(iv) Umbrella/Excess Liability. The Concessionaire shall provide or cause to be provided umbrella/excess liability insurance in excess of the underlying limits noted above

for employer's liability, commercial general liability, and automobile liability in the amount of \$100,000,000 per occurrence and in the annual aggregate.

(v) Architects/Engineers Professional Liability. The Concessionaire shall provide or cause to be provided architects/engineers professional liability insurance covering the lead design engineer for acts, errors or omissions arising in connection with the Work for not less than \$15,000,000 any one claim and in the aggregate. Such insurance shall be maintained until at least three years after the end of the Work Period and any warranty period obtained from the Design-Build Contractor.

(vi) Contractor's Pollution Liability. The Concessionaire shall provide or cause to be provided contractor's pollution liability insurance to indemnify for bodily injury or property damage or amounts which the Contractor or his or her agents, subcontractors or employees are legally obligated to pay for clean up/remediation work arising out of the Work. Such insurance shall have minimum limits of \$5,000,000 any one claim and in the aggregate and shall remain in full force and effect until at least five years after the Final Acceptance Date. The Department is to be named as an additional insured on a primary, non-contributory basis.

(vii) Builder's Risk. The Concessionaire shall provide or cause to be provided, prior to commencement of any construction Work during the Work Period, builder's risk insurance for physical loss, destruction or physical damage to the Project or any material, supplies, equipment, machinery and fixtures that are or will be part of the Project or that are used in performance of the Work. The builder's risk insurance shall cover the Design-Build Contractor, the Concessionaire, the Department and Contractors at all tiers and shall be maintained at a limit of at least 100% of the Project value as set forth in the Schedule of Values or, subject to the Department's prior approval, a limit equivalent to the maximum probable loss. The policy shall include full replacement cost coverage. Coverage shall include the following: right to partial occupancy, earthquake, earth movement, flood, transit, temporary and permanent works, expediting expenses, debris removal, offsite storage, and commissioning and start-up. The Department is to be named as an additional insured on a primary, non-contributory basis.

(b) Required Insurance During Operating Period.

The Concessionaire shall provide and maintain at its own expense, or cause the O&M Contractor to provide and maintain, during the Operating Period and during any time period following the Term's expiration if the Concessionaire is required to return and perform any additional work, the insurance coverages specified below.

(i) Property and Business Interruption. The Concessionaire shall provide or cause to be provided all-risk property insurance at replacement cost, covering loss, damage or destruction to the Project, including improvements and betterments, subject to the following terms and conditions.

(A) The limits of such coverage may be based on a maximum foreseeable loss analysis, subject to the Department's approval of such maximum foreseeable loss analysis by an independent third party that is reasonably acceptable to the Department, with such approval of the Department not to be unreasonably withheld.

(B) Coverage shall include the following: flood, earthquake, earth movement, collapse, water including overflow, leakage, utility interruption, debris removal, business ordinance or law for increased cost of construction, extra expense, valuable papers and terrorism.

(C) Coverage shall also insure against interruption or loss of projected Gross Revenues for at least one full year from the occurrence of the risk, resulting from physical damage to the Project and any relevant connecting roads resulting from occurrence of an insured risk.

(D) The Department is to be named as an additional insured.

(E) The Concessionaire is responsible for all loss or damage to personal property (including materials; fixtures/contents, equipment, tools and supplies) of the Concessionaire.

(ii) Commercial General Liability (Primary and Umbrella). The Concessionaire shall provide or cause to be provided commercial general liability insurance or its equivalent with limits of not less than \$50,000,000 per occurrence and in the aggregate in any one annual period of insurance for bodily injury, personal injury and property damage liability. Coverage shall include all premises and operations, products/completed operations, explosion, collapse, separation of insureds, defense, terrorism (if available) and contractual liability (to the extent such a clause can be obtained). The Department is to be named as an additional insured on a primary, non-contributory basis for any liability arising directly or indirectly under or in connection with this Agreement and shall contain a cross liability clause so that the insurance shall operate in the circumstance that one insured brings a Claim against another insured party. Such insurance shall also be required with regard to the periods described in clause (iv) below.

(iii) Automobile Liability (Primary and Umbrella). When any motor vehicles (owned, non-owned or hired) are used in connection with Work to be performed, the Concessionaire shall provide or cause to be provided automobile liability insurance with limits of not less than \$10,000,000 combined single limit or per occurrence and in the aggregate in any one annual period insuring for bodily injury and property damage. Such limit may be combined with an umbrella limit applicable to clause (ii) above (commercial general liability). The Department is to be named as an additional insured on a primary, non-contributory basis.

(iv) Builder's Risk. Subject to the further requirements of any Development Contract, when the Concessionaire undertakes any construction, maintenance or repairs to the Project, including Project Enhancements or other improvements and betterments pursuant to this Agreement, the Concessionaire shall provide or cause to be provided builder's risk insurance at replacement cost for material, supplies, equipment, machinery and fixtures that are or will be part of the Project. Coverage shall include right to partial occupancy, earthquake, earth movement, and flood. The Department shall be named as an additional insured on a primary, non-contributory basis. In lieu of a separate policy, the Concessionaire may satisfy the builder's risk requirement under the coverage of its Commercial General Liability Policy.

(v) Workers' Compensation and Employer's Liability. The Concessionaire shall provide workers' compensation and employer's liability insurance, as prescribed by applicable Law, for all Concessionaire employees.

(vi) Contractor Pollution Liability. The Concessionaire shall provide or cause to be provided contractor pollution liability insurance of not less than \$5,000,000 any one Claim and in the aggregate in any one annual period of insurance and a deductible that does not exceed \$500,000. The Department is to be named as an additional insured on a primary, non-contributory basis.

(c) Railroad Protective Liability Insurance (Work Period and Operating Period).

The Concessionaire shall procure and keep in force, or cause to be procured and kept in force, railroad protective liability insurance as may be required by any railroad in connection with Work across, under or adjacent to the railroad's tracks or railroad right-of-way. In the event any agreement between the Department and a railroad includes railroad protective insurance requirements applicable to the Work, the Concessionaire shall procure and keep in force or cause to be procured and kept in force, insurance meeting such requirements. The railroad shall be the named insured on any such policy.

Section 18.02 General Requirements Applicable to Insurance.

The insurances which the Concessionaire is required to maintain under Section 18.01:

(a) shall be maintained with insurers approved by the Department (such approval not to be unreasonably withheld);

(b) shall be on terms approved by the Department (such approval not to be unreasonably withheld);

(c) shall not contain any exclusion, endorsement or alteration, unless it is first approved by the Department (such approval not to be unreasonably withheld);

(d) other than for workers compensation insurance, automobile liability insurance and contractor pollution liability insurance, without inferring a right of cancellation that would not exist in the absence of these endorsements, shall contain a term which requires the insurer to give not less than 30 days' prior notice to the Department whenever the insurer gives the Concessionaire a notice of cancellation or any other notice with respect to the policy;

(e) with regard to workers compensation insurance, automobile liability insurance and contractor pollution liability insurance, shall be effected on a severability of interest basis for the purposes of which the insurer accepts the term "insured" as applying to each of the persons comprising the insured as if a separate policy of insurance had been issued to each of them (subject always to the overall policy limit not being increased as a result);

(f) shall be endorsed so that the insurer agrees to waive all rights of subrogation or action that it may have or acquire against all or any of the persons comprising the insured;

(g) other than for workers compensation insurance, automobile liability insurance and contractor pollution liability insurance, shall contain a provision under which the insurer agrees that the failure of one insured to observe and fulfill the terms of the policy will not prejudice the coverage of the other insureds;

(h) other than for workers compensation insurance and automobile liability insurance, have each policy endorsed to the effect that the Department and the other insureds shall not be prejudiced by an unintended and/or inadvertent error, omission or misdescription of the risk interest in property insured under the policies, incorrect declaration of values, failure to advise insurers of any change of risk interest or property insured or failure to comply with a statutory requirement;

(i) shall not include defense costs within the limits of coverage or permit erosion of coverage limits by defense costs, except that litigation and mediation defense costs may be included within the limits of coverage of professional and contractor pollution liability policies; and

(j) shall provide that the coverage thereof 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.

Section 18.03 Proof of Coverage.

(a) The Concessionaire shall give the Department proof satisfactory to it of currency and coverage of insurances, as soon as practicable after the Agreement Date (with respect to insurance required during the Work Period) or no later than 30 days prior to the Service Commencement Date (with respect to insurance required during the Operating Period) and annually thereafter no later than 30 days prior to policy renewal or replacement, and also whenever reasonably requested by the Department.

(b) The Concessionaire shall deliver to the Department duplicate originals or copies of each insurance policy certified by the Concessionaire's insurance broker to be true and correct copies of the originals. The Concessionaire shall make such delivery within the time set forth in Section 8.02(a)(v), 8.02(b)(vi) or 9.01(a)(v), as applicable, and thereafter during the Term within 60 days after each policy renewal or replacement.

Section 18.04 Adjustments in Coverage Amounts.

(a) All insurance coverage limits stipulated in Section 18.01(b), as well as deductibles and self-insured retentions, shall be reviewed at three yearly intervals and increased as appropriate, in line with such amounts that would be insured by a prudent business similar to, and undertaking similar activities to, the Concessionaire.

(b) In determining increases in limits and adjustments to deductibles or self-insured retentions, the parties shall take into account (A) Claims and Loss experience for the Project, provided that premium increases due to adverse Claims experience shall not be a basis for justifying increased deductibles or self-insured retentions; (B) the condition of the Project, (C) the Safety Compliance Order and Performance Points record for the Project; (D) then-prevailing Good Industry Practice for insuring comparable transportation projects; and (E) the provisions regarding unavailability of increased coverage set forth in Section 18.05.

(c) Any dispute regarding increases in limits or adjustments to deductibles or self-insured retentions shall be resolved according to the dispute resolution procedures under Section 22.01.

Section 18.05 Unavailability of Insurance.

(a) If any insurance required to be maintained pursuant to this Article 18 (including the limits or any other terms under policies for such insurance) ceases to be available on a commercially reasonable basis, the Concessionaire shall provide written notice to the Department accompanied by a letter from the Concessionaire's insurance advisor stating that such insurance is unavailable anywhere in the global market on a commercially reasonable basis. Such notice shall be given not later than 90 days prior to the scheduled date for renewal of any such policy. Except to the extent attributable to the Concessionaire, or any Concessionaire Party upon receipt of such notice by the Department, the Concessionaire and the Department shall immediately enter into good faith negotiations regarding the matters set forth in Section 18.05(c) and (d) below.

(b) The Concessionaire shall not be excused from satisfying the insurance requirements of this Article 18 merely because premiums for such insurance are higher than anticipated. To establish that the required coverages (or required terms of such coverages, including insurance policy limits) are not available on commercially reasonable terms, the Concessionaire shall bear the burden of proving either that (i) the same is not available at all in the global insurance and reinsurance markets or (ii) the premiums for the same have so materially increased over those previously paid for the same coverage that no reasonable and

prudent risk manager for a Person seeking to insure comparable risks would conclude that such increased premiums are justified by the risk protection afforded. For the purpose of clause (ii), the only increases in premiums that may be considered are those caused by changes in general market conditions in the insurance industry affecting insurance for project-financed highway facilities, and the Concessionaire shall bear the burden of proving that premium increases are the result of such changes in general market conditions. For the avoidance of doubt, no increase in insurance premiums attributable to particular conditions of the Project or Project Right of Way, or to claims or loss experience of any Concessionaire Party or Affiliate, whether under an insurance policy required by this Article 18 or in connection with any unrelated work or activity of the Concessionaire Party or Affiliates, shall be considered in determining whether required insurance is commercially unavailable.

(c) In the event that the Concessionaire and the Department cannot reach a resolution acceptable to both parties within ten days, the Concessionaire and the Department shall make arrangements for the formation of an insurance panel consisting of the Concessionaire's insurance advisor (or broker), the Department or its insurance advisor (or broker) and an independent insurance expert from a nationally recognized insurance brokerage firm, chosen by the Concessionaire and reasonably acceptable to the Department. Such independent expert shall conduct a separate review of the relevant insurance requirements of this Article 18 and the market for such insurance at the time, giving due consideration to the representations of both insurance advisors, and upon conclusion of such review shall issue a written report stating whether such insurance is available or unavailable on a commercially reasonable basis.

(d) If the insurance expert concludes that such insurance is not available on a commercially reasonable basis, the insurance expert shall provide a written recommendation (which shall include the amount and type of insurance which is available upon a commercially reasonable basis) not less than 30 days before the date for renewal of such insurance. The recommendations shall be subject to dispute resolution under Section 22.01 if the parties do not agree. The Concessionaire shall, prior to the expiration of the insurance then in effect, obtain the insurance required by this Article 18 that is available on a commercially reasonable basis.

(e) The Department makes no representation that the limits of liability specified for any insurance policy to be carried pursuant to this Agreement are adequate to protect the Concessionaire against its undertakings under this Agreement, to the Department, or any third party. No such limits of liability shall preclude the Department from taking any actions as are available to it under the Project Agreements or applicable Law.

Section 18.06 Failure to Obtain Insurance Coverage.

(a) If in any instance the Concessionaire has not performed its obligations respecting insurance coverage set forth in this 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 the Concessionaire's liability and the limits thereon or determining reductions in compensation due from the Department to the Concessionaire on account of available insurance, the Concessionaire 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 the Concessionaire performed such obligations and not committed such failure.

(b) Nothing in this Section 18.06 or elsewhere in this Article 18 shall be construed to treat the Concessionaire as electing to self-insure where the Concessionaire 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 approved by the Department.

Section 18.07 Guarantees.

(a) Except as otherwise provided in Section 18.07(b), in the event the Concessionaire, any Affiliate or any Lender receives from any Person a guaranty of payment or performance of any obligation(s) of a Contractor or an Equity Member, the Concessionaire shall cause such Person to (i) expressly include the Department as a guaranteed party under such guaranty, with the same protections and rights of notice, enforcement and collection as are available to any other guaranteed party, and (ii) deliver to the Department a duplicate original of such guaranty. Such guaranty shall provide that the rights and protections of the Department shall not be reduced, waived, released or adversely affected by the acts or omissions of any other guaranteed party, other than through the rendering of payment and performance to another guaranteed party. The Department agrees to forebear from exercising remedies under any such guaranty so long as the Concessionaire or a Lender is diligently pursuing remedies thereunder

(b) The Concessionaire is not required to provide a guaranty to the Department under Section 18.07(a) if the Department has already received a direct guaranty of payment or performance issued by the same Person that covers the same obligations. The Department will not unreasonably withhold its consent to substitution of a guaranty under Section 18.07(a) for a guaranty previously delivered under this Section 18.07(b). *[This provision and the references to this provision in Section 18.08(a) will be deleted if no guaranties are provided under the Request for Detailed Proposals.]*

ARTICLE 19.

OWNERSHIP AND ACCESS TO RECORDS

Section 19.01 Maintenance of and Access to Records; Audit Rights.

(a) The Concessionaire shall maintain or cause to be maintained proper books of records and accounts in which complete and correct entries shall be made of its transactions in accordance with Generally Accepted Accounting Principles. Such books and records shall be maintained at a location situated within the State. Unless specified otherwise in this Agreement or approved in writing by the Department, the Concessionaire at a minimum shall retain, and cause its Contractors to retain, books and records for the periods required by applicable Law.

