

COMPREHENSIVE AGREEMENT
RELATING TO THE TRANSFORM 66 P3 PROJECT
DATED AS OF DECEMBER 8, 2016,
BY AND BETWEEN
VIRGINIA DEPARTMENT OF TRANSPORTATION,
an Agency of the Commonwealth of Virginia
AND
I-66 EXPRESS MOBILITY PARTNERS LLC,
a Delaware limited liability company

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This **COMPREHENSIVE AGREEMENT RELATING TO THE TRANSFORM 66 P3 PROJECT** (this “Agreement”) is made and entered into as of December 8, 2016, by and between the **VIRGINIA DEPARTMENT OF TRANSPORTATION** (the “Department”), an agency of the Commonwealth of Virginia (the “Commonwealth”), the address of which is 1401 East Broad Street, Richmond, Virginia 23219; and **I-66 EXPRESS MOBILITY PARTNERS LLC**, a Delaware limited liability company (the “Developer”), the address of which is 9600 Great Hills Trail, Suite 250E, Austin, Texas 78759.

ARTICLE 1.

RECITALS

WHEREAS, 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 Chapter 612 of the 2015 Acts of Assembly and signed into law by the Governor, effective July 1, 2015 (as amended, the “Act”);

WHEREAS, the Act 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 and the Transportation Public-Private Partnership Advisory Committee (the “Advisory Committee”) determines, and the Commissioner of Highways certifies, that the risks, liabilities, and responsibilities transferred, assigned, or assumed by the private entity provide sufficient benefits to the public to not proceed with the development and/or operation of the transportation facility through other means of procurement available to the Responsible Public Entity;

WHEREAS, in December 2009, the Commonwealth Transportation Board (the “CTB”) reviewed the I-66 Transit/TDM Study Final Report developed by the I-66 Transit/TDM Technical Advisory Committee, which reviewed various multimodal solutions to manage existing congestion and expected growth in the Interstate 66 (“I-66”) corridor, which comprises an area of approximately two miles on either side of the corridor defined by I-66 from U.S. 15 in Haymarket, Virginia east to the District of Columbia and includes portions of the existing and planned extensions of the Virginia Rail Express and the WMATA Metrorail systems (the “Comprehensive I-66 Corridor”), and to identify short- and medium-term transit improvements, including infrastructure, services and programs for the Comprehensive I-66 Corridor;

WHEREAS, in May and July 2013, the Commonwealth Transportation Board, following the release of a Tier 1 Environmental Impact Assessment Report for the Transform 66 Project (Outside the Beltway) (formerly referred to as the “I-66 Corridor Improvements Project”), resolved that seven concepts were eligible to advance for possible consideration in improving multimodal mobility along I-66 between U.S. Route 29 in Prince William County and Interstate 495 (the “Beltway”) in Fairfax County (the “I-66 Corridor”) and in relieving major points of congestion along I-66;

WHEREAS, the Transform 66 P3 Project (the “Project”) represents the components of the overall Transform 66 Project (Outside the Beltway) chosen to be procured under the PPTA,

to improve the integrated transportation network in the Comprehensive I-66 Corridor, including the development, design, construction, finance, operation and maintenance of high occupancy/toll lanes (“Express Lanes”) and associated facilities and services along the I-66 Corridor;

WHEREAS, the Commissioner of Highways issued a Finding of Public Interest (“FOPI”) for the Transform 66 P3 Project on August 17, 2015, that found that development and operation of the Project pursuant to the PPTA is in the public interest of the Commonwealth of Virginia, a determination that was affirmed by the Advisory Committee in August 2015 and endorsed by the CTB by resolution adopted in September 2015 approving of the Project’s procurement under the Act as meeting the goals of improving multimodal transportation options and relieving congestion by moving more people along the I-66 Corridor;

WHEREAS, the Department issued a Request for Qualifications on September 17, 2015 (the “RFQ”), requesting sealed statements of qualifications and Conceptual Financial Proposals from entities desiring to deliver the Project;

WHEREAS, Express Partners, I-66 Express Mobility Partners and Transformative Solutions Partners were determined by the Department to be Qualified Proposers as defined in the RFQ;

WHEREAS, the Department, following an industry review and consultation, issued a Request for Proposals to the Qualified Proposers;

WHEREAS, in January 2016, the Department submitted to FHWA the Environmental Assessment, and requested that FHWA issue a FONSI for the Project;

WHEREAS, FHWA reviewed the Environmental Assessment and other information and issued the FONSI on June 22, 2016;

WHEREAS, following receipt and evaluation of Proposals, the Department selected I-66 Express Mobility Partners as the Preferred Proposer;

WHEREAS, the Commissioner certified in writing on November 3, 2016 to the Governor and the General Assembly that the transfer, assignment, and assumption of risks, liabilities, and permitting responsibilities or the mitigation of revenue risk by the private sector enumerated in the FOPI have not materially changed since the FOPI was issued and the FOPI is still valid; and

WHEREAS, the Department and the Developer desire to herein set forth the terms to develop, design, finance, build, operate and maintain the Project pursuant to a long-term concession arrangement granted to the Developer by the Department by this Agreement;

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 hereto agree that the Project will be developed, designed, financed, constructed, operated, and maintained in accordance with this Agreement.

(b) The Developer will perform the Work in accordance with (i) the Project Agreements, (ii) Law (including, without limitation, the Commonwealth's right to work Laws and all Federal Requirements and Laws applicable to a transportation project that has received or receives federal-aid funds); (iii) Governmental Approvals; (iv) Good Industry Practice; and (v) the requirements of insurance policies required to be maintained in accordance with this Agreement so as not to knowingly void or omit to take any action that would void any such policy or limit the coverage of any such policy in a way that materially and adversely affects the Department.

(c) The Developer will 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 this Agreement.

(d) The Developer may retain Contractors to perform certain of its responsibilities pursuant to this Agreement, subject to the terms and conditions of this Agreement. Performance of any of the Work by a Contractor will satisfy the obligation of the Developer to perform such Work; *provided* that any such Work performed will be binding on the Developer and the foregoing will not relieve the obligation of the Developer to manage such Contractor. Except with regard to Limited Notices to Proceed, notices relating to Service Commencement pursuant to Section 8.08(c)(i) and notices relating to Project Completion pursuant to Section 8.09(b), the making of any submittals or the giving of any notices to the Department by the Design-Build Contractor (with respect to the Design-Build Work) or the O&M Contractor (with respect to the O&M Work) will satisfy the obligation of the Developer to make such submittal or give such notice; *provided* that any such submittal made or notice given by the Design-Build Contractor (with respect to the Design-Build Work) or the O&M Contractor (with respect to the O&M Work) will be binding on the Developer and the foregoing will not relieve the obligation of the Developer to manage the Design-Build Contractor (with respect to the Design-Build Work) or the O&M Contractor (with respect to the O&M Work). In any such event, the Developer will remain fully and primarily responsible for the performance of the Work, the making of submittals or the giving of any notices by any Contractors.

(e) The Department will be entitled to exercise oversight of the activities of the Developer and its Contractors in accordance with this Agreement, but will also be entitled to rely upon the Developer to directly manage, oversee and resolve disputes involving its Contractors, without the involvement of the Department (except as otherwise provided in this Agreement).

(f) The Department will use reasonable efforts in performing its rights and duties under this Agreement to minimize any disruption to or impairment of the Developer's rights and obligations under this Agreement; *provided, however*, that the Department's agreement to use such reasonable efforts will in no way limit the Department's exercise of its rights and obligations under this Agreement.

Section 3.02 Project Agreements

(a) The following Project Agreements (each as more particularly described by this Agreement) will be executed on or before the Agreement Date, and the Developer will promptly deliver to the Department executed copies of the same:

- (i) Escrow Agreement attached as Exhibit D;
- (ii) Design-Build Contract in the form executed and delivered on or before the Agreement Date containing provisions that incorporate the required terms set forth in Exhibit E attached hereto;
- (iii) Design-Build Performance Security, attached as Exhibit F-1; and
- (iv) Design-Build Work Guarantee attached as Exhibit F-2.

(b) The following Project Agreements (each as more particularly described by this Agreement) will be executed on or before the Service Commencement Date as required hereof, and the Developer will promptly deliver to the Department executed copies of the same:

- (i) Operations and Maintenance Agreement in a form containing provisions that incorporate the required terms set forth in Exhibit I attached hereto (to the extent that Developer will not self-perform the O&M Work); and
- (ii) the Electronic Toll Collection Agreement attached as Exhibit K.

Section 3.03 Nature of Parties' Interests Pursuant to This Agreement

(a) This Agreement does not grant to the Developer any fee title, leasehold estate, easement or other real property interest of any kind in or to the Project Assets or the Project Right of Way. The Developer's interests pursuant to this Agreement are limited to the Permit granted by this Agreement under Section 4.01.

(b) The Department and the Developer acknowledge their mutual intent that, despite the Department's retention of fee title to (or other good and valid real property interest in) the Project Assets and the Project Right of Way, as a result of the Developer's rights and interests therein pursuant to the Permit granted to the Developer under this Agreement, to the maximum

extent permitted by Law, for federal income tax purposes, the Developer will be treated as having acquired (i) an ownership interest in those Project Assets that have an expected economic useful life equal to or less than the Term and (ii) a franchise and license, permit, or other right within the meaning of section 197(d)(1)(D) and 197(d)(1)(F) of the Internal Revenue Code of 1986, as amended, and in that regard an amount equal to the Developer's cost of development, design, construction and start-up of the Project represents acquisition cost of such assets (the "Cost"), and no payment by the Department to the Developer pursuant to Section 7.05 will be treated as part of the Cost. The Department and the Developer do not expect that the Department will be required to file any return with the Internal Revenue Service with respect to such matters, but if the Department is required to do so, it will not file any documentation inconsistent with this Section 3.03.

Section 3.04 Quiet Possession and Enjoyment

The Department agrees that, except as otherwise provided herein, the Developer will, at all times during the Term, be entitled to, and will have, the quiet possession and enjoyment of the Project and the Project Right of Way and be entitled to hold the Permit and exercise the rights granted to the Developer under this Agreement, subject to the exercise by the Department of its rights under the Project Agreements. The Department will, at all times during the Term, defend (a) the Department's title or real property interest to the Project and Project Right of Way and (b) the Permit and related rights the Department grants to the Developer hereunder, or any portion thereof, in each case against any Person claiming any interest adverse to the Department, the Commonwealth or the Developer in the Project or the Project Right of Way, or any portion thereof, except where such adverse interest arises as a result of act or omission by the Developer or any other Developer Party in breach of the provisions of this Agreement or the negligence, misconduct or violation of Law by the Developer or any other Developer Party.

Section 3.05 Term

This Agreement will take effect on the Agreement Date and will remain in effect, until the first to occur of (i) the 50th anniversary of the Agreement Date, or (ii) the effective date of the termination of this Agreement pursuant to Article 20 (the "Term").

ARTICLE 4.

GRANT OF PERMIT

Section 4.01 Grant of Permit

(a) Pursuant to the Act and subject to the terms and conditions of this Agreement, the Department grants to the Developer the exclusive right, and the Developer accepts (i) the obligation to develop, design, finance, construct, operate and maintain the Project (including without limitation the obligation to develop, design, finance and construct the Transferred Project Assets) and (ii) the right to establish, impose, charge, collect, use and enforce payment of tolls and related charges (the "Permit").

(b) The Department's grant of the Permit pursuant to Section 4.01(a), and the Developer's obligations with respect thereto pursuant to Section 4.01(a), are conditional upon

Financial Close having occurred in accordance with Section 7.06; *provided* however that portions of the Work may be performed by the Developer prior to Financial Close pursuant to Section 8.02.

(c) In consideration of the Permit granted to the Developer by the Department pursuant to this Section 4.01, the Developer will perform the Work in accordance with the terms hereof at its own expense except as otherwise provided herein and pay (to the extent required) to the Department the Permit Fee in accordance with the Permit Fee calculation attached as Exhibit J.

ARTICLE 5.

TOLLING

Section 5.01 Tolling of the Project

(a) Toll Revenues.

(i) From and after the Service Commencement Date and continuing during the Term, the Developer will have the exclusive right to establish, impose, charge, collect, use and enforce the collection and payment of the Toll Revenues, in accordance with the terms of this Agreement. The Developer will have no right to charge or collect the Toll Revenues, except as provided in this Agreement. Beginning on the Service Commencement Date and through the end of the Term, the Developer will have the exclusive right, title, entitlement and interest in and to the Toll Revenues, subject to the provisions of the Electronic Toll Collection Agreement substantially in the form attached as Exhibit K.

(ii) The Developer acknowledges and agrees that it will 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 the Public Funds Amount and other payments to the extent and in the manner specified in this Agreement. The foregoing will not affect the Developer's entitlement to Toll Revenues as provided herein.

(b) Users of the Express Lanes.

(i) Only Permitted Vehicles will be allowed to use the Express Lanes.

(ii) In the event that the Developer desires to accommodate the use of the Express Lanes by Permitted Vehicles that consist of a truck-tractor/straight truck power unit and a single trailer, the Developer may do so only following any required modification to design and environmental approvals. Should the Developer determine that the NEPA Documents require modification to accommodate such Permitted Vehicle use, the Developer will be responsible for all necessary actions, and will bear all risk of delay (except to the extent resulting from Delay Events) and all risk of increased costs (except to the extent resulting from Compensation Events), resulting from or arising out

of any such modification including, without limitation, the Department's Allocable Costs it incurs in its review and participation in obtaining any such modification.

(iii) All Permitted Vehicles, even those exempt from paying the applicable tolls, must be equipped with a transponder or other electronic toll device that registers its payment or its exemption, unless the Developer has integrated another method of registering such vehicle's payment or exemption and the Department has agreed to the use of such other method.

(iv) High Occupancy Vehicles equipped with a transponder (in the absence of other available technologies as provided in Section 5.01(e)) will be entitled to use the Express Lanes at a 100% discount from otherwise applicable tolls.

(v) Mass Transit Vehicles and Commuter Buses, school buses, motorcycles and Exempt Vehicles equipped with a transponder (in the absence of other available technologies as provided in Section 5.01(e)) will be entitled to use the Express Lanes at a 100% discount from otherwise applicable tolls.

(vi) Permitted Vehicles (other than vehicles referred to in clauses (iv) and (v) above) equipped with a transponder (in the absence of other available technologies as provided in Section 5.01(e)) will be entitled to use the Express Lanes subject to payment of the applicable tolls.

(c) Concerning Tolls. The Developer's rights under Section 5.01(a) are subject to all other provisions in this Agreement, including without limitation the following provisions:

(i) All tolling on the Express Lanes will be done by electronic means and there will be no toll booths. The Developer will not (A) accept cash tolls on the Express Lanes or (B) impose or collect any fee, charge or other amount for the use of the Express Lanes other than as authorized by this Article 5.

(ii) The Developer may charge, debit and collect tolls that comply with Section 5.02 through Open Road Tolling facilities, and use remote sensing or other technologies (including global positioning system technology) approved for revenue operations by the E-ZPass Interagency Group (or any successor network thereof) or other interoperable tolling program supported by the Department to charge, debit and collect tolls for actual vehicular use of the Express Lanes. The initial installation shall include the latest and most capable approved transponder reader technology available at the time of system development.

(iii) The Developer shall provide a payment channel and assistance programs to pay tolls for the unbanked and underbanked.

(iv) Should discrepancies regarding toll rates occur between a customer and the Developer, the Developer will attempt to resolve such discrepancies in good faith. Should such discrepancies persist, the Developer shall resolve conflicts between the assessed toll rate and the posted toll rate in favor of the lower rate.

(v) Notwithstanding anything to the contrary in this Agreement or Law regarding the right of the Developer to be awarded civil fines from unauthorized users of the Express Lanes, the Developer will not seek and will not accept civil fines under Section 33.2-503 of the Code of Virginia in excess of the maximum amount allowed by statute from any person who has not previously been found by a court of competent jurisdiction, on the basis of a prior offence (offences to be consolidated), to have violated Section 33.2-503 of the Code of Virginia.

(d) Incidental Charges. The foregoing authorization to establish, impose, charge, collect, use and enforce the collection and payment of tolls includes the right, to the extent permitted by Law, and subject to the requirement to be interoperable with E-ZPass (and any successor to E-ZPass utilized on State Highways at that time) as set forth in Section 5.01(e), to impose, charge, collect, use and enforce, with respect to electronic tolling accounts managed by or on behalf of the Developer, the following incidental charges, *provided*, that the amount of any such incidental charges will not exceed the amount reasonably necessary for the Developer to recover its Allocable Costs directly incurred with respect to the items, services and work for which they are levied:

(i) except to the extent that such services are provided by the Department pursuant to the Electronic Toll Collection Agreement, reasonable administrative fees for account maintenance, account statements and customer service not to exceed \$24 per year per account and may increase by CPI in subsequent years;

(ii) except to the extent that such services are provided by the Department pursuant to the Electronic Toll Collection Agreement, reasonable amounts for the purchase or rental of transponders or other electronic tolling devices not to exceed 110% of the device cost;

(iii) except to the extent that such services are provided by the Department pursuant to the Electronic Toll Collection Agreement, reasonable, refundable security deposits for the distribution of transponders or other electronic toll devices not to exceed 110% of the device cost;

(iv) except to the extent that such services are provided by the Department pursuant to the Electronic Toll Collection Agreement, reasonable video surcharges or other reasonable fees for non-permitted travel on the Express Lanes provided the person proactively makes toll payment within five days for travel on the Express Lanes by vehicles that are not equipped with a transponder or other available equipment allowing the processing of the applicable tolls through E-ZPass (or any successor to E-ZPass utilized on State Highways at that time) not to exceed \$1.50 per trip in 2017 and may increase by CPI in subsequent years; and

(v) fees, penalties and interest for toll violations, including costs of collection in accordance with Law, shall be closely related to the actual cost to support the Developer's violation program. The Developer's basis for fees shall be provided to the Department for review.

Except to the extent such fees and charges are covered in the Electronic Toll Collection Agreement, the Developer may apply incidental charges set forth in this Section 5.01(d) to any Permitted Vehicles other than Exempt Vehicles.

(e) Interoperability. From and after the Service Commencement Date through the end of the Term, the Developer will operate and maintain a toll collection system with respect to the Project which will be interoperable with E-ZPass and any successor to E-ZPass utilized on State Highways at that time and any other federal and Commonwealth law or regulatory mandate. If the Department intends to change any Commonwealth interoperability or compatibility standards, requirements or protocols for toll collection systems, it will coordinate with the Developer prior to the implementation of such change so as to minimize the loss of Toll Revenues, disruption and cost to the Developer, but the Department will not be liable in any event for any loss of Gross Revenues, disruption or cost attributable to such change. If the Developer selects an electronic toll and traffic management 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 E-ZPass (or any successor to E-ZPass utilized on State Highways at that time) or with such other system then utilized on other State Highways in accordance with the Technical Requirements.

(f) Toll Collection Administration. The Developer will be responsible for all toll transaction account management services; *provided*, however, (i) that the Developer will engage and contract with the Department for the provision of toll transaction account management services in accordance with and for the initial term set forth in the Electronic Toll Collection Agreement, in substantially the form attached as Exhibit K, in which the Department will perform back-office, customer service and related activities for the Project as it relates to transactions processed through E-ZPass (and any successor to E-ZPass utilized on State Highways at that time), and (ii) that the Department will make available to the public, without charge to the Developer, transponders or other electronic toll devices allowing the processing of the applicable tolls (or 100% discount from tolls) for use of the Express Lanes. The Electronic Toll Collection Agreement is subject to renewal pursuant to the terms thereof.

(g) Transaction Costs.

(i) Without limiting the immediately succeeding sentence, the Department or its agents will use commercially reasonable efforts to work with the Developer to limit transaction costs charged to the Project by the Department, including charges for toll transaction account management services. The Department will not charge the Developer or the Project any fees or other transaction amounts for toll transaction account management services, other than as set forth in the Electronic Toll Collection Agreement.

(ii) If the Department ceases to provide all or a material part of the ETC Services and as a result the Developer, following 30 days' written notice of Developer's intention to do so, incurs costs related to self-performing, or engaging a Contractor to perform, the ETC Services no longer provided by the Department, then the Department agrees to pay the Developer the amount of such reasonable costs. If the Developer self-performs or contracts with a Contractor to provide ETC Services, the Department will provide the same access to customer accounts as if the Department continued to provide

the ETC Services, if such access is permitted by Law and if the Developer pays to the Department the Allocable Costs of providing such access.

(h) Violations Processing Services.

(i) The Department has implemented and maintains a processing system for the enforcement of penalties for toll violations in Virginia for electronic toll collection systems on State Highways. The Developer may, but is not obligated to, enter into an agreement with the Department to obtain the benefits of such enforcement system, in accordance with the Violation Processing Services Agreement in the form attached as Exhibit L. In consideration of such services, the Developer will pay the Department its customary charges for such services then in effect in accordance with the terms of the Violations Processing Services Agreement. For purposes of identifying and apprehending toll violators of the Project, provided it is authorized under Law, and any applicable agreements or arrangements, the Department will make available to the Developer the benefits of any agreements or arrangements which the Department has in place with other Commonwealth authorities or agencies that provide access to records in their possession relating to vehicle and vehicle owner data, and will coordinate with the Virginia State Police in accordance with Section 9.05(a) with respect to the provision of policing services, emergency services, traffic patrol and traffic law enforcement services on the Project.

(ii) The Developer 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 Developer, and that the Department does not, and will not be deemed to, guarantee collection or collectability of such tolls and related charges to the Developer or any other Person; *provided*, however, that the foregoing will not limit the Department's obligations or duties under the Electronic Toll Collection Agreement or any other Project Agreement with the Developer.

(i) License Plate Look-up Fees. The Developer will be responsible for all fees assessed by the Virginia Department of Motor Vehicles and other agencies or services for license plate identification pursuant to the Developer's violation processing services.

(j) No Continuing Department Obligations. Nothing in this Agreement will obligate or be construed as obligating the Department to continue or cease collecting tolls after the end of the Term.

Section 5.02 Toll Rates

(a) The Developer will impose congestion pricing on the Express Lanes, which may include dynamic tolling with potential toll rate changes at frequent intervals and there will be no restrictions on toll rates, except as set forth in this Article 5. The Developer's congestion pricing methodology:

(i) will not be inconsistent with the Department's plans and programs for highway system management of the overall transportation network in Northern Virginia;

(ii) when implemented, will assure that the Project will not become a federal Degraded Facility (as defined in 23 U.S.C. §166), as set forth in the Technical Requirements; and

(iii) when implemented, will be designed to assure that the Project will meet the OSPS.

(b) The toll rates will be the same for persons using the Express Lanes under like conditions, and for this purpose “like conditions” may take into consideration:

(i) type, weight and occupancy of the vehicle;

(ii) number of axles;

(iii) time of day and/or week;

(iv) time and location of entry or exit to or from the Express Lanes;

(v) traffic volume and vehicle speed; and

(vi) similar variables or combinations of such variables.

(c) The toll rates for Permitted Vehicles with three or more axles will be imposed (A) at a rate not less than five times the toll then in effect on Permitted Vehicles with two axles during any Peak Period (as such term is defined in the Technical Requirements Attachment 1.1) and (B) at a rate not less than three times the toll then in effect on Permitted Vehicles with two axles during all other times.

Notwithstanding the foregoing, (A) the Developer may adopt and implement discount programs for different classes or groups of persons using the Express Lanes under like conditions, subject to the provisions of Section 24.01, and (B) it is understood that dynamic tolling may result in vehicles that enter the Express Lanes at different times being subject to different toll rates as well as in vehicles travelling on the same section of the Express Lanes being subject to different toll rates.

Section 5.03 User Confidentiality

The Developer will comply with all Laws related to confidentiality and privacy of users of the Express Lanes, including but not limited to Sections 33.2-504 and 33.2-614(A) of the Code of Virginia.

Section 5.04 Suspension of Tolls

(a) In addition to its rights under Law, (but without limiting the Developer’s rights in the event of the occurrence of a Department Change or a Compensation Event), the Department will have the right, in its sole discretion, to order immediate suspension of tolling on any or all portions of the Express Lanes that are designated for immediate use as an emergency mass evacuation route. The Department will have no liability to the Developer for the loss of Toll

Revenues or the increase in costs and expenses attributable to any such order issued pursuant to Law by the Department or any other Governmental Authority, *provided* that the Department:

(i) concurrently (A) suspends tolling on all other Department-operated tolled facilities that are located within the area designated for evacuation or facilitation of evacuation and (B) orders suspension of tolling on all other tolled facilities operated by others within such area and over which the Department has the authority to order such suspension; and

(ii) lifts the order on the Express Lanes before or concurrently with the lifting of the order for all other designated tolled facilities within the area designated for evacuation or facilitation of evacuation, which the Department shall endeavor to do as promptly as possible (taking into account the relevant emergency and the duration thereof).

(b) The Department will have the right to order the diversion of traffic onto the Express Lanes, and to order immediate temporary suspension of tolling on the Express Lanes in the direction(s) of diversion, if the Express Lanes are designated for immediate use as the alternate route for the diversion of such traffic from another State Highway or the GP Lanes temporarily closed to all lanes in one or both directions due to:

(i) an emergency declared pursuant to Law by the Department or any other Governmental Authority;

(ii) a significant Incident involving one or more casualties requiring hospitalization or treatment by a medical professional or a fatality on the affected State Highway or GP Lanes from which such traffic is diverted; or

(iii) a significant Incident that causes the affected State Highway or GP Lanes to be closed for a period of time projected to be for greater than three hours.

The Department and the Developer will consult with each other on any such diversion of traffic and any suspension of tolling. Without limiting the Developer's rights in the event of the occurrence of a Compensation Event, the Department will have no liability to the Developer for the loss of Gross Revenues or the increase in costs and expenses attributable to the period that such order is in effect. The Department will lift an order given in accordance with this Section 5.04(b) as soon as the need for such order ceases.

(c) If the Department receives an order, request, notice or demand from Federal authorities, the Department will have the right to close the Express Lanes to the public for such period of time as may be necessary for secret service, national security and homeland security purposes. The Department will have no liability to the Developer for the loss of Gross Revenues or the increase in costs and expenses attributable to any such event. The Department will lift an order given in accordance with this Section 5.04(c) as soon as the need for such order ceases.

(d) Each party will provide reasonable assistance to the other party in seeking any available reimbursement from Federal sources for lost Toll Revenues and related costs and expenses incurred as a result of a suspension pursuant to Section 5.04(a) or (b) or a closure of the

Express Lanes pursuant to Section 5.04(c) and for pursuing insurance coverage related thereto. If either the Developer or the Department receives reimbursement from Federal sources for lost Toll Revenues as a result of actions taken in the preceding sentence, the proceeds of such reimbursement will be applied in the following order of priority: first to repair any uninsured physical damage to the Express Lanes directly caused by the suspension of tolling or diversion of traffic onto the Express Lanes pursuant to this Section 5.04; second, pro rata, to pay the Allocable Costs of the Department and the Developer in obtaining reimbursement from Federal sources pursuant to this Section 5.04(d); and third, to the Developer as reimbursement for lost Toll Revenues and related costs and expenses.

(e) The Department agrees that commencing upon the occurrence of an event that causes the suspension of tolling on, or the closure of, the Express Lanes pursuant to this Section 5.04, and ending when such suspension or closure is lifted, the minimum average operating speed will be excluded from any calculation of OSPS.

(f) To the extent that the Developer engages in any emergency services activities while complying or attempting to comply with Chapter 3.2 of Title 44 of the Code of Virginia, the “Commonwealth of Virginia Emergency Services and Disaster Law of 2000” (Va. Code Ann. § 44-146.13 *et seq.*), or any rule, regulation, or executive order adopted or issued thereunder, the Developer may enjoy the immunity from liability granted by Section 44-146.23 of the Code of Virginia.

Section 5.05 Disposition of Gross Revenues

(a) Gross Revenues will be used first to pay all due and payable Operating Costs, specifically including all amounts due to the Department pursuant to this Agreement (which amounts, except for Transit Funding Payments and Support for Corridor Improvements, will be paid on a *pari passu* basis with all other Operating Costs, including Revenue Sharing Payments), before they may be used and applied for any other purpose. With respect to payment priority of Revenue Sharing Payments, the Department and the Developer acknowledge and agree that Revenue Sharing Payments will be subject in all respects to the terms of the TIFIA Loan Documentation.

(b) The Developer will not use Gross Revenues to make any Distributions or to pay any amount payable pursuant to an Affiliate Contract subject to approval but not approved by the Department pursuant to Section 24.02(k), unless and until the Developer first pays the following:

(i) any undisputed amounts due to the Department pursuant to the terms of this Agreement (other than amounts due and payable under (viii) and (x) below);

(ii) all current and delinquent Operating Costs (including any payments to Affiliates made solely in accordance with the applicable Affiliate Contracts entered into in accordance with Section 24.02(k));

(iii) all Revenue Sharing Payments that are currently due and payable or delinquent.

- (iv) all current and delinquent debt service and other current and delinquent amounts due under any Developer Debt (including reserves required by such lenders for Developer Debt);
- (v) all Taxes affecting the Project that are currently due and payable or delinquent;
- (vi) all current and delinquent deposits to the Major Maintenance Reserve Fund;
- (vii) all current and delinquent costs and expenses for Major Maintenance;
- (viii) all Transit Funding Payments that are currently due and payable or delinquent;
- (ix) all current and delinquent deposits to any other reserve contemplated by this Agreement; and
- (x) all Support for Corridor Improvements payments that are currently due and payable or delinquent.

In the event there are any disputed amounts due to the Department pursuant to the terms of this Agreement, the Developer will maintain an additional cash reserve for such disputed amounts as a condition precedent to making any Distribution or payment to an Affiliate (other than any payment to an Affiliate pursuant to an Affiliate Contract that has been approved or is otherwise permitted hereunder). If the Developer makes any Distribution or payment to an Affiliate in violation of this Section 5.05(b), the same will be deemed to be held in trust by such Person for the benefit of the Department and the Collateral Agent, and will be payable to the Department or the Collateral Agent on demand to be held and maintained (and distributed) in accordance with the terms hereof or any Project Financing Agreement, as applicable. If the Department collects any such amounts held in trust, it will 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 to be held and maintained (and distributed) in accordance with the terms hereof or any Project Financing Agreement, as applicable.

(c) The Developer will have no right to use Gross Revenues to pay any debt, obligation or liability unrelated to this Agreement, the Project, or the Developer's services pursuant to this Agreement, *provided*, that this Section 5.05(c) does not apply to or otherwise affect the Developer's right to make Distributions in accordance with the Developer's governing documents, subject to compliance with Section 5.05(b).

(d) If the Developer enters into a Project Financing Agreement with the Collateral Agent that provides for the collection and distribution of Gross Revenues, the Developer agrees to provide to the Department, within five Business Days after the Developer's actual receipt of the same, a copy of: any written notice of resignation or removal of the Collateral Agent; any written notice of the appointment of a successor Collateral Agent; any written notice of any merger of the Collateral Agent; any written notice of any transfer by the Collateral Agent of its

rights under the Project Financing Agreements to an affiliate; and any written notice of any change in any Depositary.

Section 5.06 Toll Revenue Risk

Except as otherwise provided herein, the Developer understands and agrees that all toll revenue, including all revenue risk associated with the volume of HOV use, remains with the Developer, and the Department will have no financial responsibility whatsoever for such HOV volume, including HOV use that is greater than projected in the Base Case Financial Model.

Section 5.07 Failure to Meet OSPS

(a) At any time after the sixth full month following the Service Commencement Date, the Developer will notify the Department if the Developer's scheduled monthly report identifies an instance of the Project's failure to meet the OSPS (as provided in the Technical Requirements). The notice will describe such failure in reasonable detail. The Department will notify the Developer within 30 Days of its receipt of the Developer's report whether or not it requires an OSPS Improvement Plan (the "OSPS Improvement Plan"). In the event the failure to meet the OSPS is solely and directly attributable to the Department's failure to meet its obligations in Section 9.02(b), the Developer will not be required to submit an OSPS Improvement Plan.

(b) Upon a notification from the Department pursuant to Section 5.07(a) that the Project requires an OSPS Improvement Plan, the Developer (at its sole cost and expense) will prepare and submit the OSPS Improvement Plan to the Department for its approval. The OSPS Improvement Plan will not be required to propose a general strategy to improve overall OSPS compliance, but will be required to propose a strategy to address the specific reasons which the Developer reasonably believes caused such failure as described in the Developer's report. The OSPS Improvement Plan will be delivered to the Department within 30 Days of the Department's notice (or longer if mutually agreed to by the parties) and will cover the matters set forth in Section 5.07(a). The Department will review the OSPS Improvement Plan in accordance with the provisions of Section 10.05. The Developer will diligently implement the elements of the approved OSPS Improvement Plan that are within the control of the Developer promptly following the Department's approval thereof and within the schedule set forth in such OSPS Improvement Plan.

(c) Each OSPS Improvement Plan will be in writing and will set forth a schedule and describe specific actions the Developer and the Department, as applicable, will undertake to improve its OSPS compliance with respect to the failure described in the Developer's scheduled report. At any time after initial implementation of an OSPS Improvement Plan, or upon a material revision of the OSPS during such time, either party may request a revision of such OSPS Improvement Plan by giving at least 30 Days written notice to the other party, whereupon both parties will review the existing OSPS Improvement Plan and agree in writing to any revisions required to such OSPS Improvement Plan.

(d) The initial OSPS requirements, as may be modified by an OSPS Improvement Plan pursuant to Section 5.07(a), will apply for a ten year period from the Service

Commencement Date. Prior to the tenth anniversary of the Service Commencement Date, the Developer and the Department will review the OSPS requirements then in effect to determine the future need for OSPS or an alternative form of performance monitoring. The Developer agrees the Department will have the right to implement a form of OSPS for subsequent periods of time as the Department may determine in its discretion throughout the Term. Any such OSPS requirements for each period of time will not:

- (i) apply for a period longer than ten years;
- (ii) be lower than established by 23 U.S.C. §166;
- (iii) on the basis of the Developer's updated traffic modeling and other available traffic data, result in a known failure to meet the OSPS requirements.

Section 5.08 23 U.S.C. §166 Compliance

(a) The Department agrees to provide to FHWA the annual certifications required of a Commonwealth agency under 23 U.S.C. §166, as amended, including amendments imposed by the FAST Act. The delivery of a certification by the Department that the Express Lanes do not comply with the applicable requirements of 23 U.S.C. §166, or such other federal, rule or regulation will not constitute a default by the Department under this Agreement. The Department further acknowledges and agrees that the FAST Act requires the State to submit a plan to FHWA for approval detailing the activities and actions that will be taken, if necessary, to bring the Project into compliance.

(b) The Developer agrees to maintain and operate the Express Lanes, at all times, in compliance with the provisions of 23 U.S.C. §166 and 23 U.S.C. §129, successor provisions, and all regulations promulgated thereunder. Accordingly, the Developer will be responsible for the satisfaction of the requirements of 23 U.S.C. §166(b)(4), in accordance with the terms of this Agreement, and will otherwise coordinate its compliance efforts with the Department so as to enable the Department to provide the certifications required by Section 5.08(a).

Section 5.09 USDOT Reporting Requirements

(a) If the Developer enters into one or more agreements with the USDOT in connection with the TIFIA Credit Assistance or other financing program, the Developer agrees to collect and provide to the Department data and other information regarding the Project and prepare reports regarding the Project (i) required to be provided by the Department to the USDOT in relation to the TIFIA Credit Assistance or other financing program or (ii) deemed necessary by the Department to satisfy the Department's reporting obligations under the TIFIA Credit Assistance or other financing program.

(b) Upon receiving prior notice from the Department, the Developer will provide the data, information and reports that it is required to provide and prepare pursuant to Section 5.09(a) to the Department at least 30 Days prior to the date on which the Department is required to submit the same to USDOT.

(c) If the Developer enters into one or more agreements with the USDOT in connection with the TIFIA Credit Assistance or other financing program, the Developer agrees to provide the Department with executed versions of such agreements together with any agreements or instruments evidencing or securing the Developer's obligations thereunder, including any collateral pledge agreements. In Exhibit G, the Department is providing the Developer with a listing of the reports, notices and other filings, copies of which are to be provided to the Department concurrently with the Developer's delivery (or receipt) thereof. The Developer agrees to provide the Department with copies of such reports, notices and other filings made under such agreements as are requested by the Department pursuant to the preceding sentence.

ARTICLE 6.

BASE CASE FINANCIAL MODEL

Section 6.01 Initial Base Case Financial Model and Base Case Financial Model

(a) The Developer and the Department agree to the composition of the Initial Base Case Financial Model as of the Agreement Date, which is included in the Escrow Documents and which will be deposited with the Escrow Agent as described in Section 18.05.

(b) The Initial Base Case Financial Model will be updated upon Financial Close in accordance with Section 7.06 and will become the Base Case Financial Model. The Base Case Financial Model may be updated, following agreement between the parties, for any event applicable under Section 6.02(b).

(c) The Developer will not cause (or permit any other Person to cause) the Initial Base Case Financial Model or the Base Case Financial Model to contain any hidden data. The Developer will furnish to the Department any password or other access rights for each of the Initial Base Case Financial Model or the Base Case Financial Model.

Section 6.02 Base Case Financial Model Updates

(a) Other than in accordance with the terms of this Agreement, in no event will the Base Case Financial Model or any Base Case Financial Model update ("Base Case Financial Model Update") be changed except with the prior written approval of both the Department and the Developer. The Developer will furnish to the Department any password or other access rights for the Base Case Financial Model Update.