(b) The Concessionaire shall make available to the Department, the State, the Independent Engineer and FHWA (including their employees, contractors, consultants, agents or designees), and allow their access to, such books, records and documents as they may request in connection with the Project, for any purpose related to the Project, this Agreement or the other Project Agreements, including monitoring compliance with the terms and conditions of this Agreement and the other Project Agreements.

(c) The Department, the State, the Independent Engineer and FHWA (including their employees, contractors, consultants, agents or designees) shall have the right to carry out an audit of information relating to (i) the operation, maintenance and repair of the Project or (ii) other information required to be maintained or delivered by the Concessionaire under this Agreement or any other Project Agreement. Such audit may extend, without limitation, to calculations undertaken, and financial or business reports provided, by or on behalf of the Concessionaire under this Agreement and the other Project Agreements. The Department, the State, the Independent Engineer and FHWA, or their respective employees, consultants, agents, auditors, and attorneys, at their own expense, at any time upon 48 hours' prior written notice (or unannounced and without prior notice where there is good faith suspicion of fraud), may examine, copy, take extracts from and audit all the books and records of the Concessionaire related to the Project, including all Contracts entered into under Section 25.02. In addition, the Department, the State, the Independent Engineer and FHWA, or their respective agents, auditors, attorneys and consultants, at their own expense, at any time upon 48 hours' prior written notice (or unannounced and without prior notice where there is good faith suspicion of fraud), may conduct a re-audit and observe the business operations of the Concessionaire to confirm the accuracy of books and records.

(d) The Concessionaire, at its expense, shall cause a reputable independent auditor to audit annually the Concessionaire's books and records relating to the Project, according to GAAP. The Concessionaire shall cause the independent auditor to deliver the audit report to the FHWA and the Department promptly after it is completed, but in any event within 120 days after the end of each calendar year. Nothing contained in this Agreement or any other Project Agreement shall in any way limit the constitutional and statutory powers, duties and rights of elected state officials, including the independent rights of the State Auditor of Public Accounts, in carrying out his or her legal authority.

(e) At the request of the Department, the Concessionaire shall furnish or cause to be furnished to the Department such information relating to the operation, maintenance and repair of the Project as the Department may reasonably request for any purpose related to the Project or this Agreement and as shall be in the possession and control of the Concessionaire, any Concessionaire Party, or any of their Representatives.

Section 19.02 Public Records.

Any Work Product the Department owns and any document of which the Department obtains a copy that relates to the Project may be considered public records under the Virginia Public Records Act, Sections 42.1-76 through 42.1-91 of the Code of Virginia or official records

under the Virginia Freedom of Information Act, Sections 2.2-3700 through 2.2-3714 of the Code of Virginia, and as such may be subject to public disclosure. In the event of a request for disclosure of any such information, the Department shall comply with applicable Law.

Section 19.03 Ownership of Work Product.

(a) All Work Product, including reports, studies, data, information, logs, records, designs, drawings, plans, plans and specifications, record plans and specifications, intangible property and the like (including records thereof in software form), which is prepared by or on behalf of the Department or its other contractors, shall be and remain the exclusive property of the Department. However, the Department shall make available to the Concessionaire, without charge, and without representation or warranty of any kind, any documents in the possession of the Department relating to the planning, design, engineering and permitting of the Project and any Project Enhancement that the Concessionaire elects to or is directed to carry out.

(b) Prior to the expiration or earlier termination of this Agreement, all Work Product prepared by or on behalf of the Concessionaire shall remain exclusively the property of the Concessionaire, notwithstanding any delivery of copies thereof to the Department. Upon the expiration or earlier termination of this Agreement for any reason, including termination by the Concessionaire for a Department Default, (i) the Concessionaire shall promptly turn over to the Department a copy of all Work Product the Concessionaire owns, and (ii) subject to Section 19.04, all such Work Product shall be considered the sole and exclusive property of the Department, without compensation due the Concessionaire or any other party.

Section 19.04 Ownership of Proprietary Intellectual Property.

(a) All Proprietary Intellectual Property of the Concessionaire shall remain exclusively the property of the Concessionaire, notwithstanding any delivery of copies thereof to the Department. Upon the expiration or earlier termination of, or any assignment by the Concessionaire of its rights under, this Agreement for any reason whatsoever, the Department shall have a nonexclusive, nontransferable, irrevocable, fully paid up license to use the Proprietary Intellectual Property of the Concessionaire solely in connection with the Project. The Department shall not at any time sell any such Proprietary Intellectual Property or use or allow any party to use any such Proprietary Intellectual Property for any purpose whatsoever other than in connection with the Project (except as permitted use on other State Highways in accordance with Section 19.04(b)). Subject to Section 19.02, the Department shall not disclose any Proprietary Intellectual Property of the Concessionaire (other than to its concessionaires, Contractors, employees, attorneys and agents in connection with the Project who agree to be bound by any confidentiality obligations of the Department relating thereto), and the Department shall enter into a confidentiality agreement reasonably requested by the Concessionaire with respect to any such Proprietary Intellectual Property. The Concessionaire shall continue to have a full and complete right to use any and all duplicates or other originals of its Proprietary Intellectual Property in any manner it chooses.

(b) The Department shall have the right to purchase from the Concessionaire a nonexclusive, nontransferable, irrevocable, fully paid up license to use the Proprietary Intellectual Property of the Concessionaire on any other State Highway owned and operated by the Department or other State agency on commercially reasonable terms.

(c) With respect to any Proprietary Intellectual Property owned by a Person other than the Concessionaire or the Department, the Concessionaire shall obtain from such owner, concurrently with execution of any Contract or purchase order with such owner, for the Concessionaire and the Department, nonexclusive, nontransferable, irrevocable, fully paid up licenses to use such Proprietary Intellectual Property solely in connection with the Project, of at least identical scope, purpose, duration and applicability as the licenses granted by Section 19.04(a). The Concessionaire shall use commercially reasonable efforts to obtain from such owner a right in favor of the Department to purchase from such owner a nonexclusive, nontransferable, irrevocable, fully paid up license to use such owner's Proprietary Intellectual Property on any other State Highway owned and operated by the Department or other State agency on commercially reasonable terms. The limitations on sale and disclosure by the Department set forth in Section 19.04(a) shall also apply to the Department's licenses in such Proprietary Intellectual Property.

(d) The Concessionaire's name and/or other trademarks, service marks and trade names owned by the Concessionaire (the "Concessionaire Marks") may appear on some of the Project assets, including supplies, materials, stationery and similar consumable items at the Project on the last day of the Term. The parties agree that the Concessionaire shall remain the owner of the Concessionaire Marks at the end of the Term, and the Concessionaire may remove, at its expense, the Concessionaire Marks prior to the end of the Term. The Department acknowledges and agrees that it shall have no right, title, interest or license in the Concessionaire Marks.

Section 19.05 Escrowed Pricing Documents.

(a) Prior to the Agreement Date, the Concessionaire, the Department and the Escrow Agent executed and delivered the EPD Escrow Agreement to implement the provisions of this Section 19.05, and the Concessionaire submitted to the Department for its review and approval the following material hereinafter referred to collectively as Escrow Pricing Documents ("EPDs"): one copy of all documentary information generated with respect to the expected costs of the Work available to the Concessionaire under the Design-Build Contract. The EPDs have been submitted in sealed containers to the Department, which containers have been clearly marked on the outside with the Concessionaire's name, reference to the Project, and the words "U.S. Route 460 Corridor Improvements Project Design-Build Contract EPDs." The EPDs were examined, organized and inventoried by representatives of the Department, assisted by members of the Concessionaire's staff who are knowledgeable in how the EPDs were prepared. This examination was to ensure that the EPDs are legible and complete. It did not include review of, and does not constitute approval of proposed, construction methods, estimating assumptions, or

interpretations of any Project Agreements, including the Design-Build Contract. Such examination will not alter any condition or term of any Project Agreement.

(b) The EPDs are, and shall always remain, the property of the Concessionaire, subject to joint review by the Department and the Concessionaire, as provided herein. The Department stipulates and expressly acknowledges that the EPDs constitute trade secrets. This acknowledgement is based on the Department's express understanding that the information contained in the EPDs is not known outside the Concessionaire's business, is known only to a limited extent and only by a limited number of employees of the Concessionaire, is safeguarded while in the Concessionaire's possession, is extremely valuable to the Concessionaire and could be extremely valuable to the Concessionaire's competitors by virtue of its reflecting Concessionaire's contemplated techniques of design and construction. The Department further acknowledges that the Concessionaire expended substantial sums of money in developing the information included in the EPDs and further acknowledges that it would be difficult for a competitor to replicate the information contained therein. The Department further acknowledges that the EPDs and the information contained therein are made available to the Department only because such action is an express prerequisite to the execution and delivery of this Agreement. The Department further acknowledges that the EPDs include a compilation of the information used in the Concessionaire's business, intended to give the Concessionaire an opportunity to obtain an advantage over competitors who do not know of or use the contents of the documentation.

(c) EPDs may be used to assist in the negotiation of Concessionaire Damages, Positive Net Revenue Impacts, Cost Savings and Change Orders and in the settlement of disputes and Claims.

(d) The Concessionaire may submit EPDs in their usual cost estimating format; *provided* that all information is clearly presented and ascertainable. It is not the intention of this Section 19.05 to cause the Concessionaire extra work, but to ensure that the EPDs will be adequate to enable complete understanding and proper interpretation for their intended use. The EPDs shall be submitted in English.

(e) It is required that the EPDs clearly itemize the estimated costs of performing each item of Work, including financing, administrative and related costs. Cost items shall be separated into sub-items as required to present a detailed cost estimate and allow a detailed cost review. The EPDs shall include: estimates for costs of the design professionals and consultants itemized by discipline both for development of the design, all quantity take-offs, crew size and shifts, equipment, calculations of rates of production and progress, copies of quotes from Contractors and suppliers, and memoranda, narratives, drawings and sketches showing site or work area layouts and equipment, add/deduct sheets, geotechnical reviews and consultant reports, and all other information used by the Concessionaire to arrive at the estimated prices for the Work. Estimated costs shall be broken down into estimate categories for items such as direct labor, repair labor, equipment ownership and operation, expendable materials, permanent materials and subcontract costs as appropriate. Plant and equipment, indirect costs, bond rates

and calculations, insurance costs and financing should be detailed. The Concessionaire's allocation of indirect costs, contingencies, and mark-up shall be identified.

(f) All costs shall be identified. For items amounting to less than \$50,000, estimated unit costs are acceptable without a detailed cost estimate, *provided* that labor, equipment, materials and subcontracts, as applicable, are specified, and *provided further* that indirect costs, contingencies, and mark-up, as applicable, are allocated.

(g) To the extent the Detailed Proposal is based upon contracting any part of the Work, each Contractor whose total Contract price exceeds 5% of the Project costs as set forth in the Schedule of Values shall provide separate similar documentation to be included with those of the Concessionaire. Such documents shall be opened and examined in the same manner and at the same time as the examination described above for the Concessionaire.

(h) If the Concessionaire is otherwise permitted by this Agreement to Contract any portion of the Work after the Agreement Date, the Department retains the right to require the Concessionaire to submit similar documentation from the Contractor before the Contract is approved.

(i) The EPDs shall be stored at the following address:

[Insert Escrow Agent]

The Concessionaire shall bear the cost for storing the EPDs.

(j) The EPDs shall be examined by the Department and the Concessionaire, at any time deemed necessary by the Department. Access to the EPDs will take place in the presence of duly designated representatives of both the Department and the Concessionaire, except that, if the Concessionaire refuses to be present or to cooperate in any other way in the review of the documents, the Department may upon notice to the Concessionaire, review such documents without the Concessionaire being present.

(k) The EPDs and information contained therein may be used in the resolution of any Claim or dispute before any entity selected to resolve disputes and in any litigation commenced hereunder.

(l) No person other than those described in Sections 19.05(j) and (k) shall have access to the EPDs.

(m) The EPDs will be returned to the Concessionaire at such time as the Concessionaire achieves Final Acceptance, final payment has been made to the Design-Build Contractor and all other Contractors having a direct contract with the Concessionaire for any part of the Work during the Work Period (other than operations and maintenance Work between the Service Commencement Date and the Final Acceptance Date), and all Claims or disputes arising

under or related to the Design-Build Contract and such other Contracts have been fully and finally resolved and/or adjudicated.

(n) The Concessionaire shall submit into escrow with the Escrow Agent the original version of the Initial Base Case Financial Model and any Base Case Financial Model Updates. The sole purpose of submitting such documents is to preserve the integrity of the information in the event of a Dispute and such information shall not be deemed EPDs. The Initial Base Case Financial Model and any Base Case Financial Model Updates held by the Escrow Agent shall be returned to the Concessionaire at the end of the Term, provided that all claims or disputes arising under or related to this Agreement have been fully and finally resolved and/or adjudicated.

ARTICLE 20.

DEFAULTS AND REMEDIES

Section 20.01 Concessionaire Defaults.

The occurrence of any one or more of the following events during the Term shall constitute a “Concessionaire Default” under this Agreement:

(a) The Concessionaire fails to timely satisfy its financing obligation under Section 7.02, unless such failure is excused as more specifically set forth in Section 7.02(d), and such failure continues without full and complete cure through completion of Financial Close within five days following written notice thereof.

(b) Any representation or warranty made by the Concessionaire herein or in any other Project Agreement is inaccurate or misleading in any respect on the date made and a material adverse effect upon the Project or the Department’s rights or obligations under the Project Agreements results therefrom, and such circumstance continues without cure for a period of 90 days following the date the Department delivers to the Concessionaire written notice thereof, with cure regarded as complete only when the adverse effects are remedied.

(c) The Concessionaire fails to pay to the Department when due any sum payable to the Department under this Agreement or any other Project Agreement or to deposit funds to any reserve or account in the amount and within the time period required by this Agreement, and such failure, including any failure to pay interest at the Bank Rate from the date due, continues without cure for a period of 30 days following the date the Department delivers to the Concessionaire written notice thereof.

(d) The Concessionaire closes all or part of the Project to public traffic, at any time following Service Commencement, other than in accordance with the terms of this Agreement for reasonable periods of time necessary for the maintenance, repair or improvement of the Project, and such closure continues without cure for a period of ten days following the date the Department delivers to the Concessionaire written notice thereof.

(e) The Concessionaire fails to achieve Substantial Completion of the Project by the Guaranteed Substantial Completion Date or, with respect to the Department's right to terminate under Section 21.04(a), by the Outside Substantial Completion Date, as either such date may be extended pursuant to this Agreement.

(f) The Concessionaire fails to achieve Service Commencement within 30 days following the date the Department issues the Substantial Completion Certificate, and such failure continues without cure for a period of 30 days following the date the Department delivers to the Concessionaire written notice thereof.

(g) The Concessionaire fails to achieve Final Acceptance within 90 days following the date the Department issues the Substantial Completion Certificate, as such 90-day deadline may be extended pursuant to this Agreement, and such failure continues without cure for a period of 30 days following the date the Department delivers to the Concessionaire written notice thereof.

(h) The Concessionaire fails to maintain, or to cause to be maintained, in effect the insurance, bonds, guarantees, letters of credit or other performance security as and when required under this Agreement for the benefit of relevant parties, or fails to comply with any requirement of this Agreement pertaining to the amount, terms or coverage of the same and such failure continues without cure for a period of five days following the date the Department delivers to the Concessionaire written notice thereof.