(b) Upon the occurrence of the following events, the Developer will provide to the Department a proposed Base Case Financial Model Update which will (except as otherwise agreed by the parties) include new projections and calculations, which will set forth the impact of the event:

- (i) upon submission of a notice of a Refinancing under Section 7.08;
- (ii) within 60 Days after the delivery of a Delay Event Notice that extends the Project Completion Date;

- (iii) within 60 Days after the delivery of a Compensation Event Notice;
 - (iv) within 60 Days after the delivery of a notice of a Net Cost Savings or positive Net Revenue Impact under Section 14.04;
 - (v) within 60 Days after the Developer notifies the Department that it proposes to undertake a Developer Project Enhancement; and
 - (vi) within 60 Days after the parties agree that any amendments to this Agreement have had or will have a material effect on future costs or Gross Revenues.
- (c) Any proposed Base Case Financial Model Update will become the Base Case Financial Model Update following its approval by the Department in accordance with Section 6.02(a).
- (d) Within 150 Days following the end of each fiscal year, the most recent undisputed Base Case Financial Model Update (or, if there has been no undisputed Base Case Financial Model Update, the Base Case Financial Model) will be updated to reflect audited historical cash flows for the most recently audited fiscal year; *provided*, however, such Base Case Financial Model Update will not: (i) include changes in Financial Model Formulas, (ii) include changes in forecast cash flows or (iii) allow such historical information to flow through the Financial Model Formulas.

Section 6.03 Financial Model Disputes

- (a) The Department will have the right to dispute any proposed Base Case Financial Model or Base Case Financial Model Update. Within 21 Days after receipt, the Department will accept or dispute a proposed Base Case Financial Model or Base Case Financial Model Update (as applicable) and, if it disputes a proposed Base Case Financial Model or Base Case Financial Model Update (as applicable), specifying its reasons for such dispute in sufficient detail to enable the Developer to correct the errors or deficiencies. To the extent that the Developer and the Department cannot agree on the changes within 90 Days of the Developer delivering the proposed Base Case Financial Model or Base Case Financial Model Update (as applicable) to the Department, the Dispute will be resolved in accordance with the dispute resolution procedures described in Article 21.
- (b) In the event of a Dispute, the Initial Base Case Financial Model, the immediately preceding Base Case Financial Model Update (as applicable) that is not being disputed (or, if there has been no undisputed Base Case Financial Model Update, the Base Case Financial Model) will remain in effect until such Dispute is resolved or a new Base Case Financial Model Update is issued and not disputed. If a proposed Base Case Financial Model or Base Case Financial Model Update (as applicable) has not been disputed, or if any such Dispute has been so resolved, the proposed Base Case Financial Model or Base Case Financial Model Update (as applicable) will serve as the Base Case Financial Model or the current Base Case Financial Model Update (as applicable) and will be submitted to the Escrow Agent in accordance with Section 18.05(d).

Section 6.04 Audit of Financial Model

(a) (i) Within 30 Days after any change to the Financial Model Formulas as a result of a proposed Base Case Financial Model Update pursuant to Section 6.02(b)(ii) through (vi), the Developer will deliver to the Department an audit report and opinion of the Financial Model Auditor to the effect that the Financial Model Formulas reflect the terms of this Agreement and are suitable for use herein in connection with Compensation Events, Delay Events, the impact of the execution and delivery of proposed TIFIA Loan Documentation, and early termination procedures, and covering such other matters as may be reasonably requested by the Department, all in form and substance acceptable to the Department. With respect to any change to Financial Model Formulas as a result of a proposed Base Case Financial Model Update due to a proposed Refinancing, such audit report and opinion will be delivered to the Department no later than seven Days prior to the proposed date of a Refinancing.

(b) Copies of the audit reports and opinions delivered by the Financial Model Auditor will be addressed to the Department, and the Department will be expressly identified therein as an entity entitled to rely upon such audit.

(c) The Developer will pay the fees and expenses of the Financial Model Auditor.

ARTICLE 7.

PROJECT FINANCING; FINANCIAL CLOSE; LENDER RIGHTS AND REMEDIES; REFINANCING

Section 7.01 Developer Responsibility for Project Financing; No Department Liability for Developer Debt

(a) Subject to Section 7.08(f)(iv), the Developer is solely responsible for obtaining and repaying each and every financing, at its own cost and risk and without recourse to any State Party necessary to develop, design, construct, maintain and operate the Project and any Developer Project Enhancement.

(b) Each bond or promissory note evidencing Developer 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 good and valid real property interest in the Project Assets, the Project Right of Way, the Department's interest hereunder or its interest and estate in and to the Project Assets or any part thereof, is not an obligation of any State Party (other than the PABS Issuer), moral or otherwise, and neither the full faith and credit nor the taxing power of any State Party is pledged to the payment of the principal thereof and interest thereon.

(c) No State Party (other than the PABS Issuer) will have any liability whatsoever for payment of the principal sum of any Developer Debt, any other obligations issued or incurred by the Developer 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. The Department's review of any Financing Assignments or other project financing documents is not:

(i) a guarantee or endorsement of the Developer Debt, any other obligations issued or incurred by the Developer in connection with this Agreement, the Project, the Base Case Financial Model or any Traffic and Revenue Study; nor

(ii) a representation, warranty or other assurance as to (A) the ability of the Developer to perform its obligations with respect to the Developer Debt or any other obligations issued or incurred by the Developer in connection with this Agreement or the Project or (B) the adequacy of the Gross Revenues to provide for payment of the Developer Debt or any other obligations issued or incurred by the Developer in connection with this Agreement or the Project.

(d) The Developer will make or cause to be made Equity Contributions in an amount equal to the Equity Contribution Amount, as required under the Agreement and the Project Financing Agreements.

Section 7.02 Support for Corridor Improvements

The Developer will be responsible for providing the Commonwealth with Support for Corridor Improvements on the terms set forth in accordance with the Permit Fee attached as Exhibit J.

Section 7.03 Transit Funding Payments

The Developer will be responsible for providing the Commonwealth with Transit Funding Payments in accordance with the terms set forth in the Permit Fee attached as Exhibit J.

Section 7.04 Revenue Sharing Payments

The Developer will be responsible for providing the Commonwealth with Revenue Sharing Payments in accordance with the terms set forth in the Permit Fee attached as Exhibit J.

Section 7.05 Concession Fee

(a) Payment of Concession Fee. The Developer acknowledges that the Concession Fee is due in full on the Financial Close Date. The Department, however, will permit the Developer, at its election, to pay the Concession Fee in two installments, as described in this Section 7.05.

(b) Installment Approach. Should the Developer elect to use the installment approach with respect to payment of the Concession Fee:

(i) the Developer shall pay to the Department on the Financial Close Date the greater of (1) 50% of the Concession Fee and (2) the Remaining PABs Proceeds;

(ii) the Developer shall pay the remainder of the Concession Fee on the earlier of (x) the date on which the funds become available from Lenders including the TIFIA Lender, and (y) subject to Section 7.05(e), 90 days following the Financial Close Date; and

(iii) the Developer shall extend the expiration of the Financial Close Security so that such security remains valid for at least 100 days following the Financial Close Date.

(c) Use of Funds. Should the Developer elect to use the installment approach contemplated by Section 7.05(b), the Developer shall not use the proceeds of any TIFIA Credit Assistance for any other purpose except to pay the Concession Fee until the Concession Fee is paid in full.

(d) Delay of Payment. Payment of the Concession Fee shall be subject to the provisions of Section 7.06(h). In the event that the Developer fails to pay the full amount of the Concession Fee within 90 days of Financial Close (subject to any extension pursuant to Section 7.05(e)), the Department will be entitled to draw on the Financial Close Security as liquidated damages in accordance with the provisions of Section 8.10(a) in the amount of the Concession Fee then outstanding. Failure to pay the Concession Fee in accordance with Section 7.05 shall be considered a failure to achieve Financial Close and shall be subject to the terms of Article 19 and Section 20.04.

(e) Extension of Payment. Notwithstanding anything to the contrary herein, the 90 day time period contemplated by clause (y) of Section 7.05(b)(ii) may be extended at the Developer's option to the extent warranted by the terms reflected in the definitive version of the TIFIA Loan Documentation in effect at Financial Close, if after the exercise of the Developer's good faith efforts in negotiation of the same, the availability of the initial funding under the TIFIA Loan Documentation in an amount necessary to pay the remainder of the Concession Fee is not contemplated to be available to be drawn during such 90 day time period. The Developer's exercise of such option shall be subject to (i) the Developer specifying a date the Developer expects the initial funding under the TIFIA Loan Documentation to be made and (ii) the Developer extending the expiration of the Financial Close Security so such security remains valid for at least 10 days following the date so specified. Should the Developer elect to further extend the time period to pay the remainder of the Concession Fee as provided herein, the Developer's election to do so is subject to the Developer specifying a new date not later than the specified date then in effect and further extending the Financial Close Security consistent with the terms set forth above.

Section 7.06 Financial Close

(a) Conditions for Financial Close. Except to the extent permitted in writing by the Department, Financial Close will only be achieved once all of the following conditions precedent are satisfied:

(i) the Developer has provided the Department: (A) a list of and proposed initial drafts of the Initial Project Financing Agreements and Financing Assignments set forth in Exhibit N and (B) a proposed initial draft of the Base Case Financial Model reflecting any changes in financing from the Initial Base Case Financial Model, contemporaneously with the distribution of such drafts to the Lenders and other parties to Financial Close for the Department's review and comment, and has included the Department on all subsequent distributions of such drafts to the Lenders and other parties

to Financial Close up and until the Developer has furnished the proposed final drafts pursuant to Section 7.06(a)(ii);

(ii) the Developer has provided or caused to be provided to the Department: (A) proposed drafts, in substantially final form, of the Initial Project Financing Agreements and Financing Assignments and (B) a proposed draft, in substantially final form, of the Base Case Financial Model reflecting any changes in financing from the Initial Base Case Financial Model, contemporaneously with the distribution of such substantially final drafts to the Lenders and other parties to Financial Close at least 10 Days prior to the scheduled Financial Close Date for the Department's review and comment, and has included the Department on all subsequent distributions of such final drafts to the Lenders and other parties to Financial Close up and until Financial Close;

(iii) the Developer has provided the Department the Base Case Financial Model and an update of the audit report and opinion delivered pursuant to Section 23.02(m) for such Base Case Financial Model;

(iv) the Developer has provided the Department true and complete copies of the executed Initial Project Financing Agreements and Financing Assignments;

(v) the Developer has provided the Department true and complete executed copies of the Equity Funding Agreements and the Equity Funding Guaranties in an amount at least equal to the Equity Contribution Amount and reflecting the commitment of each Equity Member to provide the equity funds reflected in the Base Case Financial Model which are required for meeting its obligations related to the Project;

(vi) if utilized, the PABs Issuer has issued the PABs as provided by and in accordance with the Initial Project Financing Agreements related thereto, and the Developer has made a Financing Assignment with respect to the PABs meeting the requirements set forth in Section 7.07;

(vii) the Developer has delivered to the Department certificates, as may be reasonably requested by the Department, certifying as to the Developer's compliance with the terms and conditions of this Agreement, the satisfaction of the conditions precedent to Financial Close, and the validity of the Developer's representations and warranties set forth in Section 23.02; and

(viii) the Department has received the following documents executed by the Developer and/or the Collateral Agent, as applicable:

(A) Electronic Toll Collection Agreement substantially in the form attached as Exhibit K;

(B) Violation Processing Services Agreement substantially in the form attached as Exhibit L; and

(C) Direct Agreement, substantially in the form attached as Exhibit Q;

(ix) the Department has received confirmation that the following executed documents remain in full effect:

(A) Design-Build Contract in a form containing provisions that incorporate the required terms set forth in Exhibit E attached hereto;

(B) Design-Build Performance Security in the form attached as Exhibit F-1; and

(C) Design-Build Work Guarantee in the form attached as Exhibit F-2.

If the Developer has satisfied all conditions precedent (or the Department has waived any such conditions) identified in this Section 7.06(a), the Department will issue a certificate on the Financial Close Date confirming that all conditions precedent have been satisfied and will promptly execute each of the agreements listed in Section 7.06(a)(viii) to which it is a party.

(b) Financing Adjustments. The following adjustments will be made on the Financial Close Date. Such adjustments will be implemented in accordance with the provisions of Exhibit X.

(i) Changes in Public Funds Amount or Concession Fee Due to Review of Initial Base Case Financial Model. In the event that a review by the Financial Model Auditor of the Initial Base Case Financial Model discloses errors or discrepancies in such financial model that results in an increase to the Initial Equity IRR in excess of five bps, the Public Funds Amount will be decreased in an amount so as to return the Base Case Equity IRR to the Initial Equity IRR, and the Initial Base Case Financial Model will be updated to reflect such adjustment. If a review by the Financial Model Auditor of the Initial Base Case Financial Model discloses errors or discrepancies in such financial model that results in a decrease to the Initial Equity IRR, the Initial Base Case Financial Model will be updated, subject to prior review and approval by the Department, to reflect any adjustments, however the Public Funds Amount will not change.

(ii) Changes in Market Interest Rates

(A) Subject to Section 7.06(b)(ii)(B), the Department will bear the risk and have the benefit of:

(1) 100% of the impact on the Public Funds Amount or Concession Fee (either positive or negative) arising from changes in Benchmark Rates solely with respect to TIFIA financing, bonds, private placement and bank debt assumed and indicated in the Initial Base Case Financial Model, for the period beginning on the Adjustment Period Start Date and ending on the Adjustment Period End Date; *provided, however*, that this protection will be extended only to the lesser of (aa) the amount of proceeds of TIFIA financing, bonds, private placement debt and bank debt assumed and indicated in the Initial Base Case Financial Model, and (bb) the amount of proceeds of TIFIA financing, bonds, private placement debt and bank debt issued or incurred at Financial Close; and

(2) 75% of the impact on the Public Funds Amount or Concession Fee (either positive or negative) arising from the differences between the credit spreads assumed and indicated in the Initial Base Case Financial Model for the period beginning on the Adjustment Period Start Date and ending on the Adjustment Period End Date; *provided, however*, that this protection will be extended only to the lesser of (aa) the amount of proceeds of the approved capital markets financing(s) assumed and indicated in Initial Base Case Financial Model, and (bb) the amount of proceeds of the approved capital markets financing(s) issued at the Financial Close.

(B) If the Financial Close Deadline is extended pursuant to Section 7.06(c), the Department will bear the risk and have the benefit of impacts to changes in Section 7.06(b)(ii)(A) for the period of such extension.

(iii) Changes to TIFIA Financing Terms

(A) If there is a positive impact on the Equity IRR caused by the cumulative changes from the Department Protected TIFIA Financial Terms to the corresponding Actual TIFIA Financial Terms, then the Department will receive the benefit of 60% of the positive impact on the Initial Equity IRR of the differences between the Department Protected TIFIA Financial Terms and the corresponding Actual TIFIA Financial Terms. The Parties will calculate any change in the Public Funds Amount or Concession Fee in accordance with the provisions of Exhibit X.

(B) If there is a negative impact on the Equity IRR caused by the cumulative changes from the Department Protected TIFIA Financial Terms to the corresponding Actual TIFIA Financial Terms, then the Department will bear the negative impact on the Initial Equity IRR of the differences between the Department Protected TIFIA Financial Terms and the corresponding Actual TIFIA Financial Terms as follows:

(1) 60% of the negative impact that is between \$1 and \$15,000,000; and

(2) 100% of the negative impact that exceeds \$15,000,000.

The Department's obligation to bear such negative impact by increasing the Public Funds Amount or accepting a decrease in the Concession Fee is subject to (I) the Initial Base Case Financial Model reflecting the Assumed TIFIA Financial Terms, (II) compliance with the respective Assumed TIFIA Financial Terms under (aa) the Lenders' Base Case and (bb) the Lenders' Low Case and (III) the changes in any of the Department Protected TIFIA Financial Terms are not caused by changes in the terms of the Lenders of the Senior Developer Debt or Rating Agencies with respect to the initial financing of the Project from the those included in the Initial Base Case Financial Model.

(C) The Developer must use reasonable efforts to notify and provide the Department the opportunity to observe and participate in all discussions, meetings and negotiations between the Developer and the TIFIA Joint Program Office concerning the TIFIA financing. The Developer also must exercise reasonable efforts in negotiating

the terms of the TIFIA financing to minimize any negative impact of these financing adjustments on the Public Funds Amount or Concession Fee, as applicable.

(iv) Indexation of Design-Build Contract Price

(A) Subject to Section 20.04(a)(iii), if Financial Close is not achieved within 180 days of the Proposal Due Date (the “Design-Build Contract Indexation Date”), the Department will bear 100% of the risk and have 100% of the benefit, as set forth in Section 7.06(b)(iv)(B), of indexation of the Design-Build Contract Price from the Design-Build Contract Indexation Date to the Financial Close Date; *provided, however*, the Developer will bear 100% of the risk and the Department will realize 100% of the benefit of any such Design-Build Contract Price indexation if the Developer, prior to the Design-Build Contract Indexation Date, has failed to fulfill its obligations set forth in Section 7.06(g).

(B) Subject to Section 7.06(b)(iv)(A), the Design-Build Contract price will be adjusted to reflect an amount equal to the Design-Build Contract Price multiplied by a percentage equal to the Construction Cost Index for the month of the Financial Close Date divided by the Construction Cost Index for the month of the Design-Build Contract Indexation Date. The parties will calculate any change in the Public Funds Amount or Concession Fee in accordance with the provisions of Exhibit X.

(v) Changes to Comprehensive Agreement. Subject to Section 20.04(a)(ii), if there is a negative impact on the Initial Equity IRR or on the Developer caused by the cumulative changes or modifications to the original version of this Agreement entered into as of the Agreement Date and the version of this Agreement as may be in effect as of the Financial Close Date, solely to the extent arising from requirements of the TIFIA Lender as a condition to its agreement to provide TIFIA Credit Assistance, then (A) the Department will bear 100% of such negative impact on the Initial Equity IRR by reducing the Concession Fee in a commensurate amount and (B) in the case of those changes having a negative impact on the Developer but not reducing the Initial Equity IRR, the Department will make such modifications or changes to this Agreement as are necessary in order to mitigate such negative impact.

(vi) Other Changes to the Initial Base Case Financial Model. On the Financial Close Date, the Developer will update the Initial Base Case Financial Model to reflect the terms and conditions included in the Initial Project Financing Agreements and Financing Assignments as of the Financial Close Date. For the avoidance of doubt, the Public Funds Amount will not be adjusted upwards or downwards except in accordance with the provisions of Sections 7.06(b)(i)-(iv) and the Initial Base Case Financial Model, as updated, will be the Base Case Financial Model and the resulting Equity IRR will be the Base Case Equity IRR.

(c) Financial Close Deadline. The Financial Close Deadline may not be extended, except for the following:

- (i) by the Department, in its discretion, for up to 60 days;

(ii) by the Developer upon the occurrence of a Delay Event which, following the procedures set forth in Section 13.01, will permit the Developer an extension of the Financial Close Deadline for a period of (A) 30 Days or (B) to the extent such Delay Event has not been cured during such 30-day period, the duration of the Delay Event, up to 60 Days;

(iii) by the Developer upon the occurrence of any of the events described in Section 20.04(a)(ii)(A) and Section 20.04(a)(iv) which will permit the Developer an extension of the Financial Close Deadline for a period of (A) 30 Days or (B) the duration of the event described in Section 20.04(a)(ii)(A), whichever is shorter;

provided that the Developer will, as a condition to any extension pursuant to this subsection, extend the expiration of the Financial Close Security so that such security remains valid for at least 10 days after the Financial Close Deadline (as extended). In the event Financial Close is not achieved by the Financial Close Deadline, the rights of the Department and the Developer to terminate this Agreement will be governed by Section 20.04.

(d) SIB Loan for Early Work. On the Agreement Date, the Developer may elect to receive a loan from the State Infrastructure Bank (a "SIB Loan") of \$29,021,233 to finance a portion of the cost of Early Work. The SIB Loan will not bear interest, but will be repaid in full by the Developer on or before the Financial Close Date or as required by the terms of Section 20.04 if this Agreement is terminated for failure to reach Financial Close by the Financial Close Deadline. Information on the SIB Loan application process is contained in Exhibit Y.

(e) Payments at Financial Close.

(i) On the Financial Close Date, the Developer will receive amounts agreed to by the parties, from sources identified in the Base Case Financial Model, for the costs related to project development. Such costs will be specifically itemized and identified in a schedule submitted to the Department at least seven Days prior to the scheduled Financial Close Date. Such schedule of costs will be updated for approval by the Department as a condition precedent to Financial Close.

(ii) On or before the Financial Close Date, the Developer will repay in full the outstanding principal amount of the SIB Loan.

(f) Closing Transcript. The Developer agrees to provide the Department a complete transcript of all documents executed and delivered in connection with the execution of this Agreement and the Financial Close promptly following the Financial Close Date.

(g) Reasonable Commercial Efforts; Cooperation. Subject to the termination rights of each party pursuant to Section 20.04, the Department and the Developer each agree to: (i) use reasonable commercial efforts to satisfy the conditions within their control to reach Financial Close on or prior to the Financial Close Deadline; and (ii) use reasonable commercial efforts to cooperate and assist the other party to reach Financial Close by the Financial Close Deadline. The Department also agrees to provide documents and information required to comply with any

disclosure requirements under applicable Laws in connection with the issuance of the PABS or other capital markets issuance in connection with Financial Close.

(h) Return of Financial Close Security. The Department will return the Financial Close Security to the Developer within two Business Days of (1) the Developer successfully achieving Financial Close in accordance with the terms of this Agreement, and (2) the Developer's payment in full of the Concession Fee.

Section 7.07 Project Financing Agreements; Department's Rights and Protections

(a) From time to time during the Term, the Developer has the right, at its sole cost and expense, to pledge, hypothecate or assign the Gross Revenues and the Developer's Interest as security for any Developer Debt, such debt to be issued on such terms and conditions as may be acceptable to any Lender and the Developer, 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 (other than with respect to indemnification and similar provisions provided for the benefit of the Collateral Agent and the agents, officers, representatives and/or employees of an Institutional Lender or the Collateral Agent) is entitled to the benefits and protections afforded by a Financing Assignment, except that Lenders of Developer Debt may be Persons other than Institutional Lenders so long as any Financing Assignment securing such Developer Debt made by such Person is held by an Institutional Lender acting as Collateral Agent, and debt securities may be issued, acquired and held by parties other than Institutional Lenders so long as an Institutional Lender acts as indenture trustee for the debt securities;

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

(iii) the Developer is strictly prohibited from pledging or encumbering the Developer's Interest, or any portion thereof, to secure any indebtedness, and no Financing Assignment will secure any indebtedness, (A) that is issued by any Person other than the Developer, any special purpose company that directly or indirectly owns the Developer and has no assets except as are directly related to the Project, or any special purpose subsidiary wholly owned by such company or the Developer, 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 7.07(a)(xiv);

(iv) no Financing Assignment or other instrument purporting to mortgage, pledge, encumber, or create a Lien on or against the Developer's Interest will extend to or affect the Department's fee simple title to or other property interest and estate in and to the Project, the Project Right of Way or any interest of the Department 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 will not have any obligation to any Lender or Collateral Agent pursuant hereto, except as expressly set forth in this Article 7 or in any other instrument or agreement signed by the Department in favor of such Lender or Collateral Agent and unless the Developer and/or the Collateral Agent have notified the Department of the existence of such Financing Assignment;

(vii) each Financing Assignment will require that if the Developer is in default under the Developer Debt secured by the Financing Assignment or under the Financing Assignment and the Lender or Collateral Agent gives notice of such default to the Developer, then the Collateral Agent will also give concurrent notice of such default to the Department. Each Financing Assignment also will require that the Collateral Agent deliver to the Department, concurrently with delivery to the Developer 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 will grant to a Lender any right to apply funds deposited with the Depository in accordance with Section 17.07, except for the express purposes for which the reserve or deposit is established;

(ix) each Financing Assignment will provide that the Developer may, without condition or qualification, issue additional Developer Debt, secured by the Developer's Interest, for the limited purpose of funding Safety Compliance Orders *provided*, that (A) the Lenders may limit such additional Developer Debt if other funds are then available to the Developer for the purpose of funding any such Safety Compliance Orders, and (B) the Lenders may impose reasonable, customary requirements as to performance and supervision of the work related to such Safety Compliance Order;

(x) each Financing Assignment will expressly state that the Collateral Agent and the Lenders will not name or join any State Party 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 as a necessary party is required to give the court jurisdiction over the dispute with the Developer and to enforce any Lender's remedies against the Developer 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, the Project Right of Way or any interest of the Department hereunder, or any part thereof, or for any liability of the Department;

(xi) each Financing Assignment will expressly state that neither the Lenders nor the Collateral Agent will seek any damages or other amounts from the Department due to the Department's breach of this Agreement, whether for Developer Debt or any other amount, except damages for a violation by the Department of its express obligations to Lenders set forth in this Article 7; *provided*, that the foregoing will not affect any rights or claims of a Lender as a successor to the Developer's Interest by foreclosure or transfer in lieu of foreclosure;

(xii) to the extent that such consent is required pursuant to the terms of such Financing Agreements, each Financing Assignment will expressly state that the Lenders and the Collateral Agent will respond to any request from the Department or the Developer for consent to a modification or amendment of this Agreement within a reasonable period of time;

(xiii) each Financing Assignment will expressly state, or incorporate a statement by reference to another Financing Assignment or Project Financing Agreement that states, that Developer Debt may be prepaid in whole or in part without penalty or premium at or following early termination of this Agreement; provided, however, that (A) Developer Debt (other than bank debt) shall be subject to extraordinary mandatory redemption or prepayment, in whole or in part, at a redemption or prepayment price of par plus accrued and unpaid interest to the redemption or prepayment date, in connection with any extraordinary mandatory redemption arising pursuant to the provisions of Section 20.03, Section 20.05, Section 20.06 and Section 20.07 and (B) Developer Debt that is bank debt will be permitted to have imposed on it commercially reasonable Breakage Costs irrespective of the termination provision that is the basis for the early termination of this Agreement; and

(xiv) each Financing Assignment may only secure Developer 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, designing, permitting, constructing, financing, maintaining, repairing, rehabilitating, renewing or operating the Project or any Project Enhancements or establishing or maintaining reserves in connection therewith, (B) paying reasonable fees, development costs and expenses incurred by the Developer in connection with the execution of this Agreement and the Initial Project Financing Agreements and not otherwise paid, (C) making Distributions, but only from the proceeds of any Refinancing permitted pursuant to Section 7.08, and (D) any Refinancing of pre-existing Developer Debt that conforms to the provisions of this Section 7.07(a), including use of proceeds to pay the reasonable costs of closing the Refinancing (including Lender's fees, but excluding any amounts paid to Affiliates).

(b) The Department will 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 Developer will remain liable to the Department for the payment of all sums owing to the Department pursuant to this Agreement and the performance and observance of all of the Developer's covenants and obligations pursuant to this Agreement.

(d) No Lender or Collateral Agent will, by virtue of its Financing Assignment, acquire any greater rights to or interest in the Project or Gross Revenues than the Developer has at any applicable time pursuant to this Agreement, other than the provisions set forth in this Article 7 for the specific protection of the Lenders and the Collateral Agent.

(e) All rights acquired by the Lenders or the Collateral Agent under any Financing Assignment will 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 will 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 will 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 will 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 will, 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 any Refinancing, will be valid or effective, and no Lender will be entitled to the rights, benefits and protections of this Article 7, unless the Financing Assignment complies with this Section 7.07. If the Department has actual knowledge that any Financing Assignment or amendment thereto has been entered into and does not comply with this Section 7.07, then the Department will deliver a notice to the Collateral Agent, with a copy to the Developer. Unless and until such non-compliance is remedied, the Financing Assignment will be neither valid nor effective, and the Lenders thereunder will be entitled to none of the rights, benefits and protections of this Article 7.

(h) Each Financing Assignment will make the Department a third-party beneficiary to any provision thereof that creates or protects the rights and priorities of the Department to receive payments thereunder as provided for in this Agreement, including Section 5.05.

(i) The Developer will cause all Project Financing Agreements to provide that amounts described in clauses (a), (c) and (d) of the definition of “Gross Revenues” must be deposited in one or more accounts held by the Collateral Agent or its agent under an account control or similar agreement pending disbursement; *provided*, that such funds may be invested in investments permitted by the Project Financing Agreements pending disbursement; and *provided* further that the Developer is not precluded from transferring such amounts to a separate account to pay Operating Costs as permitted in the Project Financing Agreements.

Section 7.08 Refinancing Requirements

(a) Notice of Refinancing. The Developer will provide the Department written notice of a Refinancing 75 Days before the date of such Refinancing. At the Department's request, the Developer will provide to the Department available details of the proposed Refinancing, including (i) details of the changes, if any, proposed to the Financial Model Formulas, (ii) the proposed Base Case Financial Model Update, (iii) any material changes in the Developer's obligations (including contingent obligations) to the Project Lenders, (iv) an outline detailing the changes and/or replacements, as the case may be, to the Project Financing Agreements then in effect and the Financing Assignments contemplated by the Refinancing, (v) a calculation of the anticipated Permit Fee, if any, generated from such Refinancing, in each case together with any supporting documentation, and (vi) any other details concerning the Refinancing that the Department may reasonably require to determine whether the Refinancing would, or could reasonably be expected to, have a material adverse effect on the Department, the Project or the ability of the Developer to perform its obligations pursuant to this Agreement or any other Project Agreement, *provided* that, with respect to any refinancing meeting the requirements of clauses (i), (ii) and (iii) of Section 7.08(c), the Developer will provide to the Department details to the extent reasonably required to establish that such proposed Refinancing satisfies the requirements of clauses (i), (ii) and (iii) of Section 7.08(c).

(b) Project Financing Agreements Related to Refinancings.

(i) The Developer will deliver to the Department for access and review, initial and subsequent drafts of all proposed Project Financing Agreements contemporaneously with the distribution of such drafts by and between the Developer and the Lenders. The Department's consent, when applicable, will be given not less than five Business Days prior to the proposed date of the Refinancing, *provided*, however, that the Department's consent will be conditioned upon there being no material changes in the terms of the relevant Project Financing Agreements provided to the Department and the Department having been given reasonable time to provide its review and approval in the event that written notice was not provided to Department 75 Days before the date of the Refinancing.

(ii) The Developer will deliver, not later than 15 Days after close of the Refinancing, to the Department executed copies of all Project Financing Agreements in connection with the Refinancing.

(c) Department's Right to Approve Refinancing. Any Refinancing of Developer Debt will be subject to the Department's prior approval, which approval will not be unreasonably withheld or delayed; provided, that no such approval (an "Exempt Refinancing") will be required if the Developer first demonstrates to the Department that either:

(i) (A) the proposed Refinancing refinances existing Developer Debt and does not increase the Developer Debt then outstanding other than by an amount equal to reasonable costs of closing the Refinancing, including lender fees, arranger fees and advisor fees, and the amount of any required reserves; and

(B) 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

(C) 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); or

(ii) the proposed Refinancing is a Planned Refinancing that is on terms materially consistent with the terms contemplated in the Initial Base Case Financial Model, subject to the following:

(A) the proposed Refinancing terms will be considered “materially consistent” if:

(1) the Developer will not achieve and will not be projected to achieve an Equity IRR equal to or greater than the lower of the Initial Equity IRR or 15% as a result of the proposed Refinancing; and

(2) the Refinancing does not result in a reduction of more than 100 Basis Points on the average weighted cost of the proposed Refinancing Debt; and

(B) the Developer delivers to the Department a certificate of an Authorized Representative stating that none of the matters in (1) through (4) below would exist or would be true as a result of the consummation of the proposed Refinancing.

Without limiting other reasonable grounds for withholding consent, the Department may withhold consent if it reasonably determines that:

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

(2) any change or series of changes in the obligations of the Developer due to the Refinancing would or reasonably could be expected to result in a material increase in the Department’s liabilities, obligations or risks under this Agreement and the other Project Agreements;

(3) the Refinancing would have a material adverse effect on the ability or commitment of the Developer to perform its obligations under this Agreement and the other Project Agreements; or

(4) the proposed Refinancing would or reasonably could be expected to have a material adverse effect on the Developer’s incentives and disincentives to fully comply with the standards and requirements applicable to the development, construction, operations and maintenance of the Project for which the Developer is responsible pursuant to this Agreement and the other Project Agreements.

Section 7.06 sets forth additional restrictions on Refinancings and on the incurrence of Developer Debt.

(d) Share of Refinancing Gain.

(i) The Developer will pay to the Department 50% of any Refinancing Gain from a Refinancing that is not an Exempt Refinancing. The Refinancing Gain will be calculated after deducting payment of (i) the Department's Allocable Costs under Section 7.08(e) and (ii) the Developer's Allocable Costs directly associated with the Refinancing.

(ii) The Department's portion of any Refinancing Gain will be calculated as if realized entirely in the year in which the Refinancing occurs, and the Developer will pay the Department's portion of such gain to the Department concurrently with the close of such transaction; *provided*, however, if the Developer demonstrates to the Department's reasonable satisfaction that such gain will enable the Developer to make additional Distributions only over future years (and not all at the close of the transaction), then the Department's portion of the such gain will be payable over time pursuant to a payment schedule, reasonably approved by the Department, corresponding with the anticipated timing of such future Distributions, but only so long as such payments yield the same net present value to the Department as if the Department had received its portion of such gain at the close of the transaction. Notwithstanding any such payment schedule, the net present value of the unpaid amount will be due and payable in full to the Department immediately upon (i) any failure to pay a scheduled payment when due or (ii) termination of the Agreement for any reason.

(e) Payment of Department Expenses.

(i) In connection with any Refinancing, the Developer will pay the Department for the Department's Allocable Costs incurred related to the Refinancing at the time of the closing of the Refinancing. The Department will provide the Developer with an estimate of its expected costs related to such Refinancing; if there is a change in circumstances relating to the Refinancing following the submission of the Department's initial estimate that is expected to result in higher expenses, then the Department will provide a revised estimate. For any Refinancings that do not close, the Department will be paid for its documented expenses for such Refinancings from and at the time of (or, at the Developer's option, at any time prior to) any subsequent successful Refinancings, and will be entitled to payment of interest on such expenses based on the Bank Rate calculated from the date on which such expenses were due and payable according to the first invoice issued by the Department for such expenses until paid by the Developer.

(ii) The Department will provide the Developer with an estimate of the expenses to be incurred by the Department related to the Refinancing, no later than 30 Days after the Department has provided its consent (to the extent such consent is required hereunder) to such Refinancing pursuant to Section 7.08(b)(i), and a final estimate not less than five Days prior to the proposed date of the Refinancing.

(f) Other Requirements.

(i) Every Refinancing will be subject to the provisions of Section 7.01 and Section 7.06 and the other provisions of this Agreement pertaining to Developer Debt and Financing Assignments.

(ii) Any reimbursement agreement and related documents that the Developer enters into in connection with obtaining a Letter of Credit will, if they encumber the Developer's Interest, constitute a Financing Assignment and be treated as a Refinancing for all purposes pursuant to this Agreement. No such reimbursement agreement and related documents will encumber less than the entire Developer's Interest.

(iii) In connection with the consummation of any proposed Refinancing, the Department will, promptly upon the reasonable request of the Developer 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 Developer's written analysis of whether the Department is required to approve such Refinancing pursuant to Section 7.08(c) and confirm whether the Department believes its approval is required for such Refinancing.

(iv) In connection with the Initial Project Financing or any Refinancing, the Department will use reasonable efforts to assist the PABs Issuer, in its role as conduit issuer, to, in each case as applicable and required, (i) agree to enter into a customary continuing disclosure agreement with respect to the PABs as reasonably acceptable to the Lead Underwriter(s), (ii) authorize the Developer to include, in the preliminary and final official statement for the PABs, required financial and economic information in respect of the Commonwealth and the PABs Issuer at the time of the publication of such offering materials and provide such documents and information required to comply with any disclosure requirements under applicable Laws in connection with the issuance of PABs or any other capital markets issuance in connection with Financial Close, (iii) agree to provide customary certificates and opinions in connection with Financial Close, (iv) agree to negotiate in good faith and enter into an indenture, the Senior Loan Agreement, a bond purchase agreement and such other documentation as is reasonably requested by the Developer in connection with the issuance of the PABs, (v) provide a blanket letter of representation to the Depository Trust Company, (vi) provide customary legal opinions, including legal opinions addressed to Lenders, (vii) take all required authorizing actions in a timely manner, and (viii) participate in drafting sessions related to the above. In addition, the Department will use reasonable efforts to assist the Developer in securing approvals from any Governmental Authorities as necessary in relation to the above; provided that the foregoing will not limit, restrict or prejudice the Department's rights under this Agreement or any other Project Agreement.

Section 7.09 Collateral Agent's Rights

The Collateral Agent's rights are set forth in the Direct Agreement.

ARTICLE 8.

DESIGN AND CONSTRUCTION OF THE PROJECT

Section 8.01 General Obligations of the Developer

(a) The Developer will furnish all design, construction and other services, provide all materials, equipment and labor to perform the Work reasonably inferable from this Agreement and perform the Work in accordance with this Agreement.

(b) Except as otherwise expressly provided in this Agreement, the Department makes no warranties or representations as to any surveys, data, reports or other information provided by the Department or other Persons, including the data and other information set forth in Exhibit R (Known Pre-Existing Hazardous Substances) (*provided*, the Developer will be entitled to rely upon Exhibit R to establish whether a Pre-Existing Hazardous Substance is Known or Unknown and to determine the size and nature of the presence of such Hazardous Substance for purposes of Section 16.02), concerning surface or subsurface conditions, the existing condition of the roadway and other Assets, drainage, the presence of Utilities, Hazardous Substances, contaminated ground water, archeological, paleontological and cultural resources, or endangered and threatened species, affecting the Project Right of Way or surrounding locations. The Developer acknowledges that such information is for the Developer's reference only and has not been verified by the Department, and that the Developer will be responsible for conducting all surveys, studies and assessments as it deems appropriate for the Project.

(c) Except as otherwise expressly provided in this Agreement, the Developer will bear the risk of all conditions occurring on, under or about the Project Right of Way on which the Work is performed, 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) Hazardous Substances, including contaminated groundwater;
- (vi) any archeological, paleontological or cultural resources; and
- (vii) any species listed as threatened or endangered under Federal or Commonwealth endangered species Law.

(d) The Developer will be responsible for coordinating and scheduling the Work with other separate contractors working in the Project Right of Way in accordance with the Technical Requirements. Except in the case of a Department-Caused Delay, the Department will not be liable for any delays, disruptions or damages caused by such contractors.

(e) The Developer Representative and the Department Representative will be reasonably available to each other and will have the necessary authority, expertise and experience required to oversee and communicate with respect to the Work.

(f) The Developer's Responsible Charge Engineer will be reasonably available to the Department and will have the necessary authority, expertise and experience required of the Responsible Charge Engineer.

(g) Prior to and during the Construction Period, the Developer will provide information to the public concerning the Project, any Change Order or any other construction activities in accordance with the Technical Requirements.

(h) The Developer will prepare and submit to the Department for its review and approval to confirm that the Project Development Plans are in accordance with the requirements and times set forth in the Technical Requirements.

(i) The Developer will 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 the 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 the same in writing in its sole discretion. Except in the case of an agreement approved by the Department pursuant to the preceding sentence, the Developer has no power or authority to enter into any such agreement with a third party in the name or on behalf of the Department and the parties agree that any purported agreement to that effect will be null and void.

(j) The Developer will be responsible for performing and completing all Work that the Developer is obligated to perform for or on behalf of third parties relating to the Project in accordance with its agreement with such third parties and subject to any dispute resolution with such third parties and without prejudicing the Developer's rights under any such agreements.

Section 8.02 Limited Notices to Proceed to Perform Early Work

(a) Issuance of Limited Notice to Proceed. Following the fulfillment (or written waiver by the Department) by the Developer of the conditions precedent to Early Work set forth in Exhibit B-3, the Department will issue one or more Limited Notices to Proceed (individually and collectively, "LNTTP") authorizing the Developer to commence the Early Work.

(b) Developer Notice of LNTTP Acceptance. The Developer will deliver notice to the Department upon the satisfaction of the agreed conditions to the issuance of any LNTTP and request that the Department issue such LNTTP for the applicable portion of the Work. The Department will respond to such request, within 21 Days following receipt of such request by the Department, by delivery to the Developer of the LNTTP or notice of the conditions that the Department believes, in its reasonable discretion, to have not been satisfied. The Developer will have a reasonable opportunity to address those deficiencies and re-submit a notice to the

Department or, if the Developer does not agree with the Department's assessment, to refer the matter to the dispute resolution procedures pursuant to Article 21.

(c) Performance of Early Work. The Developer will perform the Early Work in accordance with (i) the Project Agreements, (ii) Law (including, without limitation, the Commonwealth's right to work Laws, and to the extent applicable, with all Federal Requirements and Laws applicable to a transportation project that has received or receives federal-aid funds); (iii) Governmental Approvals; (iv) Good Industry Practice; and (v) the requirements of insurance policies required to be maintained in accordance with this Agreement, as modified by Exhibit B-3, so as not to knowingly void or omit to take any action that would void any such policy or limit the coverage of any such policy in a way that materially and adversely affects the Department.

(d) Developer Oversight. The Developer will 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 this Agreement.

(e) Funding for Early Work. The maximum cost of the Early Work will be the total Early Work amount ("Early Work Amount") in the Developer's Proposal, provided that such Early Work Amount may be adjusted by mutual agreement of the Developer and the Department. The Early Work Amount will be funded by the Developer and the Department in the following order:

- (i) first, from amounts, if any, the Developer makes available from its funding sources; and
- (ii) second, from the amounts loaned to the Developer pursuant to the SIB Loan.

Disbursements of SIB Loan proceeds to the Developer will be made as costs are incurred and substantiated by the Developer in accordance with the terms of the SIB Loan. On or before the Financial Close Date, the Developer will repay amounts related to the SIB Loan in accordance with Section 7.06(e)(ii).

Section 8.03 Conditions Precedent for Notice to Proceed

(a) Construction Notice to Proceed. Except with respect to Early Work described in Section 8.02, the Developer will not commence construction of the Project Assets until the Department has delivered construction notice to proceed ("Construction Notice to Proceed") to the Developer. The Department will promptly deliver the Construction Notice to Proceed to the Developer upon Developer's satisfaction of the following conditions (or the Department, in its discretion, waives in writing such conditions):

- (i) the Developer has delivered to the Department correct and complete copies of all Design Public Hearing Documentation and Construction Documentation approved for the commencement of construction in accordance with this Agreement and the Technical Requirements, and the Developer 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 commencement of construction have been acquired (and copies provided to the Department), and the Developer has satisfied all applicable pre-construction requirements of the Governmental Approvals;

(iii) all property rights necessary for the commencement of construction have been obtained;

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

(v) if not already provided pursuant to a LNTP, the builder's risk insurance policy required under Section 17.01(a) has been obtained and will be in full force and effect, and the Developer has delivered to the Department a duplicate original or copy thereof certified by the Developer's (or the Design-Build Contractor's) insurance broker to be a true and correct copy of the original; and

(vi) if not paid at Financial Close as required by Section 8.02(e), repayment in full of the outstanding principal amount of the SIB Loan.

(b) The Developer will deliver notice to the Department upon the satisfaction of the applicable conditions set forth in this Section 8.03 and request that the Department issue a Notice to Proceed. The parties will comply with the submittal and review procedures set forth in Section 10.05 for the issuance of a Notice to Proceed.

(c) The Department may waive any condition precedent set forth in Section 8.03(a); *provided*, that no person or entity will 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 Developer to be satisfied, the Developer will remain bound to use diligent efforts to satisfy the condition precedent.

(d) Segmental Construction Notice to Proceed. Notwithstanding Section 8.03(a), at any time after Financial Close the Developer may request that the Department issue one or more Segmental Construction Notices to Proceed ("SCNTP") prior to the Department's issuance of the full Construction Notice to Proceed. If the Developer satisfies the conditions described herein, a SCNTP would authorize the Developer to commence certain portions of the Work in respect of Project Assets with independent utility that are set forth in the Developer's request for a SCNTP. If the Developer satisfies the conditions described in Section 8.03(a)(i) through (vi) with respect to the segment of the Work described in the SCNTP (or the Department, in its discretion, waives in writing such conditions), the Department will promptly deliver the SCNTP with respect to such segment. Notwithstanding the foregoing, the Department will be under no obligation to issue a SCNTP on or after 18 months following the first SCNTP if the Developer has not met the conditions described in Section 8.03(a)(ii) for the Project as a whole. If the Department issues

one or more SCNTP, the Department will also issue the full Construction Notice to Proceed upon the Developer's satisfaction (or the Department's written waiver) of the conditions set forth in Section 8.03(a)(i) through (vi), and such full Construction Notice to Proceed will authorize the Developer to commence construction of the remaining balance of the Project Assets not yet authorized under a SCNTP.

Section 8.04 Design Work

(a) Except as relates to the Early Work described in Section 8.02, the Developer will submit to the Department accurate and complete copies of all Design Documentation and Construction Documentation relating to the Work (as required by the Technical Requirements), within three Days after such documentation is delivered to the Developer by the Design-Build Contractor under the Design-Build Contract. Each submittal will comply with the applicable requirements of the Technical Requirements and will be consistent in all material respects with the Developer's Proposal. The Department's review of any submittal will comply with the submittal and review procedures set forth in Section 10.05.

(b) The Developer will provide the Department with a schedule of its proposed submittals of Design Documentation and Construction Documentation (which schedule will be updated periodically as necessary) so as to facilitate the Department's coordination and review of such documents, and will complete quality control and quality assurance reviews of all Design Documentation and Construction Documentation to ensure that they are accurate and complete and comply with the requirements of this Agreement and the Technical Requirements prior to any submission to the Department.

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

(d) Construction Documentation will set forth in detail drawings and specifications describing the requirements for construction of the Work, in full compliance with the Technical Requirements, Law and Governmental Approvals. The Construction Documentation will be consistent with the latest set of design submissions, and will be submitted after the Developer has obtained all requisite Governmental Approvals associated with the Work contained in such documents.

(e) The Department's review, comment and/or approval of design submissions and the Construction Documentation are for the purpose of evaluating the Developer's compliance with the requirements of this Agreement and will be performed in accordance with the terms of this Agreement, but will not alter the Developer's obligations under this Agreement.

(f) Following the Department's initial approval pursuant to this Section 8.04, the Department's further approval of the Design Documentation will be required (i) if any amendment constitutes a material change in the scope of the Work or Deviations from any of the

Technical Requirements or (ii) except to the extent directly attributable to a Compensation Event, any amendment imposes on the Department any new or increased costs, liabilities or obligations. If an amendment does not fall under (i) or (ii) above, the Developer will have the right to amend, supplement or otherwise modify the Design Documentation or the Construction Documentation or any part thereof, without the further approval of the Department. Regardless of whether the Department's consent is required, the Developer will provide the Department notice of all such proposed amendments, supplements and modifications and will pay 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 approval.

(g) In the event the Developer's design differs from the schematic upon which the RFP Conceptual Plans were based, the Developer will be fully responsible for all necessary actions, and will bear all risk of delay (except to the extent resulting from Delay Events) and all risk of increased cost (except to the extent resulting from Compensation Events), resulting from or arising out of any associated change in the Project Assets 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) or third party approvals or agreements, and (iii) bearing all risk and cost of litigation, in each case, associated with such Developer Deviations. 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, and the Developer will pay the Department for the Allocable Costs it incurs to conduct further or supplemental environmental studies and to fulfill any other responsibilities assigned to it pursuant to 23 CFR Part 771 in connection with such Deviations.

Section 8.05 Acquisition of Project Right of Way; Utility Relocations; WMATA Coordination; Railroad Easements

(a) Right of Way Acquisition Obligations. The Developer will perform all Project ROW Acquisition Work necessary for the construction of the Project Assets including but not limited to all appraisals, appraisal reviews, negotiations with landowners and Utility Owners, relocation assistance and advisory services, and legal services. The Developer will carry out such Work as follows:

(i) the Developer will carry out the Work specified herein, in each case in accordance with the Technical Requirements and all applicable Laws;

(ii) the Developer will acquire all Project Right of Way in accordance with the Technical Requirements and Law, including but not limited to the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970, as amended (the "Uniform Act") and Titles 25.1 and 33.2 of the Code of Virginia;

(iii) the Developer will submit a ROW Acquisition and Relocation Plan to the Department for its approval. Unless otherwise permitted in the Technical Requirements, the ROW Acquisition and Relocation Plan will not include parcels considered to be solely for the convenience of the Developer, including those necessary to accommodate

laydown, staging, temporary drainage and other construction methods in connection with the construction of the Project Assets; provided, however, for the avoidance of doubt, that temporary easements which the Developer reasonably believes are necessary for the safe construction of the Project Assets or as needed in order to comply with applicable Law (including the Virginia Occupational Health Standards adopted under Code of Virginia, and the U.S. Department of Labor's Occupational Safety and Health Standards Administration) shall be included in the ROW Acquisition and Relocation Plan. The ROW Acquisition and Relocation Plan will identify a schedule of right of way activities including the specific parcels to be acquired and all relocations. The ROW Acquisition and Relocation Plan will allow for the orderly relocation of displaced persons based on time frames not less than those provided by the Uniform Act. The parties will comply with the submittal and review procedures set forth in Section 10.05 with regards to the Department's approval of the ROW Acquisition and Relocation Plan. The ROW Acquisition and Relocation Plan will be updated as necessary during the Term;

(iv) Without prejudice to its rights hereunder, the Developer will exercise due diligence and use reasonable care in determining whether property to be acquired may contain wastes or other materials or hazards requiring remedial action or treatment to the extent the Developer has access to such property and will otherwise comply with the Technical Requirements, including the undertaking of studies, assessments and tests required by the Technical Requirements;

(v) the Developer will make direct payments of benefits to property owners for negotiated settlements, relocation benefits, and payments to be deposited with the court; and

(vi) the Developer will prepare, obtain execution of, and record documents conveying title of the Project Right of Way to the Commonwealth and deliver all executed and recorded general warranty deeds to the Department. For all property purchased in conjunction with the Project, title will be acquired in fee simple except as may be specifically agreed to by the Department.

(b) Condemnation. The Developer will pursue acquisition of the Project Right of Way and condemnation, if necessary, pursuant to Section 1.6.2 of the Technical Requirements.

(c) Certain Property Outside the Project Right of Way. The Developer, at its sole cost and expense, will be responsible for the acquisition of, or for causing the acquisition of, any property, temporary easements or other property rights not included in the ROW Acquisition and Relocation Plan, including those necessary to accommodate laydown, staging, temporary drainage and other construction methods in connection with the construction of the Project Assets.

(d) ROW Costs.

(i) Except as provided in this Agreement, the Developer will be responsible for performing all activities and services necessary for the acquisition of all Project Right of Way at its sole cost and expense as set forth in the Technical Requirements.

(ii) For parcels that go to condemnation, Developer will be required, prior to the start of condemnation proceedings, to place in the Project Enhancement Account an amount equal to 130% of the offer amount set forth in the Condemnation Certificate and to separately pay to the Department \$50,000 to pay the Department's administrative costs in pursuing condemnation. Following the conclusion of all condemnation proceedings related to the Project, the Developer will be entitled to any condemnation funds remaining in the Project Enhancement Account. If the aggregate amounts awarded by the court exceeds the amount deposited to the Project Enhancement Account for condemnation, the Department will pay to the Developer the amount necessary to fund such excess. The Department will not provide review or approval of appraisals or of offers to the property owners prior to the Developer filing a Condemnation Certificate.

(e) Utility Relocations.

(i) The Developer, at its sole cost and expense, will perform all activities and services necessary for all Utility Relocations necessary to accommodate construction, operations and maintenance of the Project Assets.

(ii) The Developer will perform Utility Relocations in accordance with the Technical Requirements. Subject to Law, the Department will provide to the Developer the benefit of any provisions in recorded Utility or other easements affecting the Project which require the easement holders to relocate at their expense and the Department will reasonably assist the Developer in obtaining the benefit of all rights the Department has under any Utility easement, permit, or other right relating to Utility Relocations, it being understood that such assistance will not entail the initiation of or participation in legal actions or proceedings.

(f) WMATA Coordination.

(i) *General.* The Developer will exercise best efforts to coordinate with WMATA to minimize impacts on WMATA's operations and facilities. All contractors working on WMATA Work must be prequalified and licensed as required by WMATA. The Department will assist and support the Developer in its coordination efforts with WMATA including, as necessary, the enforcement of the Department's rights under the 1991 Easement.

(ii) *Coordination.* The Developer will be responsible for, and will bear the costs and schedule risk related to, coordination with WMATA regarding the WMATA Work, the WMATA Easement Impacts and the WMATA Incidental Impacts. Such coordination shall include (a) notifying WMATA before performing any construction, maintenance or repair activities which could affect WMATA transit operations, and (b) abiding by WMATA's reasonable regulations to assure the safety of WMATA's passengers and equipment and maintenance of WMATA's operating schedules. To the extent WMATA, pursuant to the 1991 Easement, makes a successful claim against the Department for Losses arising from Developer's impacts, the Developer will reimburse the Department for the amounts paid to WMATA, with the Developer having the right to

resolve any disputed amount determined by the Department to be due in accordance with the dispute resolution provisions set forth in Article 21.

(iii) *Changes*. To the extent WMATA changes its design or permitting criteria from those in effect on July 29, 2016, and such change adversely impacts the WMATA Work, the Developer will be entitled to relief under Article 13 and Section 14.01, as applicable.

(iv) *Approvals*. For WMATA Work, the Developer will obtain all permits, approvals and agreements with WMATA required to fulfill the Developer's obligations pursuant to this Agreement. To the extent WMATA fails to issue a permit, approval or agreement within 21 Business Days following the Developer's submission of a complete request for permit, approval or agreement (a "WMATA-Caused Delay"), the Developer will be entitled to schedule relief under Article 13, and if such delays reach 120 days in the aggregate (a "WMATA-Caused Compensation Delay"), the Developer will be entitled to seek compensation relief pursuant to Section 14.01. Notwithstanding the foregoing, should the Developer deviate from the RFP Conceptual Plans (as amended by the Developer's design and construction plans in its Proposal that have been approved by the Department), with such deviations requiring altered or new WMATA approvals, the Developer will bear 100% of the cost and schedule impact as a result of such deviation.

(v) *WMATA Reimbursable Costs*. The Developer will be solely responsible for reimbursing WMATA for WMATA Reimbursable Costs up to \$10 million. The Parties will share equally in the next \$10 million of aggregate WMATA Reimbursable Costs, with the Department reimbursing the Developer for its allocable share of any such costs incurred. In the event WMATA Reimbursable Costs are greater than \$20 million, the Department will be solely responsible for reimbursing WMATA for amounts in excess of \$20 million (or reimbursing the Developer if the Developer paid WMATA any of such excess amounts).

(g) Acquisition of Railroad Easements. The Department, at its sole cost and expense, will obtain any easements and other property rights necessary for the Work located on property owned by Norfolk Southern Corporation, and facilitate the negotiation of a construction agreement between the Developer and Norfolk Southern Corporation (the "Railroad Easement"). Notwithstanding the foregoing, (i) the Developer will pay the Department for Allocable Costs incurred by the Department in the Department's efforts to obtain the Railroad Easement, to the extent such Allocable Costs are incurred by the Department as a result of any Developer Party's misconduct, negligence or other culpable act, error or omission and (ii) the Developer will pay the costs of any Work performed on the Railroad Easement and reimburse Norfolk Southern Corporation any of its costs in connection therewith, all as provided in the Technical Requirements.

(h) Capital Beltway Coordination. The Developer, at its sole cost and expense, will coordinate with CBE, the concessionaire under the Capital Beltway Comprehensive Agreement, to minimize the disruption of CBE's operation and maintenance of the Capital Beltway HOT Lanes Project. The Developer bears the full risk for both: (i) any impacts to the Project arising from its duty to coordinate with CBE, and (ii) any impacts to the Capital Beltway HOT Lanes

Project arising from its performance under this Agreement. The Developer shall indemnify, defend, and hold harmless a State Indemnitee for any Third-Party Claims asserted by CBE to the extent such Third-Party Claims arise from Developer's activities hereunder, or arise from Developer's failure to coordinate with CBE.

Section 8.06 Governmental Approvals

(a) The Developer, at its sole cost and expense (except as otherwise provided herein), will obtain and maintain in full force and effect and comply with all Governmental Approvals necessary for the Work. Responsibility for and cost of obtaining Governmental Approvals necessitated by a Department Change or a Department Project Enhancement will be as agreed to and specified in the accompanying Change Order.

(b) The Department will provide reasonable assistance and cooperation to the Developer, as requested by the Developer, in obtaining Governmental Approvals relating to the Project and any revisions, modifications, amendments, supplements, renewals, reevaluations and extensions of Governmental Approvals.

(c) Except as otherwise provided in this Agreement, the Department will not unreasonably withhold or delay any Governmental Approval for which it is the issuing Governmental Authority with respect to the design, construction, operation or maintenance of the Project or any Project Enhancement. For the avoidance of doubt, the provisions of this Section 8.06(c) are not intended to supersede any provision of this Agreement or any other Project Agreement providing for the conditions to or time of approval of any such Governmental Approval, or any express right of the Department to withhold consent in its sole discretion.

(d) The Developer will at all times and at its sole cost and expense comply with the NEPA Documents, including, without limitation, compliance necessitated by a change in the base design of the Project and as contemplated by the provisions of Section 5.01(b)(ii). If supplements to the NEPA Documents or additional NEPA Documents are needed following the Agreement Date, the Department will prepare the necessary documentation using data and other information provided by the Developer. If the need for such supplements or additional NEPA documents arises from a Department Change or a Compensation Event, the Department will bear the costs of preparing the necessary documentation, and the Department will pay the Developer's Allocable Costs associated with the preparation of the data and other information provided by the Developer; in all other cases, the Developer will bear the costs of preparing the necessary documentation and will pay the Department for its Allocable Costs incurred in the preparation of such documentation.

Section 8.07 Construction Work and Project Schedule

(a) The Initial Baseline Schedule will be the basis for monitoring the Developer's performance of the Work until such time as a Baseline Schedule has been approved by the Department in accordance with the Technical Requirements.

(b) The Developer and the Department will conduct monthly progress meetings in accordance with the Design-Build Contract. As part of, and in conjunction with, such meetings, the Developer will provide the Department with any proposed update of the Baseline Schedule in

accordance with the Technical Requirements. The parties further agree to abide by the terms and procedures set forth in the Technical Requirements and the Design-Build Contract pertaining to project management and coordination matters.

(c) Except as provided otherwise in this Agreement, the Developer will be financially responsible for all damage to the Project Assets resulting from the Work. The Department will not be responsible for any construction means and methods of the Developer or liability ensuing therefrom, unless such means and methods were directed by the Department pursuant to a Department Change or a Department Project Enhancement implemented by the Developer.

(d) Whenever required by the Department, the Developer will provide in writing a general description of the arrangements and methods that the Developer proposes to adopt for the execution of the Work. The Developer will not significantly alter the Baseline Schedule, or such arrangements and methods, without informing the Department, and the Developer will coordinate any such alterations to take into account the Department's resources and the work to be carried out by the Department's separate contractors, if any. The Developer will not alter the Baseline Schedule except as permitted in the Technical Requirements.

(e) If any alteration to the Baseline Schedule (i) affects the Critical Path, (ii) adversely and materially affects the Department's oversight resources or the Department's separate contractors, or (iii) deviates from the Technical Requirements, the Developer will not make such alteration without the prior approval of the Department (not to be unreasonably withheld, conditioned or delayed).

Section 8.08 Service Commencement

(a) The Developer will be entitled to begin tolling on and after the Service Commencement Date.

(b) The Department will issue a written certificate of Service Commencement at such time as Service Commencement occurs.

(c) Service Commencement will have been achieved when each of the following conditions have occurred for the entire Project Assets (or the Department, in its sole discretion, waives any such condition):

(i) the Department has issued the Service Commencement Certificate and delivered to the Developer notice to that effect to the Developer (the "Service Commencement Notice to Proceed") (which Service Commencement Certificate will be issued following satisfaction or written waiver of the relevant conditions);

(ii) the Department has approved the Operations and Maintenance Plan, the updated Performance Requirements Baseline Tables, required by the Technical Requirements to be submitted on or before the Service Commencement Date;

(iii) the Developer 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;

(iv) all insurance policies required under Section 17.01 for the Operating Period have been obtained and will be in full force and effect, and the Developer has delivered to the Department duplicate originals or copies thereof (or endorsements reasonably acceptable to the Department extending coverage to the Project), certified by the Developer's insurance broker to be true and correct copies of the originals;

(v) there exists no Developer Default for which the Developer has received notice from the Department, except as to any Developer Default that has been cured or for which Service Commencement will affect its cure, and there exists no event or condition that, with notice or lapse of time, would constitute a Developer Default (with the exception of payment defaults that the Developer has disputed in writing);

(vi) all Operations and Maintenance Agreements, if applicable, and agreements relating to toll collection and violation enforcement on the Express Lanes are in full force and effect;

(vii) the Developer has implemented the Maintenance Management System in accordance with the Technical Requirements;

(viii) all Project Agreements are in full force and effect;

(ix) the Developer has provided to the Department the training required to have been provided prior to Service Commencement by the Technical Requirements;

(x) the Developer has submitted to the Department an Annual Budget for the remainder of the Agreement Year in which the Service Commencement Date occurs (or, if the remainder of such year is shorter than 90 Days, an Annual Budget that conforms with the requirements specified in Section 9.07, for the remainder of such Agreement Year and for the following Agreement Year);

(xi) the Developer has certified to the Department in writing that the conditions set forth in this subsection Section 8.08(c) have been satisfied as of the date of such certification or otherwise waived in writing;

(xii) 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, subject only to the LORI List items;

(xiii) all major safety features are installed and functional in accordance with the Technical Requirements, including, as required, shoulders, guardrails, striping and delineations, concrete traffic barriers, bridge railings, cable safety systems, metal beam guard fences, safety end treatments, terminal anchor sections and crash attenuators;

(xiv) all required illumination for normal and safe use and operation is installed and functional in accordance with the Technical Requirements;

(xv) all required signs and signals for normal and safe use and operation are installed and functional in accordance with the Technical Requirements;

(xvi) 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, single lane closures, and as otherwise permitted in accordance with the Technical Requirements) in accordance with and as permitted by a Department-approved traffic management plan solely in order to complete the LORI List);

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

(xviii) the TMS (if any) and safety features for TMS components are installed and functional; and

(xix) the Developer has otherwise completed the Design-Build Work in accordance with this Agreement, including the Technical Requirements, and with the Construction Documentation, such that the Project Assets are 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.

(d) The Department's issuance of the Service Commencement Notice will be subject in all respects to compliance with the submittal and review procedures set forth in Section 10.05 in determining whether the Developer has satisfied the conditions precedent for achieving Service Commencement.

(e) The Department's issuance of the Service Commencement Notice to Proceed will not constitute a waiver by the Department of any then-existing breach of this Agreement by the Developer.

(f) The parties will disregard the status of the landscaping and aesthetic features included in the Construction Documentation in determining whether Service Commencement has occurred, except to the extent that its later completion will affect public safety or satisfaction of the criterion in Section 8.08(c).

(g) The Developer shall provide the Department with written notice of anticipated Service Commencement at least 90 Days prior to the anticipated Service Commencement Date. The parties will comply with the submittal and review procedures set forth in Section 10.05 in the determination of whether Service Commencement has been achieved. During such 21-Day period, the Developer and the Department will meet, confer and exchange information on a regular basis with the goal being the Department's orderly, timely inspection of the Project Assets and review of the final Construction Documentation and the Department's issuance of a Service Commencement Certificate. In addition, the Department will conduct an inspection of

the Project Assets and review of the final Construction Documentation, and such other matters as may be necessary to determine whether Service Commencement is achieved and, not later than the expiration of such 90-Day period, will deliver a written report of findings and recommendations to the Developer. The Department will provide the Developer with a determination of whether or not Service Commencement has been achieved (and if not, an explanation with reasonable specificity as to the reasons therefor) within such 90-Day period.

(h) If the Department has not notified the Developer of such approval or disapproval within 21 Days after such Developer notice (or 10 Days with respect to any resubmittal of the notice), and if the delay is not a result of a Developer Party action or inaction, then such delay will constitute a Delay Event and a Compensation Event, and any Developer Damages will be determined pursuant to Section 14.01(b).

(i) The Developer will achieve Service Commencement on or before the Project Completion Date.

(j) The Developer will exercise all reasonable efforts to resolve any construction-related disputes between the Department and the Developer, including disputes presented by the Developer on behalf of the Design-Build Contractor. The Parties agree that the obligation of the Developer in the immediately preceding sentence, which shall not be limited, modified or reduced in any manner, shall not prejudice the rights of the Developer pursuant to Article 13 and Section 14.01 of this Agreement upon the occurrence of any Compensation Event or Delay Event.

Section 8.09 Project Completion

(a) The Developer will achieve Project Completion of the Project on or before the Project Completion Date, subject to adjustment in accordance with this Agreement.

(b) The Developer will provide the Department with written notification when it has determined that the following conditions to Project Completion of the Project have been satisfied in accordance with the Technical Requirements:

(i) other than the Permitted Encumbrances (not including clause (c) of the definition thereof), the Project is free and clear of all Liens, claims, security interests or encumbrances arising out of or in connection with the performance of the Work during the Construction Period;

(ii) all LORI List items have been completed and delivered to the reasonable satisfaction of the Department;

(iii) all Project Documentation, including as-built drawings of the Project Assets and all other Project Development Plans, to be submitted on or before Project Completion have been submitted and approved (to the extent approval is required) by the Department;

(iv) the Developer has paid for all Design-Build Work and other Work required to achieve Project Completion by third parties that the Developer is obligated to pay (other than disputed amounts and amounts that are not yet due and payable);

(v) the Developer has delivered all required certifications from the engineer of record and architect of record to all necessary Governmental Authorities and to the Department;

(vi) all landscaping (subject to applicable planting season requirements) and aesthetic features included in the Construction Documentation is complete;

(vii) the Developer has made all deliveries of Work Product to the Department that are required to be made pursuant to this Agreement;

(viii) the Developer has delivered to the Department a list of each Asset of the type described in the Performance Requirements Baseline Table;

(ix) the Developer has deposited the Source Code Documentation with the Escrow Agent in accordance with Section 18.06; and

(x) the Developer has paid or caused to be paid to the Department all amounts due and payable from the Developer to the Department in connection with this Agreement, including but not limited to (i) Milestone Liquidated Damages, (ii) Project Completion Liquidated Damages, and (iii) Lane Closure Liquidated Damages, including any applicable interest thereon (except such amounts subject to dispute in accordance with Article 21).

(c) The Developer will provide the Department with written notice at least 21 days prior to the Project Completion Date of the date on which Project Completion is expected to be achieved. The parties will comply with the submittal and review procedures set forth in Section 10.05 in the determination of whether Project Completion has been achieved. During the 21-Day period following delivery of the Developer's written notification, the Developer and the Department will meet, confer and exchange information with the goal being the Department's orderly, timely inspection of the Project Assets and the Department's issuance of a Project Completion Certificate. In connection with its inspection of the Project Assets, the Department will conduct an inspection of the LORI List items will review the final drawings and will undertake such other investigations as may be necessary to evaluate whether the conditions to Project Completion have been satisfied. The Department will provide the Developer with a determination of whether or not Project Completion has been achieved (and if not, an explanation with reasonable specificity as to the reasons therefor) within such 21-Day period.

(d) If the Department has not notified the Developer of such approval or disapproval within 21 Days after such Developer notice (or 10 Days with respect to any resubmittal of the notice), and if the delay is not a result of a Developer Party action or inaction, then such delay will constitute a Delay Event and a Compensation Event, and the Developer will be entitled to Developer Damages, if any, pursuant to Section 14.01.

(e) The Department reserves the right to accept the Project in segments, subject to mutual agreement with the Developer and pursuant to the provisions of this Section 8.09. Segmented acceptance of the Project will not alter the warranty requirements set forth in Section 8.11 of this Agreement.

Section 8.10 Liquidated Damages

(a) Liquidated Damages Related to Failure to Reach Financial Close.

(i) If the Developer fails to achieve Financial Close by the Financial Close Deadline for reasons not attributable to the events contemplated in Section 20.04(a)(ii), Section 20.04(a)(iii), Section 20.04(a)(iv) and Section 20.04(a)(v), the Department will be entitled to liquidated damages in the amount of \$20 million for such Developer Default (the “Financial Close Liquidated Damages”). All Financial Close Liquidated Damages will be in addition to the Developer’s obligation to repay the outstanding amount of the SIB Loan, if any (the aggregate of which, along with the Financial Close Liquidated Damages, equals the amount of the Financial Close Security). If the Developer fails to achieve Financial Close by the Financial Close Deadline for reasons not attributable to the events contemplated in Section 20.04(a)(ii), Section 20.04(a)(iii), Section 20.04(a)(iv) and Section 20.04(a)(v), the Department will be entitled to draw on the Financial Close Security without prior notice to or demand upon the Developer.

(ii) The Developer acknowledges that the time period the Department has provided to the Developer to achieve Financial Close is ample and reasonable, and both the Developer and the Department acknowledge that such Financial Close Liquidated Damages are reasonable in order to compensate the Department for damages it will incur as a result of the lost opportunity to the Department represented by this Agreement. Such damages include the harm from the difficulty, and substantial additional expense, to the Department, to procure and deliver, operate and maintain the Project through other means, potential loss of a portion of the Permit Fee, loss of or substantial delay in use, enjoyment and benefit of the Project by the general public, and injury to the credibility and reputation of the Department, with policy makers and with the general public who depend on and expect availability of service. The Developer further acknowledges that these damages are incapable of accurate measurement because of, among other things, the unique nature of the Project and the unavailability of a substitute for it.

(iii) The Developer also acknowledges that, to the extent the Financial Close Security is in a stated amount greater than \$20 million due to the Developer availing itself of the SIB Loan, any draw thereon to pay Financial Close Liquidated Damages will not adversely impact the Department’s right to draw any such additional amount in accordance with the provisions of Section 20.04(b)(i).

(b) Liquidated Damages Related to Milestone Completion. If the Developer does not complete construction of either or both of the P&R Milestone and the Route 28 Signalization Milestone within the time frames specified in Section 8.13, the Department will be entitled to assess \$10,000 as liquidated damages with respect to the P&R Milestone and \$19,000 as liquidated damages with respect to the Route 28 Signalization Milestone (individually and

collectively, “Milestone Liquidated Damages”) for each Day that completion of each milestone remains to be achieved following the expiration of the time frames specified in Section 8.13.

(c) Liquidated Damages Related to Project Completion. If the Developer does not achieve Project Completion by the Project Completion Date, the Department will be entitled to assess \$70,000 as liquidated damages (“Project Completion Liquidated Damages”) for each Day that Project Completion of the Project remains to be achieved following the expiration of the Project Completion Date.

(d) Additional Liquidated Damages Provisions. The parties acknowledge, recognize and agree on the following:

(i) 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 Developer’s failure to timely complete the Work;

(ii) that any sums assessed under Section 8.10(b) and (c), Section 8.13, Section 8.14 and Section 11.05(a) are in the nature of liquidated damages, and not a penalty, and are fair and reasonable and such payment are reasonable in order to compensate the Department for damages it will incur as a result of the lost opportunity to the Department represented by this Agreement. Such damages include the harm from the difficulty, and substantial additional expense, to the Department, to procure and deliver, operate and maintain the Project through other means, potential loss of a portion of the Permit Fee, loss of or substantial delay in use, enjoyment and benefit of the Project by the general public, and injury to the credibility and reputation of the Department, with policy makers and with the general public who depend on and expect availability of service. The Developer further acknowledges that these damages are incapable of accurate measurement because of, among other things, the unique nature of the Project and the unavailability of a substitute for it;

(iii) that any sums assessed under Section 8.10(b) and (c), Section 8.13, Section 8.14 and Section 11.05(a) will be in lieu of all liability of the Developer and its Contractors, and otherwise constitute the Department’s sole right to damages for, any and all Losses, whether direct, special or consequential, and of any nature whatsoever incurred by the Department (but excluding Non-Permitted Closures as described in Section 8.14), which are caused by the Developer’s failure to timely complete the construction Work, including failure to achieve Project Completion by the Project Completion Date or the Intermediate Milestones by dates set forth in Section 8.13. Notwithstanding the foregoing, the assessment of such sums will not affect in any manner whatsoever the Department’s rights to termination or other damages incurred by the Department as a result of a termination for Developer Default that may result from such failure to achieve either or both of Project Completion or the Intermediate Milestones by the required deadlines;

(iv) that any sums assessed under this Section 8.09(e), Section 8.13, Section 8.14 and Section 11.05(a) will be due and owing to the Department upon assessment of such liquidated damages, subject to the dispute resolution procedures of Article 21;

(v) notwithstanding the above, liquidated damages are not intended to excuse the Developer or any of its Contractors from liability for any other breach of its obligations under the Project Agreements, or limit the Department's recourse to other remedies hereunder such as termination pursuant to Article 19 and Article 20; provided, that no Developer Default will occur solely as a result of a delay in achieving Project Completion, except as set forth in Section 19.01(i);

(vi) that time is of the essence in meeting the deadlines related to Financial Close, Intermediate Milestone completion, and Project Completion; and

(vii) Milestone Liquidated Damages and Project Completion Liquidated Damages will not be assessed by the Department concurrently. Provided that the Department is assessing Project Completion Liquidated Damages, the Department will no longer assess Milestone Liquidated Damages following such assessment of Project Completion Liquidated Damages. Notwithstanding the foregoing, if at any time prior to the Department assessing Project Completion Liquidated Damages, the Developer fails to achieve both the P&R Milestone and the Route 28 Signalization Milestone under Section 8.10(b), the Department will be entitled to assess Milestone Liquidated Damages on both Intermediate Milestones concurrently.

(e) Payment of Liquidated Damages. The Developer will pay all liquidated damages under this Section 8.10 that are not subject to the dispute resolution procedures of Article 21 monthly in arrears, not later than 30 Days after the end of each calendar month, and in accordance with the requirements set forth in Section 5.05(b).

Section 8.11 Warranties; Defective Design and Construction

(a) Warranties.

(i) The Developer will warrant that (A) the Design-Build Work is complete and conforms to this Agreement and Good Industry Practice; and (B) the Design-Build Work, including all materials and equipment furnished as part of the Design-Build Work, is new unless otherwise specified in the Technical Requirements or elsewhere in this Agreement, of good quality, free of defects in materials and workmanship.

(ii) Subject to Section 8.11(a)(iii) below and to such limitations on coverage, the foregoing warranties for Work relating to the Project Assets will be effective for a period of, with respect to the Design-Build Work, 60 months beginning on the date on which Project Completion is achieved, *provided*, that with respect to Work relating to the P&R Milestone and the Route 28 Signalization Milestone, the foregoing warranties will begin on the date such Work is accepted by the Department (the "Warranty Period"). Such warranties will survive termination of this Agreement for Work that was in place prior to any termination.

(iii) If and to the extent the Developer obtains general or limited warranties from any Contractor in favor of the Developer with respect to design, materials, workmanship, construction, equipment, tools, supplies, software or services, the Developer will cause such warranties to be expressly extended to the Department;

provided, that the foregoing requirement will 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 will only have the right to exercise remedies under any such warranty so long as the Developer or a Lender is not pursuing remedies thereunder. To the extent that any Contractor warranty would be voided by reason of the Developer's negligence or failure to properly incorporate material or equipment into the Work, the Developer will be responsible for correcting such defect.

(iv) Contractor warranties are in addition to all rights and remedies available pursuant to this Agreement or Law or in equity, including Claims against the Performance Security, and will not limit the Developer's liability or responsibility imposed by this Agreement or Law or in equity with respect to the Work, including liability for Non-Conforming Work, design defects, patent and latent construction defects, strict liability, breach, negligence, willful misconduct or fraud.