(i) The Concessionaire (A) fails to deliver to the Department within the deadline for submission set forth in Section 11.06(b)(i) a Performance Improvement Plan meeting the requirements for approval set forth in Section 11.06(b)(i), and such failure continues without cure for a period of five days following the date the Department delivers to the Concessionaire written notice thereof, (B) fails to fully comply with the schedule or specific elements of, or actions required under, the approved Performance Improvement Plan, and such failure continues without cure for a period of 30 days following the date the Department delivers to the Concessionaire written notice thereof, or (C) fails to demonstrate the results of implementation described in Section 11.06(b)(ii) within the 180-day period described therein.

(j) The Concessionaire fails to comply with, perform or observe any other obligation, covenant, agreement, term or condition in this Agreement or any other Project Agreement to which the Department and the Concessionaire are parties, including failure to perform any Work relating to the design, construction, operation and maintenance of the Project or any portion thereof in accordance with this Agreement (other than provisions subject to the other subsections of this Section 20.01), and such failure continues without cure for a period of 90 days following the date the Department delivers to the Concessionaire written notice thereof (giving particulars of the failure in reasonable detail).

(k) This Agreement or all or any portion of the Concessionaire's Interest is Transferred, or there occurs a Change in Control, in contravention of Section 26.01.

(l) After exhaustion of all rights of appeal, there occurs any suspension or debarment (distinguished from ineligibility due to lack of financial qualifications), or there goes into effect an agreement for voluntary exclusion, of the Concessionaire, any Affiliate of the Concessionaire (as “affiliate” is defined in 29 CFR 98.905 or successor regulation of similar import), or the Design-Build Contractor or any O&M Contractor whose work is not completed, from bidding, proposing or contracting with any federal or State department or agency, and such failure continues without cure for a period of 90 days following the date the Department delivers to the Concessionaire written notice thereof (giving particulars of the failure in reasonable detail. If the Person debarred or suspended or subject to an agreement for voluntary exclusion is an Equity Member, cure will be regarded as complete when the Concessionaire proves it has removed such Person from any position or ability to manage, direct or control the decisions of the Concessionaire or to perform Work; and if the Person debarred or suspended or subject to an agreement for voluntary exclusion is the Design-Build Contractor or an O&M Contractor or its Affiliate, cure will be regarded as complete when the Concessionaire replaces such Contractor in accordance with this Agreement.

(m) The Concessionaire (i) admits, in writing, that it is unable to pay its debts as they become due, (ii) makes an assignment for the benefit of its creditors, (iii) files a voluntary petition under Title 11 of the U.S. Code, or if such petition is filed against it and an order for relief is entered, or if the Concessionaire files any petition or answer seeking, consenting to or acquiescing in any reorganization, arrangement, composition, readjustment, liquidation, dissolution or similar relief under the present or any future U.S. bankruptcy code or any other present or future applicable Law, or shall seek or consent to or acquiesce in or suffer the appointment of any trustee, receiver, custodian, assignee, sequestrator, liquidator or other similar official of the Concessionaire, or of all or any substantial part of its properties or of the Project or any interest therein, or (iv) takes any action in furtherance of any action described in this subsection.

(n) Within 90 days after the commencement of any proceeding against the Concessionaire seeking any reorganization, arrangement, composition, readjustment, liquidation, dissolution or similar relief under the present or any future U.S. bankruptcy code or any other present or future applicable Law, such proceeding has not been dismissed, or, within 90 days after the appointment, without the consent or acquiescence of the Concessionaire, of any trustee, receiver, custodian, assignee, sequestrator, liquidator or other similar official of the Concessionaire or of all or any substantial part of its properties or of the Project or any interest therein, such appointment has not been vacated or stayed on appeal or otherwise, or, within 90 days after the expiration of any such stay, such appointment has not been vacated.

(o) A levy under execution or attachment has been made against all or any part of the Project or any interest therein (including the Concessionaire’s Interest) as a result of any Lien (other than a Lien relating to permitted Concessionaire Debt) created, incurred, assumed or suffered to exist by the Concessionaire or any Person claiming through it, and such execution or attachment has not been vacated, removed or stayed by court order, bonding or otherwise within

a period of 60 days, unless such levy resulted from actions or omissions of the Department or its Representatives.

(p) If the Concessionaire has delivered to the Department a guaranty with respect to the Committed Investment obligation of an Equity Member or with respect to the Design-Build Contract, (i) any voluntary or involuntary petition, proceeding or other act or event described in Sections 20.01(m) and (n) shall occur with respect to the guarantor thereunder (and in the case of an involuntary proceeding shall not be contested in good faith or shall not be vacated or stayed within 90 days after the commencement of the proceeding), (ii) such guarantor repudiates the guaranty, or (iii) such guarantor shall breach or fail to perform any obligation under such guaranty and shall not cure such breach or failure to perform within the time available for cure under such guaranty, or if the guaranty does not specify a time period to cure, within 60 days following the date the Department or other party benefited by the guaranty delivers to the guarantor written notice of such breach or failure to perform (giving particulars of the breach or failure in reasonable detail).

Section 20.02 Department Remedies upon Concessionaire Default.

Upon the occurrence of a Concessionaire Default, the Department may, subject to the provisions of Article 7, do any or all of the following as the Department, in its discretion, shall determine:

(a) The Department may terminate this Agreement and any other Project Agreements to which the Department is a party, to the extent provided in Section 21.04 or 21.05.

(b) If the Concessionaire Default is by reason of the failure to pay any monies to a third party, the Department may (but shall have no obligation to) make payment on behalf of the Concessionaire of such monies, and any amount so paid by the Department shall be payable by the Concessionaire to the Department within five days after demand, including accrued interest at the Bank Rate from the date such payment is made by the Department to the repayment date; *provided*, that (i) the Department shall not incur any liability to the Concessionaire for any act or omission of the Department or any other Person in the course of remedying or attempting to remedy any Concessionaire Default, and (ii) the Department's cure of any Concessionaire Default shall not waive or affect the Department's rights against the Concessionaire by reason of the Concessionaire Default.

(c) The Department may cure the Concessionaire Default (but this shall not obligate the Department to cure or attempt to cure a Concessionaire Default or, after having commenced to cure or attempted to cure a Concessionaire Default, to continue to do so), and all costs and expenses reasonably incurred by the Department in curing or attempting to cure the Concessionaire Default, including the Department's Allocable Costs, shall be payable by the Concessionaire to the Department within five days of demand, including accrued interest at the Bank Rate from the date such costs or expenses were incurred to the repayment date; *provided*, that (i) the Department shall not incur any liability to the Concessionaire, and the Concessionaire hereby irrevocably waives and releases any liability of the Department to the Concessionaire, for

any act or omission of the Department or any other Person in the course of remedying or attempting to remedy any Concessionaire Default, and (ii) the Department's cure of any Concessionaire Default shall not waive or affect the Department's rights against the Concessionaire by reason of the Concessionaire Default.

(d) The Department may seek specific performance, injunction or other equitable remedies, it being acknowledged that damages may not be an inadequate remedy for a Concessionaire Default.

(e) With respect to those Concessionaire Defaults that entitle the Department to terminate this Agreement pursuant to Section 20.02(a), the Department may terminate the Concessionaire's right of possession of the Project, and in such event, the Department or the Department's agents, contractors and employees may immediately or at any time thereafter re-enter the Project and remove all persons and all or any property there from, by any available action or proceeding at law or in equity, and with or without terminating this Agreement, and repossess, occupy, and operate the Project; *provided* that no re-entry by the Department shall be construed as an election on its part to terminate this Agreement unless a notice of such intention is given to the Concessionaire; *provided, further*, that any re-entry or termination of this Agreement made in accordance with this Agreement as against the Concessionaire shall be valid and effective against the Concessionaire even though made subject to the rights of the Collateral Agent to cure any default of the Concessionaire and continue as in the place of the Concessionaire under this Agreement or New Agreements as provided herein.

(f) The Department may, subject to applicable Law, distraint against any of the Concessionaire's goods situated on the Project and the Concessionaire waives any statutory protections and exemptions in connection therewith.

(g) The Department may close any and all portions of the Project.

(h) If the Concessionaire Default consists of imposing tolls in excess of that permitted under this Agreement, such Concessionaire Default shall be curable only by (A) reinstating the tolls in effect immediately prior to the impermissible raise in tolls, unless waived by the Department, and (B) disgorging to the Department any and all increases in Toll Revenues that would not have been realized in the absence of such Concessionaire Default, together with interest thereon at the Bank Rate from the date of collection until the date disgorged.

(i) Without notice and without awaiting lapse of the period to cure, in the event of any breach or failure under Section 20.01(d) (closure of all or any part of the Project or any lane in violation of the Agreement), or any failure to perform a Safety Compliance Order and the failure results in or prolongs an Emergency or danger to persons or property, the Department may enter and take control of the Project or applicable portion thereof to the extent the Department finds it necessary to rectify the closure, Emergency or danger, and may suspend construction Work and/or close or cause to be closed the portion of the Project affected by the Emergency or danger, until such time as such breach or failure is cured, or the Department terminates this Agreement. The Concessionaire shall pay to the Department on demand the

Department's Allocable Costs in connection with such action. So long as the Department undertakes such action in good faith, even if under a mistaken belief in the occurrence of such a breach or failure, such action shall not be deemed unlawful or a breach of this Agreement, shall not expose the Department to any liability to the Concessionaire and shall not entitle the Concessionaire to any other remedy, it being acknowledged that the Department has a high priority, paramount public interest in providing and maintaining continuous public access to the Project and in protecting public and worker safety. The foregoing shall not, however, protect the Department from the Concessionaire's lawful Claims for recovery for third party bodily injury or property damage arising out of any such Department action, if and to the extent (A) the Department was mistaken in believing such a breach or failure occurred, (B) the third party liability is not insured and not required to be insured under this Agreement and (C) such injury or property damage was caused by the Department's gross negligence, recklessness or intentional misconduct. Immediately following rectification of such breach or failure, as determined by the Department, acting reasonably, the Department shall relinquish control and possession of the Project or applicable portion thereof back to the Concessionaire.

(j) The Department may, without waiving or releasing the Concessionaire from any obligations, make demand upon and enforce any bond, and make demand upon, draw on and enforce and collect any letter of credit, (including without limitation the Financial Close Security, the Performance Security and the O & M Security), guaranty or other security available to the Department under this Agreement with respect to the Concessionaire Default in question in any order in the Department's sole discretion. Where access to a bond, letter of credit or other payment or security is to satisfy damages owing, the Department shall be entitled to make demand, draw, enforce and collect regardless of whether the Concessionaire Default is subsequently cured. The Department will apply the proceeds of any such action to the satisfaction of the Concessionaire's obligations under the Project Agreements, including payment of amounts due the Department.

(k) The Department shall have the right and authority, without liability to the Concessionaire, to suspend any affected portion of the Work by written order to the Concessionaire to comply with any court order or judgment, to protect against a risk to the public health, safety or welfare, as more particularly set forth in Section 25.04(b), including to workers, other personnel or the general public from unsafe or dangerous conditions, or in the case of any of the following Concessionaire Defaults:

- (i) Performance of Nonconforming Work;
- (ii) Failure to comply with any Law or Governmental Approval (including failure to handle, preserve and protect archeological, paleontological or cultural resources, or failure to handle Hazardous Substances, in accordance with applicable Laws and Governmental Approvals);
- (iii) Failure to provide proof of required insurance coverage or to provide or maintain the required Performance Security;

- (iv) Failure to carry out and comply with Directive Letters; and
- (v) Failure to satisfy any condition to commencement of construction set forth in Section 8.02(b).

The Department will lift the suspension order promptly after it is permitted by the terms of the court order or judgment, after the dangerous or unsafe condition is rectified, or after the Concessionaire fully cures and corrects the applicable breach or failure to perform.

(l) The Department may exercise any of its other rights and remedies provided for hereunder or the other Project Agreements or at law or equity.

Section 20.03 Damages; Liquidated Damages for Certain Concessionaire Defaults.

(a) Damages for Concessionaire Breach or Failure to Perform. Without prejudice to any other rights with respect to the Concessionaire's breaches or failures, subject to Section 26.09, the Department shall be entitled to recover its Losses and any other amounts due and payable under this Agreement arising from the Concessionaire's breach or failure to perform any obligation under this Agreement, regardless of whether the breach or failure to perform ripens into a Concessionaire Default, together with interest thereon at the Bank Rate from the date payment is due until paid and, in connection therewith, exercise any recourse available to any Person who is owed damages or a debt.

(b) Damages for Failure to Achieve Financial Close.

(i) The Concessionaire shall be liable for and pay to the Department damages if (A) there occurs a Concessionaire Default under Section 20.01(a), without need for any other notice and without any additional cure period, and (B) as a result thereof the Department terminates this Agreement pursuant to Section 21.05(a). If the Concessionaire has not entered into the Initial Project Financing Agreements on or before the Agreement Date, then concurrently with execution of this Agreement, the Concessionaire shall deliver, or has delivered, to the Department the Financial Close Security in the cumulative original amount which is the greater of \$165 million or 25% of the Committed Investment. The Department shall be entitled to draw upon the Financial Close Security to reimburse the Department for its resulting damages.

(c) Liquidated Damages for Delay. The Concessionaire understands that, if the Concessionaire fails to achieve the timely completion of Project construction, the Department will suffer damages which are difficult to determine and accurately specify. Accordingly, to compensate the Department for such damages, the Concessionaire hereby agrees as follows:

(i) If Substantial Completion of the Work is not attained by the Guaranteed Substantial Completion Date, Concessionaire shall pay the Department \$21,000 as liquidated damages for each day that actual Substantial Completion of the Work extends

beyond the Guaranteed Substantial Completion Date, regardless of whether the delay has ripened into a Concessionaire Default.

(ii) If Final Acceptance is not attained within 90 days after the Substantial Completion Date, as such deadline may be extended pursuant to this Agreement, the Concessionaire shall pay the Department \$5,000 as liquidated damages for each day that Final Acceptance remains to be achieved following the expiration of 90 days after the Substantial Completion Date, as such deadline may be extended pursuant to this Agreement, regardless of whether the delay has ripened into a Concessionaire Default.

(iii) The parties acknowledge, recognize and agree on the following:

(A) that because of the unique nature of the Project, it is difficult or impossible to determine with precision the amount of damages that would or might be incurred by the Department as a result of the Concessionaire's failure to timely complete the Work during the Work Period;

(B) that any sums which would be payable under this Section 20.03(c) are in the nature of liquidated damages, and not a penalty, and are fair and reasonable and such payment represents a reasonable estimate of fair compensation for the losses that may reasonably be anticipated from such failure; and

(C) that any sums which would be payable under this Section 20.03(c) shall be in lieu of all liability of the Concessionaire and its Contractors for any and all Losses, whether special or consequential, and of whatsoever nature incurred by the Department which are occasioned by any delay described by this Section 20.03(c). Notwithstanding the above, liquidated damages are not intended to excuse the Concessionaire or any of its Contractors from, or liquidate, liability for any other breach of its obligations under this Agreement and the other Project Agreements, or limit the Department's recourse to other contract remedies under this Agreement such as termination pursuant to Articles 20 and 21.

Section 20.04 Department Defaults.

The occurrence of any one or more of the following events during the Term shall constitute a "Department Default" under this Agreement:

(a) Any representation or warranty made by the Department herein or in any other Project Agreement is inaccurate or misleading in any respect on the date made and a material adverse effect upon the Project or the Concessionaire's rights or obligations under the Project Agreements results therefrom, and such circumstance continues without cure for a period of 90 days following the date the Concessionaire delivers to the Department written notice thereof, with cure regarded as complete only when the adverse effects are remedied; or

(b) The Department fails to comply with or observe any material obligation, covenant, agreement, term or condition in this Agreement or any other Project Agreement to which it is a party, which failure materially adversely affects the Concessionaire's Interest, and such failure continues without cure for a period of 90 days following the date the Concessionaire delivers to the Department written notice thereof (giving particulars of the failure in reasonable detail) or for such longer period as may be reasonably necessary to cure such failure, *provided* that, in the latter case, (i) the Department is proceeding with all due diligence to cure or cause to be cured such failure, (ii) the failure is capable of being cured within a reasonable period of time, and (iii) such failure is in fact cured within such period of time.

Section 20.05 Remedies of the Concessionaire upon Department Default.

(a) Upon the occurrence of a Department Default under this Agreement, the Concessionaire may by notice to the Department declare the Department to be in default and may, subject to the provisions of Section 20.05(b), do any or all of the following as the Concessionaire, in its discretion, shall determine.

(i) The Concessionaire may terminate this Agreement and any executory Project Agreements to which the Concessionaire and the Department are both parties, to the extent provided in Section 21.04(b).

(ii) The Concessionaire may exercise any of its other rights and remedies provided for under this Agreement or applicable Law, subject to any limitations thereon set forth in this Agreement, including Sections 26.09 and 26.19.

(b) If the Department's failure constitutes a Delay Event or Compensation Event, the Concessionaire's sole recourse shall be to seek remedies pursuant to Articles 13 and 14.

ARTICLE 21.

TERMINATION

Section 21.01 Termination Upon Expiration of Term.

Unless earlier terminated in accordance with the terms of this Article 21, all the rights and obligations of the parties hereunder shall cease and terminate, without notice or demand, on the last day of the Term. Not later than 180 days preceding the end of the Term, the Concessionaire and the Department shall develop a plan to assure the orderly transition of the Project to the Department or its designee (which plan is in addition to the adjustments and changes to the Life Cycle Maintenance Plan under Section 21.02). The parties shall then diligently implement the plan.

Section 21.02 Handback Obligations and Reserve.

(a) Upon the end of the Term, the Concessionaire shall hand back the Project to the Department, at no charge to the Department, with asset conditions as specified in the Technical Requirements. In addition, if requested by the Department, the Concessionaire will dismantle and remove portions of the ETTM Facilities and ETTM Equipment as designated by the Department at the Concessionaire's sole cost and expense.

(b) Beginning five years prior to the projected expiration of the Term and every year thereafter, the Concessionaire shall conduct annual inspections of the Project and provide reports of such inspections to the Department pursuant to the Technical Requirements.

(c) The Concessionaire shall diligently perform and complete all work contained in the Life Cycle Maintenance Plan prior to reversion of the Project back to the Department, based on the required adjustments and changes to the Life Cycle Maintenance Plan resulting from the inspections and analysis under Section 21.02(b).

(d) Five years prior to the projected expiration of the Term, the Concessionaire shall make a single deposit into the Handback Reserve Fund (or post a letter of credit, in a form acceptable to the Department, in favor of the Department) in an amount equal to [20%] of the aggregate nominal lifecycle costs expended in the previous five years of the Term pursuant to the most recent Life Cycle Maintenance Plan approved by the Department. If the Handback Reserve Fund is in the form of cash reserves, such reserves shall be held by a third party mutually agreed upon by the Concessionaire and the Department. The Department shall have the right to draw upon the Handback Reserve Fund or letter of credit only in the event that subsequent to termination or expiration of the Term, the Project is found to fail to address the Handback Requirements. The Department may make draws in the amount required to address such failures up to the full amount of the security available. Amounts held in the Handback Reserve Fund shall be released to the Concessionaire following the Department's determination that the Project meets all Handback Requirements. If the Concessionaire elects to post the letter of credit in lieu of depositing funds into the Handback Reserve Fund, the Department shall return the letter of credit to the Concessionaire if and when the Department determines that the Project meets all Handback Requirements.

Section 21.03 Termination for a Force Majeure Event.

(a) If a Force Majeure Termination Event occurs as set forth in Section 13.02(a), then (i) the Concessionaire may elect to terminate this Agreement unless the Department elects, within 60 days following receipt of the Concessionaire's written notice of election to terminate, to treat the Force Majeure Termination Event as a Compensation Event, and (ii) the Department may elect to terminate this Agreement unless the Concessionaire elects, within 60 days following the Force Majeure Termination Event, to restore the damage or destruction. A party shall exercise its right to terminate this Agreement by delivering to the other party written notice of its election to terminate this Agreement ("Force Majeure Termination Notice"). If this Agreement is terminated at the election of the Concessionaire pursuant to this Section 21.03, no compensation shall be payable to the Concessionaire arising out of or relating to such termination.

(b) If this Agreement is terminated at the election of the Department, the Department must pay to the Concessionaire a sum equal to the following:

(i) The lesser of: (A) the Project Value (as determined pursuant to Section 21.10) or (B) the Concessionaire Debt Termination Amount; plus

(ii) Without duplication, the amount necessary to reimburse the reasonable out-of-pocket and documented costs and expenses incurred by the Concessionaire, including its reasonable Allocable Costs, to demobilize and terminate Contracts between the Concessionaire and third parties or Affiliates for performance of Work, excluding the Concessionaire's non-contractual liabilities and indemnity liabilities (contractual or non-contractual) to third parties or Affiliates; minus

(iii) The sum of (A) the greater of (1) the proceeds of insurance (including casualty insurance and business interruption insurance) that is required to be carried pursuant to Section 18.01 and provides coverage to pay, reimburse or provide for any of the costs and losses attributable to the Force Majeure event, and (2) the proceeds of insurance (including casualty insurance and business interruption insurance) that is actually carried by or insuring the Concessionaire under policies solely with respect to the Project and the Work, regardless of whether required to be carried pursuant to Section 18.01, and that provides coverage to pay, reimburse or provide for any of the costs and losses attributable to the Force Majeure Event, plus (B) the foregoing costs and losses that the Concessionaire is deemed to have self-insured pursuant to Section 18.04; minus

(iv) The portion of any Concessionaire Damages previously paid to the Concessionaire that compensated the Concessionaire for Net Cost Impacts and Net Revenue Impacts attributable to the period after the effective date of termination, *provided*, that if the Concessionaire Debt Termination Amount is applicable there shall not be subtracted any such Concessionaire Damages previously used to reduce Concessionaire Debt within the definition of Concessionaire Debt Termination Amount; minus

(v) All Borrowed Cash and Credit Balances, except to the extent such balances are already deducted in determining the Concessionaire Debt Termination Amount.

(c) If the Concessionaire has elected to restore the Project and then fails to promptly and completely restore the Project in accordance with Section 13.02, such failure shall constitute a Concessionaire Default and the provisions of Sections 20.02, 20.03 and 21.04 shall apply.

(d) Subject to Section 26.19, the Department shall pay any sum due pursuant to this Section within 365 days after the date of determination of the Project Value and Concessionaire Debt Termination Amount, together with interest thereon at the average earnings rate on the State's Transportation Trust Fund, or any successor thereto, during such period from the date of determination of the Project Value and Concessionaire Debt Termination Amount to the date of payment.

Section 21.04 Default Termination.

(a) The Department is entitled to terminate this Agreement and any other Project Agreement to which the Department is a party by giving 60 days' prior written notice to the Concessionaire and the Collateral Agent upon the occurrence of a Concessionaire Default; *provided*, that for a failure to achieve Substantial Completion, the right to terminate shall not arise until the Outside Substantial Completion Date. No compensation shall be payable to the Concessionaire where this Agreement is terminated due to a Concessionaire Default. If the Department terminates this Agreement for grounds which are later determined not to justify a termination by the Department pursuant to this Section 21.04(a), such termination shall be deemed to constitute a termination for convenience pursuant to Section 21.06, and the Concessionaire's remedy shall be as set forth in Sections 21.06(c) and (d).

(b) The Concessionaire is entitled to terminate this Agreement by delivering to the Department 90 days' prior written notice of intent to terminate only in the event of a Department Default as described in Section 20.04 that materially impairs the Concessionaire's rights to realize the material benefits of the Permit granted under this Agreement; *provided*, that the Department shall be entitled to cure such Department Default by providing the Concessionaire with a written work plan within the 90-day period after the Department receives the written notice of intent to terminate. The work plan shall outline the actions by which the Department will ensure future compliance with the obligation, covenant, agreement, term or condition in this Agreement that the Department failed to perform or observe. The work plan shall be subject to the Concessionaire's written approval (which approval shall not be unreasonably withheld, delayed or conditioned). Any failure of the Department to comply in any material respect with such approved work plan following an additional 90 days' notice of such failure from the Concessionaire to the Department shall be deemed to be a material Department Default entitling the Concessionaire to terminate if such failure is not cured within 30 days after the date the Department receives written notice of such failure. In the case of any such termination, the Concessionaire shall be entitled to the same measure of compensation as upon a termination for convenience pursuant to Section 21.06. If the Concessionaire terminates this Agreement for grounds which are later determined not to justify a termination by the Concessionaire pursuant to this Section 21.04(b), such termination shall be deemed to constitute a termination for Concessionaire Default pursuant to Section 21.04(a).

Section 21.05 Termination for Failure to Achieve Financial Close.

(a) The Department, at its sole election, shall be entitled to terminate this Agreement and the other Project Agreements to which it is a party, if there occurs a Concessionaire Default under Section 20.01(a), without need for any other notice and without any additional cure period. Upon such termination, the Department shall be entitled to draw on the Financial Close Security, for the damages owing to the Department under Section 20.03(b).

(b) The Concessionaire or the Department may terminate this Agreement without fault, Claim or penalty if Financial Close does not occur by the Financial Close Deadline and such failure is directly attributable to the contingency set forth in Section 7.02(d). In the event of

such a termination, all the Project Agreements to which the Department is a party shall be deemed rescinded, and the Department shall promptly return to the Concessionaire the original of the Financial Close Security.

Section 21.06 Termination for Convenience.

(a) The Department may terminate this Agreement, at any time following the expiration of 5 years after the Agreement Date, if it determines that, in its sole discretion, a termination is in the best interests of the Department. Termination pursuant to this Section 21.06 shall not relieve the Concessionaire of its obligation for any Claims arising prior to termination.

(b) The Department may terminate this Agreement pursuant to Section 21.06(a) by delivering to the Concessionaire and the Collateral Agent written notice of its election to terminate no less than 60 days prior to when such termination is to take effect.

(c) In the event of termination pursuant to Section 21.06(a), the Department must pay to the Concessionaire a sum equal to that set forth in option A or option B below, as selected by the Department in its sole discretion:

Option A

(i) The amount necessary to reimburse reasonable and documented out-of-pocket costs of third parties and Affiliates to demobilize and terminate under Contracts between the Concessionaire and such third parties or Affiliates for performance of Work, excluding the Concessionaire’s non-contractual liabilities and indemnity liabilities (contractual or non-contractual) to such third parties or Affiliates; plus

(ii) Breakage Costs, if any; plus

(iii) A compensation amount (“COMP”), calculated using the following equation to determine the lump sum required to make up the difference between the Maximum PVR and the PVR as of the month prior to the effective date of termination, less the present value of all avoided operating and maintenance costs indicated for calendar month *i* in the Initial Base Case Financial Model, including costs of Major Maintenance:

$$COMP_m = \left(MPVR - PVR_{m-1} - \sum_{i=m}^r \frac{O\&M_i}{(1 + r_n)^{\left(\frac{i-1}{12}\right)}} \right) * \prod_{n=1}^m (1 + r_n)^{\left(\frac{1}{12}\right)}$$

where:

COMP_{*m*} is the lump sum amount to be determined in month *m*;

The calendar month m is the month which includes the effective date of termination.

$MPVR$ is the Maximum PVR;

PVR_{m-1} is the PVR as of the end of month $m-1$;

“ t ” is the number of months remaining until the projected end of the Term, as indicated in the Initial Base Case Financial Model.

The calendar month i includes the effective date of termination when $i = m$;

$O\&M_i$ is all avoided operating and maintenance costs indicated for month i in the Initial Base Case Financial Model, including costs of Major Maintenance;

r_n is the PVR Discount Rate for month n , *provided* that for months where $m = < n$, the PVR Discount Rate shall be the same as it was in month $m-1$ and

The calendar month n which includes the Agreement Date is $n = 1$;

minus

(iv) The PVR for any Monthly Gross Revenue received in month m by or on behalf of the Concessionaire that was not included previously in the calculation of PVR; minus

(v) The portion of any Concessionaire Damages previously paid to the Concessionaire that compensated the Concessionaire for Net Cost Impacts and Net Revenue Impacts attributable to the period after the effective date of termination.

Option B

(i) The greater of (A) Project Value (as determined pursuant to Section 21.10) or (B) the Concessionaire Debt Termination Amount; plus

(ii) Without duplication, the amount necessary to reimburse the reasonable out-of-pocket and documented costs and expenses incurred by the Concessionaire, including its reasonable Allocable Costs, to demobilize and terminate Contracts between the Concessionaire and third parties or Affiliates for performance of Work, excluding the Concessionaire’s non-contractual liabilities and indemnity liabilities (contractual or non-contractual) to third parties or Affiliates; minus

(iii) The portion of any Concessionaire Damages previously paid to the Concessionaire that compensated the Concessionaire for Net Cost Impacts and Net Revenue Impacts attributable to the period after the effective date of termination, provided that if the Concessionaire Debt Termination Amount is applicable there shall not be

subtracted any such Concessionaire Damages previously used to reduce Concessionaire Debt within the definition of Concessionaire Debt Termination Amount; minus

(iv) Only where the Concessionaire Debt Termination Amount is applicable, all Borrowed Cash and Credit Balances, except to the extent such balances are already deducted in determining the Concessionaire Debt Termination Amount; minus

(v) Only where the Concessionaire Debt Termination Amount is applicable, the cost of Major Maintenance Work that the Concessionaire was required to but did not perform prior to the effective date of termination, as well as the amount of funds that would have been required to be funded into the Handback Reserve Fund and delivered to the Department at the end of the Term as if the Handback Requirements and Handback Reserve Fund provisions had been in effect prior to termination; minus

(vi) Only where Project Value is applicable, the amount of all Distributions, and all payments to Affiliates in excess of reasonable compensation or that are advance payments for services not yet rendered, from and after the date notice of election to terminate is delivered; minus

(vii) Only where Project Value is applicable, all amounts received by the Lenders in relation to the Concessionaire Debt (including all interest, principal and Breakage Costs) from and after the date notice of election to terminate is delivered; plus

(viii) Only where Project Value is applicable, Breakage Costs.

(d) Subject to Section 26.19, the Department shall pay the foregoing sum within 180 days after its determination, together with interest thereon at the average earnings rate on the State's Transportation Trust Fund, or any successor thereto, during such period from the date of determination of the termination compensation until the date of payment.

Section 21.07 Concessionaire Actions Upon Termination.

(a) On delivery of notice of termination of this Agreement or the Concessionaire's rights hereunder for any reason prior to expiration of the Term, the provisions of this Section 21.07 shall apply. The Concessionaire shall timely comply with such provisions independently of, and without regard to, the timing for determining, adjusting, settling and paying any amounts due to the Concessionaire or the Department on account of termination. In connection with the expiration of the Term, certain provisions of this Section 21.07, as specified, shall apply.