(b) Non-Conforming Work. In the event of the occurrence of a Defect in the Work, including in any materials and equipment furnished as part of the construction, and including any Non-Conforming Work, the Department will be entitled, in addition to any other remedies:

(i) to demand that the Developer rectify, or require the Contractor to rectify, such Defect at the Developer's sole expense, it being understood that, in such event, the Developer will be permitted to draw on the Performance Security provided by the Contractor liable for such Work if the Contractor fails to perform such Work, to the extent of the cost of any work performed by the Developer;

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

(iii) to rectify such Defects itself and to obtain payment of its Allocable Costs from the Developer or, where the Contractor providing such Performance Security is liable for such Work from a draw on any Performance Security furnished pursuant to this Agreement (and the Developer agrees to make such drawing upon the request of the Department); *provided*, that the Department will not rectify such Defects itself or seek payment from the Developer or such Performance Security unless (1) it has requested rectification of the Defects and the Developer and the Contractor have failed to progress to rectify the Defects to the satisfaction of the Department within 15 Days from receipt of the Department's request for rectification of such Defects or (2) the Developer has received approval from the Department on a Remediation Plan and Schedule, unless health and safety of the public requires more urgent action; or

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

(c) The issuance of a suspension order pursuant to Section 8.11(b) will not affect the Developer's rights to cure or correct any Non-Conforming Work giving rise to the issuance of the suspension order.

(d) With respect to any Pre-Existing Structure the Developer modifies as part of the Design-Build Work, the Parties' rights and obligations relating to rectification of Defects pursuant to Section 8.11(b) shall be limited to Defects occurring in the portions or segments of any such Pre-Existing Structure actually modified by the Developer.

Section 8.12 Transportation Management Plan.

(a) The Department will develop, fund and implement a transportation management plan for the Project ("Transportation Management Plan" or "TMP"), which will be undertaken in coordination with the Developer's Maintenance of Traffic Plan and Sequence of Construction Plan. The Department will provide the Developer with a reasonable opportunity to comment on the TMP. The TMP will set forth the program for traffic management and related activities to ensure safety and mobility for the travelling public throughout the I-66 Corridor for the duration of the Construction Period. The Developer's Maintenance of Traffic Plan (as described further in the Technical Requirements) will be consistent with, and included as part of, the TMP for the Construction Period.

(b) In connection with the TMP, the Developer, at its sole cost and expense, will (i) develop and implement the Developer's Maintenance of Traffic Plan, (ii) be responsible for the Developer's share of public outreach for the TMP pursuant to the Technical Requirements; and (iii) be responsible for traffic and operational analysis for lane closures, roadway reconfigurations and detours.

Section 8.13 Intermediate Milestones.

(a) As set forth in the Technical Requirements, the Developer will complete construction of the P&R Milestone by the earlier of (1) March 5, 2019 or (2) 24 months following Construction Notice to Proceed, as such date may be adjusted pursuant to Section 13.02. Developer will be responsible for operations and maintenance of the P&R lot until the Project Completion Date unless the Department, in its discretion, elects to accept the P&R lot prior to the Project Completion Date and assume responsibility for operations and maintenance as of the date of its early acceptance.

(b) As set forth in the Technical Requirements, the Developer will complete construction of the Route 28 Signalization Milestone by the earlier of (1) February 18, 2020 or (2) 30 months following Construction Notice to Proceed, as such date may be adjusted pursuant to Section 13.02.

(c) The Department will assess the applicable Milestone Liquidated Damages in accordance with Section 8.10(b) for failure to timely complete either or both of the P&R Milestone and the Route 28 Signalization Milestone.

Section 8.14 Lane Closure Liquidated Damages.

In its performance of the Work during the Construction Period, the Developer may temporarily close existing lanes on the Project Right of Way only in accordance with the Technical Requirements. Any such closure that exceeds the time period permitted therefor in the Technical Requirements is a “Non-Permitted Closure”. If a Non-Permitted Closure occurs, the Department will notify the Developer thereof and of the associated Lane Closure Damages, in writing, within 48 hours. The Developer will pay to the Department the liquidated damages set forth below (the “Lane Closure Liquidated Damages”) at the time and in the manner set forth in the Technical Requirements.

Liquidated Damages for Lane Closures			
Liquidated damage (\$ per minute, per lane closed)			
<u>Elapsed Time (min)</u>	<u>I-66, I-495, RT. 50, RT. 28 and all ramps</u>	<u>RT 234 Bus.</u>	<u>All other roads</u>
1-5, or any portion thereof	\$0	\$0	\$0
Every additional minute or portion thereof after the initial five minutes stated above.	\$8,000 for the sixth minute plus \$1,500 per each additional minute	\$2,500 for the sixth minute plus \$500 per each additional minute	\$500 for the sixth minute plus \$500 per each additional minute

The Lane Closure Liquidated Damages paid by the Developer for any Non-Permitted Closure will not exceed \$400,000 per incident; *provided, however*, that under no circumstances shall any Lane Closure Liquidated Damages paid by the Developer count toward the per-incident cap where the Developer (i) intentionally causes, facilitates or allows to continue a Non-Permitted Closure in order to reduce its Allocable Costs for performing any Work during the Construction Period, or (ii) is not diligently and in good faith attempting to remedy any such Non-Permitted Closure.

Section 8.15 Long Stop Date

- (a) The Developer will achieve Project Completion by the Long Stop Date.

ARTICLE 9.

PROJECT MANAGEMENT; OPERATIONS AND MAINTENANCE

Section 9.01 Transition of Operations and Maintenance to Developer

- (a) Operations and Maintenance Agreement

On or before the earlier of (i) the Service Commencement Date or (ii) the date that is eighteen months prior to the projected Project Completion Date, to the extent the Developer will not self-perform the O&M Work, the Developer will enter into an Operations and Maintenance

Agreement with an Operations and Maintenance Contractor in a form containing provisions that incorporate the required terms set forth in Exhibit I. Upon execution, the Developer will deliver to the Department an executed copy of such Operations and Maintenance Agreement.

(b) Care, Custody and Control.

(i) Except as otherwise specifically provided for in a LNTP, after the Financial Close Date and prior to the Project Completion Date, the Developer will (A) have care, custody and control of the Design Build Right of Way for the Project Assets and (B) be responsible for the security and protection of active construction areas on the Project Assets and the Project Right of Way and (1) all materials, equipment, supplies and any other property of any Developer Party and (2) all materials, equipment, supplies and any other property of the Department being held in a secure location at or on the Project Assets or otherwise being used or procured in connection with the Work, whether or not on the Project Right of Way.

(ii) Through the coordination process described in Section 8.07, the Developer and the Department will determine from time to time which portions of the Existing Lanes will be open for traffic or under construction.

(iii) On and after the Project Completion Date to the end of the Term, the Developer will have care, custody and control of the Project Assets (other than the Transferred Project Assets and the Department Shared Assets).

(iv) On the Project Completion Date, the Developer will transfer ownership of the Transferred Project Assets to the Department, at which time all care, custody and control and risk of loss (other than as covered by any applicable warranty) for the Transferred Project Assets will vest with the Department.

(c) Service Commencement Process. The parties will cooperate and coordinate with each other with respect to activities undertaken pursuant to the Service Commencement Plan attached as Exhibit T.

Section 9.02 Developer Obligation to Manage and Operate

(a) At all times following the Service Commencement Date, the Developer, at its sole cost and expense (except as otherwise provided herein), will cause the Project Assets to be managed, maintained and operated in accordance with Law, all Governmental Approvals, the terms, conditions and standards set forth in this Agreement, including the requirements set forth in the Technical Requirements and Exhibit I, and in accordance with Good Industry Practice. Without limiting the foregoing, the Developer agrees to be responsible for the following, at its sole cost and expense at all times following the Service Commencement Date for the Project:

(i) the management and control of traffic on the Project Assets, including, but not limited to, incident management and temporary partial or full closures of the Project Assets, subject to the Department's rights to assume control as expressly provided in this Agreement;

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

(iii) the operation of the Project Assets and the ETTM System, and otherwise carrying out the collection and enforcement of tolls and other incidental charges in accordance with Article 5 respecting the Project Assets;

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

(v) except as otherwise specifically provided herein (including the right of the Developer to close all or a portion of the Express Lanes in accordance with the provisions hereof), at all times during the Term, causing the Project Assets to be continuously open and operational for use by all members of the public travelling in Permitted Vehicles 24 hours a day, 365 Days a year.

(b) Snow and Ice Removal.

(i) The Developer shall provide snow and ice removal services on the Express Lanes at a comparable level of service to that which the Department provides on the GP Lanes in accordance with the Technical Requirements. The Developer's snow and ice removal services shall include the buffer area between the Express Lanes and the GP Lanes. The Developer may arrange for a contractor to provide such snow and ice removal services at the Developer's sole cost and expense; *provided* that, in any case, the Developer and the Developer's Contractors, as applicable, will not in any way hinder the removal of snow and ice from the GP Lanes.

(ii) In coordination with the Developer's snow and ice removal operations, the Department will request from the Developer access to the Express Lanes during snow and ice removal operations so that the Department or its contractors may access appropriate and available areas, as determined by the Developer, of the median for dumping excess snow from the GP Lanes; *provided, however*, that the Department will have the right to enter any part of the Express Lanes as necessary to gain access to the median for the purposes of dumping excess snow and ice that is removed from the GP Lanes, following the Department's determination that a risk to the public health, safety or welfare is present.

(iii) The Department will have no liability to the Developer arising out of its snow and ice removal services. If the Developer or the Developer's Contractors for snow and ice removal damage the Project Assets, the Developer will be responsible, at its sole cost and expense, for repairing any damage to the Project Assets. If the Developer or the Developer's Contractors for snow and ice removal damage the GP Lanes, the Developer shall pay to the Department the Department's Allocable Costs to repair such damage. If, in the course of its removal of snow and ice on the GP Lanes, the Department damages

any of the Project Assets, the Department shall pay the Developer's Allocable Costs to repair such damage.

(iv) If the Developer fails at any time to provide snow and ice removal to the Express Lanes at a level of service comparable to what the Department provides on the GP Lanes, the Department may make a written determination to that effect. The Department will subsequently have the option to perform snow and ice removal services for the Express Lanes, subject to reimbursement by the Developer of the Department's Allocable Costs and subject to the Department's priorities, or the Developer may choose to close the Express Lanes during the severe weather event.

(c) Drainage. The Developer will be responsible, at its own cost and expense, for the maintenance, repair and replacement of the existing drainage system located within and outside of the Project Right of Way in accordance with the Technical Requirements, except to the extent such responsibility is allocated to the Department in accordance with the Technical Requirements.

(d) The Developer will commit \$5 million for research, development and implementation of pilot advanced technologies that will enhance the Project during the first five years after Service Commencement.

(e) The Developer will commit \$500,000 to improve customer service metrics during the first five years after Service Commencement.

Section 9.03 Procedures Relating to Maintenance Work

(a) General. The Developer will perform all maintenance obligations with respect to the Project in accordance with this Agreement and the Technical Requirements.

(b) Life Cycle Maintenance Plan. No later than 90 Days before the beginning of each calendar year after the Service Commencement Date, the Developer will prepare and deliver to the Department 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") in accordance with the Technical Requirements. The Life Cycle Maintenance Plan will 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, the underlying assumptions used to develop such plan, including assumptions arising from the re-evaluations of the physical condition of the Assets conducted pursuant to Section 9.03(d); and such other information as may be reasonably requested by the Department.

(c) Review and Approval of Life Cycle Maintenance Plan.

(i) The Department will review and approve the Life Cycle Maintenance Plan and components thereof, including, but not limited to, the proposed scope of work, timing and estimated costs for the Major Maintenance. The Department will deliver its comments, approval or disapproval to the Developer within 45 Days after the Developer has delivered each proposed Life Cycle Maintenance Plan to the Department in accordance with Section 9.03(b).

(ii) The Developer will review and implement, or in the case they cannot implement, provide to the Department written comments regarding why they cannot implement, any changes or additions proposed by the Department to the proposed Life Cycle Maintenance Plan and will modify the Life Cycle Maintenance Plan to reflect those changes and additions which are consistent with the standards and requirements of this Agreement.

(iii) In the event of any Dispute relating to a Life Cycle Maintenance Plan, the Department and the Developer will endeavor in good faith to resolve any such Dispute within 60 Days after it is provided to the Department. Any 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, the Technical Requirements and Law. If no agreement is reached within such 60-Day period as to any such matter, either party may submit the Dispute to the dispute resolution procedures set forth in Article 21. Until resolution of any Dispute relating to a Life Cycle Maintenance Plan, the treatment of the disputed Tasks in the most recently-approved Life Cycle Maintenance Plan will remain in effect and govern the requirements relating to such Tasks. If there is no approved Life Cycle Maintenance Plan then in effect, the Developer will proceed as directed by the Department until resolution of such Dispute.

(d) Inspection and Implementation.

(i) Commencing two years after the Service Commencement Date, the Developer will conduct biennial assessments of the physical condition of the Project Assets pursuant to the Technical Requirements, and will 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 will be assessed using the Department's Maintenance Rating Program in accordance with the Technical Requirements. If any Asset reported by the Developer to the Department is determined by the Developer or the Department to fall below the applicable level or rating specified in the Technical Requirements for such Asset, the Developer will, 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 at Developer's sole cost and expense, and such plan will also include a budget, timeline and identification of the funding sources (if known at the time) that will be utilized to restore such Asset. If any Asset is determined by the Developer or the Department to fall below the applicable level or rating specified in the Technical Requirements for such Asset and was discovered by the Department or otherwise not reported to the Department by the Developer, the Developer will, 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 at Developer's sole cost and expense, with such plan also including a budget, timeline and identification of the funding sources (if known at the time) that will be utilized to restore such Asset.

(ii) If the Developer fails to complete any of the Tasks in accordance with this Agreement and the applicable Life Cycle Maintenance Plan, the Department may demand by notice in writing that such Tasks be completed by the Developer. If the Developer has failed to commence and diligently continue to perform such Tasks within 30 Days after the Department delivers such notice, the Department may, at its option, but is not obligated to, either (A) carry out such Task or correct such required work using Department personnel, materials and equipment or (B) procure the services for such Task or corrective work by one or more contractors. If the Developer fails to commence and diligently continue to perform such Tasks within 30 Days after the Department delivers notice pursuant to this Section 9.03(d)(ii) and the Department elects to pursue its rights pursuant to this Section 9.03(d)(ii)(A) or (B), then the Developer will pay the Department's Allocable Costs plus 25% it incurs to complete such Task or corrective work, and its third-party costs to procure such contract(s).

(iii) Notwithstanding anything to the contrary in Section 9.03(d)(ii), the Developer may, by written notice delivered to the Department within 30 Days of receipt of the Department's notice of demand described in Section 9.03(d)(ii), object to any such demand by the Department on the basis that the Developer has completed the Task(s) specified in the Department's demand in accordance with this Agreement and the applicable Life Cycle Maintenance Plan or that such Task(s) are not then required in accordance with this Agreement or the applicable Life Cycle Maintenance Plan, which notice will give details of the grounds for such objection. Upon the giving of any such notice, the parties will endeavor to reach agreement as to any matters referred to in the notice. If no agreement is reached as to any such matter within 30 Days after the giving of such notice, either party may refer the Dispute to the dispute resolution procedures set forth in Article 21. Notwithstanding the foregoing, the Developer will perform the Task as directed by the Department and the Department will be entitled to exercise its remedies for the Developer's failure to comply with such directive in accordance with this Agreement. If it is determined in accordance with the dispute resolution procedures in Article 21 that the Developer was in compliance with its obligations under this Agreement, then such directive and any additional Work required by the Department will be treated as a Department Change pursuant to Section 14.02.

Section 9.04 Major Maintenance Reserve Fund

The Developer will fund the Major Maintenance Reserve Fund in such amounts and in accordance with the terms as may be required by the Lenders.

Section 9.05 Police and Enforcement Services

(a) The Developer will coordinate with the Virginia State Police to provide basic policing, incident response services and emergency services (fire and rescue), including traffic patrol and traffic law enforcement services and enforcement of HOV compliance, on the Project Assets at a level of service equivalent to that provided on comparable State Highways from time to time. The Developer will be solely responsible for the costs associated with the foregoing services in accordance with the schedule set forth in Attachment 1. In addition, the Developer may coordinate with the Virginia State Police to obtain enhanced levels of police services for the

control of traffic for construction or maintenance activities or as otherwise needed (and in each case, at the Developer's sole cost and expense).

(b) The Developer may, at its sole cost and expense, engage the Virginia State Police to provide toll enforcement services, and the Department will assist the Developer in obtaining such services if so requested by the Developer. The Developer will not engage or permit the engagement of private security services to provide traffic patrol or traffic law enforcement services on the Project Assets; *provided*, that the foregoing does not preclude the Developer 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 and to identify toll violators, subject to Law, and to enforce any private rights and civil remedies available to it, as limited by Section 5.01(c)(v) of this Agreement, respecting toll violations.

(c) Notwithstanding the foregoing, the Developer will not permit any private security firm to stop vehicles, apprehend road users, or engage in any other direct enforcement activity on the Project Right of Way.

(d) The Department will not have any responsibility or liability to the Developer 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 9.05 or any of the acts or omissions of the Virginia State Police or such agencies with respect to such services.

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

Section 9.06 Maintenance by the Department

(a) Except as otherwise provided herein, the Department will maintain, repair and, subject to and in accordance with the Department's normal course of operations and activities as in effect from time to time, cause to be open and operational, in a manner consistent with access to State Highways, so as to permit access to the Express Lanes by Permitted Vehicles, the ramps, bridges and roadways directly connecting to the Express Lanes over which the Department has sole control. The foregoing does not restrict the Department's right to operate existing or new facilities, to modify existing facilities, to construct new facilities, including Project Enhancements, and, subject to Section 12.02(d)(i) through (iii), to perform planned and emergency maintenance, renewal and replacement, safety and repair activities on existing and new facilities adjacent to or near the Project regardless of the impact of such activities on the Project.

(b) Except as set forth in the Technical Requirements, the Department will maintain and repair the Department Shared Assets, subject to and in accordance with the Technical Requirements and the Department's normal course of operations and activities as in effect from time to time. Except as set forth in the Technical Requirements, the cost for maintenance and

repair of the Department Shared Assets will be shared equally between the Department and the Developer.

Section 9.07 Annual Budget

(a) For each Agreement Year and partial Agreement Year from and after the Service Commencement Date, the Developer will file with the Department an annual budget for the Project for such full or partial Agreement Year at least 60 Days prior to the start thereof (an “Annual Budget”). Each Annual Budget will be in a form reasonably acceptable to the Department and will show in reasonable detail, based upon a five-year rolling average in respect of such full or partial Agreement Year:

- (i) projected Gross Revenues;
- (ii) projected Operating Costs, including all amounts payable to the Department;
- (iii) projected maintenance expenses, including the costs of Major Maintenance activities to be performed pursuant to the Life Cycle Maintenance Plan;
- (iv) projected debt service and other amounts payable with respect to Developer Debt, including deposits to reserve funds held for benefit of the Project Lenders; and
- (v) projected Distributions.

(b) The Developer will provide such other information as the Department may reasonably require in connection with its review of the Annual Budget, including any amendments to operating budgets pursuant to the O&M Agreement.

Section 9.08 Signage.

(a) The Developer will submit a Signage Plan to the Department for its review and approval pursuant to the Technical Requirements. The Developer will limit its signage to the Project Right of Way and any other real property or real property rights as set forth in Section 8.05.

(b) The Developer agrees that it will, at its sole cost, install, operate and maintain on connecting State Highways such signs solely notifying motorists of the access to the Express Lanes, the amount of tolls and that violators will be fined, the applicable High Occupancy Requirement, and other relevant information, in accordance with applicable Law and the Technical Requirements.

(c) The Department will remain responsible, at its cost, for general directional signs on State Highways informing the public of the direction and distance to the Express Lanes and other State Highways. During the Term, the Department will also cooperate with, and use its commercially reasonable efforts to cause other public agencies or entities to cooperate with, the Developer to install, at the Developer’s cost, additional signs along State Highways notifying

motorists of the access to the Express Lanes and any other communications relating to the Express Lanes as are reasonably requested by the Developer, subject to any obligation to obtain any necessary authorizations of any other Governmental Authority and in accordance with applicable Law. In connection with any such request, the Developer will submit the proposed layout, location, type, size, color and content of all such traffic signs or other signs.

ARTICLE 10.

DEVELOPER PROJECT AND QUALITY MANAGEMENT; DEPARTMENT OVERSIGHT AND OTHER SERVICES

Section 10.01 Project and Quality Management

The Developer will provide oversight and management of the Project to control the scope, quality, cost, and on-time delivery of the Work. If the Developer is required to rectify any Non-Conforming Work in accordance with Section 8.11(b), the parties will review the Quality Management System Plan to assess and determine whether changes, including increased management and oversight efforts by the Developer, to such plan are necessary to prevent such further Non-Conforming Work.

Section 10.02 Right to Oversee Work

(a) The Department will 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. The Department's Oversight Services will not impact its right to rely on the Developer to perform its obligations pursuant to this Agreement.

(b) The Developer will fully cooperate with the Department to facilitate its conduct of Oversight Services. In the course of performing Oversight Services, the Department will use reasonable efforts to minimize the effect and duration of any disruption to or impairment of the Work or the Project.

Section 10.03 Department Access and Inspection

The Department, the FHWA, and their respective authorized agents will have unrestricted access at all times and for any reason to enter upon, inspect, sample, measure and physically test any part of the Project Assets 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 will also have the right for any reason, upon reasonable advance written notice (except as provided in Section 18.07(b)) to the Developer, to inspect financial or other records relating to the Project. Upon the Developer's request, the Department will provide the Developer with the results of any such test or inspections subject to any protections from disclosure under applicable Law.

Section 10.04 Compensation for Oversight Services

(a) Except as otherwise expressly provided in this Agreement, including, without limitation, Section 10.04(b), Section 10.04(c), Section 10.05(g), Section 11.05(a) and Section 24.03, the Department will not be compensated for its Oversight Services, whether in respect of the design, inspection or permitting for the Project, any Project Enhancement or any Safety Compliance Orders.

(b) Notwithstanding Section 10.04(a), if at any time the Developer has failed to perform any of its construction, operating or maintenance obligations in any material respect then, in addition to other remedies available pursuant to this Agreement and the other Project Agreements, the Department, with written notice to the Developer given concurrently with the increase in the Department's monitoring or as soon as practicable thereafter, is entitled to adequately and appropriately increase the level of its monitoring of the Project and the Developer's compliance with its construction, operation and maintenance obligations pursuant to this Agreement, until such time as the Developer has demonstrated to the Department's reasonable satisfaction that it will perform and is capable of performing its construction, operation and maintenance obligations pursuant to this Agreement. The Developer will compensate the Department for all Allocable Costs incurred by the Department as a result of such increased level of monitoring from and after the date on which such increased level of monitoring begins, *provided*, that the Developer will not be required to pay the Department's Allocable Costs for increased monitoring to the extent that such costs have otherwise been paid by the Developer through liquidated damages for the amounts to be paid by the Developer under this Agreement by the Department.

(c) If the Department increases its monitoring or oversight as permitted in this Agreement during the Operating Period, then the Department will give notice of such increased level of monitoring as provided in Section 10.04(b). Within 21 Days following the day on which increased monitoring activities begin, the Department will provide the Developer with a budget for its increased oversight and/or monitoring activities which sets out its total proposed costs in reasonable detail. If there is a change in circumstances in the oversight activities or the events which precipitated them occurs following the submission of the Department's initial budget, then the Department will provide a revised budget, which budget will detail any increased costs.

(d) The Developer may submit a cure plan describing specific actions the Developer will undertake to improve its performance and avoid the need for increased monitoring, which the Department may accept or reject.

Section 10.05 Department Approvals

(a) This Section 10.05 sets forth procedures governing certain submittals or requests by the Developer (or the Design-Build Contractor or the O&M Contractor) to the Department (including, but not limited to, plans, schedules, designs, Design Documentation and Construction Documentation) which require an approval, review, comment, consent, notification, determination, decision or other response (collectively, a "Response") from the Department pursuant to this Agreement. All submittals or requests to the Department will be made in the

form required by, and otherwise in conformity with, the requirements set forth in the Technical Requirements.

(b) Except as otherwise set forth herein, any submittal, resubmittal or request to the Department will be deemed complete at 5:30 p.m. Eastern time on the seventh Day following its receipt by the Department unless, the Department notifies the Developer in writing prior to 5:30 p.m. Eastern time on such seventh Day that such submittal, resubmittal or request is incomplete according to the standards set forth in the Technical Requirements and sets forth in reasonable detail the incomplete elements of the submittal, resubmittal or request.

(c) In any case in which a submittal or request is or has been deemed to be complete under Section 10.05(b), the Department will review and respond to such submittal or request as promptly as reasonably possible, and no later than 14 Days after the date on which the Developer (or the Design-Build Contractor or the O&M Contractor) has delivered such submittal or request to the Department. The Department will respond within such 14-Day period by (i) approving, certifying or taking other appropriate action with respect to, the submittal or request, as applicable or (ii) disapproving such submittal or request and providing written notice to the Developer specifying in reasonable detail the reasons for which it has disapproved the submittal or request. If the Department objects or disapproves any submittal or request in accordance with clause (ii) of the preceding sentence, the Developer will resubmit the submittal or request as promptly as reasonably possible, and the Department will resume its review and respond to such submittal or request by approving or disapproving the submittal or request (provided that such submittal or request is complete or has been deemed to be complete under Section 10.05(b)) within eight Days following its receipt of a resubmittal or request. The Department's review of a resubmittal or request will be limited to the issue, condition or deficiency which gave rise to the Department's disapproval and will not extend to other aspects for which a notice of disapproval was not previously provided to the Developer unless the issue, condition or deficiency which gave rise to the Department's disapproval reasonably relates to the Department's disapproval for which notice was previously provided.

(d) The time periods specified in Section 10.05(c) will be extended for the duration of a Force Majeure Event that prevents the Department or the Developer, as applicable, from performing under this Section 10.05.

(e) Unless otherwise agreed by the parties, the Developer is entitled to resolve any disapproval by the Department of a resubmittal in accordance with the dispute resolution procedures set forth in Article 21. If the Department reasonably believes that all or a portion of a resubmittal fails to comply with this Agreement, the Department may, in accordance with this Agreement, direct the Developer to perform the Work in accordance with the Department's instructions. In such event, the Developer will diligently proceed with the Work in accordance with such directive, and may (i) dispute the Department's directive in accordance with this Agreement and (ii) if it chooses, proceed with the dispute resolution procedures set forth in Article 21. If it is finally determined in accordance with such dispute resolution procedures that the Developer's submittal or resubmittal complied with this Agreement, the Work required under the Department's directive will be treated as a Department Change.

(f) In all cases where Responses are required to be provided hereunder, such Responses will not be withheld or delayed unreasonably and such determinations will be made reasonably except in cases where a different standard is specified. In cases where sole discretion is specified with respect to a Response by the Department, the Response will not be subject to the dispute resolution procedures set forth in Article 21. The Department will provide within ten days after a request by the Developer its rationale, in reasonable detail, for any disapproval or deemed disapproval of any matter.

(g) Subject to Section 10.04, if the Developer must submit a submittal or request to the Department for review and Response more than twice due to the Developer's failure to comply with the requirements of this Agreement, the Developer will pay the Department for the Department's Allocable Costs incurred thereafter in reviewing any portions of such submittal or request.

Section 10.06 Limitations on the Developer's Right to Rely

(a) The Developer expressly acknowledges and agrees that the Department's rights, if any, under the Project Agreements:

(i) to review, comment on, approve, disapprove and/or accept designs, plans, specifications, work plans, construction, equipment, installation, plans for maintenance, traffic management, policing and/or Project management, books, records, reports or statements, or documents pertaining to Developer Debt and Financing Assignments,

(ii) to review, comment on and approve or disapprove qualifications and performance of, and to communicate with, Contractors, and

(iii) to perform Oversight Services,

exist solely for the benefit and protection of the Department, do not create or impose upon the Department any standard or duty of care toward any Developer Party, all of which are hereby disclaimed, may not be relied upon, nor may the Department's exercise or failure to exercise any such rights be relied upon, by the Developer in determining whether the Developer has satisfied the standards and requirements set forth in this Agreement and may not be asserted, nor may the Department's exercise or failure to exercise any such rights be asserted, against the Department by the Developer as a defense, legal or equitable, to the Developer's obligation to fulfill such standards and requirements; *provided*, that the foregoing will not limit the Department's liabilities or obligations pursuant to this Agreement.

(b) To the maximum extent permitted by Law, and subject to the provisions of this Agreement, the Developer hereby releases and discharges the Department from any and all duty and obligation to cause permitting, Project Right of Way acquisition, 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 that has been allocated to the Developer hereunder; *provided*, that the foregoing will not limit the Department's liability or obligations under this Agreement. The Department will be entitled to remedies for Non-Conforming Work pursuant to Section 8.11(b).

(c) No rights of the Department described in Section 10.06(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 Project Completion of the Project or any Project Enhancement will:

(i) relieve the Developer from performance of the Work or of its responsibility for the selection and the competent performance of its Contractors;

(ii) relieve the Developer 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, except as expressly noted therein.

(d) Notwithstanding Section 10.06(a), (b) and (c) above: (i) any Limited Notices to Proceed, Notices to Proceed and certificates or notices of Service Commencement and Project Completion will be binding on the Department and the Developer will be entitled to rely thereon; *provided* however, that the delivery of such notices and certificates will not constitute a waiver by the Department of any breach of this Agreement by the Developer or relieve the Developer of any of its obligations hereunder; and (ii) the Developer will be entitled to rely on specific approved written Deviations and interpretative engineering decisions the Department gives pursuant to this Agreement in accordance with the Technical Requirements, the Design-Build Contract or any Development Contract, and any Law.

Section 10.07 Suspension of the Work

(a) The Department will have the right and authority, without liability to the Developer, to suspend any affected portion of the Work by written order to the Developer 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 24.05(b)), including to workers, other personnel or the general public from unsafe or dangerous conditions, or upon the occurrence of any of the following by the Developer:

(i) with respect to Non-Conforming Work, as provided in Section 8.11(b)(i);

(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 conditions to commencing performance of the applicable portion of the Work set forth in Article 8 or Section 9.01.

(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 Developer fully cures and corrects the applicable breach or failure to perform.

(c) The Developer will have the right to dispute the Department's suspension order by written notice to the Department, which notice will provide supporting information for the Developer's position. Unless directed otherwise by the Department after receipt of such notice, the Developer will carry out the Work required by the Department. If it is determined in accordance with the dispute resolution procedures in Article 21 that the Developer was in compliance with its obligations under this Agreement, then the suspension order and any additional Work required by the Department will be treated as a Department Change pursuant to Section 14.02.

(d) The issuance of a suspension order will not affect the Developer's rights to cure or correct any such incidents giving rise to the issuance of the suspension order in accordance with this Agreement.

(e) Notwithstanding the foregoing, the Department will have the right and authority to suspend the Early Work due to the existence of litigation challenging any aspect of the Project between the Agreement Date and the Financial Close Deadline. Unless lifted prior to Financial Close, any such suspension will terminate at Financial Close.

ARTICLE 11.

NON-COMPLIANCE POINTS SYSTEM

Section 11.01 Non-Compliance Points System

(a) Exhibits U-1 and U-2 to this Agreement set forth tables for the identification of certain Performance Shortfalls that may result in the assessment by the Department of Non-Compliance Points. The Non-Compliance Points system is used by the Department to measure the Developer's performance levels and the accumulation of Non-Compliance Points by the Developer may trigger the remedies set forth or referenced in this Article 11. The inclusion in Exhibits U-1 and U-2 of a breach or failure to perform will not determine whether such breach or failure is material.

(b) 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.

(c) If the Department determines any breach or failure described in Exhibits U-1 and U-2, as applicable, has occurred, the Department will within five Days of its determination deliver to the Developer written notice thereof describing the breach or failure in reasonable detail. Within five Days of receipt of the Department's notice, the Developer will investigate the Department's claim and provide a written report as to whether the breach or failure in performance has in fact occurred and describing any mitigating factors. Within 10 Days after

receiving the Developer's report, the Department will deliver to the Developer a written determination setting forth the number of Non-Compliance Points, if any, the Department, has assessed to the Developer in accordance with the terms hereof.

Section 11.02 Assessment of Non-Compliance Points and Cure Periods

The Department may assess Non-Compliance Points subject to the following terms and conditions.

(a) The Construction Period Non-Compliance Points system will apply commencing on the date the Department issues the Construction Notice to Proceed and will end on the Project Completion Date. The Operations Period Non-Compliance Points system will apply commencing on the Service Commencement Date. Non-Compliance Points incurred during the Construction Period that relate to the Design-Build Work will not carry forward to the Operations Period.

(b) Various categories and elements of work have been identified by the Department as critical to the overall success of the project. Each category and work element has been assigned a level of severity category defined as follows:

- Level of severity category A – consequences of non-compliance may have a moderate impact on the Project
- Level of severity category B – consequences of non-compliance may have a high impact on the Project
- Level of severity category C – consequences of non-compliance may have a severe impact on the Project

(c) Exhibits U-1 and U-2 set forth the maximum number of Non-Compliance Points the Department will apply for each breach or failure. The Department may assess fewer Non-Compliance Points for a particular breach or failure based on the merits of the individual breach or failure.

(d) Where a single act or omission gives rise to more than one breach or failure as described in Exhibits U-1 and U-2, the Department may assess Non-Compliance Points for only one breach or failure. In such circumstances, the Department may assess Non-Compliance Points for the breach or failure for which the highest maximum number of Non-Compliance Points will apply.

(e) For Performance Shortfalls classified as category A in Exhibits U-1 and U-2, Non-Compliance Points will be assessed only at the end of the applicable cure period if the Developer has failed to cure within that time. Additional Non-Compliance Points may be assessed again at the end of each subsequent cure period, until the breach or failure is cured, or the cumulative total of cured and uncured Non-Compliance Points equals or exceeds the level described in Section 19.01(f).

(f) For Performance Shortfalls classified as category B in Exhibits U-1 and U-2, the Non-Compliance Points will be assessed on the date of the written determination from the

Department to the Developer. Provided that the breach or failure is not then cured within the applicable cure period, Non-Compliance Points will be assessed again at the end of the first and each subsequent cure period, until the breach or failure is cured, or the cumulative total of cured and uncured Non-Compliance Points equals or exceeds the level described in Section 19.01(f).

(g) For Performance Shortfalls identified as category C in Exhibits U-1 and U-2 (no applicable cure period), the Non-Compliance Points will be assessed on the date of the written determination from the Department to the Developer.

(h) Any cure period specified in Exhibits U-1 and U-2 will be extended day-for-day for any Delay Event that prevents performance of Work to cure a breach or failure.

(i) At every ten year anniversary of the Service Commencement Date, or upon significant revision of the Technical Requirements, either party, by written notice to the other party at least 90 Days prior to such anniversary reserves the right to request a review of the Non-Compliance Points system. Upon receiving the notice, both parties must review the existing Non-Compliance Point system in place and agree in writing to any revisions required to the system.

Section 11.03 Notification of Cure

When the Developer determines it has cured any breach or failure for which the Department has assessed Non-Compliance Points, the Developer will deliver written notice to the Department. The Developer's written notice will identify the breach or failure at issue and describe what steps were undertaken to cure it. The Department or its designee will then promptly verify the cure through inspection or other means and provide to the Developer a written certification of cure. The Department retains the right to verify independently that the breach or failure in performance has in fact been cured.

Section 11.04 Accumulation of Non-Compliance Points

(a) The total of uncured Non-Compliance Points assessed by the Department will be monitored by the Department or its designee on an ongoing basis for the duration of the Construction Period or the Operating Period, as applicable.

(b) The cumulative total of cured and uncured Non-Compliance Points assessed by the Department will be monitored in rolling 365 Day cycles from the time the breach has been cured for those breaches classified in categories A and B, and from the time the breach has occurred for those breaches classified in category C. Non-Compliance Points will become stale on the 366th Day after such points initially were assessed against the Developer; stale points will be subtracted from the cumulative total number of Non-Compliance Points the Developer has been assessed.

Section 11.05 Impact of Non-Compliance Points

(a) Non-Compliance Points Liquidated Damages. The Developer will be assessed liquidated damages ("Non-Compliance Points Liquidated Damages") upon accumulation of assessed Non-Compliance Points in the amounts in Table 11-1 below and in accordance with

Section 8.10(d). Non-Compliance Points Liquidated Damages amounts will be reconciled by the Developer as of the beginning of each Agreement Year after the Financial Close Date and paid to the Department within 30 days of the same Agreement Year.

Table 11 – 1: Non-compliance Performance Violations			
Cumulative Non-compliant Points Per Element	Level of Severity Category		
	A	B	C
0	\$ -	\$ -	\$ -
1	\$ -	\$ -	\$ -
2	\$ -	\$ 2,500	\$ 5,000
3	\$ 1,000	\$ 5,000	\$ 10,000
4	\$ 5,000	\$ 10,000	\$ 20,000
5	\$ 10,000	\$ 25,000	\$ 40,000
>5	\$ 15,000	\$ 40,000	\$ 60,000

(b) Increased Monitoring. If the Developer is assessed 100 or more Non-Compliance Points during any 365 Day cycle or maintains 50 or more uncured Non-Compliance Points at any time as described in Section 11.04, the Department may increase the level of monitoring of the Project in accordance with Section 10.04. The Developer will compensate the Department for its Allocable Costs incurred as a result of such increased level of monitoring. The Developer may submit a cure plan describing specific actions the Developer will undertake to improve its performance and avoid the need for increased monitoring, which the Department may accept or reject.

(c) The Remedial Plan.