(b) The Concessionaire shall conduct all discussions and negotiations to determine the amount of any termination compensation, and shall share with the Department all data, documents and information pertaining thereto, on an Open Book Basis.

(c) Except as otherwise specified in this Agreement, within three days after receipt of a notice of termination, or, if applicable, not later than 120 days before expiration of the Term,

the Concessionaire shall meet and confer with the Department for the purpose of developing an interim transition plan for the orderly transition of Work, demobilization and transfer to the Department of control of the Project and Project Right of Way. The parties shall use diligent efforts to complete preparation of the interim transition plan within 15 days after the date the Concessionaire receives the notice of termination or, if applicable, not later than 15 days before expiration of the Term. The parties shall use diligent efforts to complete a final transition plan within 30 days after such date. The transition plan shall be in form and substance acceptable to the Department in its good faith discretion and shall include and be consistent with the other provisions and procedures set forth in this Section 21.07, all of which procedures the Concessionaire shall immediately follow, regardless of any delay in preparation or acceptance of the transition plan.

(d) Upon receipt of a notice of termination, or, if applicable, before expiration of the Term, the Concessionaire shall take all action that may be necessary, or that the Department may direct, for the protection and preservation of the Project, the Work and such materials, goods, machinery, equipment, parts, supplies and other property.

(e) The Concessionaire shall deliver to the Department on the date of expiration of the Term or on the effective date of any earlier termination:

(i) all tangible personal property, reports, books, records, Work Product and Intellectual Property used or owned by the Concessionaire, Concessionaire Party or any Affiliate relating to the Project or the Work;

(ii) possession and control of the Project and Project Right of Way, free and clear of any and all Liens created, incurred or suffered by the Concessionaire, Concessionaire Party or any Affiliate or anyone claiming under any of them;

(iii) all other intangible personal property used or owned by any Concessionaire Party and relating to or derived from the Project, the Work and the Handback Reserve Fund; and

(iv) a recordable notice of termination of this Agreement and the Concessionaire's Interest, in the form required by the Department, executed and acknowledged by the Concessionaire. The Department may record such notice of termination in the land records of each county in which the Project is located and of the City of Richmond.

(f) If as of the date notice of termination is delivered the Concessionaire has not completed construction of all or part of the Project, the Department may elect, by written notice to the Concessionaire and the Design-Build Contractor delivered within 90 days after the date of notice delivery, to continue in effect the Design-Build Contract or to require its termination. If the Department does not deliver written notice of election within such time period, the Department shall be deemed to elect to require termination of the Design-Build Contract. If the Department elects to continue the Design-Build Contract in effect, then the Concessionaire shall

execute and deliver to the Department a written assignment, in form and substance acceptable to the Department, acting reasonably, of all the Concessionaire's right, title and interest in and to the Design-Build Contract, and the Department shall assume in writing the Concessionaire's obligations thereunder that arise from and after the end of the Term. If the Department elects (or is deemed to elect) to require termination of the Design-Build Contract, then the Concessionaire shall:

(i) Unless the Department has granted New Agreements to a Lender or its Substituted Concessionaire, take such steps as are necessary to terminate the Design-Build Contract, including notifying the Design-Build Contractor that the Design-Build Contract is being terminated and that the Design-Build Contractor is to immediately stop work and stop and cancel orders for materials, services or facilities unless otherwise authorized in writing by the Department;

(ii) Immediately safely demobilize and secure construction, staging, lay down and storage areas for the Project and Utility Relocations included in the construction Work in a manner satisfactory to the Department, and remove all debris and waste materials except as otherwise approved by the Department in writing;

(iii) Take such other actions as are necessary or appropriate to mitigate further cost;

(iv) Subject to the prior written approval of the Department, settle all outstanding liabilities and all Claims arising out of the Design-Build Contract;

(v) Cause the Design-Build Contractor to execute and deliver to the Department a written assignment, in form and substance acceptable to the Department, acting reasonably, of all the Design-Build Contractor's right, title and interest in and to (A) all third party agreements and permits, except Contracts for performance of the Design-Build Contractor's Work, provided the Department assumes in writing all of the Design-Build Contractor's obligations thereunder that arise after the effective date of termination, and (B) all assignable warranties and Claims held by the Design-Build Contractor against other Contractors and other third parties in connection with the Project or the Work; and

(vi) Carry out such other directions as the Department may give for suspension or termination of Work performed under the Design-Build Contract.

(g) If as of the date notice of termination is delivered the Concessionaire has entered into any other Contract for the design, construction, permitting, installation and equipping of the Project, the Department shall elect, by written notice to the Concessionaire, to continue in effect such Contract or to require its termination. If the Department elects to continue the Contract in effect, then the Concessionaire shall execute and deliver to the Department a written assignment, in form and substance acceptable to the Department, acting reasonably, of all the Concessionaire's right, title and interest in and to the Contract, and the Department shall assume in writing the Concessionaire's obligations thereunder that arise from and after the effective date

of termination. If the Department elects to require termination of the Contract, then the Concessionaire shall take actions comparable to those set forth in Section 21.07(f) with respect to the Contract.

(h) If as of the date notice of termination is delivered the Concessionaire has entered into any operations or maintenance Contract, the Department shall elect, by written notice to the Concessionaire, to continue it in effect or require its termination; provided that if a Lender is entitled to New Agreements following termination, the Department shall not elect to terminate any such Contract until the Lender's right to New Agreements expires without exercise. If the Department elects to continue any such Contract in effect, then on or about the effective date of termination (or promptly after any later election to terminate) the Concessionaire shall execute and deliver to the Department a written assignment, in form and substance acceptable to the Department, acting reasonably, of all the Concessionaire's right, title and interest in and to the Contract, and the Department shall assume in writing the Concessionaire's obligations thereunder that arise from and after the effective date of termination.

Section 21.08 Liability After Termination; Consequences of Termination.

(a) If this Agreement or any other Project Agreement is terminated by reason of a material default, such termination shall not excuse the defaulting party from any liability arising out of such default as provided in the Project Agreements. If any outstanding Claim of the Concessionaire against the Department that is independent of the event of termination and determination of the termination compensation is resolved prior to payment of the termination compensation (if any), the parties shall adjust the termination compensation by the amount of the unpaid award, if any, on the Claim. Notwithstanding the foregoing, any termination of this Agreement shall automatically extinguish any Claim of the Concessionaire to payment of Concessionaire Damages for adverse Net Cost Impacts and Net Revenue Impacts accruing after the effective date of termination from Compensation Events that occurred prior to termination.

(b) If this Agreement or any other Project Agreement is terminated for reason other than a default, no party shall have any further obligation or liability except for performance of their respective obligations which are either expressly stated in this Agreement or any other Project Agreement to survive termination or by their sense and context are intended to survive termination.

(c) The Department shall, as of the effective date of termination of this Agreement or the Concessionaire's rights hereunder, whether due to expiration or earlier termination of the Term, assume full responsibility for the Project or, if Substantial Completion has not been achieved or other Work has otherwise not been completed as of such date, be permitted to assume full responsibility for such outstanding Work, and as of such date, the Concessionaire shall have no liability or responsibility for such Work, as the case may be, occurring after such date; *provided* that the Department and the Concessionaire shall remain fully responsible for all of their respective obligations or liabilities under this Agreement or any other Project Agreement arising before the effective date of termination and those obligations under this Agreement or other Project Agreements which survive termination.

(d) Each of the Concessionaire and the Department shall be liable for all costs, expenses and other amounts for which it is liable or responsible hereunder incurred up to but not including the effective date of termination of this Agreement or the Concessionaire's rights hereunder, whether due to expiration or earlier termination of the Term, and the Concessionaire shall not be liable for any costs, expenses and amounts incurred in connection with the Project or the Work on and after such date, except to the extent such costs, expenses and amounts are properly included in the measure of any damages due to the Department arising from a default by the Concessionaire under this Agreement. The amount of any termination compensation is subject to reduction and offset for such damages.

(e) Regardless of the Department's prior actual or constructive knowledge thereof, no contract or agreement to which the Concessionaire is a party (unless the Department is also a party thereto) as of the effective date of termination shall bind the Department, unless the Department elects to assume such contract or agreement in writing. Except in the case of the Department's express written assumption, no such contract or agreement shall entitle the contracting party to continue performance of work or services respecting the Project following the effective date of termination, or to any Claim, legal or equitable, against the Department.

(f) As of the effective date of termination of this Agreement, whether due to expiration or earlier termination of the Term, the Permit and all of the Concessionaire's Interest shall automatically terminate and expire, and all Liens created, permitted or suffered by the Concessionaire shall be automatically extinguished.

Section 21.09 Exclusive Termination Remedies.

Article 20 and Article 21 set forth the entire and exclusive provisions and rights of the Department and the Concessionaire regarding termination of this Agreement, and any and all other rights at law or in equity to terminate or to payment of compensation upon termination are hereby waived to the maximum extent permitted by Law. The parties hereto agree that, upon any termination of this Agreement, the payments provided herein shall constitute the Concessionaire's sole compensation pursuant to this Agreement and in the event the Department or any designee or licensee of the Department imposes tolls for travel on the Project after termination of this Agreement, neither the Concessionaire nor any beneficiary or Lender as a result of a Financing Assignment shall be entitled to any further compensation in respect thereof. In furtherance of the foregoing, the parties hereto agree that the provisions of Section 56-568B of the Code of Virginia shall not apply to the Project after the termination of this Agreement.

Section 21.10 Determination of Project Value.

(a) Project Value shall be determined according to the following procedures:

(i) Within 30 days after a party requests the appointment of an appraiser, the Department and the Concessionaire shall confer in good faith to mutually appoint an independent third-party appraiser to determine the Project Value by written appraisal. This appraiser must be nationally recognized and experienced in appraising similar assets.

(ii) If the parties are unable to agree upon such a single appraiser within such 30-day period, then within ten days thereafter the Department and the Concessionaire shall each appoint an independent third-party appraiser and both such appraisers shall be instructed jointly to select, within 15 days after they are appointed, a third independent third-party appraiser who is nationally recognized and experienced in appraising similar assets to make the appraisal referred to above.

(iii) If the appraisers appointed by the parties are unable to appoint an independent third-party appraiser under Section 21.10(a)(ii) within 60 days after a party has requested the appointment of an appraiser under Section 21.10(a)(i), then either party may petition the Circuit Court for the City of Richmond to appoint an independent third-party appraiser having such reputation and experience.

(iv) Each party shall pay the costs of its own appraiser. The Department and the Concessionaire shall pay in equal shares the reasonable costs and expenses of the third independent appraiser.

(v) Each party shall diligently cooperate with the appraiser, including promptly providing the appraiser with data and information regarding the Project, Project Right of Way, asset condition, historical cost and revenue data, and other information the appraiser may request that is in the possession of or reasonably available to the party. Each party

shall provide the appraiser with access to the party's books and records regarding the Project on an Open Book Basis.

(vi) Once appointed, the independent third-party appraiser shall conduct an appraisal of the Project Value and deliver to both parties a draft appraisal report and draft valuation. The appraisal shall determine Project Value as of the date notice of termination of the Agreement is delivered, based on the then condition of the Project, *provided that*, in the case of a termination due to a Force Majeure Termination Event, the appraisal shall be based on the condition immediately preceding the Force Majeure Termination Event and on the assumption that the Force Majeure Termination Event did not occur. The appraiser shall appraise Project Value by taking into account the terms and conditions of this Agreement, projected cash flows and projected costs of the Project for the remainder of the projected Term had this Agreement not been terminated, as determined by the appraiser. In conducting the appraisal, and before issuing a draft appraisal report, the independent appraiser shall afford reasonable and comparable opportunity to each party to provide the appraiser with information, data, analysis and reasons supporting each party's view on the Project Value. The parties shall have 15 days after receipt of the draft appraisal report to comment thereon. After the opportunity to comment has expired, the independent third-party appraiser shall consider and evaluate all comments, prepare a final appraisal report stating the Project Value, and deliver the final appraisal report to both parties.

(b) The effect of any Compensation Event occurring prior to determination of Project Value shall be addressed as follows:

(i) To the extent the Concessionaire previously received payment of Concessionaire Damages for adverse Net Cost Impacts and Net Revenue Impacts accruing from and after the effective date of termination from such Compensation Event, Project Value shall not further compensate the Concessionaire for such impacts, and accordingly Project Value shall be determined by taking into account the adverse Net Cost Impacts and Net Revenue Impacts accruing from and after the effective date of termination.

(ii) To the extent Concessionaire Damages has previously been determined by mutual agreement or pursuant to the dispute resolution procedures and would be payable to the Concessionaire after the effective date of termination for adverse Net Cost Impacts and Net Revenue Impacts accruing from and after the effective date of termination from such Compensation Event, Project Value shall include the present value of the right to such future payments (and, as provided in Section 21.09, the Concessionaire shall have no other Claim for such future adverse Net Cost Impacts and Net Revenue Impacts).

(iii) To the extent no Concessionaire Damages have previously been determined for such Compensation Event, then Project Value shall be determined as if the Compensation Event had not occurred and therefore is unaffected by any adverse Net Cost Impacts and Net Revenue Impacts of the Compensation Event accruing from and after the effective date of termination (and, as provided in Section 21.09, the Concessionaire shall have no other Claim for such future adverse Net Cost Impacts and Net Revenue Impacts).

(c) If the parties agree upon the Project Value, the Department shall make payment to the Concessionaire in accordance with the terms of this Agreement. If either party disagrees with the Project Value, either shall be entitled to invoke the dispute resolution procedures of Section 22.01, by delivery of notice to the other party within 60 days following receipt of the appraiser's report. Failure to invoke the dispute resolution procedures within such time period shall conclusively constitute acceptance of the Project Value.

ARTICLE 22.

DISPUTE RESOLUTION

Section 22.01 Dispute Resolution; No Declaratory Judgment Procedure.

(a) A dispute arising out of, relating to, or in connection with this Agreement shall be resolved as set forth in this Article 22. However, it is understood and agreed that: (i) matters that are expressly stated in this Agreement to be within the sole discretion of a party shall not be subject to this Section, but shall be final as determined by such party; and (ii) matters that are expressly stated in this Agreement to be within the good faith discretion of a party shall only be overturned if such party's actions or determinations are found to be arbitrary or capricious.

(b) The parties shall attempt in good faith to resolve the dispute informally through discussion within 15 days after either party receives notice of the dispute from the other party, including a detailed description of such dispute. If the parties are unable to resolve the dispute within that timeframe, and upon notice by either party to the other, the parties may mutually agree to submit the dispute to mediation or other non-binding alternative dispute resolution process. In the case of mediation, the parties shall share equally the expenses of the mediator. If the parties have not agreed to submit the dispute to mediation or other non-binding alternative dispute resolution process, then after expiration of such 15-day period either party may litigate the matter in a court of law as set forth in Section 22.01(d). Subject to Section 22.01(c), if the parties have entered into mediation or other non-binding alternative dispute resolution process but have not resolved the dispute within 180 days (or, in the case of disputes relating to the Project arising prior to Substantial Completion, 60 days) following the date on which either party receives notice of the dispute from the other party, then either party may litigate the matter in a court of law as set forth in Section 22.01(d).

(c) If the Department determines, in its sole discretion, that a dispute arising under this Agreement and subject to this Section 22.01 involves an issue impacting the health or safety of the traveling public, the Department shall be entitled to take whatever steps that it deems appropriate and to immediately initiate litigation of the matter in a court of law as set forth in Section 22.01(d). The parties agree that such litigation shall be progressed on such expedited basis as the Department may elect.

(d) All litigation between the parties arising out of or pertaining to this Agreement or its breach shall be filed, heard and decided in the Circuit Court for the City of Richmond,

Virginia, Division I, which shall have exclusive jurisdiction and venue; *provided*, that the foregoing does not affect any Claims or matters which are governed by a different dispute resolution procedure set forth in any other Project Agreement.

(e) Each party shall bear its own attorneys' fees and costs in any dispute or litigation arising out of or pertaining to this Agreement or any other Project Agreement, and no party shall seek or accept an award of attorneys' fees or costs, except as otherwise expressly set forth in this Agreement.

(f) As permitted by Section 56-569 of the Code of Virginia, the parties agree that any requirement that the State Corporation Commission issue a declaratory judgment regarding a material default (as defined in Section 56-565 of the Code of Virginia) pursuant to such Section 56-569, as a prerequisite to exercising any remedy set forth in this Agreement, any other Project Agreements or such Section 56-569, shall not apply to this Agreement or any other Project Agreement.

ARTICLE 23.

RESERVED RIGHTS

Section 23.01 Exclusions from the Concessionaire's Interest.

The Concessionaire's rights and interests in the Project and Project Right of Way have been granted to the Concessionaire under the Permit in order to enable it to accomplish the Project Purposes. Subject to Section 23.04, the Concessionaire's rights and interests consist only of those expressly granted by this Agreement and specifically exclude all Reserved Rights. Unless expressly authorized by the Department in its sole discretion, the Concessionaire will not grant permission for any Person (other than the Department) to use or occupy the Project for any ancillary or collateral purpose.

Section 23.02 Department Reservation of Rights.

The Department may, at any time at its sole cost and expense, devote, use or take advantage of the Reserved Rights for any public purpose without any financial participation whatsoever by the Concessionaire. The Department hereby reserves to itself all ownership, development, maintenance, repair, replacement, operation, use and enjoyment of, and access to, the Reserved Rights. The Department shall owe no compensation or damages on account of its exercise of Reserved Rights.

Section 23.03 Disgorgement.

If a Concessionaire Default concerns a breach of the provisions of Section 23.01 or 23.02, in addition to any other remedies under this Agreement, the Department shall be entitled

to disgorgement of all profits from the prohibited activity and to sole title to and ownership of the prohibited assets and improvements.

Section 23.04 Alternate Treatment of Reserved Rights.

Notwithstanding Sections 23.01 and 23.02, the Department may elect in its sole discretion to treat any development of improvements respecting Reserved Rights that it undertakes as Project Enhancements, in which case all the provisions of Section 12.02 shall apply.

ARTICLE 24.

REPRESENTATIONS, WARRANTIES AND FINDINGS

Section 24.01 Department Representations and Warranties.

The Department hereby represents and warrants to the Concessionaire as follows:

(a) The Department is an agency of the State and has full power, right and authority to execute, deliver and perform its obligations under, in accordance with, and subject to the terms and conditions of this Agreement and other Project Agreements to which the Department is a party.

(b) Each person executing this Agreement or any other Project Agreement on behalf of the Department to which the Department is a party has been or at such time will be duly authorized to execute each such document on behalf of the Department.

(c) Neither the execution and delivery by the Department of this Agreement and the other Project Agreements executed concurrently herewith to which the Department is a party, nor the consummation of the transactions contemplated hereby or thereby, is in conflict with or will result in a default under or violation of any other agreements or instruments to which it is a party or by which it is bound.

(d) There is no action, suit, proceeding, investigation or litigation pending and served on the Department which challenges the Department's authority to execute, deliver or perform, or the validity or enforceability of, this Agreement and the other Project Agreements to which the Department is a party, or which challenges the authority of the Department official executing this Agreement or the other Project Agreements, and the Department has disclosed to the Concessionaire any pending and unserved or threatened action, suit, proceeding, investigation or litigation with respect to such matters of which the Department is aware.

(e) As of the Agreement Date, no agreement, contract, option, commitment or other right exists which binds, or which in the future may become binding on, the Department to sell, transfer, convey, dispose of or encumber the Project. The Department has not granted or

assigned any interest in Gross Revenues to any other party other than the Concessionaire under this Agreement.

(f) This Agreement has been duly authorized, executed and delivered by the Department and constitutes a valid and legally binding obligation of the Department, enforceable against it in accordance with the terms hereof, subject only to applicable bankruptcy, insolvency and similar laws affecting the enforceability of the rights of creditors generally and to general principles of equity.

(g) The Department has taken or caused to be taken all requisite action to authorize the execution and delivery of, and the performance of its obligations under, this Agreement and the other Project Agreements to which the Department is a party.

(h) The Department is in material compliance with all Laws and Governmental Approvals applicable to its obligations in connection with this Agreement.

Section 24.02 Concessionaire Representations and Warranties.

The Concessionaire hereby represents and warrants to the Department as follows:

(a) The Financial Model Formulas (i) were prepared by or on behalf of the Concessionaire in good faith, (ii) are the same financial formulas that the Concessionaire utilized and is utilizing in the Initial Base Case Financial Model in making its decision to enter into this Agreement and, if the Concessionaire is proceeding with Financial Close as of the Agreement Date, in making disclosures to Lenders under the Initial Project Financing Agreements, and (iii) as of the Agreement Date are mathematically correct and suitable for making reasonable projections.

(b) The Initial Base Case Financial Model (i) was prepared by or on behalf of the Concessionaire in good faith, (ii) was audited and verified by an independent recognized model auditor prior to the Agreement Date and will be audited and verified upon Financial Close, (iii) fully discloses all cost, revenue and other financial assumptions and projections that the Concessionaire has used or is using in making its decision to enter into this Agreement and, if the Concessionaire is proceeding to Financial Close as of the Agreement Date, in making disclosures to potential Lenders under the Initial Project Financing Agreements, (iv) as of the Agreement Date represents the projections that the Concessionaire believes in good faith are reasonable for the Project, and (v) has been or will be audited and verified by an independent recognized model auditor acceptable to the Lenders prior to the Financial Close Date.

(c) The Concessionaire is a [**description of legal structure**].

(d) The Concessionaire has taken or caused to be taken all requisite action to authorize the execution and delivery of, and the performance of its obligations under, this Agreement and the other Project Agreements to which the Concessionaire is a party.

(e) Each person executing this Agreement or any other Project Agreement on behalf of the Concessionaire has been or will at such time be duly authorized to execute each such document on behalf of the Concessionaire.

(f) This Agreement and each Project Agreement to which the Concessionaire or a Concessionaire Party is a party have been duly authorized, executed and delivered by the Concessionaire or the Concessionaire Party and constitutes a valid and legally binding obligation of the Concessionaire or the Concessionaire Party (as the case may be), enforceable against it in accordance with its terms, subject only to applicable bankruptcy, insolvency and similar laws affecting the enforceability of the rights of creditors generally and to general principles of equity.

(g) Neither the execution and delivery by the Concessionaire of this Agreement and the other Project Agreements to which the Concessionaire is a party, nor the consummation of the transactions contemplated hereby or thereby, is in conflict with or will result in a default under or a violation of the governing instruments of the Concessionaire or any other agreements or instruments to which it is a party or by which it is bound.

(h) There is no action, suit, proceeding, investigation or litigation pending and served on the Concessionaire which challenges the Concessionaire's authority to execute, deliver or perform, or the validity or enforceability of, this Agreement and the other Project Agreements to which the Concessionaire is a party, or which challenges the authority of the Concessionaire official executing this Agreement or the other Project Agreements; and the Concessionaire has disclosed to the Department any pending and unserved or threatened action, suit, proceeding, investigation or litigation with respect to such matters of which the Concessionaire is aware.

(i) The Concessionaire is in material compliance with all Laws applicable to the Concessionaire or its activities in connection with this Agreement and the other Project Agreements.

(j) Except for any broker or advisor whose fees will be paid by the Concessionaire, there is no investment banker, broker, finder or other intermediary which has been retained by or is authorized to act on behalf of the Concessionaire or any of its Affiliates (including the O&M Contractor) who might be entitled to any fee or commission in connection with the transactions contemplated by this Agreement.

(k) [**Other representations regarding the make-up of the Concessionaire**].

(l) None of the Concessionaire, any affiliate of the Concessionaire (as "affiliate" is defined in 29 CFR 98.905), or the Design-Build Contractor or its affiliates (as so defined) is suspended or debarred, subject to a proceeding to suspend or debar it, or subject to an agreement for voluntary exclusion, from bidding, proposing or contracting with any federal or State department or agency.

Section 24.03 Survival of Representations and Warranties.

The representations and warranties of the Department and the Concessionaire contained herein shall survive expiration or earlier termination of this Agreement and the other Project Agreements.

Section 24.04 Department's Findings Under PPTA.

The Department, as the responsible public entity with respect to the Project, makes the following findings:

(a) the actions taken by the Department pursuant to the PPTA facilitate the development, design, construction, management, operation and maintenance of the Project and the timely development of any Project Enhancements, and such public need may not be wholly satisfied by existing methods of procurement in which qualifying transportation facilities are developed and/or operated;

(b) there is a public need to construct and operate a qualifying transportation facility (as defined in Section 56-557 of the Code of Virginia) of the type of the Project;

(c) the Permit granted hereunder authorizing the Concessionaire to develop, design, construct, manage and operate and maintain the Project, including the development of any Project Enhancements, may result in their availability to the public in a more timely, more efficient and less costly fashion, thereby serving the public safety and welfare;

(d) the Project, its interconnections with existing transportation facilities, and the Concessionaire's plans for the development, design, construction, operation and maintenance of the Project are reasonable and compatible with the State transportation plan and with local comprehensive plans;

(e) the estimated cost of developing, designing, constructing, operating and maintaining the Project is reasonable in relation to similar transportation facilities;

(f) the Concessionaire's plans will result in the timely construction and operation and maintenance of the Project and in the development of any Project Enhancements;

(g) the Department will continue to have fee title or good and valid interest to the Project and the Project will remain open for use by members of the public as a public road upon payment of the applicable tolls;

(h) through this Agreement the Department intends to encourage investment in the State by the Concessionaire to facilitate the development, construction, operation and maintenance of the Project and the development of any Project Enhancements; and

(i) the terms and conditions of this Agreement serve the public purpose of the PPTA.

ARTICLE 25.

CONTRACTING PRACTICES AND PUBLIC WELFARE CONSIDERATIONS

Section 25.01 Obligation to Refrain from Discrimination.

The Concessionaire covenants and agrees that it shall not discriminate and it shall require all Contractors not to discriminate against any person, or group of persons, on account of age, sex, marital status, race, creed, color, national origin, religion or the presence of any sensory, mental or physical handicap in the permitting, design, acquisition and construction of the Project, or the maintenance, operation or management of the Project, nor shall the Concessionaire establish or permit any such practice or practices of discrimination or segregation with reference to the selection, use, hiring, firing, promotion or termination of employees, Contractors, and vendors or with reference to the use, occupancy or enjoyment of or access to or toll rates charged for use of the Project; *provided*, that the prohibition against discrimination on the basis of sensory, mental or physical handicap shall not apply if the particular disability prevents the proper performance of the particular person involved.

Section 25.02 Contracting.

(a) The Concessionaire may perform its permitting, construction, traffic management, ordinary maintenance and repair, and other responsibilities under this Agreement through use of its own personnel, materials and equipment, or by contracting to Persons with the expertise, qualifications, experience, competence, skills and know-how to perform the responsibilities being contracted in accordance with all applicable Law, all Governmental Approvals, all Federal Requirements, and the terms, conditions and standards set forth in this Agreement.

(b) Each Contract that the Concessionaire executes at a minimum:

(i) shall 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;

(ii) shall establish provisions for prompt payment by the Concessionaire in accordance with the provisions of Sections 2.2-4347 through 4355 of the Code of Virginia, which would apply if the Department was contracting with such Contractor;

(iii) shall require the Contractor to carry out its scope of work in accordance with all applicable Law (including construction, health, and safety standards described in the Technical Requirements), all Governmental Approvals, all federal requirements, and the terms, conditions and standards set forth in this Agreement;

(iv) shall set forth warranties, guaranties and liability provisions of the contracting party in accordance with Good Industry Practice for work of similar, scope and scale;

(v) shall be fully assignable to the Department, such assignability to include the benefit of all Contractor warranties, indemnities, guarantees and professional responsibility and include express requirements that, if the Department succeeds to the Concessionaire's rights under the subject Contract (by assignment or otherwise), then the relevant Contractor agrees that it will (A) 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), (B) permit audit thereof by the Concessionaire, and provide progress reports to the Concessionaire appropriate for the type of Contract it is performing sufficient to enable the Concessionaire to provide the reports it is required to furnish the Department under this Agreement, and (C) allow the Department, to assume the benefit of the Concessionaire's Contract rights and the work performed thereunder with liability only for those remaining obligations accruing after the date of assumption;

(vi) shall not be assignable by the Contractor without the Concessionaire's prior written consent;

(vii) shall expressly require the Contractor to participate in meetings between the Concessionaire and the Department, upon the Department's reasonable request, concerning matters pertaining to such Contractor or its work, *provided* that all direction to such Contractor shall be provided by the Concessionaire, and *provided further* that nothing in this Section 25.02(b)(vii) shall limit the authority of the Department to give such direction or take such action which in the opinion of the Department is necessary to remove an immediate and present threat to the safety of life or property;

(viii) shall expressly provide that all Liens and Claims of any Contractors at any time shall not attach to any interest of the Department in the Project or the Project Right of Way; and

(ix) shall be consistent in all other respects with the terms and conditions of this Agreement to the extent such terms and conditions are applicable to the scope of work of such Contractor.

(c) The Concessionaire shall not enter into, permit, allow or suffer any Contract at any level with any Person if that Person or any of its affiliates (as "affiliate" is defined in 29 CFR 98.905), or any of their respective officers, directors and employees, (i) is then suspended or debarred, subject to a proceeding to suspend or debar it, or subject to an agreement for voluntary exclusion, from bidding, proposing or contracting with any federal or State department or agency, (ii) has been indicted, convicted, pled guilty or *nolo contendere* to a violation of Law involving fraud, conspiracy, collusion, bribery, perjury, material misrepresentation, or any other violation that shows a similar lack of moral or ethical integrity, or (iii) is then barred or restricted from owning, operating or providing services for the Project under applicable Law, including the Foreign Investment and National Security Act of 2007, 50 USC App. 2170 (HR556).

(d) The Concessionaire shall include a provision in each Contract requiring the Contractor to maintain all licenses required by applicable Law and comply with the requirements of the eVA Business to Government Vendor System or its successor.

(e) The Concessionaire shall include in each Contract for design, construction, operations or maintenance services to which the Concessionaire or an Affiliate of the Concessionaire is a party (including the Design-Build Contract) a provision naming the Department as a third-party beneficiary of all Contractor representations and warranties contained in the Contract.

(f) The Concessionaire shall not contract any part of the Work to a Contractor who is not prequalified with the Department in accordance with the Department's Rules Governing Prequalification Privileges, unless otherwise indicated in the Agreement. This restriction does not apply to contract specialty items, consultants, manufacturers, suppliers, or haulers.