(i) If the Developer is assessed 225 or more Non-Compliance Points during any 365 Day cycle or maintains 100 or more uncured Non-Compliance Points at any time as described in Section 11.04, the Department may require the Developer to prepare and submit a remedial plan for the Department’s approval. The remedial plan will be delivered to the Department within 30 Days of its request. The remedial plan will set forth a schedule and describe specific actions the Developer will undertake to improve its

performance as demonstrated by its incurring no additional Non-Compliance Points and by reducing the total number of uncured Non-Compliance Points it has accumulated to date. Such actions may include but are not limited to improvements to the Developer's quality management practices, plans and procedures; changes in its organizational and management structures; increased monitoring and inspections; changes in key personnel; and the replacement of subcontractors.

(ii) If, after 180 Days following the implementation of the remedial plan, the Developer can demonstrate that: (1) the remedial plan has reduced the number and frequency of Non-Compliance Points assessed as compared to the period prior to the implementation of the remedial plan; (2) the Developer is complying in all material respects with the course of action described in the remedial plan; and (3) the Developer has no uncured Non-Compliance Points, then the total number of Non-Compliance Points assessed over the course of the 180 Day period will be reduced by 50%. If the rolling 365 Day cycle described in Section 11.04(b) ends at any time during the 180 Day period described herein, the total number of Non-Compliance Points the Developer has cured during that 365 Day cycle will carry over to the next 365 Day cycle. However, if the total number of Non-Compliance Points assessed over the course of the 180 Day period is reduced by 50% as described above, the total number of previously cured Non-Compliance Points that were carried over also will be subtracted from the Developer's cumulative total number of assessed Non-Compliance Points.

Section 11.06 Disputes Regarding the Assessment of Non-Compliance Points

(a) The Developer may object to the assessment of Non-Compliance Points or the amount of Non-Compliance Points assessed by delivering to the Department written notice of its objection within 10 Days of receipt of the Department's written determination assessing the Non-Compliance Points at issue. Such notice will set forth with specificity the grounds for the Developer's objection.

(b) The Department will reasonably consider the Developer's objections and Representatives of the Department and the Developer will meet to discuss the matter within 30 Days after the Developer has provided its written objection. If, at the conclusion of this 30 Day period, the Developer still objects to the Department's decision, it may pursue dispute resolution under Article 21.

(c) If for any reason the Developer fails to deliver its written notice of objection within the time periods specified in Sections 11.06(a) and (b), the Developer will have waived its right to challenge the Department's assessment of Non-Compliance Points.

ARTICLE 12.

PROJECT ENHANCEMENTS AND SAFETY COMPLIANCE ORDERS

Section 12.01 Project Enhancements by the Developer

The Developer will have the right, at its sole cost and expense, at any time, to design, develop, construct, operate and maintain Developer 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 Developer will not undertake any such Project Enhancements unless all aspects thereof are approved in writing by the Department in its sole discretion, and the Developer has entered into a Development Contract with the Department with respect to such Developer Project Enhancement.

Section 12.02 Project Enhancements by the Department

(a) The Department will have the right from time to time after Project Completion, at its sole cost and expense, to design, develop, construct, operate and maintain Department Project Enhancements. The Department will 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;
- (iii) authorizing and directing the Developer, at the Department's sole cost and expense, to undertake the Department Project Enhancements, through contracting for 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; and

provided, that the Department will give the Developer at least 60 Days' written notice prior to initiating any procurement process referred to in clause (ii) above, during which time the Developer will have the right, but not the obligation, to agree in writing to undertake the Department Project Enhancement on such terms and conditions as the Department and the Developer will mutually agree upon; *provided further*, that if the Department and the Developer fail to agree upon such terms and conditions within such 60 Day period, the Department will be entitled to proceed with any of the mechanisms set forth in clauses (i), (ii) and (iii) of this Section 12.02(a) and will have no further liability or obligation to the Developer except as otherwise expressly provided in this Agreement.

(b) If the Department authorizes and directs the Developer to undertake a Department Project Enhancement pursuant to Section 12.02(a)(iii), then, in cooperation with the Department, as applicable, and subject to (i) the review and written approval by the Department in its sole discretion and (ii) without limiting the Developer's right to claim additional Developer Damages, the Department making available to the Developer sufficient funds, through monthly progress payments for work performed and costs incurred (plus an amount not to exceed 10% of such Developer costs to pay the Developer for reasonable and documented costs actually incurred to administer the work), including without limitation the costs of obtaining any Governmental Approvals necessitated by such Department Project Enhancement, in order to perform the work required to design, construct, operate and maintain such Department Project Enhancement, the Developer will implement such Project Enhancement in accordance with the terms and

provisions of this Agreement, and the Project Enhancement will be deemed a part of the Project and will become subject to all the terms and provisions of this Agreement as of the date the Developer is required to assume such responsibility pursuant to this Section 12.02(b).

(c) The Department will have the right to enter upon the Project and the relevant rights of way for any purpose relating to Department Project Enhancements under this Section 12.02.

(d) The Department will have the right at any time (and without liability to the Developer for any damages it may suffer, except as otherwise expressly provided in this Agreement) to perform planned and emergency maintenance, renewal and replacement, safety and repair activities on existing and new facilities adjacent to or near the Project regardless of the impact of such activities on the Project; *provided* that

(i) the Department will use reasonable commercial efforts to keep the Developer informed of planned maintenance, renewal and replacement and repair activities which can reasonably be foreseen to impact activities on the Project;

(ii) the Department will provide to the Developer copies of and other information concerning the Department's then current maintenance, renewal and replacement and repair program, upon the Developer's reasonable request; and

(iii) to the extent it relates to Department Project Enhancements, the provisions of Section 12.02 will govern the Department's liability to the Developer therefor.

(e) If the Department and the Developer jointly agree to undertake Project Enhancements, the parties will amend this Agreement as appropriate to reflect the joint Project Enhancements and payment mechanisms thereof.

Section 12.03 Safety Compliance Orders

(a) The Department may, but is not obligated to, issue Safety Compliance Orders to the Developer at any time after the Service Commencement Date; *provided*, that no Safety Compliance Order may in any event order or direct the Developer to do any act in violation of any Law. Compliance with a Safety Compliance Order by the Developer, to the extent it conflicts with another obligation of the Developer under this Agreement, will not be deemed a default by the Developer under the provisions of this Agreement or any other VDOT Project Agreement.

(b) The Department will use good faith efforts to inform the Developer 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 Developer, prior to issuing a Safety Compliance Order concerning the risk to public or worker safety, alternative compliance measures, cost impacts and the availability of Developer resources to fund the Safety Compliance Work. The Department may, in its discretion, monitor and inspect the Project Assets at any time and from time to time for the purposes of determining whether any

circumstances exist that warrant issuance of a Safety Compliance Order and giving the Department and the Developer reports and recommendations related to such matters.

(c) If the Department issues a Safety Compliance Order, the Developer will proceed, at its sole cost and expense, with the necessary environmental, design and construction Work to carry out the Safety Compliance Order as follows:

(i) if the Safety Compliance Order is of the type described in clause (a) of the definition of that term, the Developer will proceed expeditiously; and

(ii) if the Safety Compliance Order is of the type described in clause (b) of the definition of that term, the Developer will carry it out in accordance with the procedures adopted by the Department for carrying out similar work on similar portions of the State Highways.

(d) The Developer will have the right to dispute a Safety Compliance Order by providing written notice to the Department within 21 Days of the issuance of the Safety Compliance Order setting forth the Developer's Claim that no condition exists to justify the disputed Safety Compliance Order and the Developer's estimate of impact costs, Gross Revenues and the construction schedule, if applicable. The Developer will nevertheless implement the Safety Compliance Order, but if it is finally determined in accordance with the dispute resolution procedures in Article 21 that conditions warranting the Safety Compliance Order did not exist, then the Safety Compliance Order will be treated as a Department Change pursuant to Section 14.02.

Section 12.04 Development of Other Facilities

(a) Except for the right of the Developer to receive compensation set forth in Section 12.02 and Section 12.05, the State Parties will have the unlimited right, 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, without limitation, free roads, connecting roads, service roads, frontage roads, turnpikes, managed lanes, high occupancy/toll lanes, HOV lanes, light rail, heavy rail, high-speed rail, freight rail and bus lanes) and exercise all of its authority to advise and recommend on transportation planning, development and funding, and to otherwise improve the GP Lanes and other roadways and structures within or adjacent to the I-66 Corridor (collectively, the "Department Projects") outside the Express Lanes, and whether 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, *provided*, that:

(i) the Department will use diligent efforts to keep the Developer informed of planned maintenance, renewal and replacement and repair activities of the Department Projects, which can reasonably be foreseen to impact the Work or traffic on the Express Lanes; and

(ii) the Department will provide to the Developer copies of and other information concerning the Department's then current maintenance, renewal and

replacement and repair program of the Department Projects, upon the Developer's reasonable request.

(b) The Department Projects include those facilities (i) owned or operated by the State Parties, including those owned or operated by a private entity pursuant to a contract with a State Party; (ii) owned or operated by a joint powers authority or similar entity to which a State Party is a member; (iii) owned or operated by any other Governmental Authority pursuant to a contract with a State Party, including, without limitation, regional mobility authorities, joint powers authorities, counties and municipalities and (iv) owned or operated by any other Governmental Authority (including, without limitation, WMATA or other regional mobility authorities, joint powers authorities, counties and municipalities) with respect to which a State Party has contributed funds, in-kind contributions or other financial or administrative support. The foregoing rights include the ability to institute, increase or decrease tolls or other fees and charges on such facilities or modify, change or institute new or different operation and maintenance procedures.

(c) The State Parties 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 of its authority to advise and recommend on transportation planning, development and funding on any project of its choosing.

(d) In no event will the taking of any action described in this Section 12.04 by a State Party (i) constitute a default by the Department pursuant to this Agreement or (ii) entitle the Developer to Developer Damages or other relief, except to the extent provided in (A) Section 12.02 with respect to any such existing and new transportation or other facilities that constitute Department Project Enhancements (with the exception of jointly developed or shared facilities) and (B) Section 12.05 with respect to Alternative Facilities; *provided* however, that if the construction activities associated with a Department Project directly cause a material disruption to the construction of the Project, then such construction activities may entitle the Developer to Developer Damages or other relief as provided in this Agreement; *provided further* however, that the Developer will not be entitled to Developer Damages or other relief if such material disruption is caused by a Developer Party.

Section 12.05 Alternative Facilities.

(a) Additional General Purpose Lanes. Additional general purpose lanes on I-66 within the Project Corridor encompassing the Express Lanes will be considered an Alternative Facility. For purposes of this Section 12.05(a), the term general purpose lanes does not include the use of auxiliary lanes for any of their intended uses or the use of the shoulder between auxiliary lanes as an additional travel lane for incident management, maintenance and construction.

(b) Orange Line Expansion. The opening of an expansion of the Orange Line for operations within the I-66 Corridor encompassing the Express Lanes within the 10 years following the Agreement Year in which the Project Completion Date occurs will be considered an Alternative Facility.

(c) Procedures.

(i) This Section 12.05(c) sets forth the Developer's sole and exclusive rights and remedies with respect to Alternative Facilities, and supersedes any provisions of this Agreement to the contrary; *provided* however, that if the construction activities associated with an Alternative Facility directly cause a material disruption to the construction of the Project Assets, then such construction activities may entitle the Developer to Developer Damages or other relief as provided in this Agreement. Such rights and remedies are subject to Section 12.05(c)(iii).

(ii) The Developer Damages owing from the Department to the Developer on account of an Alternative Facility will be equal to the Developer Damages, if any, attributable to the Alternative Facility, but only to the extent that any such amount has not been previously recognized under Section 14.04. The foregoing Developer Damages will be determined in the same manner, and subject to the same conditions and limitations, as for a Compensation Event under Section 14.01.

(iii) The Developer acknowledges that each of CTB and the Department has a paramount public interest and duty to develop and operate whatever Department Projects it deems to be in the best interests of the State, and that the compensation to which the Developer is entitled on account of Alternative Facilities is a fair and equitable remedy. Accordingly, the Developer will not have, and irrevocably waives and relinquishes, any and all rights to institute, seek or obtain any injunctive relief or pursue any action, order or decree to restrain, preclude, prohibit or interfere with CTB's or the Department's rights to plan, finance, develop, operate, maintain, toll or not toll, repair, improve, modify, upgrade, reconstruct, rehabilitate, restore, renew or replace Alternative Facilities; *provided*, that the foregoing will not preclude the Developer from enforcing, respectively, its rights to compensation under this Section 12.05, or claiming any relief in respect of Compensation Events or Delay Events, if appropriate. The filing of any such action by the Developer seeking to restrain, preclude, prohibit or interfere with CTB's or the Department's rights will automatically entitle CTB or the Department, as applicable, to recover all costs and expenses, including attorneys' fees, of defending such action and any appeals.

ARTICLE 13.

DELAY EVENTS

Section 13.01 Delay Event Notice and Determination

(a) If the Developer is affected by a Delay Event, it will give written notice to the Department within 21 Days following the date on which the Developer first became aware (or should have become 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 will be necessary) (a "Delay Event Notice"). Such Delay Event Notice will 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 duration of the

delay in the performance of obligations pursuant to this Agreement attributable to such Delay Event and information in support thereof, if known at that time. In the event (ii) and (iii) above are not known at the time of the Delay Event Notice, such notice will be resubmitted within 21 Days of the original Delay Event Notice to include such information. The Developer will also provide such further information relating to the Delay Event as the Department may reasonably require. The Developer will bear the burden of proving the occurrence of a Delay Event and the resulting impacts.

(b) Written Claim and Department Response.

(i) Within 21 Days following the date on which the Developer first became aware (or should have become aware, using all reasonable due diligence) that a Delay Event has ceased, the Developer will submit a claim in writing to the Department requesting the relief, if any, the Developer seeks as a result of the Delay Event. The written claim must state the date on which the Delay Event ceased. After submitting its written claim, the Developer will provide any additional information relating to the Delay Event that the Department may reasonably require.

(ii) If the written claim seeks monetary relief (because the Delay Event is also a Compensation Event), the written claim will be treated as a Compensation Event Notice and the parties will proceed under Section 14.01(a)(iii).

(iii) If the written claim seeks only non-monetary relief then, within 45 Days of receiving the Developer's written claim, the Department will issue a written response granting or denying, in full or in part, the Developer's claim. If the Department fails to respond within the 45-Day period, the claim will be deemed denied. Thereafter, if there is a dispute relating to the Department's response, or failure to respond, either party will be entitled to refer the matter to the dispute resolution procedures in Article 21 within 30 Days of the denial or deemed denial, otherwise, the claim will be extinguished and forever barred.

(c) The Developer's complete compliance with Section 13.01(a) and Section 13.01 are conditions precedent to filing a claim for a Delay Event. If for any reason the Developer fails to deliver a Delay Event Notice within such 21-Day period, the Developer will 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 pursuant to this Agreement or any Project Agreement.

(d) Upon the occurrence of any Delay Event, the Developer will promptly undertake efforts to mitigate the effects of such Delay Event, including all steps that would generally be taken in accordance with Good Industry Practice. The Developer will promptly deliver to the Department an explanation of the measures being undertaken to mitigate the delay and other consequences of the Delay Event.

(e) Notwithstanding the occurrence of a Delay Event, the Developer will continue its performance and observance pursuant to this Agreement of all of its obligations and covenants to be performed to the extent that it is reasonably able to do so and will use its reasonable efforts to

minimize the effect and duration of the Delay Event. Without limiting the foregoing, the occurrence of a Delay Event will not excuse the Developer from timely payment of monetary obligations pursuant to this Agreement, from compliance with Law, or from compliance with the Technical Requirements, except temporary inability to comply with the Technical Requirements as a direct result of the Delay Event.

(f) Subject to the Developer giving the notice required in Section 13.01(a), a Delay Event will excuse the Developer from the performance that is prevented or delayed by the Delay Event referred to in such notice to the extent set forth in Section 13.02 and Section 13.03.

Section 13.02 Delay Events Prior to Project Completion

A Delay Event occurring prior to Project Completion will excuse the Developer from performance of its obligations to perform the Work pursuant to this Agreement but only to the extent that such obligations are directly affected by such Delay Event. In addition, prior to Project Completion, extensions of milestones and/or activities identified on the Baseline Schedule for Delay Events affecting the Work will be made based on Schedule Impact Analysis, using the then current Baseline Schedule and taking into account impacts of the Delay Events on Critical Path items, in accordance with the Technical Requirements, and will extend, as applicable, the Intermediate Milestone completion dates, the Project Completion Date and the Long Stop Date. If the Department and the Developer cannot agree upon the extension, then either party will be entitled to refer the matter to the dispute resolution procedures in Article 21.

Section 13.03 Delay Events After Project Completion

A Delay Event occurring after Project Completion will only excuse the Developer from performance of its obligations to perform O&M Work pursuant to this Agreement directly affected by such Delay Event.

ARTICLE 14.

COMPENSATION EVENTS; DEPARTMENT CHANGES; DEVIATIONS; NET COST SAVINGS

Section 14.01 Compensation Events

For Delay Events that are also Compensation Events, the Developer must first comply with the requirements of Section 13.01, and the Developer will not be required to submit a separate Compensation Event Notice for an event that is covered by a written claim under Section 13.01(b), it being understood that, with respect to any Compensation Event that is set forth in a Delay Event Notice, the Developer will be entitled to the timeframes contemplated in this Section 14.01 with respect to the delivery of required information. For all other Compensation Events, the Developer must comply with each of the requirements of this Article 14.

(a) Compensation Event Notice.

(i) If the Developer is affected by a Compensation Event, it will give written notice to the Department within 21 Days following the date on which the Developer first became aware (or should have become 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 will set forth (A) the Compensation Event and its date of occurrence in reasonable detail, (B) the amount claimed as Developer Damages and (C) details of the calculation thereof including a written analysis and calculation of the estimated Net Cost Impact, if any, and estimated Net Revenue Impact, if known at that time; *provided* that, if the amount of Developer Damages and details of the calculation thereof are not available within the 21-Day notice period required herein, the Developer will submit an estimate of the amount, or if known, the actual amount claimed as Developer Damages and details of the calculation thereof no later than 60 Days from submission of the Compensation Event Notice.

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

(iii) After the Developer submits a Compensation Event Notice, the Department may, but is not required to, obtain, at its sole cost, (A) a comprehensive report as to the Developer’s estimate of the Net Cost Impact attributable to the Compensation Event and (B) 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 45 Days after receiving a Compensation Event Notice and the supporting documentation required by Section 14.01(a)(i), the Department will provide to the Developer a copy of such reports as it has elected to obtain, and the Department will issue a written response granting or denying, in full or in part, the Developer’s requested relief. If the Department fails to respond within the 45-Day period, the claim will be deemed denied. If the Department disagrees with the entitlement to or amount of Developer Damages claimed by the Developer, the Developer and Department will commence good faith negotiations to resolve the Dispute within 30 Days after the Department’s written response or deemed denial. If the Dispute cannot be resolved within such 30 Days, either party may submit the Dispute for resolution pursuant to Article 21 within an additional 30 Days, otherwise, the claim will be extinguished and forever barred.

(b) Developer Damages Determination.

(i) Developer Damages with respect to any Compensation Event will be calculated based on the sum of (A) any adverse Net Cost Impact and (B) any adverse Net Revenue Impact for each year that there is an impact attributable to such Compensation Event; *provided*, that, subject to Section 14.01(c), any Net Cost Savings and positive Net Revenue Impact attributable to such Compensation Event will be used to decrease the amount of Developer Damages. The calculation of Developer Damages will be based on the difference in the projected cost and revenue related to the Project immediately prior to

the occurrence of the Compensation Event and the projected cost and revenue related to the Project after taking into account the impact of the Compensation Event.

(ii) Following the calculations pursuant to Section 14.01(b)(i), the Developer will incorporate such calculations into the proposed Base Case Financial Model Update and will provide such proposed Base Case Financial Model Update to the Department pursuant to Article 6.

(iii) The Developer Damages will be net of all applicable insurance deductibles and self-insured retentions, as well as proceeds payable to and collectable by the Developer or its Contractors associated with the Compensation Event (or that would have been payable to the Developer or its Contractors but for the failure by the Developer or its Contractors to comply with the insurance requirements set forth in Article 17).

(iv) During the 45-Day period referred to in Section 14.01(a)(iii), Developer will conduct all discussions and negotiations with the Department to determine any Developer Damages and will share with the Department all data, documents and information pertaining thereto, on an Open Book Basis. As part of such negotiations, the parties will continue to refine and exchange, on an Open Book Basis, plans, drawings, configurations and other information related to the Compensation Event, traffic and revenue data, information, analyses and studies and financial modeling and quantifications of projected Net Cost Impacts, Net Revenue Impacts or Net Cost Savings, if any.

(v) The Developer will take all steps reasonably necessary to mitigate the amount of the Developer Damages attributable to, and other consequences of, any Compensation Event, including all steps that would generally be taken in accordance with Good Industry Practice, including filing a timely claim for insurance and pursuing such claims.

(vi) If the Developer and the Department are unable to agree upon the amount of the Developer Damages within 120 Days after the delivery of the Compensation Event Notice, then either party, by written notice to the other party, may terminate the negotiations and request the Dispute be resolved in accordance with Article 21; *provided*, that the Department may proceed to make payment to the Developer of the undisputed portion of the Developer Damages in accordance with Section 14.01(b) without regard to the dispute resolution procedures.

(vii) The Developer will not be entitled to Developer Damages which are *de minimis*.

(c) Compensation Event Payment. Following a determination of the Developer Damages pursuant to Section 14.01(b), the Department will compensate the Developer for such Developer Damages in such manner as agreed upon by the parties in writing or as may be determined through the dispute resolution procedures set forth in Article 21; *provided*, that:

(i) in the case of any lump sum payment of the Developer Damages or any other payment schedule that differs from the projected timing of the Developer Damages,

the net present value of the Developer Damages will be determined using the then appropriate risk adjusted discount rate(s), as agreed between the Department and the Developer;

(ii) in the case of any payment method chosen other than an up-front lump sum payment or a payment that is based on the projected timing and amounts of the Developer Damages, the payment method will yield an amount that will be equal to the present value of a lump sum payment, using appropriate risk adjusted discount rate(s) as agreed by the parties;

(iii) the amount and timing of payment of Developer Damages related to a Compensation Event will take into account the ability of the Developer, *first*, to obtain funding in relation to such Developer Damages in accordance with Section 14.01(d) and, *second*, to have funds available in such time and in such amounts as are required to make current payments to third parties in respect of any portion of Net Cost Impact related to such Compensation Event; and

(iv) any Net Cost Savings or positive Net Revenue Impact attributable to such Compensation Event not included in the determination of Developer Damages under the provisions of this Section 14.01 will be included in the Permit Fee calculated pursuant to the Permit Fee calculation, as agreed between the Department and the Developer.

(d) Developer Funding of Developer Damages. If requested by the Department, the Developer will use commercially reasonable efforts to obtain funding for a portion or the full amount of Developer Damages; provided, however, that the Developer will not be obligated to obtain such funding if the Developer, in its reasonable discretion, determines that obtaining such funding will diminish the Project Value, or to the extent such funding, combined with any payments from the Department, will not make funds available in such time and in such amounts as are required to make current payments to third parties as they are due or will become due in respect of any portion of Net Cost Impact included as part of such Developer Damages. If the Developer is able to obtain funding for all or part of the Developer Damages, the Developer will submit a funding proposal for the Department's review and approval. Such funding proposal will identify the terms and conditions required to secure funding for such Developer Damages, including any proposed payments by the Department. The Department will reject or accept the funding proposal within 30 Days of receipt of the funding proposal. If the funding proposal is accepted by the Department, the Department will issue a Change Order to implement the funding proposal and, to the extent such funding proposal secures financing for less than 100% of the Developer Damages, the Change Order will provide funding for the remainder thereof on terms and conditions mutually agreed by the parties. If the funding proposal is rejected by the Department, the Developer and the Department will continue negotiations in good faith and, if the parties cannot reach an agreement, the funding of Developer damages will be subject to the dispute resolution procedures described in Article 21.

(e) Sole Remedy and Release of Claims.

(i) Without limiting the Developer's rights with respect to non-monetary relief for Delay Events, the Developer Damages as determined according to this Section

14.01 will represent the sole right to compensation and damages for the adverse effects of a Compensation Event.

(ii) As a condition precedent to the Department's obligation to compensate any portion of the Developer Damages, following a determination of the Developer Damages, the Developer will 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 (A) the Claim and right to the subject Developer Damages, (B) the Developer's right to non-monetary relief for a Delay Event and (C) the right to terminate this Agreement in accordance with Article 20 and to receive any applicable termination compensation.

(f) Additional Provisions Related to Certain Compensation Events. Notwithstanding the provisions of Section 14.01(b)(i), for Compensation Events described in clauses (g), (o) and (p) of the definition thereof, Developer Damages will be an amount equal to any adverse Net Cost Impact of each such Compensation Event; *provided, however*, that: (A) the Developer will be solely responsible for the first \$10 million of aggregate Net Cost Impact for each such Compensation Event; (B) the Parties will share equally in the next \$10 million of aggregate Net Cost Impact for each such Compensation Event; and (C) the Department will be solely responsible for the Net Cost Impact in excess of \$20 million for each such Compensation Event.

Section 14.02 Department Changes

(a) Department's Right to Issue Change Orders. The Department may, at any time and from time to time during the Term, authorize and/or require changes in the Work pursuant to a Change Order or in the terms and conditions of the Technical Requirements (including changes in the standards applicable to the Work); *provided*, that the Department has no right to require any change that:

- (i) is not in compliance with Law;
- (ii) would contravene an existing Governmental Approval and such contravention cannot be corrected by the issuance of a further or revised Governmental Approval that can be obtained by the Developer;
- (iii) would cause an insured risk to become uninsurable; or
- (iv) would give rise to a material and adverse health or safety issue.

(b) Request for Change Proposal.

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

(ii) Within five Days following the Developer's receipt of the Request for Change Proposal, the Developer will provide the Department with a preliminary estimate of the Developer's Allocable Costs for preparing the Change Proposal (a "Change

Proposal Estimate”). Upon review and written approval by the Department of the Change Proposal Estimate, the Developer will proceed to prepare the Change Proposal.

(iii) Within 14 Days following the Department’s written approval of the Change Proposal Estimate, the Developer will provide the Department with a preliminary written response, and within a reasonable time thereafter (not to exceed 30 Days or such other timeframe agreed upon between the Developer and the Department), with a definitive written response (a “Change Proposal”), as to whether, in the Developer’s opinion, the Department Change constitutes a Compensation Event, and if so, (A) a detailed assessment of the Net Revenue Impacts and Net Cost Impacts, to the extent known at that time, (B) the effect of the proposed Department Change on the Developer’s performance of its obligations pursuant to this Agreement, to the extent known at the time, (C) the proposed Base Case Financial Model Update and (D) a Time Impact Analysis, if applicable.

(iv) Within 30 Days following the delivery of the Change Proposal, the Developer and the Department will exercise good faith efforts to negotiate a mutually acceptable Change Order.

(v) If the Department approved in writing the Change Proposal Estimate and the Developer delivered the Change Proposal then, within 30 Days following the delivery of the Change Proposal, the Department will pay to the Developer the lesser of (1) the Developer’s Allocable Costs for preparation of the Change Proposal or (2) the amount of the Change Proposal Estimate.

(c) Developer Performance of Department Change. The Developer will perform the work required to implement the Department Change in a timely manner; *provided, that*:

(i) a Change Order setting forth, among other things, the adjusted scope of the Work and adjustments to the Baseline Schedule and the Technical Requirements, if applicable, will have been mutually agreed upon between the Department and the Developer and issued by the Department;

(ii) the Department and the Developer (if applicable) will have identified sufficient funds that may be made available to the Developer to perform the work required to implement the Department Change; and

(iii) all necessary Governmental Approvals to commence the Work required to implement the Department Change have been obtained.

(d) Disputed Work.

(i) If the Department and the Developer agree that the Work in question constitutes a Department Change and are unable to reach an agreement on a Change Order, the Department may deliver to the Developer a Directive Letter, directing the Developer to proceed with the performance of the Work in question, notwithstanding such disagreement. Such Directive Letter will include any changes to the Technical

Requirements, if applicable, necessary to proceed with the Work covered by the Directive Letter.

(ii) If the parties disagree whether the Work in question constitutes a Department Change, the Department will have the right to issue a Directive Letter, directing the Developer to proceed with the performance of the Work in question, and the Developer will proceed with such work. Such Directive Letter will include any changes to the Technical Requirements necessary to proceed with the Work covered by the Directive Letter.

(iii) Upon receipt of a Directive Letter under (i) or (ii) above, the Developer will implement and perform the Work in question as directed by the Department.

(iv) To the extent there are any Disputes related to any Directive Letter issued under Section 14.02(d), such Disputes will be subject to the dispute resolution procedures set forth in Article 21.

(e) Payments for Directive Letter Work. If the Department issues a Directive Letter to the Developer pursuant to Section 14.02(d), the Developer will continue to perform the Work and Department will continue to satisfy its payment obligations to Developer pending the final resolution of any dispute or disagreement between Developer and Department pursuant to the dispute resolution procedures set forth in Article 21.

(f) Technical Requirements Revisions. Notwithstanding anything to the contrary contained in this Agreement, during the Construction Period, a change in the terms and conditions of the Technical Requirements (including changes in the standards applicable to the Work) required or authorized by the Department will constitute a Department Change.

Section 14.03 Developer Requests for Deviations

(a) The Developer may request the Department to approve, in the Department's sole discretion, Deviations by submitting to the Department a written change request in a form approved by the Department. At a minimum, the following information will be submitted with each such change request:

(i) a statement that the request is submitted pursuant to this Section 14.03(a);

(ii) a statement concerning the basis for the request, benefits to the Department or the Project 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.

(b) The Department may consider and approve or disapprove, in its sole discretion, any such request, and the Developer will 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 will exist or be effective unless and until approval thereof is expressly provided in writing by the Department. Approval of a submission containing a Deviation will 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 14.03(b). The Department's decision will not be subject to the dispute resolution procedures of Article 21. If not previously communicated, the Department will provide within 10 Days after a request by the Developer its rationale, in reasonable detail, for any disapproval of a Deviation proposed by the Developer.

(c) Unless otherwise agreed, the Developer will be solely responsible for payment of any increased costs, for any losses of Gross Revenues, for all Allocable Costs and for any schedule delays or other impacts resulting from the implementation of a Deviation requested by the Developer that has been approved by the Department.

Section 14.04 Net Cost Savings or Positive Net Revenue Impact

(a) Whenever it believes a Net Cost Saving or positive Net Revenue Impact exists or will arise from a Compensation Event, a Deviation, a Department Change or a Department waiver of Non-Conforming Work, the Department at its election may, and the Developer will, deliver to the other party written notice thereof. The notice will set forth (i) the Compensation Event and its date of occurrence in reasonable detail, the proposed or approved Deviation, or the Non-Conforming Work, as the case may be, (ii) a preliminary estimate, if then known, of the amount of the Net Cost Saving or positive Net Revenue Impact and (iii) a brief, preliminary written analysis and calculation thereof. Such notice will be brought within 30 Days after a claim for Developer Damages or, if no claim is brought by the Developer for Developer Damages, within 30 Days after the occurrence of the Compensation Event or, in the case of a Project Enhancement, within 30 Days after the Commencement of Use of the Project Enhancement.

(b) If the Developer gives such a notice to the Department, the parties will follow the terms and procedures set forth in Section 14.01 as if they applied to the determination of the Net Cost Saving or positive Net Revenue Impact.

(c) For notices given by the Department, following a determination of the Net Cost Saving or positive Net Revenue Impact by mutual agreement or the dispute resolution procedures set forth in Article 21, the Department will decide on the percentage share of each that it desires as compensation, up to 100% of the applicable Net Cost Savings and/or positive Net Revenue Impact. For notices given by the Developer, following a determination of the Net Cost Saving or positive Net Revenue Impact by mutual agreement or the dispute resolution procedures set forth in Article 21, the Department and the Developer each will receive 50% of the applicable Net Cost Savings and/or positive Net Revenue Impact. The Developer will

compensate the Department in an amount equal to the applicable percentage in the manner provided for in Section 14.01(c); *provided* that when Developer Damages and Net Cost Saving or positive Net Revenue Impact are payable in the same time period, such amounts will be netted to the extent possible. The parties will select one or any combination of the following methods of compensation:

(i) through monthly payments of the selected percentage of the Net Cost Saving or positive Net Revenue Impact in accordance with a written payment schedule determined by mutual agreement or through the dispute resolution procedures set forth in Article 21;

(ii) by a lump sum payment of the selected percentage, payable as determined by mutual agreement or through the dispute resolution procedures set forth in Article 21;
or

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

ARTICLE 15.

INDEMNIFICATION

Section 15.01 Indemnities of the Developer

In addition to the Developer's indemnity obligations as set forth elsewhere in this Agreement, the Developer will indemnify, defend, and hold harmless a State Indemnitee from and against any actual Losses by such State Indemnitee (except to the extent such Losses are solely caused by the misconduct, negligence or other culpable act, error or omission of a State Indemnitee), due to Third-Party Claims that are based upon:

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

(b) any actual or alleged misconduct, negligence or other culpable act, error or omission of a Developer Party in connection with the Project;

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

(d) any actual or alleged inverse condemnation, trespass, nuisance or similar taking of or harm to real property committed or caused by a Developer Party in connection with the Project arising from any actual or alleged (i) failure by the Developer to comply with, observe or perform any of the covenants, obligations, agreements, terms or conditions in this Agreement; (ii) breach by the Developer of its representations or warranties set forth in this Agreement or (iii) misconduct, negligence or other culpable act, error or omission of a Developer Party;

provided, however, that the Developer will not be required to indemnify, defend or hold harmless a State Indemnitee due to Third-Party Claims that are based upon any actual inverse condemnation arising from the establishment of the Project Right of Way as identified in the NEPA Documents and any other real property or real property rights outside the Project Right of Way acquired pursuant to Section 8.05(b);

(e) any actual or alleged violation of any Federal or state securities or similar law by any Developer Party, or the Developer's failure to comply with any requirement necessary to preserve the tax exempt status of interest paid on the PABs;

(f) any actual or alleged Tax attributable to any Transfer of the Developer's Interest or any part thereof; or

(g) any actual or alleged claim for brokerage commissions, fees or other compensation by any Person who acted on behalf of the Developer, its Affiliates or their respective Representatives in connection with this Agreement or a Project Agreement, any Transfer of the Developer's Interest or any part thereof; *provided*, that at the time of the Developer's failure to pay such amounts which are the subject of the foregoing claims, the Department has not failed to timely make any payment due to the Developer under this Agreement.

Section 15.02 Defense and Indemnification Procedures

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

(b) The Developer will be entitled and obligated to appoint counsel of its choice at the expense of the Developer to represent a State Indemnitee in any action for which indemnification is sought (in which case the Developer will 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 will be satisfactory to the Virginia Office of the Attorney General. Notwithstanding the Developer's appointment of counsel to represent a State Indemnitee in any action, such State Indemnitee will have the right to employ separate counsel, and the Developer will bear the reasonable fees, costs and expenses of such separate counsel, if:

(i) the use of counsel chosen by the Developer to represent the State Indemnatee 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 Indemnatee and the Developer and the State Indemnatee will have reasonably concluded that there may be legal defenses available to it and/or other State Indemnatees which are different from or additional to those available to the Developer;

(iii) the Developer will not have employed counsel to represent the State Indemnatee within a reasonable time after notice of the institution of such action;

(iv) the Developer authorizes the State Indemnatee to employ separate counsel at the Developer's expense; or

(v) the Developer is otherwise not providing an effective defense in connection with the action.

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

ARTICLE 16.

HAZARDOUS SUBSTANCES

Section 16.01 General Obligations

(a) The Developer will be responsible for the management, treatment, handling, storage, monitoring, remediation, removal, transport and/or disposal of any Hazardous Substances the presence of which constitutes a Hazardous Environmental Condition that during the Construction Period are discovered on, in or under the Project Right of Way on which the Work is performed and during the Operating Period are discovered on, in or under the Express Lane, after the earlier to occur of (i) the issuance of an LNTP (but limited to the portion of the Project Right of Way on which the LNTP Work is performed pursuant to such LNTP), (ii) issuance of a Notice to Proceed, or (iii) Project Completion in accordance with this Agreement.

(b) After the earlier to occur of (i) the issuance of an LNTP (but limited to the portion of the Project Right of Way on which the LNTP Work is performed pursuant to such LNTP), (ii) the issuance of the Notice to Proceed, or (iii) Project Completion, if the Developer encounters any Hazardous Environmental Condition that must be managed, treated, handled, stored, monitored, remediated, removed, transported or disposed of (collectively, "Remedial Actions"), then the Developer will promptly notify the Department of the Hazardous Environmental Conditions and any obligation to notify Commonwealth or Federal Agencies under Applicable Law. In the case of Hazardous Environmental Conditions that are attributable to Known Pre-Existing Hazardous Substances, the Developer will thereafter proceed with such Remedial Actions in accordance with the Developer's Environmental Management Plan. In the

case of all other Hazardous Environmental Conditions and to the extent not covered by the Environmental Management Plan, the Developer will develop an Environmental Management Plan setting out the scope of the Remedial Actions that the Developer proposes to take in relation to the relevant Hazardous Environmental Condition, such actions to include, but not be limited to: (i) conducting such further investigations as may be necessary or appropriate to determine the nature and extent of the Hazardous Substances and submitting copies of such data and reports to the Department for its review and approval, (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 Governmental Approvals for environmental management plans, including Department approval, (iv) carrying out the Environmental Management Plan, including, as necessary, disposal of the Hazardous Substances and (v) timely informing the Department of all such actions.

(c) Before any Remedial Actions are taken that would inhibit the Department's ability to ascertain the nature and extent of the Hazardous Environmental Condition, the Developer will afford the Department the opportunity to inspect areas and locations that require Remedial Actions; *provided*, that in the case of a sudden release of any Hazardous Substances, the Developer may take all reasonable actions necessary to stabilize and contain the release without prior notice or inspection, but will promptly notify the Department of the sudden release and its location.

(d) The Developer will obtain all Governmental Approvals relating to Remedial Actions. The Developer will be solely responsible for compliance with such Governmental Approvals and applicable Environmental Laws concerning or relating to Hazardous Substances. In carrying out Remedial Actions that are compensable by the Department pursuant to this Agreement, the Developer will not take any steps or actions which impair the Department's potential Claims for indemnity and contribution, statutory or otherwise.

(e) Unless directed otherwise by the Department, the Developer will seek to recover costs from any available reimbursement program or from any third party responsible for generating or otherwise creating or contributing to conditions that lead to the need for Remedial Action. Without limiting the preceding sentence, the Developer will seek pre-approval and pursue reimbursement from the Virginia Petroleum Storage Tank Fund ("VPSTF") for qualifying expenses incurred during the course of investigation, containment, management, mitigation or remediation activities on petroleum storage tank releases. The parties will cooperate with and notify each other with respect to activities undertaken pursuant to this Section 16.01(e).

(f) Except as provided in Section 16.02, the Developer will bear all costs and expenses of preparing and complying with any Environmental Management Plan, of complying with Law and obtaining and complying with Governmental Approvals pertaining to Hazardous Substances, and otherwise of carrying out Remedial Actions.

Section 16.02 Pre-Existing Hazardous Substances and Third-Party Hazardous Substances

(a) The Department, to the extent permitted by Law, will pay the Developer for the Developer's Allocable Costs for Remedial Actions with respect to any Unknown Pre-Existing Hazardous Substances and Third-Party Hazardous Substances, the presence of either of which constitutes a Hazardous Environmental Condition. To the extent the Developer recovers costs from any available reimbursement program or third parties with respect to Unknown Pre-Existing Hazardous Substances or Third-Party Hazardous Substances, the Developer will pay such costs to the Department, less the Allocable Costs incurred by the Developer in seeking recovery in accordance with Section 16.01(e). The Developer will furnish to the Department documentation supporting the amount recovered from any reimbursement program or third parties and the Allocable Costs incurred by the Developer in pursuing such recovery.

(b) The Department, to the extent permitted by law, will assume responsibility for third-party claims against the Developer or any Developer Party for personal injury, damages or harm to property or business due to a sudden release of Hazardous Substances by a Person other than the Developer that first occurs on the GP Lanes and concurrently or immediately thereafter is found to be present on the Express Lanes, and all related penalties, fines and administrative or civil sanctions arising out of or related to such sudden release of Hazardous Substances, except to the extent such claims are due to the negligence, recklessness, illegal conduct or willful misconduct of the Developer or any Developer Party.

(c) At all times during the Term, the Developer will provide cost estimates with respect to such Remedial Actions which may be paid by the Department, for the Department's review and approval of such costs prior to proceeding with any such Remedial Actions, *provided*, that in the case of a sudden release of any Hazardous Substances, the Developer may take all reasonable actions necessary to stabilize and contain the release without prior submission of such cost estimates.

Section 16.03 Developer Indemnifications Regarding Hazardous Substances

(a) The Developer will indemnify, protect, defend and hold harmless and release each State Indemnitee from and against any and all Third Party Claims, including attorney's fees, expert witness fees and court costs suffered or incurred by such State Indemnitee, to the extent caused by:

(i) Hazardous Substances introduced to or brought onto the Project Right of Way by a Developer Party;

(ii) failure of any Developer Party to comply with any requirement of this Agreement or any other Project Agreement relating to Hazardous Substances (including any failure to perform any Remedial Action required in accordance with Section 16.01) or to otherwise comply with applicable Environmental Laws and Governmental Approvals; or

(iii) the exacerbation, release, spreading, migration, or toxicity of Hazardous Substances due to the negligence, recklessness, or willful misconduct of a Developer Party.

(b) The Developer will defend such Third-Party Claims in accordance with Section 15.02.

(c) The Developer's obligations under this Section 16.03 will not apply to Third-Party Claims to the extent caused by the negligence, recklessness, or willful misconduct of any State Indemnitee.

Section 16.04 Generator and Arranger Status

(a) The Department will be deemed the generator and arranger of Pre-Existing Hazardous Substances and Third-Party Hazardous Substances, the presence of either of which constitutes a Hazardous Environmental Condition. The Department agrees to be identified as the generator and arranger of such Pre-Existing Hazardous Substances and Third-Party Hazardous Substances in waste manifests and any other documentation submitted to transporters, disposal facilities and any Governmental Authority.

(b) The Developer will be deemed the generator and arranger of Hazardous Substances introduced to the Project Right of Way by a Developer Party, the presence of which constitutes a Hazardous Environmental Condition within the Project Right of Way. The Developer agrees to be identified, or cause the applicable Developer Party to be identified, as the generator and arranger of such Hazardous Substances in waste manifests and any other documentation submitted to transporters, disposal facilities and any Governmental Authority.

ARTICLE 17.

INSURANCE; PERFORMANCE SECURITY

Section 17.01 Insurance Coverage Required

(a) Required Insurance for the Construction Period. The Developer will provide and maintain at its own expense, or cause the Design-Build Contractor to provide and maintain, for the Construction Period the insurance coverages specified in Part 1 of the Insurance Requirements attached as Exhibit V.

(b) Required Insurance for Operating Period. The Developer will provide and maintain at its own expense, or, if the Developer is not self-performing the O&M Work, cause the O&M Contractor to provide and maintain, for the Operating Period and for any time period following the Term's expiration if the Developer is required to return and perform any additional work in accordance with the terms hereof, the insurance coverages specified in Part 2 of Exhibit V.

Section 17.02 General Requirements Applicable to Insurance

The insurances which the Developer is required to maintain or cause to be maintained under Section 17.01:

(a) will delete any specific design-build or similar exclusions that could compromise coverages because of the Developer's use of the design-build delivery method;

(b) except for professional liability insurance, worker's compensation insurance and employer's liability insurance, the Department will be named as an additional insured or loss payee, as applicable, on a primary, non-contributory basis;

(c) will not limit the Developer's liabilities and obligations pursuant to this Agreement, including the Developer's indemnification obligations;

(d) will be maintained with insurers that at the time coverage commences are authorized to do business in the Commonwealth and have a current policyholder's management and financial size category rating of not less than "A-: VIII" according to A.M. Best's Financial Strength Rating and Financial Size Category, except as otherwise approved by the Department;

(e) will be on terms specified herein or otherwise approved by the Department (such approval not to be unreasonably withheld);

(f) will contain coverage terms and conditions that reflect the industry standard that the commercial market will provide and support as of the date of such insurance procurement and any subsequent renewals;

(g) without inferring a right of cancellation that would not exist in the absence of these endorsements, will contain a term which requires the insurer to give not less than 30 Days' prior notice to the Department whenever the insurer gives the Developer a notice of cancellation or non-renewal with respect to the policy (except in the case of any non-premium payment, not less than ten Days' prior notice, which the insurer will be obligated to give to the Department simultaneously with providing such notice to the Developer);

(h) other than for workers compensation insurance, employer's liability insurance, automobile liability insurance, property and business interruption insurance, professional liability insurance and contractor pollution liability insurance, will 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);

(i) other than for professional liability insurance, worker's compensation insurance, employer's liability insurance and property and business interruption insurance, will include cross-liability clauses allowing one insured to bring a claim against another insured party (with regard to pollution liability insurance, a cross-liability clause will be allowed as long as it does not impact an additional insured's ability to sue another insured party and collecting under the policy);

(j) will be endorsed so that the insurer agrees to waive, to the extent permitted by Law, all rights of subrogation or action that it may have or acquire against any additional insured and all or any of the Persons comprising the insured;

(k) other than for workers compensation insurance, employer's liability insurance, automobile liability insurance, professional liability insurance and contractor pollution liability insurance, will 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;

(l) other than for workers compensation insurance, employer's liability insurance, commercial general liability insurance, excess liability insurance, professional liability, contractor pollution liability insurance and automobile liability insurance, have each policy endorsed to contain a standard mortgagee clause to the effect that the Department and the other insureds will not be prejudiced by an unintended and/or inadvertent error, omission or mistaken description 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; and

(m) will not include defense costs within the limits of coverage or permit erosion of coverage limits by defense costs, except that defense costs may be included within the limits of coverage of professional and contractor pollution liability policies.

Section 17.03 Proof of Coverage

The Developer will deliver to the Department true and correct copies of policies, material forms, endorsements and premium indications of each insurance policy certified by the Developer's insurance broker (or as appropriate the Design-Build Contractor's, the Lead Engineering Contractor's or the O&M Contractor's broker) to be true and correct copies of such policies, forms, endorsements and premium indications, as a condition to receiving the applicable notices to proceed set forth in this Agreement, and annually thereafter no later than 30 Days after policy renewal or replacement. The Developer will also deliver to the Department duplicate originals or copies of each Project-specific insurance policy and endorsements for the Project coverage of each other insurance policy certified by the Developer's insurance broker (or as appropriate the Design-Build Contractor's, the Lead Engineering Contractor's or the O&M Contractor's broker) to be true and correct copies of the originals no later than 30 Days after receiving the applicable notices to proceed set forth in this Agreement and annually thereafter no later than 30 Days after policy renewal or replacement, and also whenever reasonably requested by the Department.

Section 17.04 Adjustments in Coverage Amounts

(a) The Developer, at its sole cost and expense, will review and recommend upward adjustments as appropriate to all insurance coverages stipulated in Section 17.01(b) as well as adjustments to deductible and self-insured retentions, as appropriate for projects of a similar nature in a similar setting, *provided*, any such recommendations will be subject to the Department's review and approval. No such review or adjustments will be required with respect to insurance coverage required for the Design-Build Work.

(b) In determining increases in limits and adjustments to deductibles or self-insured retentions, the parties will take into account (A) Claims and Loss experience for the Project, *provided*, that premium increases due to adverse Claims experience will not be a basis for justifying increased deductibles or self-insured retentions; (B) the condition of the Project, (C) the safety compliance and performance 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 17.05.

(c) In connection with such review, the Developer will deliver to the Department evidence that such insurance is in effect, together with the Developer's certification that such insurance is in line with amounts that would be insured by such a prudent business.

(d) Any Dispute regarding increases in limits or adjustments to deductibles or self-insured retentions will be resolved according to the dispute resolution procedures under Article 21.

Section 17.05 Unavailability of Insurance

(a) If any insurance required to be maintained pursuant to this Article 17 (including the limits, deductibles or any other terms under policies for such insurance) ceases to be available on a commercially reasonable basis, the Developer will provide written notice to the Department accompanied by a letter from the Developer's insurance advisor stating that such insurance is unavailable anywhere in the global market on a commercially reasonable basis. Such notice will be given not later than 30 Days prior to the scheduled date for renewal of any such policy. Except to the extent attributable to the Developer, or any Developer Party upon receipt of such notice by the Department, the Developer and the Department will immediately enter into good faith negotiations regarding the matters set forth in Section 17.05(c) and (d) below.

(b) The Developer will not be excused from satisfying the insurance requirements of this Article 17 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 Developer will 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 a reasonable and prudent risk manager for a Person seeking to insure comparable risks would conclude that such increased premiums are not 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.

(c) In the event that the Developer and the Department cannot reach a resolution acceptable to both parties within ten Days, the Developer and the Department will make arrangements for the formation of an insurance panel consisting of the Developer'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 Developer and reasonably acceptable to the Department. Such independent expert will conduct a

separate review of the relevant insurance requirements of this Article 17 and the market for such insurance at the time, giving due consideration to the representations of each insurance advisor, and upon conclusion of such review will issue a written report stating whether such insurance is available or unavailable on a commercially reasonable basis.

(d) If the insurance panel concludes that such insurance is not available on a commercially reasonable basis, the insurance panel will provide a written recommendation (which will include the amount and type of insurance which is available upon a commercially reasonable basis) not less than 15 Days before the date for renewal of such insurance. The Developer will, prior to the expiration of the insurance then in effect, obtain the insurance required by this Article 17 as adjusted in accordance with such recommendation.

(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 Developer against its undertakings pursuant to this Agreement, to the Department, or any third party. No such limits of liability will preclude the Department from taking any actions as are available to it under the Project Agreements or Law.

Section 17.06 Failure to Obtain Insurance Coverage

(a) If in any instance the Developer has not performed its obligations respecting insurance coverage set forth in this Agreement (as may be adjusted in accordance with Section 17.05) or is unable to enforce and collect any such insurance for failure to assert Claims in accordance with the terms of the insurance policies, then for purposes of determining the Developer's liability and the limits thereon or determining reductions in compensation due from the Department to the Developer on account of available insurance, the Developer will 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 Developer performed such obligations and not committed such failure.

(b) Nothing in this Section 17.06 or elsewhere in this Article 17 will be construed to treat the Developer as electing to self-insure where the Developer 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 17.07 Restoration; Insurance Proceeds

(a) If all or any part of any of the Project Assets will be destroyed or damaged during the Term in whole or in part by fire or other casualty of any kind or nature (including any casualty for which insurance was not obtained or obtainable), ordinary or extraordinary, foreseen or unforeseen, the Developer will:

(i) give the Department and the appropriate insurer notice thereof promptly after the Developer receives actual notice of such casualty;

(ii) except (A) in the case of destruction or damage caused by a Compensation Event (in which case the provisions of Section 14.01 will apply) or (B) as otherwise provided in Section 20.03, at its sole cost and expense (whether or not insurance proceeds, if any, are equal to the estimated cost of repairs, alterations, restorations,

replacement and rebuilding (the “Casualty Cost”), proceed diligently to restore the Project to its pre-casualty condition;

(iii) account for all monies received as a result of any insurance claim and immediately provide to the Department any such funds that are rightfully the property of the Department due to there being an insurable interest. In the event the insurance proceeds exceed \$20,000,000, deposit all insurance proceeds received by the Developer in connection with any restoration with a Depository (such insurance proceeds, together with any interest earned thereon, the “Restoration Funds”) and provide detailed accounting of how such funds are utilized.

(b) Subject to Section 17.07(a)(ii), if the Developer (i) fails or neglects to commence the diligent restoration of the Project or the portion thereof so damaged or destroyed, (ii) having so commenced such restoration, fails to diligently complete the same in accordance with the terms of this Agreement or (iii) prior to the completion of any such restoration, this Agreement expires or terminates in accordance with the terms of this Agreement, the Department may, but will not be required to, complete such restoration at the Developer’s expense and will be entitled to be paid out of the Restoration Funds for the relevant restoration costs incurred by the Department. Subject to Section 17.07(a)(ii), in any case where this Agreement will expire or be terminated prior to the completion of the restoration, the Developer will (A) account to the Department for all amounts spent in connection with any restoration which was undertaken, (B) immediately pay over or cause the Depository to pay over to the Department the remainder, if any, of the Restoration Funds received by the Developer prior to such termination or cancellation and (C) pay over or cause the Depository to pay over to the Department, within five Business Days after receipt thereof, any Restoration Funds received by the Developer or the Depository subsequent to such termination or cancellation. The Developer’s obligations under this Section 17.07(b) will survive the expiration or termination of this Agreement.

(c) Subject to the satisfaction by the Developer of all of the terms and conditions of this Section 17.07, the Developer will cause the Depository, with prior written notice to the Department, to pay to the Developer from time to time, any Restoration Funds, but not more than the amount actually collected by the Depository upon the loss, together with any interest earned thereon, to be utilized by the Developer solely for the restoration, such payments to be made as follows:

(i) prior to commencing any restoration, with regard to insurance proceeds in excess of \$20,000,000, the Developer will furnish to the Department for its approval the estimated cost, estimated schedule and detailed plan for the completion of the restoration, each prepared by an architect or engineer;

(ii) the Restoration Funds will be paid to the Developer in installments as the restoration progresses, subject to Section 17.07(c)(iii), based upon requisitions to be submitted by the Developer to the Depository, with a copy to the Department, showing the cost of labor and materials purchased for incorporation in the restoration, or incorporated therein since the previous requisition, or the amounts payable or paid to the Contractor, as the case may be, and due and payable or paid by the Developer; *provided*, that if any Lien caused by a Developer Party is filed against the Project or any part

thereof in connection with the restoration (other than a Permitted Encumbrances (but not including clause (c) of the definition thereof)), the Developer will not be entitled to receive any further installment until such Lien is satisfied or discharged (by bonding or otherwise); *provided further*, that notwithstanding the foregoing, but subject to the provisions of Section 17.07(c)(iii), the existence of any such Lien will not preclude the Developer from receiving any installment of Restoration Funds so long as such Lien will be discharged with funds from such installment and at the time the Developer receives such installment the Developer delivers to the Department and the Depository a release of such Lien executed by the holder of such Lien and in recordable form;

(iii) the amount of each installment to be paid to the Developer will be the aggregate amount of Casualty Costs theretofore incurred by the Developer minus the aggregate amount of Restoration Funds theretofore paid to the Developer in connection therewith; *provided*, that all disbursements to the Developer will be made based upon an architect's or engineer's certificate for payment in accordance with industry standards, and disbursements may be made for advance deposits for materials and Contractors to the extent that such disbursements are customary in the industry and that the unapplied portion of the funds held by the Depository, together with other funds available to the Developer for such Restoration, as certified by the Developer, are sufficient to complete the restoration; and

(iv) except as provided in Section 17.07(b), upon completion of and payment for the restoration by the Developer, subject to the rights of any Collateral Agent, the Depository will pay the balance of the Restoration Funds, if any, to the Developer; *provided*, that if the insurance proceeds are insufficient to pay for the restoration (or if there will be no insurance proceeds), the Developer will nevertheless be required to make the restoration and provide the deficiency in funds necessary to complete the restoration as provided in Section 17.07(a)(iii).

(d) If the Developer obtains Performance Bonds or performance Letters of Credit related to a restoration (which the Developer may or may not obtain in its discretion), the Developer will name the Department and the Developer and the Collateral Agent, as their interests may appear, as additional obligees or transferee beneficiaries (as applicable), and will deliver copies of any such bonds or letters of credit to the Department promptly upon obtaining them. The Department will only have the right to exercise remedies under any such bonds or letters of credit so long as the Developer or a Lender, or the Collateral Agent, is not pursuing remedies thereunder.

(e) The requirements of this Section 17.07 are for the benefit only of the Department, and no Contractor or other Person will have or acquire any claim against the Department as a result of any failure of the Department actually to undertake or complete any restoration as provided in this Section 17.07 or to obtain the evidence, certifications and other documentation provided for herein.

(f) Restoration Funds deposited with a Depository will be invested and reinvested in direct obligations of and obligations fully guaranteed by, the United States of America or any agency or instrumentality of the United States of America, the obligations of which are backed

by the full faith and credit of the United States of America, or in other “permitted investments” under the Project Financing Agreements, and all interest earned on such investments will be added to the Restoration Funds.

(g) The Department acknowledges and agrees that any Restoration Funds not applied to a restoration as provided in this Section 17.07 will be subject to the Lien or Liens of any Collateral Agent.

Section 17.08 Performance Security

(a) Equity Funding Guaranties or Equity Letter of Credit. The Developer will cause each Equity Member to provide an equity funding guaranty from each of the Equity Sponsors (each an “Equity Funding Guaranty”) or a letter of credit from each of the Equity Sponsors (each an “Equity Letter of Credit”) which guarantees the funding of capital contributions of the Equity Members in accordance with the terms of the Equity Funding Agreements. Subject to the provisions of the Direct Agreement, the Project Financing Agreements will include a provision granting the Department the right to direct the Collateral Agent to draw upon the applicable Equity Funding Guaranty or Equity Letter of Credit with respect to any amounts that the relevant Equity Member has failed to fund when due and payable (whether at the scheduled date or upon acceleration upon an event of default under the Project Financing Agreements), and that the proceeds of such draw will be deposited in a project account as designated by the Collateral Agent in accordance with the Project Financing Agreements to be applied by the Collateral Agent in accordance with the terms thereof.

(b) Design-Build Performance Security.

(i) The Developer will furnish or require the Design-Build Contractor to furnish a (1) Letter of Credit in the amount of \$20 million, (2) a performance bond (the “Performance Bond”) in the amount of \$730 million and (3) a payment bond (the “Payment Bond”) in the amount of \$750 million, each in substantially the forms set forth in Exhibit F-1(I),(II) and (III) (collectively, the “Design-Build Performance Security”). Each of the Letter of Credit, Performance Bond and Payment Bond may be provided in multiple forms that, in the aggregate, equal the required amount for each of such Letter of Credit, Performance Bond and Payment Bond, as applicable. The Design-Build Performance Security will provide that it may be transferred by the Developer to the Department or the Collateral Agent, as beneficiary, with rights to draw upon or exercise other remedies thereunder if the Department or the Collateral Agent, as applicable, succeeds to the position of the Developer under the Design-Build Contract.

(ii) In lieu of the Letter of Credit and Performance Bond requirements set forth above, the Developer may deliver, or may allow the Design-Build Contractor to deliver, a Performance Bond in the form set forth in Exhibit F-1(IV) that provides for expedited or accelerated dispute resolution in the amount of \$750 million.

(iii) The Developer may use a graduated approach to meeting the terms of this Section 17.08(b) by delivering a Performance Bond and a Payment Bond each in the initial amount of \$29,021,233 on the Agreement Date and each of which providing that

on or before the Department's Construction Notice to Proceed (or the first Segmental Construction Notice to Proceed if the Department approves any such SCNTP) that the amounts of each of the Performance Bond and the Payment Bond will increase to the amounts set forth in (i) and (ii) above, as applicable. Alternatively, the Developer may use the graduated approach by delivering (A) a Performance Bond and a Payment Bond each in the amount of \$29,021,233 on the Agreement Date and (B), on or before the Department's Construction Notice to Proceed (or the first Segmental Construction Notice to Proceed, as applicable), an additional Performance Bond and an additional Payment Bond that, when aggregated with the amounts of each of the Performance Bond and Payment Bond delivered on the Agreement Date, equal the amounts set forth in (i) and (ii) above, as applicable.

(c) Design-Build Work Guarantee. Concurrently with Financial Close or, if earlier, the commencement of Work under the Design-Build Contract, the Developer will cause to be delivered to the Department executed copies of guaranty agreements in substantially the forms set forth in Exhibit F-2 (the "Design-Build Work Guarantee") from each of (i) Allan Myers, Inc., (ii) Allan Myers VA, Inc., (iii) Ferrovia Agroman S.A., (iv) Ferrovia Agroman International Ltd. and (v) Ferrovia Agroman US Corp., pursuant to which each entity shall jointly and severally guarantee the full performance of the Design-Build Contractor's obligations under the Design-Build Contract.

(d) Additional Requirements

(i) Unless otherwise specified in this Agreement, a draw on any Performance Security will not be conditioned on prior resort to any other security of, or provided for the benefit of, any Developer Party. If the Department receives proceeds of a draw on any Performance Security in excess of the relevant obligation, the Department will promptly refund the excess to the Developer (or to its designee) after all relevant obligations are satisfied in full.

(ii) The Developer will obtain and furnish all Performance Security and replacements thereof at its sole cost and expense, and will pay all charges imposed in connection with the Department's presentment of sight drafts and drawing against any Performance Security or replacements thereof (to the extent made in accordance with the terms hereof).

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

(iv) The obligations of the Developer during the Term to reimburse the issuer for draws under any Performance Security may be secured by a Financing Assignment if it encumbers the entire Developer's Interest.

(e) Applicability to Project Enhancements and Major Maintenance. The Developer will require its contractors to furnish the Major Maintenance Performance Security with respect to Project Enhancements and Major Maintenance during the Term if and to the extent required by the Project Financing Agreements or, if there are no Project Financing Agreements, as may be reasonably required by the Department. The Major Maintenance Performance Security will name the Department a permitted assignee or transferee beneficiary (as applicable), with rights to draw upon or exercise other remedies thereunder if the Department succeeds to the position of the Developer under the O&M Contract.

ARTICLE 18.

OWNERSHIP AND ACCESS TO RECORDS

Section 18.01 Maintenance of Records

The Developer will maintain or cause to be maintained proper books, records and accounts in which complete and correct entries will be made of its transactions hereunder in accordance with GAAP or any other generally accepted accounting standards which are acceptable to the Department. Such books and records will be maintained at a location situated within the contiguous United States of America as designated by the Developer by delivery of notice of such location to the Department. Further, the Developer will maintain or cause to be maintained such books, records and accounts in accordance with applicable Law, including Laws applicable to the Project as a result of the costs of the Project being financed in part with Commonwealth funds, federal-aid funds and Commonwealth bond proceeds.

Section 18.02 Public Records

(a) The Developer acknowledges that 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 will comply with Law. The Department recognizes that certain Work Product the Department owns, and certain documents of which the Department obtains a copy that relate to the Project, including Escrow Documents obtained under Section 18.05, may contain information exempt from disclosure under Section 2.2-3705.6(11) of the Code of Virginia, may constitute trade secrets as defined in the Uniform Trade Secrets Act, Sections 59.1-336 through 59.1-343 of the Code of Virginia, and may include confidential information which is otherwise subject to protection from misappropriation or disclosure, and the Department will keep such information confidential unless disclosure is required by Law. Should such records become the subject of a request for public disclosure, the Department will promptly notify the Developer of such request and the date by which the Department anticipates responding and will consider the objections received from the Developer in advance of such date.

(b) If the Developer believes that any Work Product or any document subject to transmittal to or review by the Department under the terms of this Agreement or a Project

Agreement contains proprietary or confidential information or trade secrets that are exempt or protected from disclosure pursuant to Law, the Developer will use its reasonable efforts to identify such information prior to such transmittal or review and the Developer and the Department will confer on appropriate means of ensuring compliance with such Law prior to transmittal or review. Upon the written request of either party, the Developer and the Department will mutually develop a protocol for the transmittal, review and disclosure of Work Product or other documents produced or obtained by the Developer so as to avoid violations of any Law and to protect, consistent with the requirements of Law, appropriate information from disclosure.

Section 18.03 Ownership of Work Product

(a) All Work Product (including records thereof in software form), including reports, studies, data, information, logs, records and similar terms, which is prepared or procured by or on behalf of the Department or its other contractors, whether before or after the Agreement Date, will be and remain the exclusive property of the Department; *provided*, that the Department will make available to the Developer, 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 Developer 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 Developer will remain exclusively the property of the Developer, 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 Developer for a Department Default, (i) the Developer will promptly turn over to the Department a copy of all Work Product the Developer owns and (ii) subject to Section 18.04, all such Work Product will be considered the sole and exclusive property of the Department (other than Proprietary Work Product, with respect to which the Department will have a nonexclusive, nontransferable, irrevocable, fully paid up license in connection with the Project), without compensation due the Developer or any other party. The Department will enter into a confidentiality agreement reasonably requested by the Developer with respect to any Proprietary Work Product, subject to Section 18.02. The Developer will continue to have a full and complete right to use any and all duplicates or other originals of such Proprietary Work Product in any manner it chooses.

Section 18.04 Ownership of Proprietary Intellectual Property

(a) All Proprietary Intellectual Property of the Developer will remain exclusively the property of the Developer, notwithstanding any delivery of copies thereof to the Department. Upon the expiration or earlier termination of, or any assignment by the Developer of its rights under, this Agreement for any reason whatsoever, the Department will have a nonexclusive, nontransferable, irrevocable, fully paid up license to use the Proprietary Intellectual Property of the Developer solely in connection with the Project. The Department will 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 on other State Highways in accordance with Section 18.04(a)). Subject to Section 18.02, the Department will not disclose any Proprietary Intellectual Property of the

Developer (other than to its developers, Contractors, employees, attorneys and agents in connection with the development and operation of the Project who agree to be bound by any confidentiality obligations of the Department relating thereto), and the Department will enter into a confidentiality agreement reasonably requested by the Developer with respect to any such Proprietary Intellectual Property. Notwithstanding anything to the contrary herein, traffic data relating to the Project will not be considered Proprietary Intellectual Property. The Developer will make traffic data from the Project available to the Department as specified in the Technical Requirements. The Department reserves the right to use such traffic data for any purpose.

(b) The Department will have the right to purchase from the Developer a nonexclusive, nontransferable, irrevocable, fully paid up license to use the Proprietary Intellectual Property of the Developer on any other tolled State Highway owned and operated by the Department or other Commonwealth agency on commercially reasonable terms. The Developer will continue to have the full and complete right to use, sell or license to other Persons any and all duplicates or other originals of its Proprietary Intellectual Property in any manner it chooses.

(c) With respect to any Proprietary Intellectual Property owned by a Person other than the Developer or the Department, the Developer will obtain from such owner, concurrently with execution of any Contract or purchase order with such owner, both for the Developer and the Department, nonexclusive, nontransferable, irrevocable, fully paid up (other than with respect to ongoing maintenance and support fees) 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 18.04(a); *provided*, that the foregoing requirement will not apply to standard, pre-specified manufacturer licenses of mass-marketed products (including software products) or equipment where the license cannot be extended to the Department using commercially reasonable efforts or to other licenses of products or equipment where the products or equipment are not reasonably necessary for the operation or maintenance of the Project. The Developer will 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 tolled State Highway owned and operated by the Department or other Commonwealth agency on commercially reasonable terms. The limitations on sale and disclosure by the Department set forth in Section 18.04(a) will also apply to the Department's licenses in such Proprietary Intellectual Property.

(d) The Developer Marks may appear on some of the Project Assets, including supplies, materials, stationery and similar consumable items at the Project until the last Day of the Term. The parties agree that the Developer will remain the owner or licensee, as applicable, of the Developer Marks at the end of the Term, and the Developer may remove, at its expense, the Developer Marks prior to the end of the Term. If the Developer fails to do so, the Department will be entitled to remove the Developer Marks and, in such case, the Department will be entitled to payment of its Allocable Costs in so doing from the Developer. The Department acknowledges and agrees that it will have no right, title, interest or license in the Developer Marks.

(e) On or before the Agreement Date, the Department will grant to the Developer a nonexclusive, nontransferable, irrevocable, fully paid up license to use any Proprietary Intellectual Property of the Department that has been developed for the Project, solely in connection with the development, construction, operation, maintenance and other incidental activities of the Project. The Developer will not at any time sell such Proprietary Intellectual Property or use or allow any party to use such Proprietary Intellectual Property for any purpose whatsoever other than in connection with the Project. On or before the Agreement Date, the Department will also assign in favor of the Developer the Department's rights with respect to any license by the Department's software suppliers (to the extent permitted by, and subject to the terms of, such license) for the use of any Proprietary Intellectual Property for the Project, together with an assignment of the Department's rights under any escrow for the Source Code and Source Code Documentation relating to such Proprietary Intellectual Property, which assignments will be reasonably satisfactory to the Developer. The Developer will not disclose any such Proprietary Intellectual Property (other than to its Contractors, employees, attorneys, agents and Affiliates in connection with the Project who agree to be bound by any confidentiality obligations of the Developer relating thereto), and the Developer will enter into a confidentiality agreement reasonably requested by the Department with respect to any such Proprietary Intellectual Property. The Department will 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.

Section 18.05 Escrow Documents

(a) General. Prior to the Agreement Date, the Developer, the Department and the Escrow Agent will have executed and delivered the Escrow Agreement to implement the provisions of this Section 18.05, and the Developer will have submitted to the Department for its review and approval the following materials (collectively, the "Escrow Documents"): one copy of all documentary information generated with respect to (i) the expected costs of the Work (which uses the estimating methodology actually used by the Design-Build Contractor) available to the Developer under the Design-Build Contract (the "Construction Escrow Documents") and (ii) the components of, and formulae for, the Initial Base Case Financial Model and the Base Case Financial Model, including, without limitation, forecast revenue and expected non-financial costs of the Project during the Term included in the Initial Base Case Financial Model and the Base Case Financial Model (the "Financing Escrow Documents").

(b) Format and Contents.

(i) The Developer may submit Escrow Documents in their usual cost estimating format; *provided*, that all information is clearly presented and ascertainable and submitted in accordance with the requirements of this Section 18.05. It is not the intention of this Section 18.05 to cause the Developer extra work, but to ensure that the Escrow Documents will be adequate to enable complete understanding and proper interpretation for their intended use.

(ii) The Escrow Documents will be submitted in English and clearly itemize the estimated costs of performing each item of the Project, including financing,

administrative and related costs. Cost items will be separated into sub-items as required to present a detailed cost estimate and allow a detailed cost review.

(iii) The Construction Escrow Documents will include, to the extent obtained, procured or in the possession of the Developer: 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, all other information used by the Developer to arrive at the estimated prices for the Project, and all information and formulae used by the Developer in developing the Initial Base Case Financial Model. Estimated costs will 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 Developer's allocation of indirect costs, contingencies, and mark-up will be identified.

(iv) The Construction Escrow Documents will identify all costs. If detailed costs are not available to the Developer, 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.

(c) Submittal.

(i) The Developer will submit the Escrow Documents in sealed containers, the Construction Escrow Documents in one and the Financing Escrow Documents in another, to the Department, which containers have been clearly marked on the outside with the Developer's name, reference to the Project, and the words "Transform 66 P3 Project Construction Escrow Documents" or "Transform 66 P3 Project Financing Escrow Documents" as applicable.

(ii) On or before the Agreement Date, representatives of the Department, assisted by members of the Developer's staff who are knowledgeable in how the Escrow Documents were prepared, will have examined, organized and inventoried the Escrow Documents. This examination was to ensure that the Escrow Documents 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.

(iii) Timely submission of complete Escrow Documents as of the Agreement Date is an essential element of the Developer's responsibility and a prerequisite to the execution and delivery of this Agreement by the Department.

(iv) To the extent the Developer plans to contract out any part of the Work as of the Agreement Date, the Developer will cause each Contractor whose total Contract price exceeds five percent of the Project costs as set forth in the Design-Build Contract to provide separate similar documentation to be included with those of the Developer. Such documents will be opened and examined in the same manner and at the same time as the examination described above for the Developer to the extent that they are relevant to the issue at hand.

(d) Updating of the Escrow Documents. Upon each update of the Initial Base Case Financial Model and Base Case Financial Model Update in accordance with this Agreement (other than any such update that does not change the Financial Formulas or forecast assumptions), such update, along with any attending software update, will be submitted by the Developer to the Escrow Agent promptly and in any event within seven Days after an update has not been disputed or any such dispute has been resolved for inclusion as part of the Financing Escrow Documents. For the avoidance of doubt, previous undisputed versions of the Escrow Documents will remain in escrow with the Escrow Agent.

(e) Storage. The Escrow Documents will be stored at the following address:

SunTrust Bank
Attn: Escrow Services
919 East Main Street, 7th Floor
Richmond, Virginia 23219
Attention: Charles Henderson, Trust Officer
Phone: 804-782-7087
Facsimile: 804-225-7141

The Developer will bear the cost for storing the Escrow Documents

(f) Examination and Copying. The Escrow Documents may be examined and, as permitted by the Escrow Agreement, copied by the Department and the Developer at any time deemed necessary by the Department or the Developer and for any reason, and the Department may delegate review of the Escrow Documents to members of its staff or to Consultants, each of which shall be subject to all applicable confidentiality undertakings. No other person will have access to the Escrow Documents. The Department will provide advance notice (given not less than 24 hours) of any such examination to the Design-Build Contractor.

(g) Ownership. The Escrow Documents are, and will always remain, the property of the Developer, subject to joint review by the Department and the Developer, as provided herein.

(h) Final Disposition and Return of Escrow Documents. The Construction Escrow Documents will be returned to the Developer upon the earlier to occur of (i) completion of the Design-Build Work, including tender of final payment and resolution of all claims or disputes arising under the Design-Build Contract or (ii) termination of this Agreement and resolution of all claims or disputes arising pursuant to this Agreement. The remaining Escrow Documents will be returned upon termination of this Agreement and resolution of all claims or disputes arising pursuant to this Agreement.

Section 18.06 Source Code Escrow

(a) The Department and the Developer acknowledge that the Developer and/or the Developer's Software suppliers may not wish to disclose directly to the Department at the time of installation the Source Code and Source Code Documentation, as public disclosure could deprive the Developer and/or the Developer's software suppliers of commercial value. Notwithstanding the foregoing, the Department must be ensured access to, and will be granted a nonexclusive, transferrable, irrevocable, fully paid right and license to use, reproduce, modify adapt and disclose such Source Code and Source Code Documentation (a) from and after the expiration or earlier termination of the Term for any reason whatsoever, (b) during any time that the Department is exercising any step-in rights, and (c) during any time that a receiver is appointed for the Developer, or during any time that there is pending a voluntary or involuntary proceeding in bankruptcy in which the Developer is the debtor.

(b) By no later than the Project Completion Date, the Department and the Developer will establish one or more escrows (the "Source Code Escrows") with the Escrow Agent on terms and conditions reasonably acceptable to the Department and to the Developer into which such Source Code and Source Code Documentation will be escrowed, including all relevant commentary, explanations and other documentation, as well as instructions to compile such Source Code and Source Code Documentation and all modifications, additions or substitutions made to such Source Code and Source Code Documentation. As necessary, the Developer will update the Source Code and Source Code Documentation so that it is not, and does not become, obsolete.

(c) The escrow provided for herein will survive any termination of this Agreement regardless of the reason.

(d) The Developer will pay the reasonable costs and expenses of the Escrow Agent related to the Source Code Escrows.

Section 18.07 Inspection and Audit Rights

(a) Subject to Section 18.07(c), the Developer will make available to the Department and the FHWA (including their employees, contractors, consultants, agents or designees), and allow each of them access to, such books, records and documents as they may reasonably request in connection with the Project as are in the possession and control of the Developer or any Developer Party for any purpose related to the Project, this Agreement, including but not limited to monitoring compliance with the terms and conditions of this Agreement. The Department will provide the Developer 48 hours prior written notice prior to exercising its rights to access and audit the Developer's books, records and documents pursuant to this Section 18.07(a) and Section 18.07(b); *provided*, however, (i) that the Department may exercise such rights unannounced and without prior notice during a Developer Default or where there is good faith suspicion of fraud and (ii), such advance notice provisions will not apply to the Escrow Documents, such access being governed by the terms of Section 18.05.