(g) The appointment of Contractors by the Concessionaire shall not relieve the Concessionaire of its responsibility hereunder or for the quality of work, materials and services provided by it. The Concessionaire shall at all times be held fully responsible to the Department for the acts and omissions of its Contractors and persons employed by them and no Contract entered into by the Concessionaire will impose any obligation or liability upon the Department to any such Contractor or any of its employees. Further, absent the Department's express written consent, no Contract or delegation of Work thereunder shall affect the obligation of the Concessionaire to directly communicate with the Department and to directly oversee the Work of the Contractor. Nothing in this Agreement will create any contractual relationship between the Department and a Contractor.

(h) The Concessionaire shall not enter into, permit or suffer a Contract or amendment thereto with an Affiliate (an "Affiliate Contract") without notice to and consent of the Department, which consent shall not be unreasonably withheld or delayed if the Contract is entered into in the ordinary course of business and the Concessionaire demonstrates to the Department's satisfaction that the Contract is on overall terms no less favorable or unfavorable to the Concessionaire than terms the Concessionaire could obtain in an arm's-length transaction for comparable services with a Person that is not an Affiliate of the Concessionaire; *provided*, that no consent shall be required for (i) reasonable overhead sharing fees and reimbursement of third-party costs payable to an Affiliate for legal, accounting, tax, computer and other centralized management services provided to the Concessionaire in lieu of the Concessionaire having its own employees for such functions; or (ii) the joint ownership of assets or property used for the operation or maintenance of the Project and other projects owned or operated by Affiliates of the Concessionaire so long as the cost of such assets and properties are reasonably shared and documented.

(i) From and after the Agreement Date, the Concessionaire shall be solely responsible for paying each Contractor and any other Person to whom any amount is due from the Concessionaire for services, equipment, materials and supplies in connection with the Work. Pursuant to Section 2.2-4354 of the Code of Virginia, the Concessionaire shall require the

Design-Build Contractor and O&M Contractor, within seven days following receipt of monies from the Concessionaire for work performed by any Contractor of the Design-Build Contractor or O&M Contractor, to either: (i) pay such Contractor for the proportionate share of the total payment received from the Concessionaire attributable to the Work performed by such Contractor; or (ii) notify the Concessionaire and such Contractor, in writing, of the Design-Build Contractor's or O&M Contractor's intention to withhold all or a part of the Contractor's payment, specifying the reason for the non-payment. The Concessionaire also agrees that it will require the Design-Build Contractor and O&M Contractor to include in all of its Contracts a provision that: (A) obligates the Design-Build Contractor or O&M Contractor, as applicable, to pay interest to its Contractors on all amounts owed by the Design-Build Contractor or O&M Contractor, as applicable, that remain unpaid after seven days following receipt of monies from the Concessionaire for work performed by its Contractor, except for amounts withheld as allowed in clause (ii) of this Section 25.02(i); (B) states, "Unless otherwise provided under the terms of this contract, interest shall accrue at the rate of one percent per month."; and (C) obligates each Contractor to include or otherwise be subject to the same payment and interest requirements as specified in this Section 25.02(i) with respect to each lower-tier Contractor.

(j) The Concessionaire shall provide the Department a monthly report listing (i) all Contracts in effect to which the Concessionaire is a party, (ii) all Contracts to which an Affiliate of the Concessionaire is a party, and (iii) where such an Affiliate Contract is in effect, all Contracts in effect to which such Affiliate is a party and under which all or a substantial portion of the Affiliate's responsibilities or obligations under its Contract are delegated to its Contractor. The Concessionaire also shall list in the monthly report the Contractors under such Contracts, guarantees of any Contracts in effect and the guarantors thereunder. The Concessionaire shall allow the Department ready access to all Contracts and records regarding Contracts, including amendments and supplements to Contracts and guarantees thereof.

(k) As soon as the Concessionaire identifies a potential Contractor for a potential Contract described in the first sentence of Section 25.02(j), but in no event later than five days after Contract execution, the Concessionaire shall notify the Department in writing of the name, address, phone number and authorized representative of such Contractor.

Section 25.03 Small, Women-Owned and Minority Business (SWAM) and Disadvantaged Business Enterprise (DBE) Reporting.

(a) The parties recognize the importance of pursuing, inviting and developing the participation of minority, women-owned and small businesses through the federal Disadvantaged Business Enterprise ("DBE") and Small, Women-Owned and Minority Business ("SWAM") programs, where applicable. Accordingly, during the Operating Period the Concessionaire will promote the participation of local small business as well as minority and women owned businesses in the Project. The Concessionaire will set annual goals and make a good faith effort to achieve or exceed them in contracts for operating and for goods and services related to operating the Project. The Concessionaire will provide its participation on such matters to the Department Representative, and the Department may include those participation rates, as

appropriately adjusted, with its own towards the Commonwealth's long-term goal established pursuant to the Office of the Governor's Executive Order 33 (2006). The long-term participation SWAM goal for the Concessionaire during the Operating Period shall be 27% and the long-term participating DBE goal for the Concessionaire during the Operating Period shall be 13%.

(b) During the Work Period, in an effort to comply with 49 CFR Part 26 and support Executive Order 33 (2006), the Department has established a goal of 13% for DBE participation and 27% for SWAM participation, such percentages relating to the value of the Design-Build Contact totaling an aggregate goal of 40% of the value of the Design-Build Contact during the Work Period. The Department and the Concessionaire agree to manage this goal during the Work Period as follows:

(i) the Concessionaire will establish a goal for each bid item group (i.e., aggregates, box culverts, clearing and grubbing, excavation, pavement marking) that equates to the overall goal of 40%;

(ii) the Concessionaire will prepare first draft of proposed goals and will submit such draft to the Department for review and comment;

(iii) the goals for each bid item group will be established 30 days after the Agreement Date and reviewed annually;

(iv) if the goal can not be achieved on a particular bid item group, the Department may, in its reasonable discretion, waive the goal on that item subject to the submission of acceptable Good Faith Effort ("GFE") documentation using form C-49 and other supplemental information as appropriate; and

(v) the Concessionaire agrees that if the Department accepts the GFE documentation on a particular bid item group, the Concessionaire will make reasonable efforts to accomplish the overall goal using other bid item groups.

(c) Furthermore, during the Work Period the parties will work cooperatively to accomplish the DBE and SWAM objectives. The Department will assist the Concessionaire in meeting the Work Period goals by offering assistance, to include the following items:

(i) Prior to carrying out the activities under subsections (b)(i) and (ii) above, the Department will participate with the Concessionaire in a planning session to establish the above referenced goals for each bid item group by reviewing the work, available firms, strategies, anticipated obstacles and means to overcome obstacles,

(ii) The parties will jointly conduct outreach meetings for DBE and SWAM firms,

(iii) The Department will identify to the Concessionaire DBE and SWAM firms that are eligible to bid on the specific bid item groups, and

(iv) The Department will provide access to technical and managerial assistance to eligible DBE and SWAM firms through the Business Opportunity Workforce Development Center.

(d) The Concessionaire acknowledges that the Department's assistance and cooperation will not eliminate or reduce the Concessionaire's responsibility to achieve the Work Period goals or demonstrate GFE. The Concessionaire is expected to utilize a variety of means and methods and creative strategies to do so. These strategies should be employed for all phases of the Project. The Concessionaire is expected to meet the goal or demonstrate that GFE has been made. The Concessionaire shall submit quarterly reports of GFE documentation, and DBE and SWAM payments, on form C-63 to the Department Representative, who will make determinations on GFE.

(e) When there is a contract goal during the Work Period, the Concessionaire and the Concessionaire Parties must make good faith efforts to meet the goal either through obtaining enough DBE and SWAM participation or documenting the GFE it made to do so. These means of meeting contract goal requirements are fully equivalent. 49 CFR Part 26 explicitly provides that the Department must not disregard showings of GFE, and it gives the Concessionaire and the Concessionaire Parties the right to have the Department reconsider a decision that their GFES were insufficient. The Department must seriously consider the Concessionaire's documentation of GFE. The Department will issue a guidance memorandum on GFE, providing examples, procedures and reporting requirements for the Concessionaire.

(f) If, at any time during the Work Period, the Department determines that the Concessionaire or a Concessionaire Party neither achieves the goals nor demonstrates GFE, the Concessionaire, such Concessionaire Party neither achieving the goals nor demonstrating GFE and/or their respective Affiliates may be enjoined or disqualified from additional work or new contracts with the State. The Department will disqualify any such Persons for a minimum period of 90 days from the date of the Department's notice of disqualification. Such notice will also be provided to the FHWA and will be posted on the Department's web site. If, during any 90-day-period that any such Person is disqualified, the Concessionaire or such Concessionaire Party continues to fail to achieve the goals and fails to demonstrate GFE, then the period of disqualification shall be extended for an additional 90 days.

Section 25.04 Public Safety and Welfare.

The parties recognize and agree that protection of the health, safety and welfare of the public and the all persons engaged in connection with the performance of the Concessionaire's obligations under this Agreement is a priority. Accordingly, the Concessionaire shall comply with the following provisions, along with all other applicable Laws.

(a) The Concessionaire shall comply, and shall require all Contractors to comply, with all construction safety and health standards established by applicable Law, including the State and Federal Occupational Health and Safety Acts. Neither the Concessionaire nor any Contractor shall require any worker to work in surroundings or under working conditions that are

unsanitary, hazardous or dangerous to their health or safety, as determined under construction safety and health standards promulgated by the U.S. Secretary of Labor in accordance with the Section 107 of the Contract Work Hours and Safety Standards Act.

(b) The Department shall be entitled to require the Concessionaire to suspend any Work or other activities related to the Project, which, in the sole discretion of the Department, presents a risk to the public health, safety or welfare, and to take such other actions as the Department may require to prevent such risk, at the Concessionaire's sole cost and expense.

Section 25.05 Employment Related Matters.

The Concessionaire shall comply, and shall cause its Contractors to comply, with the provisions set forth in Exhibit J to this Agreement.

Section 25.06 Federal Immigration Reform and Control Act.

In accordance with VA Code Section 2.2-4311.1, the Concessionaire certifies that it does not and agrees that it shall not, during the Term, knowingly employ an unauthorized alien as defined in the Federal Immigration Reform and Control Act of 1986. The Concessionaire further agrees that it shall require all of its Contractors to certify that they do not and shall not knowingly employ an unauthorized alien as defined by such Act.

ARTICLE 26.

MISCELLANEOUS

Section 26.01 Transfers by the Concessionaire.

(a) The Concessionaire shall not Transfer, or otherwise permit the Transfer of, any or all of the Concessionaire's Interest to or in favor of any Person (a "Transferee") during the Lock-up Period (unless it is the Collateral Agent or a transferee from the Collateral Agent, in each case if permitted under Article 7). Following the Lock-up Period, the Concessionaire shall not Transfer, or otherwise permit the Transfer of, any or all of the Concessionaire's Interest to or in favor of a Transferee, unless (i) the Department has approved (based upon a determination in accordance with Section 26.01(b)) such proposed Transferee (unless it is the Collateral Agent permitted under Article 7) and (ii) the proposed Transferee (unless it is the Collateral Agent permitted under Article 7) enters into an agreement with the Department in form and substance satisfactory to the Department wherein the Transferee acquires the rights and assumes the obligations of the Concessionaire and agrees to perform and observe all of the obligations and covenants of the Concessionaire under this Agreement. Any Transfer made in violation of the foregoing provision shall be null and void *ab initio* and of no force and effect.

(b) The Department's approval of a proposed Transferee may be withheld if the Department determines that the proposed Transfer is prohibited by applicable Law or such proposed Transferee is not capable of performing the obligations and covenants of the Concessionaire under this Agreement, which determination may be based upon, or take into account, one or more of the following factors:

- (i) the financial strength and integrity of the proposed Transferee, each of its direct Contractors, and their respective direct or indirect beneficial owners, any proposed managers or operating partners and each of their respective Affiliates;
- (ii) the capitalization of the proposed Transferee;
- (iii) the experience of the proposed Transferee and each of its direct Contractors in operating toll roads or highways and performing other projects; and
- (iv) the background and reputation of the proposed Transferee, each of its direct Contractors, and their respective direct or indirect beneficial owners, any proposed managers or operating partners, each of their respective officers, directors and employees and each of their respective Affiliates (including the absence of criminal, civil or regulatory Claims or actions against any such Person and the quality of any such Person's past or present performance on other projects).

If the Department is not satisfied that these conditions are met, it may condition its consent on provision of reasonable additional security or other reasonable arrangements.

(c) No Transfer of all or any of the Concessionaire's Interest (except a Transfer of all the Concessionaire's Interest to the Collateral Agent upon its exercise of remedies under the Financing Assignments and a subsequent transfer to the Lender's transferee that has been approved under Section 7.05) shall be made or have any force or effect if at the time of such Transfer there has occurred a Concessionaire Default that has not been remedied or an event that with the lapse of time, the giving of notice or otherwise would constitute a Concessionaire Default.

(d) A Change in Control of the Concessionaire shall be deemed to be a Transfer of the Concessionaire's Interest for purposes of the foregoing provisions.

Section 26.02 Ethical Standards.

(a) The Concessionaire has adopted and provided copies to the Department of its written policies establishing ethical standards of conduct for all its directors, officers and supervisory or management personnel in dealing with the Department and employment relations. Such policy including any amendments or modifications shall include standards of ethical conduct concerning the following:

(i) Restrictions on gifts and contributions to, and lobbying of, the Department, the CTB and any of their respective commissioners, directors, officers and employees;

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

(iii) Protection of employees from retaliatory actions (including discharge, demotion, suspension, threat, harassment, pay reduction or other discrimination in the terms and conditions of employment) in response to reporting of illegal (including the making of a false Claim), unethical or unsafe actions or failures to act by the Concessionaire or its personnel or any Contractors;

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

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

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

(vi) Adherence to the Department's organizational conflict of interest rules and policies pertaining to the hiring of any consultant which has assisted the Department in connection with the negotiation of this Agreement or the conduct of Oversight Services for the Project.

(b) The Concessionaire shall cause its directors, members, officers and supervisory and management personnel, and require those of its Contractors, to adhere to and enforce the adopted policy on ethical standards of conduct. The Concessionaire shall establish reasonable systems and procedures to promote and monitor compliance with the policy.

(c) Without limiting the foregoing provisions of this Section, the Concessionaire further agrees: (i) no gifts, gratuities, or favors of any nature whatsoever shall be given or offered by any Concessionaire Party to personnel of the Department; and (ii) no Concessionaire Party shall employ any personnel of the Department for any services during the Term, without the prior written consent of the Department. If the Department determines, after investigation, that a Concessionaire Party or any of its employees, representatives, or agents of any person acting in its behalf have violated this provision, the Concessionaire Party may, at the discretion of the Department, be disqualified from bidding on future contracts with the Department for a period of six months from the date of the Department's determination of such a violation. Any implicated employees, agents, or representatives of the Contractor may be prohibited from working on any contract awarded by the Department for the period of disqualification.

Section 26.03 Assignment by the Department.

The Department may transfer and assign its interests, in whole or in part, in the Project, this Agreement and any other Project Agreements to any other public agency or public entity of the State as permitted by law; *provided* that the successor or assignee has assumed all of the Department's obligations, duties and liabilities under this Agreement and the Project Agreements then in effect.

Section 26.04 Authorized Representatives.

(a) Each of the Concessionaire and the Department hereby designates the individuals indicated on Exhibit K as its initial Concessionaire Representative(s) and Department Representative(s), respectively, to administer this Agreement on its respective behalf.