(b) Subject to Section 18.07(c), the Department and the Commonwealth, at the Department's own expense, will have the right to carry out an audit of information relating to (i)

the design, construction, operation, maintenance and repair of the Project or (ii) other information required to be maintained or delivered by the Developer pursuant to 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 Developer pursuant to this Agreement. The Department or its employees, agents, auditors, attorneys and consultants, at the Department's own expense may examine, copy, take extracts from and audit all the books and records of the Developer related to the Project, including all subcontracts entered into under Section 24.02. In addition, the Department or its agents, auditors, attorneys and consultants, at the Department's own expense, may conduct a re-audit and observe the business operations of the Developer to confirm the accuracy of books and records. In addition, at FHWA's request, the Developer will make all its records relating to the Project available to the FHWA for inspection and audit.

(c) The Developer reserves the right to assert exemptions from Persons other than the Department from disclosure for information that would be exempt under Law from discovery or introduction into evidence in legal actions. Unless otherwise required by Law or this Agreement, the Developer may make available copies of books, records and documents containing trade secrets or confidential proprietary information with such information redacted.

(d) In addition, the Developer, at its expense, will cause a reputable independent auditor to annually audit its books and records relating to the Project, according to GAAP or any other generally accepted accounting standards, which are acceptable to the Department. The Developer will 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 of the end of each of the Developer's fiscal years.

(e) Nothing contained in this Agreement will in any way limit the constitutional and statutory powers, duties and rights of elected Commonwealth officials, including the independent rights of the Commonwealth Auditor of Public Accounts, in carrying out his or her legal authority.

(f) The Developer will cooperate with the Department, the FHWA and the other persons mentioned in this Section 18.07 in the exercise of their rights hereunder. At the request of the Department, the Developer will 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 will be in the possession and control of the Developer, any Developer Party, or any of their Representatives. Subject to Section 18.02, the Department will keep confidential any information obtained from the Developer, any Developer Party or their Representatives that (i) constitutes trade secrets or commercial or financial information (A) where the trade secrets or commercial or financial information are proprietary, privileged or confidential or (B) where disclosure of the trade secrets or commercial or financial information may cause competitive harm and (ii) is designated as such by the Developer, a Developer Party or their Representatives in writing to the Department, and the Department has determined that such information qualifies for exemption from disclosure under Law.

ARTICLE 19.

DEFAULTS AND REMEDIES

Section 19.01 Developer Defaults

The occurrence of any one or more of the following events during the Term will constitute a “Developer Default” pursuant to this Agreement:

(a) the Developer (i) fails to begin the applicable Work within 30 Days following the later of issuance of the LNTP or the Construction NTP, (ii) fails to satisfy all conditions to issuance of notice to proceed required to be satisfied by the Developer under Section 8.03, or (iii) fails to begin O&M Work with diligence and continuity as of the Service Commencement Date;

(b) the Developer abandons all or a material part of the Project, which abandonment will have occurred if (a) the Developer clearly demonstrates through statements or acts an intent not to continue to construct or operate all or a material part of the Project and (b) no significant Work (taking into account the Project Schedule, if applicable, and any Delay Event) on the Project or a material part thereof is performed for a continuous period of more than 45 Days (other than because of a Delay Event, Compensation Event or a written order by the Department suspending the Work that materially interferes with ability to continue); and, in either instance, such abandonment is not cured within 30 Days after the Department gives notice of such abandonment to the Developer;

(c) any representation or warranty made by the Developer herein or in any other Project Agreement to which the Developer and the Department are parties is false or materially 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 representation or warranty is not cured within 90 Days following the date the Department delivers to the Developer written notice thereof;

(d) the Developer fails to comply with, perform or observe any other material obligation, covenant, agreement, term or condition in this Agreement or any Project Agreement to which the Department and the Developer are parties (provided, that a debarment pursuant to the provisions set forth in Section 24.04(b) (relating to SWaM participation) or Section 24.04(c) (relating to veteran and local hires) will not constitute a Developer Default), which failure materially and adversely affects the Department’s rights or obligations under this Agreement or any other VDOT Project Agreement, and such failure continues without cure for a period of 90 Days following the date the Department delivers to the Developer 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 up to a maximum cure period of 180 Days; *provided*, that this Section 19.01(d) will not apply to events covered by other provisions of this Section 19.01;

(e) the Developer fails to pay to the Department when due any undisputed amount payable to the Department pursuant to this Agreement or any other VDOT Project Agreement or to deposit funds to any reserve 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 90 Days following the date the Department delivers to the Developer written notice thereof;

(f) the Developer (1) during the Construction Period, incurs a total of 350 Non-Compliance Points during any 365 Day cycle, plus 30 Days for the dispute resolution procedures set forth in Article 21 or maintains 150 or more uncured Non-Compliance Points at any time as described in Section 11.04(a); or (2) during the operations period, incurs a total of 245 Non-Compliance Points during any 365 Day cycle, plus 30 Days for the dispute resolution procedures set forth in Article 21, or maintains 75 or more uncured Non-Compliance Points at any time as described in Section 11.04(a);

(g) other than a Permitted Closure, the Developer closes all or part of the Express Lanes to traffic, at any time following Project Completion, other than in accordance with the terms of this Agreement, and such closure continues without cure for a period of ten Days following the date the Department delivers to the Developer written notice thereof;

(h) the Developer fails to achieve Financial Close by the Financial Close Deadline under circumstances specified in Section 20.04(a)(i);

(i) the Developer fails to achieve Project Completion by the Long Stop Date, as such date may be extended pursuant to this Agreement;

(j) the Developer fails to maintain, or to cause to be maintained, in effect the insurance, guarantees, letters of credit or other performance security as and when required pursuant to 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 ten Business Days following the date the Department delivers to the Developer written notice thereof;

(k) this Agreement or all or any portion of the Developer's Interest is Transferred, or there occurs a Change in Control, in contravention of Section 25.01;

(l) after exhaustion of all rights of appeal, (i) 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 Developer, any affiliate of the Developer (as "affiliate" is defined in 29 CFR 98.905 or successor regulation of similar import) or the Design-Build Contractor whose work is not completed, from bidding, proposing or contracting with any Federal or Commonwealth department or agency or (ii) the Developer or the Design-Build Contractor who have ongoing Work, or any of their respective officers, directors, or Administering Employees have been convicted of, or plead guilty or nolo contendere to, a violation of Law for fraud, conspiracy, collusion, bribery, perjury, or material misrepresentation, as a result in whole or in part of activities relating to any project in the Commonwealth, and such failure continues without cure for a period of 90 Days following the date the Department delivers to the Developer written notice thereof (giving particulars of the failure in reasonable detail). If the offending Person is an officer, director or Administering Employee, cure will be regarded as complete when the Developer proves that such Person has been removed from any position or ability to manage, direct or control the decisions of the Developer or the Design-Build

Contractor (as applicable) or to perform Work; and if the Person debarred or suspended or subject to an agreement for voluntary exclusion is an affiliate of the Developer (as “affiliate” is defined in 29 CFR 98.905 or successor regulation of similar import) or the Design-Build Contractor, cure will be regarded as complete when the Developer replaces such Person in accordance with this Agreement;

(m) the Developer or any Developer Financial Party (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 files any other petition or answer seeking, consenting to or acquiescing in any reorganization, liquidation, dissolution or similar relief under the present or any future U.S. bankruptcy code or any similar Law, or (iv) seeks or consents to or acquiesces in the appointment of any trustee, receiver, custodian, assignee, sequestrator, liquidator or other similar official of such Developer or Developer Financial Party, or of all or any substantial part of its properties or of the Project or any interest therein (so long as such person continues to have obligations hereunder);

(n) within 90 Days after the commencement of any proceeding against the Developer or any Developer Financial Party seeking any reorganization, liquidation, dissolution or similar relief under the present or any future U.S. bankruptcy code or any similar Law, such proceeding has not been dismissed, or, within 90 Days after the appointment, without the consent or acquiescence of such Developer or Developer Financial Party, of any trustee, receiver, custodian, assignee, sequestrator, liquidator or other similar official of such Developer or Developer Financial Party 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 Developer’s Interest) as a result of any Lien (other than a Lien relating to permitted Developer Debt) created, incurred, assumed or suffered to exist by the Developer 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; and

(p) after the sixth full month following the Service Commencement Date, the Developer (i) fails to deliver an OSPS Improvement Plan meeting the requirements set forth in Section 5.07(b) at the time specified in Section 5.07(b) and such failure continues without cure for a period of 30 Days following the date on which the Department delivers to the Developer notice of such failure, or (ii) fails to use commercially reasonable efforts to comply with any of the provisions set forth in an OSPS Improvement Plan submitted pursuant to Section 5.07(b), and such failure to use commercially reasonable efforts continues without cure for a period of 30 Days following the date on which the Department delivers notice of such failure to the Developer.

Section 19.02 Department Remedies upon Developer Default

Upon the occurrence and during the continuance of a Developer Default, the Department may, subject to the provisions of the Direct Agreement, do any or all of the following as the Department, in its sole discretion, will determine:

(a) the Department may terminate this Agreement and any other Project Agreements to which the Department and the Developer are both parties, to the extent provided in Section 20.05;

(b) if the Developer Default is by reason of the failure to pay any undisputed monies to a third party required to be paid hereunder, the Department may (but will have no obligation to) make payment on behalf of the Developer of such monies, and any amount so paid by the Department will be payable by the Developer 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 will not incur any liability to the Developer for any act or omission of the Department or any other Person in the course of remedying or attempting to remedy any Developer Default and (ii) the Department's cure of any Developer Default will not waive or affect the Department's rights against the Developer by reason of the Developer Default;

(c) the Department may cure the Developer Default (but this will not obligate the Department to cure or attempt to cure a Developer Default or, after having commenced to cure or attempted to cure a Developer Default, to continue to do so), and all costs and expenses reasonably incurred by the Department in curing or attempting to cure the Developer Default, including the Department's Allocable Costs, will be payable by the Developer 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 will not incur any liability to the Developer, and the Developer hereby irrevocably waives and releases any liability of the Department to the Developer, for any act or omission of the Department or any other Person in the course of remedying or attempting to remedy any Developer Default and (ii) the Department's cure of any Developer Default will not waive or affect the Department's rights against the Developer by reason of the Developer Default;

(d) except as provided in Section 19.02(e) below, the Department will not incur any liability to the Developer for any act or omission of the Department or any other Person in the course of remedying or attempting to remedy any Developer Default, and the Department's cure of any Developer Default will not affect the Department's rights against the Developer by reason of the Developer Default.

(e) without notice and without awaiting lapse of the period to cure, in the event of a Developer Default under Section 19.01(g) (closure of all or any part of the Project or any lane in violation of this Agreement), or any failure to perform a Safety Compliance Order and the Developer Default or failure to perform the Safety Compliance Order 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 in accordance with the terms hereof. In the event of such action by the Department, the Department may, subject to Law, distraint against any of the materials and equipment purchased exclusively for the Project that are situated on the Project and the Developer waives any statutory protections and exemptions in connection therewith. Further, the Developer will pay to the Department on demand the Department's Allocable Costs in connection with the exercise of the Department's rights pursuant to this Section 19.02(e). 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 will not be deemed unlawful or a breach of this Agreement, will not expose the Department to any liability to the Developer and will not entitle the Developer 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 Assets and in protecting public and worker safety. Immediately following rectification of such breach or failure, as determined by the Department, acting reasonably, the Department will relinquish control and possession of the Project or applicable portion thereof back to the Developer; and

(f) the Department may exercise any of its other rights and remedies provided for hereunder or the other Project Agreements or at law or in equity, except where a specific remedy is expressly provided for herein.

Section 19.03 Department Default

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

(a) any representation or warranty made by the Department herein or in any other Project Agreement to which the Department and the Developer are parties is false or materially misleading on the date made and a material adverse effect upon the Project or the Developer's rights or obligations under such Project Agreements results therefrom, and such circumstance continues without cure for a period of 60 Days following the date the Developer delivers to the Department written notice thereof, or such longer period as may be reasonably necessary to cure such failure, up to a maximum of 120 days, with cure regarded as complete only when the adverse effects are remedied;

(b) the Department fails to comply with, perform 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 Developer's Interest, and such failure continues without cure for a period of 60 Days following the date the Developer 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 up to a maximum cure period of 120 Days; 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 such period of time and (iii) such failure is in fact cured within such period of time; or

(c) subject to Section 25.19, the Department fails to pay to the Developer when due any undisputed amount payable to the Developer pursuant to this Agreement, and such failure continues without cure for a period of 120 Days following the date on which the Developer delivers to the Department written notice thereof.

Section 19.04 Developer Remedies upon Department Default

(a) Upon the occurrence of a Department Default pursuant to this Agreement, the Developer may by notice to the Department declare the Department to be in default and may, subject to the provisions of Section 19.04(b), do any or all of the following as the Developer, in its discretion, will determine:

(i) the Developer may terminate this Agreement and any Project Agreements to which the Developer and the Department are both parties, to the extent provided in Section 20.06; and

(ii) the Developer may exercise any of its other rights and remedies provided for under this Agreement or at Law, subject to any limitations thereon set forth in this Agreement, including Section 25.09 and Section 25.19.

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

ARTICLE 20.

TERMINATION; HANDBACK

Section 20.01 Termination Upon Expiration of Term

Unless earlier terminated in accordance with the terms of this Article 20, all the rights and obligations of the parties hereunder will cease and terminate, without notice or demand, on the last Day of the Term. Not later than 365 Days preceding the scheduled end of the Term, the Developer will develop and submit to the Department a plan (the "Transition Plan") to assure the orderly transition of the Project to the Department or its designee (which Transition Plan is in addition to the adjustments and changes to the Life Cycle Maintenance Plan under Section 20.02). The parties will then diligently implement the Transition Plan in accordance with the Technical Requirements.

Section 20.02 Handback Obligations and Reserve

(a) Upon the end of the Term, the Developer will hand-back the Project to the Department, at no charge to the Department, in accordance with the Handback Requirements set forth in the Technical Requirements. Such Handback shall include the following: (1) milling and overlaying GP Lanes pavement, including shoulders and ramps, so that such assets have a minimum remaining service life of 10 years at Handback; (2) reconstructing the pavement on the Express Lanes, shoulders, and ramps prior to Handback; and (3) beginning five years prior to the expiration of the Term, completing total replacement of bridge joints and bearings, performing complete deck replacement, and completing all recoating (as required, in the Department's

discretion) on all Express Lane structures and Department Shared Assets structures. In addition, if requested by the Department, the Developer will dismantle the Express Lanes toll system as required to convert the Express Lanes back to HOV lanes; *provided* that the Department will notify the Developer at least one year prior to the end of the Term if the Express Lanes are to be converted back to HOV lanes. Any such dismantling of the Express Lanes toll system will be at the Developer's sole cost and expense.

(b) Beginning 20 years prior to the expiration of the Term and every five years thereafter, the Developer and the Department will jointly conduct inspections of the Project Assets and, as applicable, the Handback Work required in clause (a) above with respect to the GP Lanes, for the purposes of jointly (i) determining and verifying the condition of all Project Assets and their residual lives, and (ii) determining, revising and updating the Life Cycle Maintenance Plan to reflect the Handback Requirements.

(c) Beginning five years prior to the expiration of the Term, the Developer and the Department will jointly conduct annual inspections of the Project Assets to ensure that the Handback Requirements will be met.

(d) The Developer will 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 20.02(b) and (c). The Developer will complete all such work prior to the end of the Term.

(e) Starting five years prior to the expiration of the Term, the Developer will either (1) establish a Handback reserve account (the "Handback Reserve Account") with a 60-month claim period or (2) post to the Department a ten-year irrevocable Letter of Credit for a period of five years after expiration of the Term, in either case in an amount (or in the case of a Letter of Credit, in a stated amount) equal to 100% of the nominal lifecycle cost expected to be expended in the final five years of the Term pursuant to the most recent Life Cycle Maintenance Plan approved by the Department, such amount to be subject to reduction based on work performed and in accordance with the Operations and Maintenance Plan, the Life Cycle Maintenance Plan and the Joint Operation and Maintenance Protocol, as described in Section 1.15 of Attachment 1.3 to the Technical Requirements. This Letter of Credit or Handback Reserve Account may be drawn upon by the Department only in the event that subsequent to termination or expiration of the Term, the Project Assets are found to fail to address the Handback Requirements and in the amount required to address such failures up to the full amount of the Letter of Credit in accordance with the terms hereof.

(f) The Department will determine whether the Project Assets meet the Handback Requirements based on routine inspections up to five years after termination or expiration of the Term ("Handback Period"). If the Developer disagrees with the Department's determination of the condition of the Project Assets during the Handback Period, the Developer may, at its own expense, retain an engineer to inspect the facility and review the findings of the Department. Resolution of any disagreement will be subject to the dispute resolution procedures set forth in Article 21.

Section 20.03 Termination for a Significant Force Majeure Event or by a Court Ruling

(a) If a Significant Force Majeure Event occurs and is continuing, then either party may elect to terminate this Agreement unless:

(i) the Department elects, within 14 Days following receipt of the Developer's written notice of election to terminate, to treat the Significant Force Majeure Event as a Compensation Event; or

(ii) the Developer submits to the Department, within 14 Days, or if requested by the Developer, such longer period as mutually agreed between the parties, following receipt of the Department's written notice of election to terminate, a restoration plan to restore any damage or destruction at its sole cost and expense, and such restoration plan is acceptable to the Department;

provided, that a party will exercise its right to terminate this Agreement pursuant to this Section 20.03(a) by delivering to the other party written notice of its election to terminate this Agreement ("Significant Force Majeure Termination Notice").

(b) If this Agreement is terminated pursuant to Section 20.03(a), the Department will pay to the Developer the Significant Force Majeure Termination Amount.

(c) Upon receipt from a court of competent jurisdiction of a final, non-appealable judicial order (i) finding that the Agreement is invalid or unenforceable, or (ii) upholding the binding effect of a change in law that causes impossibility of Developer's or the Department's performance of a fundamental obligation under the Agreement, either party may elect to terminate this Agreement by delivering to the other written notice of termination. In the event of a termination for court ruling, the Developer will be entitled to compensation in an amount equal to the Department Termination Amount.

Section 20.04 Termination for Failure to Achieve Financial Close; Liability Upon Termination

(a) Failure to Achieve Financial Close by Financial Close Deadline.

(i) Failure to achieve Financial Close by the Financial Close Deadline, unless such failure is directly attributable to any of the circumstances described in Section 20.04(a)(ii), Section 20.04(a)(iii), Section 20.04(a)(iv) and Section 20.04(a)(v) below, will be considered a Developer Default and the Department will be entitled to terminate this Agreement under this Section 20.04.

(ii) (A) The Developer or the Department may terminate this Agreement without fault, Claim, penalty or termination compensation if Financial Close does not occur by the Financial Close Deadline and such failure is directly attributable to:

(1) If the Developer's initial plan to finance the Project includes PABs, the refusal or unreasonable delay of the PABs Issuer to issue

PABs in the amount that the Developer's underwriters are prepared to underwrite, provided that (aa) such refusal or delay is not due to any fault or less-than-diligent efforts of the Developer (including the Developer's failure to satisfy all requirements that it is obligated to satisfy to obtain PABs Issuer issuance of the PABs) and (bb) the Developer's financing schedule provides the PABs Issuer customary time periods for carrying out the ordinary and necessary functions of a conduit issuer of tax-exempt bonds;

(2) If the Developer's initial plan to finance the Project includes PABs, (aa) the expiration of the USDOT-approved PABs allocation despite the Developer's commercially reasonable efforts to obtain an extension of the PABs allocation or (bb) the withdrawal, rescission or revocation of the USDOT-approved PABs allocation, or the reduction of such allocation by USDOT to an amount less than the amount of PABs included in the Developer's plan to finance the Project; *provided* that, in all such cases, the failure to achieve Financial Close is directly caused by such occurrence, and such occurrence is not due to any fault of the Developer (including the Developer's failure to satisfy any conditions precedent to the use of the PABs allocation);

(3) If TIFIA Credit Assistance is included in the Developer's initial plan to finance the Project, the failure of the TIFIA Lender to provide TIFIA Credit Assistance to the Developer (including a decision by the TIFIA Lender to decline to invite the Developer to apply for TIFIA Credit Assistance), or the determination by the Department that such a decision is reasonably likely to occur, due to no direct fault of the Developer or any Developer Party or the Developer's advisors and provided that the Developer (aa) is in compliance with all applicable federal statutes and rules with respect to TIFIA Credit Assistance, and (bb) has used diligent and reasonable efforts to achieve such close, including negotiating in good faith mutually agreeable terms and conditions with the TIFIA Lender and furnishing all required information and credit ratings in a timely manner (for clarity, deviations between the Assumed TIFIA Financial Terms and the Actual TIFIA Financial Terms will not excuse the Developer from a failure to achieve Financial Close);

(4) If TIFIA Credit Assistance is included in the Developer's initial plan to finance the Project, the (aa) failure of the TIFIA Lender to work diligently and reasonably toward achieving Financial Close by the Financial Close Deadline (including unreasonable negotiation) despite commercially reasonable efforts by the Developer to do so or (bb) the TIFIA Lender requiring changes to this Agreement or the Design-Build Contract that either, or both of, the Department or the Developer reasonably object; it being agreed, however, that the failure of the Developer to satisfy any of the conditions precedent for the TIFIA Credit Assistance set forth in the term sheet and/or credit agreement (other than conditions outside of the control of the Developer, including any such conditions requiring actions of the Department and for which the Department has been notified by the Developer that it is responsible and must act and the Department

fails to act) will not be considered a failure by the TIFIA Lender under this clause (4); and

(5) The existence of litigation challenging the NEPA Documents that is filed before lapse of the applicable statute of limitations and remains pending as of the Financial Close Deadline.

(B) If the Developer fails to achieve Financial Close by the Financial Close Deadline as a direct result of the circumstances described in Section 20.04(a)(ii)(A), either party may elect to terminate this Agreement and any other Project Agreement to which it is a party. If a party elects to terminate pursuant to this Section 20.04(a)(ii)(B), such party will provide written notice of termination to the other party and, subject to the provisions of such termination will be effective immediately upon delivery of such notice.

(C) Following the delivery of any notice to terminate this Agreement under Section 20.04(a)(ii)(B), the Department and the Developer will engage in good faith negotiations for up to 30 Days regarding means of proceeding to Financial Close in light of the adverse circumstances giving rise to the termination right, including (as appropriate) alternative financing sources, a debt competition, and (with respect to the circumstances described in Section 20.04(a)(ii)(A)) incorporation of some or all of the net change contemplated by Section 7.06(b)(iii). Each Party may act in its own discretion in determining whether to consent to a proposed change to this Agreement intended to mitigate such adverse circumstances and avoid termination.

(iii) (A) Subject to Section 20.04(a)(iii)(B), the Department, upon written notice to the Developer, may terminate this Agreement if the aggregate adjustment due to Benchmark Rates, credit spreads, TIFIA financing terms, Design-Build Contract price indexation pursuant to Section 7.06(b)(ii) and Section 7.06(b)(iii) results in a decrease in the Concession Fee that results in the Department then being required to pay any Public Funds Amount.

(B) If the aggregate adjustment due to Benchmark Rates, credit spreads, TIFIA financing terms, Design-Build Contract price indexation pursuant to Section 7.06(b)(ii), Section 7.06(b)(iii) and Section 7.06(b)(iv) results in a decrease in the Concession Fee that results in the Department being required to pay any Public Funds Amount, the Developer may, by written notice to the Department, elect to not request such Public Funds Amount. Upon any such election, the Department will not have the right to terminate this Agreement pursuant to Section 20.04(a)(iii).

(iv) If Financial Close is not achieved by the Financial Close Deadline due to the Department's unreasonable delay including (but not limited to) if:

(A) the Department fails to timely deliver an opinion of counsel addressed to Lenders with respect to the enforceability of the VDOT Project Agreements, any Project Financing Agreements, and other customary items to which it is a party, substantially in the form of legal opinion provided in Exhibit AA;

(B) the Department fails to timely execute the Direct Agreement;

(C) the Department is unable to make any of the representations and warranties set forth in Section 23.01 as of the date of Financial Close; or

(D) a Department Default has occurred and is continuing as of the date falling up to ten Business Days in advance of the Financial Close Deadline or circumstances exist at the date falling up to ten Business Days before the Financial Close Deadline which will, if not cured, give rise to a Department Default with the passage of time;

then the Developer will be excused from its obligation to reach Financial Close by the Financial Close Deadline, and may terminate this Agreement upon notice to the Department.

(v) In addition to the right of the Department to terminate this Agreement pursuant to Section 20.04(a)(ii)(A)(5), the Department also may terminate this Agreement at any time between the Agreement Date and Financial Close if litigation or other regulatory challenge is made to the NEPA Documents.

(b) Liability Upon Termination.

(i) In the event of termination under Section 20.04(a)(i), the Department will be entitled to (A) Financial Close Liquidated Damages as set forth in Section 8.10(a) and (B) the repayment in full of the outstanding amount of the SIB Loan, if any, and the Department will have no liability to the Developer under this Agreement or any other Project Agreement. The Department will be entitled to such damages as set forth in Section 8.10(a) regardless of whether it exercises its right to terminate under Section 20.04(a)(i).

If the Developer fails to repay the SIB Loan, the Department will be entitled to draw upon the Financial Close Security for application against all or a portion of the outstanding principal amount of the SIB Loan, and will return as promptly as is practicable the remaining portion of the Financial Close Security not drawn to repay the outstanding principal amount of the SIB Loan.

(ii) In the event of termination under Section 20.04(a)(ii) and Section 20.04(a)(iv) by either the Developer or the Department, as applicable, the Department will pay to the Developer an amount equal to the outstanding principal balance of the SIB Loan, and the Developer will repay in full the outstanding principal amount of the SIB Loan. If the Developer repays the SIB Loan in full prior to the date the Department is entitled to draw upon the Financial Close Security, the Department will promptly return to the Developer the original of the Financial Close Security, will pay the Developer the amount payable under the Stipend Payment Agreement as if the Developer had not been the Preferred Proposer, and this Agreement and all Project Agreements will be deemed terminated (except for provisions of this Agreement that survive termination). If the Developer fails to repay the SIB Loan in full by such date, the Department will be entitled to draw upon the Financial Close Security for application against all or a portion

of the outstanding principal amount of the SIB Loan, the Developer will remain liable for the unpaid principal amount, if any, of the SIB Loan and the Developer will not be entitled to receive the Stipend Payment Agreement payment described above. Except as set forth in this Section 20.04(b)(ii), such termination will be without fault, Claim, penalty or termination compensation.

(iii) In the event of termination under Section 20.04(a)(iii) and Section 20.04(a)(v), the Department will pay to the Developer an amount equal to the outstanding principal amount of the SIB Loan, and the Developer will repay in full the outstanding principal amount of the SIB Loan prior to the date the Department is entitled to draw upon the Financial Close Security. Following the Developer's repayment of the SIB Loan in full, the Department will promptly return to the Developer the original of the Financial Close Security, will pay the Developer the amount payable under the Stipend Payment Agreement as if the Developer had not been the Preferred Proposer, and this Agreement and all Project Agreements will be deemed terminated (except for provisions of this Agreement that survive termination). If the SIB Loan is not repaid in full by such date, the Department will be entitled to draw upon the Financial Close Security for application against all or a portion of the outstanding principal amount of the SIB Loan, the Developer will remain liable for the unpaid principal amount, if any, of the SIB Loan and the Developer will not be entitled to receive the Stipend Payment Agreement payment described herein. Except as set forth in this Section 20.04(b)(iii), such termination will be without fault, Claim, penalty or termination compensation.

Section 20.05 Termination for Developer Default

(a) Subject to the provisions of the Direct Agreement, at any time after the occurrence and during the continuance of a Developer Default, the Department is entitled to terminate this Agreement and any other Project Agreement to which the Department and the Developer are both parties.

(b) If the Department elects to terminate pursuant to this Section 20.05, the Department will deliver to the Developer and the Collateral Agent written notice of its election to terminate, which termination will take effect not less than 60 Days after the delivery of such notice.

(c) In the event of termination pursuant to this Section 20.05, the Department will pay to the Developer in accordance with Section 25.19, the Developer Default Termination Amount.

(d) A termination by the Department for a Developer Default that is later determined by a court of competent jurisdiction to be wrongful or in violation of this Agreement will entitle the Developer to, as the Developer's sole compensation from the Department, the Department Termination Amount.

Section 20.06 Termination for Department Default

(a) Subject to the provisions of this Section 20.06, the Developer is entitled to terminate this Agreement and any other Project Agreement to which the Developer and the Department are both parties in the event of a Department Default.

(b) If the Developer elects to terminate pursuant to this Section 20.06, the Developer will deliver to the Department a written notice of intent to terminate this Agreement. Upon receipt of such notice of intent to terminate, the Department will be entitled to cure such Department Default by providing the Developer with a written work plan within the 90-Day period after the Department receives the written notice of intent to terminate. The work plan will 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 will be subject to the Developer's written approval (which approval will not be unreasonably withheld, delayed or conditioned).

(c) If (i) the Department fails to provide the Developer with the work plan required pursuant to Section 20.06(b) or (ii) the Department fails to comply in any material respect with the work plan approved by the Developer pursuant to Section 20.06(b) and in the case of this clause (ii), such failure continues without cure for 90 Days following the date the Developer delivers to the Department written notice thereof, the Developer may terminate this Agreement by delivering to the Department written notice of its election to terminate, which termination will take effect not less than 30 Days after the delivery of such notice.

(d) In the event of a termination pursuant to this Section 20.06, the Department will pay to the Developer the Department Termination Amount.

Section 20.07 Termination for Convenience

(a) The Department may terminate this Agreement and any other Project Agreement to which the Department and the Developer are both parties, at any time 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 20.07 will not relieve the Developer or the Department of their respective obligations for any Claims arising prior to termination.

(b) If the Department elects to terminate pursuant to this Section 20.07, the Department will deliver to the Developer and the Collateral Agent written notice of its election to terminate, which termination will take effect no less than 90 Days after delivery of such notice.

(c) In the event of termination pursuant to this Section 20.07, the Department will pay to the Developer the Department Termination Amount.

Section 20.08 Developer Actions Upon Termination

(a) On delivery of notice of termination of this Agreement or the Developer's rights hereunder for any reason prior to the expiration of the Term, the provisions of this Section 20.08 will apply. The Developer will timely comply with such provisions independently of, and

without regard to, the timing for determining, adjusting, settling and paying any amounts due to the Developer or the Department on account of termination. In connection with the expiration of the Term, certain provisions of this Section 20.08, as specified, will apply.

(b) The Developer will conduct all discussions and negotiations to determine the amount of any termination compensation, and will 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 30 Days after receipt of a notice of termination, or, if applicable, not later than 120 Days before the expiration of the Term, the Developer will 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 will use diligent efforts to complete preparation of the interim transition plan within 15 Days after the date the Developer receives the notice of termination or, if applicable, not later than 15 Days before expiration of the Term. The parties will use diligent efforts to complete a final transition plan within 30 Days after such date. The transition plan will be in form and substance acceptable to the Department in its good faith discretion and will include and be consistent with the other provisions and procedures set forth in this Section 20.08, all of which procedures the Developer will promptly 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 the expiration of the Term, the Developer will take all action that may be necessary, or that the Department may reasonably direct, for the protection and preservation of the Project, the Work and such materials, goods, machinery, equipment, parts, supplies and other property. For the avoidance of doubt, during the period from its receipt of a notice of termination until the expiration of the Term, the Developer will continue to perform its obligations and be entitled to receive Toll Revenues pursuant to this Agreement.

(e) The Developer will 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, and records necessary or useful for the Project, and, to the extent provided in Article 18, Work Product and Intellectual Property used or owned by the Developer or any Contractor relating to the Project or the Work; excluding, however, all personal property, machinery, equipment and tools owned or leased by any Contractor and not incorporated or intended to be incorporated into the Project;

(ii) possession and control of the Project and Project Assets (other than the Department Shared Assets), free and clear of any and all Liens created, incurred or suffered by the Developer, any Developer Party or any Affiliate or anyone claiming under any of them; *provided*, that release of the Liens of the Lenders will be subject to payment of termination compensation owing by the Department;

(iii) all other intangible personal property used or owned by the Developer and relating to or derived from the Project and the Work; and

(iv) a notice of termination of this Agreement and the Developer's Interest, in the form reasonably required by the Department, executed and acknowledged by the Developer.

(f) If, as of the date on which the notice of termination is delivered, the Developer has not completed construction of all or part of the Project, the Department may, subject to the provisions of the Direct Agreement, elect, by written notice to the Developer and the Design-Build Contractor delivered within 90 Days after the date on which the notice of termination is delivered, to continue in effect the Design-Build Contract or to require the termination of such agreement. If the Department does not deliver written notice of election within such time period, the Department will 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 Developer will execute and deliver to the Department a written assignment, in form and substance acceptable to the Department, acting reasonably, of all the Developer's right, title and interest in and to the Design-Build Contract, and the Department will assume in writing the Developer'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 Developer will:

(i) unless the Department has granted Replacement Agreements to a Lender or its Substituted Developer, 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 and safely demobilize and secure construction, staging, lay down and storage areas for the Project Assets 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 Work; *provided*, that 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; *provided* that the Design-Build Contractor will be entitled to retain its rights and remedies with respect to Work performed prior to the effective date of termination; 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 Developer has entered into any other Contract for the design, construction, permitting, installation and equipping of the Project, the Department will elect, by written notice to the Developer, to continue in effect such Contract or to require its termination. If the Department elects to continue the Contract in effect, then the Developer will execute and deliver to the Department a written assignment, in form and substance acceptable to the Department, acting reasonably, of all the Developer's right, title and interest in and to the Contract, and the Department will assume in writing the Developer'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 Developer will take actions comparable to those set forth in Section 20.08(f) with respect to the Contract.

(h) If, as of the date notice of termination is delivered, the Developer has entered into any operations or maintenance Contract, the Department will elect, by written notice to the Developer, to continue it in effect or require its termination; *provided*, that if a Lender is entitled to Replacement Agreements following termination, the Department will not elect to terminate any such Contract until the Lender's right to Replacement 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 Developer will execute and deliver to the Department a written assignment, in form and substance acceptable to the Department, acting reasonably, of all the Developer's right, title and interest in and to the Contract, and the Department will assume in writing the Developer's obligations thereunder that arise from and after the effective date of termination.

Section 20.09 Liability After Termination; Consequences of Termination

(a) If this Agreement is terminated by reason of a Developer Default or a Department Default or any other Project Agreement is terminated for default thereunder, such termination will 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 Developer 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 will adjust the termination compensation by the amount of the unpaid award, if any, on the Claim. Notwithstanding the foregoing, any termination of this Agreement will automatically extinguish any Claim of the Developer to payment of Developer 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; *provided*, however, that (i) Claims for any such Net Cost Impacts that cannot reasonably be avoided by the Developer will not be extinguished, and (ii) the foregoing will not limit any Claim of the Developer for interest on unpaid amounts owing or to become owing by the Department as provided herein.

(b) If this Agreement is terminated by any reason other than a Developer Default or a Department Default or any other Project Agreement is terminated other than a termination for default, no party will 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 will, as of the effective date of termination of this Agreement or the Developer's rights hereunder, whether due to expiration or earlier termination of the Term, assume full responsibility for the Project or, if Project 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 Developer will have no liability or responsibility for such Work, as the case may be, occurring after such date; *provided*, that the Department and the Developer will remain fully responsible for all of their respective obligations or liabilities pursuant to this Agreement or any other Project Agreement arising before the effective date of termination and those obligations pursuant to this Agreement or other Project Agreements which survive termination.

(d) Each of the Developer and the Department will be liable for all costs, expenses and other amounts for which it is liable or responsible hereunder incurred up to the effective date of termination of this Agreement or the Developer's rights hereunder, whether due to expiration or earlier termination of the Term, and the Developer will 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 Developer Default pursuant to 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 Developer is a party (unless the Department is also a party thereto) as of the effective date of termination will 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 will 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 Developer's Interest will automatically terminate and expire, and all Liens created, permitted or suffered by the Developer will be automatically extinguished, *provided* however, that the foregoing will not prohibit the Developer from assigning its right to receive termination payments to the Lenders.

Section 20.10 Exclusive Termination Remedies

(a) Each of the Department and the Developer hereby acknowledges and agrees that it may only terminate this Agreement in accordance with the express terms hereof.

(b) Article 19 and this Article 20 set forth the entire and exclusive provisions and rights of the Department and the Developer 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 will constitute the Developer's sole compensation (and the Developer will have no further liability to the Department except as otherwise provided herein) 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 Developer nor any beneficiary or Lender as a result of a Financing Assignment will be entitled to any further compensation in respect thereof. In furtherance of the foregoing, the parties hereto agree that the provisions of Section 33.2-1813 of the Code of Virginia will not apply to the Project after the termination of this Agreement.

Section 20.11 Determination of Project Value

(a) In the event the Department owes the Developer an amount calculated by reference to the Project Value, Project Value will be determined according to the following procedures:

(i) within 30 Days after a party requests the appointment of an appraiser, the Department and the Developer will 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 Developer will each appoint an independent third-party appraiser and both such appraisers will 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 20.11(a)(ii) within 60 Days after a party has requested the appointment of an appraiser under Section 20.11(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 will pay the costs of its own appraiser. The Department and the Developer will pay in equal shares the reasonable costs and expenses of the third independent appraiser;

(v) each party will 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 will provide the appraiser with access to the party's books and records regarding the Project on an Open Book Basis; and

(vi) once appointed, the independent third-party appraiser will conduct an appraisal of the Project Value and deliver to both parties a draft appraisal report and draft valuation. The appraisal will determine Project Value as of the effective date of

termination of the Agreement, based on the then condition of the Project (but without regard to any damage or loss resulting from a Department Default). The appraiser will 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 will 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 will 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 will consider and evaluate all comments, prepare a final appraisal report stating the Project Value, and deliver the final appraisal report to both parties.