(b) The Concessionaire Representatives and the Department Representatives shall be reasonably available to each other during the Term and shall have the authority to issue instructions and other communications on behalf of the Concessionaire and Department, respectively, and shall be the recipient of notices and other written communications from the other party under this Agreement (except any notice initiating or relating to the dispute resolution

procedures of Section 22.01 shall be given in accordance with Section 26.05). However, such Representatives shall not have the authority to make decisions or give instructions binding upon the Concessionaire or the Department, except to the extent expressly authorized by the Concessionaire or the Department, as the case may be, in writing. In the event the Concessionaire or the Department designates different Representatives, it shall give the other party written notice of the identity of and contact information for the new Concessionaire Representative(s) or Department Representative(s), as the case may be.

Section 26.05 Notices.

(a) Whenever under the provisions of this Agreement it shall be necessary or desirable for one party to serve any notice, request, demand, report or other communication on another party, the same shall be in writing and shall not be effective for any purpose unless and until actually received by the addressee or unless served (i) personally, (ii) by independent, reputable, overnight commercial courier, (iii) by facsimile transmission, where the transmitting party includes a cover sheet identifying the name, location and identity of the transmitting party, the phone number of the transmitting device, the date and time of transmission and the number of pages transmitted (including the cover page), where the transmitting device or receiving device records verification of receipt and the date and time of transmission receipt and the phone number of the other device, and where the facsimile transmission is immediately followed by service of the original of the subject item in another manner permitted herein, or (iv) by deposit in the United States mail, postage and fees fully prepaid, registered or certified mail, with return receipt requested, addressed as follows:

If to the Department:
Virginia Department of Transportation
1401 E. Broad Street
Richmond, VA 23219
Attention: Chief Engineer
Facsimile: (804) 786-2940

With copies to:

Office of the Attorney General
900 E. Main Street
Richmond, VA 23219
Attention: Chief Transportation Section
Facsimile: (804) 786-9136

If to the Concessionaire:

[]

(b) Any party may, from time to time, by notice in writing served upon the other party as aforesaid, designate an additional and/or a different mailing address or an additional

and/or a different person to whom all such notices, requests, demands, reports and communications are thereafter to be addressed. Any notice, request, demand, report or other communication served personally shall be deemed delivered upon receipt, if served by mail or independent courier shall be deemed delivered on the date of receipt as shown by the addressee's registry or certification receipt or on the date receipt at the appropriate address is refused, as shown on the records or manifest of the United States Postal Service or independent courier, and if served by facsimile transmission shall be deemed delivered on the date of receipt as shown on the received facsimile (provided the original is thereafter delivered as aforesaid).

Section 26.06 Binding Effect.

Subject to the limitations of Sections 26.01 and 26.03, this Agreement shall be binding upon and shall inure to the benefit of the parties hereto and their respective legal representatives, successors and permitted assigns, and wherever a reference in this Agreement is made to any of the parties hereto, such reference also shall be deemed to include, wherever applicable, a reference to the legal representatives, successors and permitted assigns of such party, as if in every case so expressed.

Section 26.07 Relationship of Parties.

(a) The relationship of the Concessionaire to the Department shall be one of an independent contractor, not an agent, partner, lessee, joint or co-venturer or employee, and neither the Department nor the Concessionaire shall have any rights to direct or control the activities of the other or their respective Affiliates, contractors or consultants, except as expressly provided by this Agreement.

(b) Officials, employees and agents of the Concessionaire or the Department shall in no event be considered employees, agents, partners or representatives of the other.

Section 26.08 No Third-Party Beneficiaries.

Nothing contained in this Agreement is intended or shall be construed as creating or conferring any rights, benefits or remedies upon, or creating any obligations of the parties hereto toward, any person or entity not a party to this Agreement, except rights expressly contained herein for the benefit of the Lenders, the Collateral Agent and/or State Indemnitees.

Section 26.09 Limitation on Consequential Damages.

Except as expressly provided in this Agreement to the contrary, neither party shall be liable to the other for punitive damages or special, indirect or incidental consequential damages of any nature, whether arising in contract, tort (including negligence) or other legal theory. The foregoing limitation shall not, however, in any manner:

(a) prejudice the Department's right to recover liquidated damages from the Concessionaire as provided in this Agreement;

(b) limit the Concessionaire's liability for any type of damage arising out of the Concessionaire's obligation to indemnify, protect, defend and hold each State Indemnitee harmless from Third Party Claims under Article 15 and elsewhere in this Agreement;

(c) limit the Concessionaire's liability for any type of damage to the extent covered by insurance required hereunder; or

(d) limit the amounts the Department or the Concessionaire may owe under the express provisions of this Agreement.

Section 26.10 Waiver.

(a) No waiver by any party of any right or remedy under this Agreement or the other Project Agreements shall be deemed to be a waiver of any other or subsequent right or remedy under this Agreement or the other Project Agreements. The consent by one party to any act by the other party requiring such consent shall not be deemed to render unnecessary the obtaining of consent to any subsequent act for which consent is required, regardless of whether similar to the act for which consent is given.

(b) No act, delay or omission done, suffered or permitted by one party or its agents shall be deemed to waive, exhaust or impair any right, remedy or power of such party under this Agreement or any other Project Agreement, or to relieve the other party from the full performance of its obligations under this Agreement and the other Project Agreements.

(c) No waiver of any term, covenant or condition of this Agreement shall be valid unless in writing and signed by the obligee party.

(d) The acceptance of any payment or reimbursement by a party shall not: (i) waive any preceding or then-existing breach or default by the other party of any term, covenant or condition of this Agreement, other than the other party's prior failure to pay the particular amount or part thereof so accepted, regardless of the paid party's knowledge of such preceding or then-existing breach or default at the time of acceptance of such payment or reimbursement; or (ii) continue, extend or affect (A) the service of any notice, any suit, or other legal proceeding or final judgment, (B) any time within which the other party is required to perform any obligation or (C) any other notice or demand.

(e) No custom or practice between the parties in the administration of the terms of this Agreement shall be construed to waive or lessen the right of a party to insist upon performance by the other party in strict compliance with the terms of this Agreement.

Section 26.11 No Brokers.

Except for any financial adviser or investment banker whose fee will be paid by the party retaining such adviser or banker, each party represents and warrants that it has not dealt with any real estate or business opportunity broker or agent or any finder in connection with this Agreement. Each party agrees, to the extent permitted by Law, to indemnify, protect, defend with counsel acceptable to the other party and hold harmless the other party against any Claim for commission, finder's fee or like compensation asserted by any real estate or business opportunity broker, agent, finder or other Person claiming to have dealt with the indemnifying party in connection with this Agreement.

Section 26.12 Governing Law.

This Agreement shall be governed and construed in accordance with the Laws of the State applicable to contracts executed and to be performed within the State.

Section 26.13 Use of Police Power.

Nothing in this Agreement limits the authority of the Department to exercise its regulatory and police powers granted by Law, including its powers of condemnation with respect to all or any part of the Project, the Project Right of Way and any of the Concessionaire's rights hereunder.

Section 26.14 Survival.

All covenants, agreements, representations and warranties made in or pursuant to this Agreement shall be deemed continuing and made at and as of the date of this Agreement and at and as of all other applicable times during the Term. All covenants, agreements, representations and warranties made in or pursuant to this Agreement shall survive the expiration or earlier termination of this Agreement and shall not be waived by the execution and delivery of this Agreement, by completion of construction, by any investigation by the Department or by any other event except a specific written waiver by the party against whom waiver is asserted.

Section 26.15 Subpoena.

Except as provided for in Section 33.1-4 of the Code of Virginia, the Concessionaire may subpoena any Department personnel; *provided*, that the Concessionaire shall pay for such personnel's time at its fully burdened rate (including overhead and fringe benefits), together with all out-of-pocket expenses incurred, no later than 30 days after the Concessionaire's receipt of an invoice reasonably documenting the amount of such time provided.

Section 26.16 Construction and Interpretation of Agreement.

(a) The language in all parts of this Agreement shall in all cases be construed simply, as a whole and in accordance with its fair meaning and not strictly for or against any party. The parties hereto acknowledge and agree that this Agreement is the product of an extensive and thorough, arm's length exchange of ideas, questions, answers, information and drafts during the RFDP process, that each party has been given the opportunity to independently review this Agreement with legal counsel, and that each party has the requisite experience and sophistication to understand, interpret and agree to the particular language of the provisions hereof. Accordingly, in the event of an ambiguity in or dispute regarding the interpretation of this Agreement, this Agreement shall not be interpreted or construed against the party preparing it, and instead other rules of interpretation and construction shall be utilized.

(b) If any term or provision of this Agreement, the deletion of which would not adversely affect the receipt of any material benefit by either party hereunder, shall be held by a court of competent jurisdiction to be invalid or unenforceable, the remainder of this Agreement shall not be affected thereby and each other term and provision of this Agreement shall be valid and enforceable to the fullest extent permitted by Law. It is the intention of the parties to this Agreement, and the parties hereto agree, that in lieu of each clause or provision of this Agreement that is illegal, invalid or unenforceable, the parties in good faith shall supply as a part of this Agreement an enforceable clause or provision as similar in terms to such illegal, invalid or unenforceable clause or provision as may be possible.

(c) The captions of the articles and sections herein are inserted solely for convenience and under no circumstances are they or any of them to be treated or construed as part of this instrument.

(d) References in this instrument to this "Agreement" mean, refer to and include this instrument as well as any riders, exhibits, addenda and attachments hereto (which are hereby incorporated herein by reference) or other documents expressly incorporated by reference in this instrument. Any references to any covenant, condition, obligation and/or undertaking "herein," "hereunder" or "pursuant hereto" (or language of like import) mean, refer to and include the covenants, conditions, obligations and undertakings existing pursuant to this instrument and any riders, exhibits, addenda, attachments or other documents affixed to or expressly incorporated by reference in this instrument. All terms defined in this instrument shall be deemed to have the same meanings in all riders, exhibits, addenda, attachments or other documents affixed to or expressly incorporated by reference in this instrument unless the context thereof clearly requires the contrary. Unless expressly provided otherwise, all references to Articles and Sections refer to the Articles and Sections set forth in this Agreement. All references to a subsection or clause "above" or "below" refer to the denoted subsection or clause within the Section in which the reference appears. Unless otherwise stated in this Agreement or the Project Agreements, words which have well-known technical or construction industry meanings are used in this Agreement or the Project Agreements in accordance with such recognized meaning. Wherever the word "including," "includes" or "include" is used in this Agreement or the Project Agreements, except

where immediately preceded by the word “not”, it shall be deemed to be followed by the words “without limitation”. Wherever reference is made in the Project Agreements to a particular Governmental Authority, it includes any public agency succeeding to the powers and authority of such Governmental Authority.

(e) As used in this Agreement and as the context may require, the singular includes the plural and vice versa, and the masculine gender includes the feminine and vice versa.

(f) This Agreement, its exhibits and the other Project Agreements to which the Department is a party are intended to be complementary and consistent with each other and shall, to the maximum extent possible, be construed according to such intent.

(i) In the event of an irreconcilable conflict or inconsistency between the terms and conditions of this Agreement, the exhibits to this Agreement and/or the executed Project Agreements to which the Department is a party, the conflict or inconsistency shall be resolved by applying the following order of document precedence:

From Highest to Lowest:	A. Agreement and its Exhibits, except the Technical Requirements
	B. Technical Requirements
	C. Other Project Agreements to which the Department is a party

(ii) In the event of an irreconcilable conflict or inconsistency between the Technical Requirements and the Department’s standards and specifications as set forth in Attachment 1.5a of the Technical Requirements, the conflict or inconsistency shall be resolved by applying the following order of document precedence:

From Highest to Lowest:	A. Technical Requirements
	B. Special Provisions Copied Notes
	C. Special Provisions
	D. Standards, Specifications and Guides

(g) A Project Agreement to which the Department is not a party shall have no effect upon the terms and conditions of this Agreement or the construction or interpretation thereof.

Section 26.17 Counterparts.

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

Section 26.18 Entire Agreement; Amendment.

(a) THIS AGREEMENT AND THE PROJECT AGREEMENTS TO WHICH THE DEPARTMENT AND THE CONCESSIONAIRE ARE BOTH PARTIES CONSTITUTE THE ENTIRE AND EXCLUSIVE AGREEMENT BETWEEN THE PARTIES RELATING TO THE SPECIFIC MATTERS COVERED HEREIN AND THEREIN. ALL PRIOR WRITTEN AND PRIOR OR CONTEMPORANEOUS VERBAL AGREEMENTS, UNDERSTANDINGS, REPRESENTATIONS AND/OR PRACTICES RELATIVE TO THE FOREGOING ARE HEREBY SUPERSEDED, REVOKED AND RENDERED INEFFECTIVE FOR ANY PURPOSE. THIS AGREEMENT MAY BE ALTERED, AMENDED OR REVOKED ONLY BY AN INSTRUMENT IN WRITING SIGNED BY EACH PARTY HERETO, OR ITS PERMITTED SUCCESSOR OR ASSIGNEE, EXCEPT TO THE EXTENT THE DEPARTMENT HAS THE RIGHT TO AMEND BY DEPARTMENT CHANGE OR DIRECTIVE LETTER PURSUANT TO ARTICLE 14. NO VERBAL AGREEMENT OR IMPLIED COVENANT SHALL BE HELD TO VARY THE TERMS HEREOF, ANY STATUTE, LAW OR CUSTOM TO THE CONTRARY NOTWITHSTANDING.

(b) This Agreement and the other Project Agreements attempt to set forth in full all requirements applicable under the PPTA as to the development, operation, maintenance, repair, management and financing of the Project and attempt to define in full the rights and responsibilities of each party in connection therewith. To the extent requirements and rights and responsibilities have not been addressed in this Agreement and the other Project Agreements, the parties agree to carry out their respective responsibilities in the spirit of cooperation contemplated by the PPTA, recognizing that they may not have defined in a sufficient detail or anticipated fully all activities necessary for the full implementation of the Project.

Section 26.19 Payment of Concessionaire Damages and Other Amounts by the Department.

The Department's payment of any Concessionaire Damages, Losses or any other amounts due and owing by the Department to the Concessionaire under this Agreement shall be subject to appropriation by the General Assembly and allocation by the CTB thereof. The Department shall be entitled to deduct from any amounts due from the Department to the Concessionaire any amounts then due and owing from the Concessionaire to the Department.

Section 26.20 Payments to Department.

Except as otherwise expressly provided herein or in any Project Agreement, payments due to the Department hereunder shall be due and payable within 30 days of receipt by the Concessionaire of an invoice thereof.

Section 26.21 Interest on Overdue Amounts.

Any amount not paid when due under this Agreement shall bear interest from the date such payment is due until payment is made (after as well as before judgment) at a variable rate per annum at all times equal to the Bank Rate (except as provided otherwise in Sections 21.03(d) and 21.06(d)), which interest shall be payable on demand.

IN WITNESS WHEREOF, the parties, intending to be legally bound, have executed this Comprehensive Agreement Relating to the U.S. Route 460 Project as of the date first written above.

VIRGINIA DEPARTMENT OF TRANSPORTATION,
an agency of the Commonwealth of Virginia

By: _____
David S. Ekern
Commonwealth Transportation Commissioner

[Concessionaire],
[Description of Legal Structure]

By: _____
[Name]
[Title]