(b) If either party disagrees with the Project Value, either party may invoke the dispute resolution procedures set forth in Article 21, 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 will conclusively constitute acceptance of the Project Value.

ARTICLE 21.

DISPUTE RESOLUTION

Section 21.01 General

(a) The parties will attempt to resolve any Disputes arising out of this Agreement at the Project level through good faith negotiations between designated representatives. The Department, the Developer, the Design-Build Contractor, all subcontractors and the FHWA are firmly committed to the following principles:

(i) trust and open communications are encouraged and expected by all participants;

(ii) all of the participants move quickly to address and resolve issues at the lowest possible level by approaching problems from the perspectives and needs of all of the participants involved;

(iii) all of the participants have identified common goals and respect each other's individual goals and values; and

(iv) all of the participants create an atmosphere conducive to cooperation and teamwork in finding better solutions to potential problems and issues at hand.

(b) If the Dispute cannot be resolved at the Project level in accordance with Section 21.01(a) above within ten Days following notice of a dispute, then either party will have the right to submit the Dispute to the Steering Committee for resolution. The Steering Committee will convene a meeting within ten Days of written notification by either party of any unresolved

Dispute. After the meeting has convened, the Steering Committee will have seven Days to resolve the Dispute.

(c) If the Steering Committee has not resolved the Dispute pursuant to Section 21.01(b), then either party may request non-binding mediation of the Dispute or any other form of alternative dispute resolution process that is mutually acceptable to both parties. If the Dispute has not been resolved within 60 Days after the initiation of mediation proceedings or, if both parties do not agree to mediation, the other form of alternative dispute resolution process, either party will have the right to proceed in accordance with Section 21.02. The first face-to-face meeting between the mediator and both parties will be deemed to be the initiation of mediation.

(d) Any of the time periods specified in this Section 21.01 may be extended by mutual agreement of the parties.

Section 21.02 Litigation; Venue

(a) In the absence of complete resolution under Section 21.01, the party seeking relief may file a legal action no later than two years from the date written notification was submitted to the Steering Committee under Section 21.01(b). All litigation between the parties arising out of or pertaining to this Agreement or its breach will be filed, heard and decided in the Circuit Court for the City of Richmond, Virginia, Division I, which will have exclusive jurisdiction and venue.

(b) As permitted by Section 33.2-1814 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 33.2-1813 of the Code of Virginia) pursuant to such Section 33.2-1814, as a prerequisite to exercising any remedy set forth in this Agreement or such Section 33.2-1814, will not apply to this Agreement.

(c) Satisfaction of the procedures set forth in Section 21.01 will be a condition precedent to instituting a legal action in court; *provided*, that if the Department determines, in its sole discretion, that a Dispute involves an issue that poses an immediate and serious threat to the public health, safety and welfare, the Department will be entitled to take whatever steps it deems appropriate and to initiate litigation of the matter in court without first submitting the Dispute to the dispute resolution procedures of this Agreement.

Section 21.03 Conduct During Pendency of Dispute

(a) Notwithstanding anything to the contrary in this Agreement, neither party will be required to await the resolution of dispute proceedings regarding the reasons for terminating this Agreement before exercising such party's termination rights.

(b) Pending final resolution of any Dispute (except a Dispute regarding the cause for terminating this Agreement), the parties will continue to fulfill their respective obligations under this Agreement.

Section 21.04 Costs of Dispute Resolution

(a) Each party will bear its own attorneys' fees and costs in any Dispute or litigation arising out of or pertaining to this Agreement, and no party will seek or accept an award of attorneys' fees or costs, except as otherwise expressly provided herein.

(b) The fees and costs of any mediator will be borne equally by each party.

ARTICLE 22.

RESERVED RIGHTS

Section 22.01 Exclusions from the Developer's Interest

The Developer's rights and interests in the Project have been granted to the Developer under the Permit in order to enable it to accomplish the Project Purposes. Subject to Section 22.04, the Developer's rights and interests consist only of those expressly granted by this Agreement and other Project Agreements and specifically exclude all Reserved Rights.

Section 22.02 Department Reservation of Rights

(a) 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 Developer. 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 will owe no compensation or damages on account of its exercise of Reserved Rights, unless such exercise qualifies as a Compensation Event.

(b) The Developer acknowledges and agrees that all rights to own, lease, sell, assign, transfer, utilize, develop or take advantage of the Reserved Rights are hereby reserved to the Department, and the Developer will not engage in any activity infringing upon the Reserved Rights.

Section 22.03 Disgorgement

If a Developer Default concerns a breach of the provisions of Section 22.01 or Section 22.02, in addition to any other remedies pursuant to this Agreement, the Department will 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 22.04 Alternate Treatment of Reserved Rights

Notwithstanding Section 22.01 and Section 22.02, 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 of the provisions of Section 12.02 will apply.

Section 22.05 Naming Rights

(a) The Department hereby grants the Developer the naming rights for the Project, subject to (i) approval of any such name by the Department, in its discretion, and (ii) compliance with Law and Governmental Approvals. The Developer will request the Department's approval of a name for the Project in writing and no such approval will be effective unless and until provided in writing by the Department. The Developer may sub-license any such rights to the O&M Contractor.

(b) If the Developer changes the name of the Express Lanes, the Developer will pay the Department for the cost of changing names on signs maintained by the Department pursuant to the Technical Requirements.

(c) For purposes of the Permit Fee calculation, any revenues received by the Developer with respect to the naming rights granted to the Developer under this Section 22.05 will be treated as Gross Revenues.

ARTICLE 23.

REPRESENTATIONS, WARRANTIES AND FINDINGS

Section 23.01 Department Representations and Warranties

The Department, as of the Agreement Date, hereby represents and warrants to the Developer as follows:

(a) the Department is an agency of the Commonwealth, 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 and deliver each such document on behalf of the Department;

(c) 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, and the performance of its obligations hereunder and thereunder, will not conflict with or will result, at the time of execution, in a default under or violation of (i) any other agreements or instruments to which it is a party or by which it is bound or (ii) to its knowledge, any Law, where such violation will have a material adverse effect on the ability of the Department to perform its obligations under this Agreement;

(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

Developer any pending and unserved or threatened action, suit, proceeding, investigation or litigation with respect to such matters of which the Department is aware;

(e) this Agreement, and any other Project Agreement to which the Department is a party, have 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;

(f) 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;

(g) as of the Agreement Date, no agreement, contract, option, commitment or other right exists that binds, or that 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 Developer pursuant to this Agreement; and

(h) other than with respect to portions of the Project Right of Way not yet acquired as of the Agreement Date, the Department has good and sufficient title and interest to the Project Right of Way, free and clear of all Liens or other exceptions to title, except Permitted Encumbrances.

Section 23.02 Developer Representations and Warranties

The Developer, as of the Agreement Date, hereby represents and warrants to the Department as follows:

(a) the Developer is a duly organized limited liability company created under the laws of the State of Delaware, is qualified to conduct business in the Commonwealth, has the requisite power and all required licenses to carry on its present and proposed activities, and has full power, right and authority to execute and perform each and all of its obligations under the Project Agreements to which it is a party;

(b) as of the Agreement Date, the membership interests in the Developer are owned in 100% holdings by I-66 Express Mobility Partners Holdings LLC and no other Person has a membership interest in the Developer;

(c) the Developer 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 Developer is a party;

(d) each person executing this Agreement or any other Project Agreement on behalf of the Developer has been or will at such time be duly authorized to execute and deliver each such document on behalf of the Developer;

(e) this Agreement and each Project Agreement to which the Developer or a Developer Financial Party is a party have been duly authorized, executed and delivered by the Developer or the Developer Financial Party and constitutes a valid and legally binding obligation of the Developer or the Developer Financial 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;

(f) neither the execution and delivery by the Developer of this Agreement and the other Project Agreements to which the Developer 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 (i) the governing instruments of the Developer or any other agreements or instruments to which it is a party or by which it is bound or (ii) to its knowledge, any Law, where such violation will have a material adverse effect on the ability of the Developer to perform its obligations under this Agreement;

(g) there is no action, suit, proceeding, investigation or litigation pending and served on the Developer which challenges the Developer's authority to execute, deliver or perform, or the validity or enforceability of, this Agreement and the other Project Agreements to which the Developer is a party, or which challenges the authority of the Developer official executing this Agreement or the other Project Agreements; and the Developer 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 Developer is aware;

(h) the Developer is in material compliance with all Laws applicable to the Developer or its activities in connection with this Agreement and the other Project Agreements to which the Developer is a party;

(i) none of the Developer, any affiliate of the Developer (as "affiliate" is defined in 29 CFR 98.905), or the Design-Build Contractor or their 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 Commonwealth department or agency;

(j) no event which, with the passage of time or the giving of notice, would constitute a Developer Default has occurred, to the best of the Developer's knowledge after diligent inquiry;

(k) no event which, with the passage of time or the giving of notice, would constitute a Delay Event or a Compensation Event under this Agreement has occurred, to the best of the Developer's knowledge after diligent inquiry;

(l) the Initial Base Case Financial Model (i) was prepared by or on the Developer's behalf in good faith, (ii) fully discloses all Financial Model Formulas, and all cost, revenue and other financial assumptions and projections that the Developer used or is using in making its decision to enter into this Agreement, (iii) fully discloses all Financial Model Formulas disclosed to the Lenders under the Project Financing Agreements and (iv) as of the Agreement Date, represents the projections that the Developer believes in good faith are realistic and reasonable

for the Project; *provided*, that such projections are based upon a number of estimates and assumptions and are subject to significant business, economic and competitive uncertainties and contingencies and that, accordingly, no representation or warranty is made that any of the assumptions are correct, that such projections will be achieved or that the forward-looking statements expressed in such projections will correspond to actual results; and

(m) on or before the Agreement Date, the Developer has delivered to the Department an audit report and an opinion of the Financial Model Auditor addressed to the Department to the effect that the Base Case Financial Model and the Financial Model Formulas reflect the terms of this Agreement and that the Financial Model Formulas and the Base Case Financial Model are suitable for use herein in connection with Compensation Events, Delay Events and early termination procedures, and covering such other matters as may have been reasonably requested by the Department, all in form and substance acceptable to the Department.

ARTICLE 24.

CONTRACTING PRACTICES AND PUBLIC WELFARE CONSIDERATIONS

Section 24.01 Obligation to Refrain from Discrimination

The Developer covenants and agrees that it will not discriminate and it will require all Contractors not to discriminate against any person, or group of persons, on account of age, sex, sexual orientation or gender identity marital status, race, creed, color, national origin, religion or the presence of any sensory, mental or physical handicap in the permitting, design, acquisition, construction, maintenance, operation or management of the Project, nor will the Developer 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 will not apply if the particular disability prevents the proper performance of the particular person involved.

Section 24.02 Contracting

(a) General. The Developer may perform the Work 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 Law, all Governmental Approvals, and the terms, conditions and standards set forth in this Agreement.

(b) Design-Build Contractor. The Developer has entered into the Design-Build Contract. Notwithstanding its use of the Design-Build Contractor, the Developer remains responsible for the Design-Build Work during the Term in accordance with this Agreement. The Developer will immediately notify the Department upon the termination, replacement or removal of the Design-Build Contractor.

(c) O&M Contractor.

(i) Subject to the Department's approval, which will not be unreasonably withheld, conditioned or delayed, the Developer may self-perform, or may contract with one or more separate O&M Contractors with the expertise, qualifications, experience, competence, skills and know-how to perform the operations and maintenance obligations of the Developer in accordance with this Agreement. Notwithstanding its use of an O&M Contractor, the Developer remains ultimately responsible for the operation and maintenance of the Project during the Term in accordance with this Agreement. The O&M Contractor will be subject at all times to the direction and control of the Developer, and any delegation to an O&M Contractor does not relieve the Developer of any of its obligations, duties or liability pursuant to this Agreement. The Developer will immediately notify the Department upon the termination, replacement, removal or resignation of an O&M Contractor. Subject to the Direct Agreement, any agreement between the Developer and any O&M Contractor will 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 will have no interest in or rights pursuant to this Agreement or the Project.

(ii) Each O&M Contractor and its Contract will comply with this Section 24.02. 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 Developer pursuant to this Agreement and the other Project Agreements.

(d) Replacement of Design-Build Contractor or O&M Contractor. Before entering into any Contract replacing the initial Design-Build Contractor or O&M Contractor, as applicable, the Developer will submit a true and complete copy of the proposed Contract for the Department's review and approval, subject to the following:

(i) the Department may disapprove such proposed Contract if such Contract or the Work to be performed thereunder does not comply, or is inconsistent, in any material respect with the applicable requirements of this Agreement; and

(ii) the Department may disapprove of the replacement Contractor after taking into account the following factors:

(A) the financial strength and integrity of the proposed Contractor, 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;

(B) the capitalization of the proposed Contractor or any parent guarantor, as applicable;

(C) the experience of the proposed Contractor and each of its direct Contractors in constructing or operating toll roads or highways and performing other projects;

(D) the presence of any actions, suits or proceedings, at law or in equity, or before any Governmental Authority, pending or, to the best of such Contractor's knowledge, threatened against such Contractor, that would or could reasonably be expected to have a material adverse effect on its ability to perform its obligations under the Contract;

(E) the background of the proposed Contractor, 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); and

(F) the Contractor's compliance with any of the other provisions of this Section 24.02.

(e) Each Contract for the performance of the Work that the Developer executes at a minimum:

(i) will 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 will set forth effective procedures for Claims and change orders;

(ii) will establish provisions for prompt payment by the Developer 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) will require the Contractor to carry out its scope of work in accordance with Law, the Technical Requirements, all Governmental Approvals, Good Industry Practice and the terms, conditions and standards set forth in this Agreement;

(iv) will 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) will be fully assignable to the Department upon termination of this Agreement, such assignability to include the benefit of all Contractor warranties, indemnities, guarantees and professional responsibility in accordance with the terms hereof;

(vi) will include express requirements that, if the Department succeeds to the Developer'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 in respect of the Project (e.g., constructor, equipment supplier, designer, service provider), (B) permit audit thereof by the Developer, and provide progress reports to the Developer appropriate for the type of Contract it is performing sufficient to enable the Developer to provide the reports it is required to furnish the Department pursuant to this Agreement

and (C) allow the Department, to assume the benefit of the Developer's Contract rights and the work performed thereunder, with liability only for those remaining obligations accruing after the date of assumption, but excluding any monetary claims or obligations that the Developer may have against such Contractor that existed prior to the Department's assumption of such Contract;

(vii) will not be assignable by the Contractor without the Developer's prior written consent; *provided*, that the foregoing will not limit permitted subcontracting of the Work;

(viii) will expressly require the Contractor to participate in meetings between the Developer 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 will be provided by the Developer; and *provided further*, that nothing in this Section 24.02(e)(viii) will 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;

(ix) will expressly provide that all Liens and claims of any Contractors at any time will not attach to any interest of the Department in the Project or the Project Right of Way; and

(x) will be consistent in all other material 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.

(f) The Developer will not enter into 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) at the time the Contract is entered into, 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 Commonwealth department or agency, (ii) has been 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 Law, including the Foreign Investment and National Security Act of 2007, 50 USC App. 2170 (HR556), in the Commonwealth or the U.S..

(g) The Developer will include provisions in each Contract for the performance of the Work that the Developer executes requiring the Contractor: (i) to maintain all licenses required by Law; (ii) if the Department makes a direct payment under such Contract, to comply with the requirements of the eVA Business to Government Vendor System or its successor; and (iii) to include in Contracts for the performance of the Work that such Contractor executes the provisions set forth in this Section 24.02(g).

(h) The Developer will include provisions in each Contract for the performance of the Work that the Developer executes (i) naming the Department as a third-party beneficiary of all

Contractor representations and warranties contained in such Contract and (ii) requiring the Contractor to include in Contracts for the performance of the Work that such Contractor executes to name the Department as a third-party beneficiary of all Contractor representations and warranties contained in such Contract; *provided*, that the Department will have the right to exercise its rights under such representations and warranties only so long as the Developer, the Contractor or a Lender is not pursuing remedies thereunder.

(i) The Developer will not permit any Contractor who is not prequalified with the Department in accordance with the Department's Rules Governing Prequalification Privileges to undertake any part of the Design-Build Work or the O&M Work, unless otherwise indicated in this Agreement. This restriction does not apply to contract specialty items, consultants, manufacturers, suppliers, haulers or snow removal service providers.

(j) The appointment of Contractors will not relieve the Developer of its responsibility hereunder or for the quality of work, materials and services provided by it. The Developer will 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 Developer will impose any obligation or liability upon the Department to any such Contractor or any of its employees. Further, except as provided herein or otherwise, absent the Department's express written consent, no Contract or delegation of Work thereunder will affect the obligation of the Developer to directly communicate with the Department and to oversee the Work of the Contractor. Nothing in this Agreement will create any contractual relationship between the Department and a Contractor.

(k) The Developer will not enter into or materially amend an Affiliate Contract without notice to and consent of the Department, which consent will not be unreasonably withheld or delayed if the Contract is entered into in the ordinary course of business and the Developer demonstrates to the Department's satisfaction that the Affiliate Contract is on overall terms no less favorable or unfavorable to the Developer than terms the Developer could obtain in an arm's-length transaction for comparable services with a Person that is not an Affiliate of the Developer; *provided*, that no consent will 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 Developer in lieu of the Developer 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 Developer so long as the cost of such assets and properties are reasonably shared and documented.

(l) From and after the Agreement Date, the Developer will be solely responsible for paying each Contractor and any other Person to whom any amount is due from the Developer for services, equipment, materials and supplies in connection with the Work. Pursuant to Section 2.2-4354 of the Code of Virginia, the Developer will require the Design-Build Contractor and O&M Contractor, each within a separate seven-Day period following receipt of monies from the Developer 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 Developer attributable to the Work performed by such Contractor or (ii) notify the Developer 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 Developer 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 Developer for work performed by its Contractor, except for amounts withheld as allowed in clause (ii) of this Section 24.02(1); (B) states, "Unless otherwise provided under the terms of this contract, interest will 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 24.02(1) with respect to each lower-tier Contractor.

(m) Upon entering into a Contract for the Design-Build Work or O&M Work in excess of \$100,000, the Developer will provide the Department with notice of such contract and an updated list of all such contracts relating to the Project and, if such Contract is with an Affiliate of the Developer, include in such list 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. At the Department's request, the Developer will provide the Department with an electronic copy of any Contract in the foregoing list. The Developer will allow the Department ready access to all Contracts and records regarding Contracts, including amendments and supplements to Contracts and guarantees thereof, at the Developer's sole cost and expense.

(n) As soon as the Developer identifies a potential Contractor for a potential Contract described in the first sentence of Section 24.02(m), but in no event later than five Days after Contract execution, the Developer will notify the Department in writing of the name, address, phone number and authorized representative of such Contractor.

Section 24.03 Key Personnel

(a) The Developer will retain, employ and utilize the individuals specifically listed in its Proposal to fill the corresponding Key Personnel positions listed therein. The Developer will not change or substitute any such individuals except due to internal promotion, retirement, death, disability, incapacity, or voluntary or involuntary termination of employment, or as otherwise approved by the Department pursuant to Section 24.03(b).

(b) The Developer will notify the Department of any proposed replacement for any Key Personnel position. The Department will have the right to review the qualifications and character of each individual to be appointed to a Key Personnel position (including personnel employed by Contractors to fill any such position) and to approve or disapprove use of such individual in such position prior to the commencement of any Work by such individual.

(c) The Developer will cause each individual filling a Key Personnel position to dedicate the full amount of time necessary for the proper performance of the Work.

(d) The Developer will provide the Department with telephone number and email addresses for all Key Personnel. The Department requires the ability to contact Key Personnel 24 hours per day, seven days per week.

Section 24.04 Small, Women-Owned and Minority Business (SWaM), Disadvantaged Business Enterprise (DBE) and Local Hiring Reporting

(a) Disadvantaged Business Enterprise (DBE).

(i) General.

(A) The parties recognize the importance of pursuing, inviting and developing the participation of minority, women-owned and small businesses through the DBE program, where applicable.

(B) The Developer and each Contractor will not discriminate on the basis of race, color, national origin, sex, sexual orientation or gender identity in the performance of this Agreement. The Developer and each Contractor will carry out applicable requirements of 49 CFR Part 26 in the award and administration of DOT-assisted contracts. Failure by the Developer and each Contractor to carry out these requirements is a material breach of this Agreement, which may result in the termination of this Agreement or such other remedy as set forth in Section 24.04(a)(v).

(ii) Design-Build Work.

(A) During performance of the Design-Build Work, in an effort to comply with 49 CFR Part 26, the Department has established a goal of 15% for DBE participation on the DBE/SWaM Design-Build Contract Value as a whole, which should be met through the design and construction phases of the Design-Build Work.

(B) The Department and the Developer agree to manage the foregoing goals as follows:

(1) the Developer will submit an updated DBE/SWaM Plan on January 1 of each year of the Term that defines the Developer's approach to meeting the DBE participation goals set forth in this Section 24.04(a);

(2) the Developer will have dedicated resources to the DBE inclusion program to ensure compliance with 49 CFR Part 26, the DBE/SWaM Plan, nondiscrimination provisions, technical assistance activities, communication of subcontracting and generate reports specific to DBE utilization;

(3) the Developer will be responsible for either achieving or making Good Faith Efforts to achieve the goal of 15% for DBE participation by providing maximum contracting opportunities for DBE businesses;

(4) the Developer will provide to the Department each calendar quarter documentation of all executed Contracts, including subcontracts, and payments to DBE businesses;

(5) the Developer will have the opportunity to establish DBE sub-contracting work packages; and

(6) the Developer will provide Good Faith Efforts documentation using form C-49 and other supplemental information as appropriate for Contracts that do not include DBE participation. The Developer agrees that if the Department accepts the Good Faith Efforts documentation on a particular bid item group, the Developer will make reasonable efforts to accomplish the overall goal using other bid item groups.

(C) During the performance of the Design-Build Work, the parties will work cooperatively to accomplish the applicable DBE objectives. The Department will assist the Developer in meeting the Design-Build Work goals by offering assistance to include the following items:

(1) the parties will jointly conduct outreach meetings for DBE firms;

(2) the Department will identify to the Developer through the Department Civil Rights team DBE firms that are eligible to bid on the specific bid item groups; and

(3) the Department will provide access to technical and managerial assistance to eligible DBE firms, including in part, through the Department Civil Rights Team and the Business Opportunity Workforce Development Center based upon available funds.

(D) The Developer acknowledges that the Department's assistance and cooperation will not eliminate or reduce the Developer's responsibility to achieve the Design-Build Work goals for DBE participation or demonstrate Good Faith Efforts. The Developer 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 Developer is expected to meet the goal or demonstrate that Good Faith Efforts have been made. The Developer will submit quarterly reports of Good Faith Efforts documentation, and, DBE payments on form C-63 or equivalent to the Department Representative.

(E) When there is a contract goal for the Design-Build Work, the Developer and the Developer Parties must make Good Faith Efforts to meet the goal either through obtaining enough DBE participation or documenting the Good Faith Efforts it made to do so. 49 CFR Part 26 explicitly provides that the Department must not disregard showings of Good Faith Efforts, and it gives the Developer and the Developer Parties the right to have the Department reconsider a decision that their Good Faith Efforts were insufficient. The Department must seriously consider the Developer's documentation of Good Faith Efforts. The Department will issue a guidance

memorandum on Good Faith Efforts, providing examples, procedures and reporting requirements for the Developer.

(iii) O&M Work. During performance of the O&M Work, when contracting for such work the Developer will encourage the participation of DBE firms in the Project. The Developer will set annual goals and make Good Faith Efforts to achieve or exceed such goals in contracts for the O&M Work. The annual and long-term participation DBE goal for the Developer in contracting for the O&M Work is 15% on the O&M Work as a whole.

(iv) DBE Reporting and Assessment.

(A) The Developer will report quarterly, within 15 Days after each calendar quarter ends, to the Division Administrator for Civil Rights on the Developer's efforts to (1) satisfy the DBE goals set forth in this Section 24.04(a) or (2) demonstrate Good Faith Efforts to accomplish the DBE goals set forth in this Section 24.04(a).

(B) The Division Administrator for Civil Rights will assess, confirm and communicate to the Developer within 30 Days after receiving each quarterly report whether the Developer has (1) satisfied the DBE goals, (2) demonstrated Good Faith Efforts, or (3) failed to satisfy the requirements of clause (1) and (2) of this Section 24.04(a)(iv)(B).

(v) Failure to Demonstrate DBE Good Faith Efforts Related to Design-Build Work.

(A) If the Division Administrator for Civil Rights notifies the Developer pursuant to Section 24.04(a)(iv)(B) that the Developer has failed to satisfy the requirements of clause (1) of Section 24.04(a)(iv)(B) and has failed to satisfy the requirements of clause (2) of Section 24.04(a)(iv)(B) with respect to the DBE goals for the Design-Build Work for a quarterly period, the Developer will have until the end of the next consecutive quarter to demonstrate that it has satisfied the requirements of either clause (1) or (2) of Section 24.04(a)(iv)(B) with respect to such DBE goals.

(B) If the Developer has failed to satisfy the requirements of clause (1) of Section 24.04(a)(iv)(B) and has failed to satisfy the requirements of clause (2) of Section 24.04(a)(iv)(B) with respect to the DBE goals for the Design-Build Work for two consecutive quarters based on the determinations by the Division Administrator for Civil Rights pursuant to Section 24.04(a)(iv), the Developer will prepare and submit, at the Developer's sole cost and expense, a DBE Performance Improvement Plan for the Department's review and approval. The DBE Performance Improvement Plan will describe the specific actions and measures that the Developer will undertake to improve its performance with respect to satisfying the requirements of clause (1) and (2) of Section 24.04(a)(iv)(B) with respect to the DBE goals for the Design-Build Work. The Developer will submit the DBE Performance Improvement Plan within 15 Days after receiving notice from the Department pursuant to Section 24.04(a)(iv) that the Developer has failed to satisfy the requirements of clause (1) of Section 24.04(a)(iv)(B) and has

failed to satisfy the requirements of clause (2) of Section 24.04(a)(iv)(B). The Developer will pay the Department for its Allocable Costs in reviewing, approving and monitoring the Developer's compliance with the DBE Performance Improvement Plan until the Developer satisfies the requirements of either clause (1) or (2) of Section 24.04(a)(iv)(B) with respect to the DBE goals for the Design-Build Work.

(C) If the Developer has failed to satisfy the requirements of clause (1) of Section 24.04(a)(iv)(B) and has failed to satisfy the requirements of clause (2) of Section 24.04(a)(iv)(B) with respect to the DBE goals for the Design-Build Work for three consecutive quarters based on the determinations by the Division Administrator for Civil Rights pursuant to Section 24.04(a)(iv), the Department may debar or disqualify the Key Members from participating in Commonwealth procurements through the Department until the earlier to occur of (i) the Developer satisfies the requirements of either clause (1) or (2) of Section 24.04(a)(iv)(B) with respect to the DBE goals for the Design-Build Work or (ii) twenty-four months after the effective date of the debarment. Only the Commissioner of Highways for the Department may waive the provisions of this Section 24.04(a)(v).

(D) If the Division Administrator for Civil Rights determines at any time that the Developer has satisfied the requirements of either clause (1) or (2) of Section 24.04(a)(iv)(B) with respect to the DBE goals for the Design-Build Work performed to date with respect to the applicable calendar quarter, then any prior determinations by the Division Administrator for Civil Rights of the Developer's failure to satisfy the requirements of clause (1) of Section 24.04(a)(iv)(B) and the Developer's failure to satisfy the requirements of clause (2) of Section 24.04(a)(iv)(B) with respect to such DBE goals will be disregarded, the Developer will be deemed to be in compliance with this Section 24.04, and any future determinations of a failure to satisfy the requirements of clause (1) of Section 24.04(a)(iv)(B) and a failure to satisfy the requirements of clause (2) of Section 24.04(a)(iv)(B) with respect to such DBE goals will be pursuant to the provisions set forth in Section 24.04(a)(v)(A).

(E) Any decision or action taken by the Division Administrator for Civil Rights or the Department pursuant to Section 24.04(a) is subject to the dispute resolution procedures set forth in Article 21.

(b) Small, Women-Owned and Minority Business (SWaM).

(i) General.

(A) The parties recognize the importance of pursuing, inviting and developing the participation of minority, women-owned and small businesses through the SWaM program, where applicable.

(B) The Developer will not and will not permit its Contractors to discriminate on the basis of race, color, national origin, sex, sexual orientation or gender identity in the performance of this Agreement. The Developer will carry out applicable

requirements of Executive Order 20 (2014), in the award and administration of this Agreement and the award and administration of subcontracts pursuant to this Agreement.

(C) Failure by the Developer to carry out the requirements in this Section 24.04(b) relating to SWaM participation will subject the Developer to only the remedies set forth in Section 24.04(b)(v) and will not result in a Developer Default.

(D) If debarment occurs as a result of the Department's exercise of such remedies, such debarment will not result in a Developer Default.

(ii) Design-Build Work.

(A) During performance of the Design-Build Work, in an effort to support Executive Order 33 (2006), the Department has established a goal of 27% for SWaM participation on the DBE/SWaM Design-Build Contract Value.

(B) The Department and the Developer agree to manage the foregoing goals as follows:

(1) the Developer will submit an updated DBE/SWaM Plan on January 1 of each year of the Term that defines the Developer's approach to meeting the SWaM participation goals set forth in this Section 24.04(b);

(2) the Developer will have dedicated resources to the SWaM inclusion program to ensure compliance with Executive Order 33 (2006), the DBE/SWaM Plan, nondiscrimination provisions, technical assistance activities, communication of subcontracting and generate reports specific to SWaM utilization;

(3) the Developer will be responsible for either achieving or making Good Faith Efforts to achieve the goal of 27% for SWaM participation by providing maximum contracting opportunities for SWaM businesses;

(4) the Developer will provide to the Department each calendar quarter documentation of all executed Contracts and payments to SWaM businesses;

(5) the Developer will have the opportunity to establish SWaM-only statement of work packages; and

(6) the Developer will provide Good Faith Efforts documentation using form C-49 and other supplemental information as appropriate for Contracts that do not include SWaM participation. The Developer agrees that if the Department accepts the Good Faith Efforts documentation on a particular bid item group, the Developer will make reasonable efforts to accomplish the overall goal using other bid item groups.

(C) During the performance of the Design-Build Work, the parties will work cooperatively to accomplish the applicable SWaM objectives. The Department will assist the Developer in meeting the Design-Build Work goals by offering assistance to include the following items:

(1) the parties will jointly conduct outreach meetings for SWaM firms;

(2) the Department will identify to the Developer SWaM firms that are eligible to bid on the specific bid item groups; and

(3) the Department will provide access to technical and managerial assistance to eligible SWaM firms, including in part, through the Department Civil Rights Team and the Business Opportunity Workforce Development Center based upon available funds.

(D) The Developer acknowledges that the Department's assistance and cooperation will not eliminate or reduce the Developer's responsibility to achieve the Design-Build Work goals for SWaM participation or demonstrate Good Faith Efforts. The Developer 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 Developer is expected to meet the goal or demonstrate that Good Faith Efforts have been made. The Developer will submit quarterly reports of Good Faith Efforts documentation, and, SWaM payments on form C-63 to the Department Representative.

(E) When there is a contract goal for the Design-Build Work, the Developer and the Developer Parties must make Good Faith Efforts to meet the goal either through obtaining enough SWaM participation or documenting the Good Faith Efforts it made to do so. The Department must seriously consider the Developer's documentation of Good Faith Efforts. The Department will issue a guidance memorandum on Good Faith Efforts, providing examples, procedures and reporting requirements for the Developer.

(iii) O&M Work. During performance of the O&M Work, when contracting for such work the Developer will encourage the participation of SWaM firms in the Project. The Developer will set annual goals and make Good Faith Efforts to achieve or exceed such goals in contracts for the O&M Work. The Developer 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 20 (2014). The annual and long-term participation SWaM goal for the Developer in contracting for the O&M Work is 27% on the O&M Work as a whole.

(iv) SWaM Reporting and Assessment.

(A) The Developer will report quarterly, within 15 Days after each calendar quarter ends, to the Division Administrator for Civil Rights on the Developer's efforts to (A) satisfy the SWaM goals set forth in this Section 24.04(b) or (B)

demonstrate Good Faith Efforts to accomplish the SWaM goals set forth in this Section 24.04(b).

(B) The Division Administrator for Civil Rights will assess, confirm and communicate to the Developer within 30 Days after receiving each quarterly report whether the Developer has (1) satisfied the SWaM goals, (2) demonstrated Good Faith Efforts, or (3) failed to satisfy the requirements of clause (1) and (2) of this Section 24.04(b)(iv)(B).

(v) Failure to Demonstrate SWaM Good Faith Efforts Related to Design-Build Work.

(A) If the Division Administrator for Civil Rights notifies the Developer pursuant to Section 24.04(b)(iv) that the Developer has failed to satisfy the requirements of clause (1) of Section 24.04(b)(iv)(B) and has failed to satisfy the requirements of clause (2) of Section 24.04(b)(iv)(B) with respect to the SWaM goals for the Design-Build Work for a quarterly period, the Developer will have until the end of the next consecutive quarter to demonstrate that it has satisfied the requirements of either clause (1) or (2) of Section 24.04(b)(iv)(B) with respect to such SWaM goals.

(B) If the Developer has failed to satisfy the requirements of clause (1) of Section 24.04(b)(iv)(B) and has failed to satisfy the requirements of clause (2) of Section 24.04(b)(iv)(B) with respect to the SWaM goals for the Design-Build Work for two consecutive quarters based on the determinations by the Division Administrator for Civil Rights pursuant to Section 24.04(b)(iv), the Developer will prepare and submit, at the Developer's sole cost and expense, a SWaM Performance Improvement Plan for the Department's review and approval. The SWaM Performance Improvement Plan will describe the specific actions and measures that the Developer will undertake to improve its performance with respect to satisfying the requirements of clause (1) and (2) of Section 24.04(b)(iv)(B) with respect to the SWaM goals for the Design-Build Work. The Developer will submit the SWaM Performance Improvement Plan within 15 Days after receiving notice from the Division Administrator for Civil Rights pursuant to Section 24.04(b)(iv) that the Developer has failed to satisfy the requirements of clause (1) of Section 24.04(b)(iv)(B) and has failed to satisfy the requirements of clause (2) of Section 24.04(b)(iv)(B). The Developer will pay the Department for its Allocable Costs in reviewing, approving and monitoring the Developer's compliance with the SWaM Performance Improvement Plan until the Developer satisfies the requirements of either clause (1) or (2) of Section 24.04(b)(iv)(B) with respect to the SWaM goals for the Design-Build Work.

(C) If the Developer has failed to satisfy the requirements of clause (1) of Section 24.04(b)(iv)(B) and has failed to satisfy the requirements of clause (2) of Section 24.04(b)(iv)(B) with respect to the SWaM goals for the Design-Build Work for three consecutive quarters based on the determinations by the Division Administrator for Civil Rights pursuant to Section 24.04(b)(iv), the Department may debar or disqualify the Key Members from participating in Commonwealth procurements through the Department until the earlier to occur of (i) the Developer satisfies the requirements of

either clause (1) or (2) of Section 24.04(b)(iv)(B) with respect to the SWaM goals for the Design-Build Work or (ii) twenty-four months after the effective date of the debarment. Only the Commissioner of Highways for the Department may waive the provisions of this Section 24.04(b)(v).

(D) If the Division Administrator for Civil Rights determines that the Developer has satisfied the requirements of either clause (1) or (2) of Section 24.04(b)(iv)(B) with respect to the SWaM goals for the Design-Build Work performed to date, then any prior determinations by the Division Administrator for Civil Rights of the Developer's failure to satisfy the requirements of clause (1) of Section 24.04(b)(iv)(B) and the Developer's failure to satisfy the requirements of clause (2) of Section 24.04(b)(iv)(B) with respect to such SWaM goals will be disregarded, the Developer will be deemed to be in compliance with this Section 24.04, and any future determinations of a failure to satisfy the requirements of clause (1) of Section 24.04(b)(iv)(B) and a failure to satisfy the requirements of clause (2) of Section 24.04(b)(iv)(B) with respect to such SWaM goals will trigger the provisions set forth in Section 24.04(b)(v)(A).

(E) Any decision or action taken by the Division Administrator for Civil Rights or the Department pursuant to Section 24.04(b) is subject to the dispute resolution procedures set forth in Article 21.

(c) Veteran and Local Hires.

(i) General.

(A) The Commonwealth is committed to reducing barriers to employment to ensure a diverse workforce in the construction industry. Therefore, the purpose of the Veteran and Local Hiring Program, set forth in the Department's Special Experimental Project – 14 document issued September 2, 2015 (“SEP-14”), is to support and grow the Commonwealth's commitment by means of a robust hiring and retention program for local workers and veterans and a robust on-the-job training program.

(B) The Developer, Design-Builder and any subcontractors will comply with SEP-14.

(C) The parties recognize the importance of recruiting, hiring, and technical and workplace training of local workers and veterans in the development and execution of the Project. As such, the Developer will utilize workforce on-the-job training, apprenticeship and recruitment programs to actively recruit local workers and veterans.

(D) The Developer will comply with all applicable state and federal law, regulations, guidelines, and policies in the administration of SEP-14 and the award and administration of subcontracts. Failure by the Developer to carry out the requirements of SEP-14 will subject the Developer to only the remedies set forth in Section 24.04(b)(v) and will not result in a Developer Default.

(E) If debarment occurs as a result of the Department's exercise of such remedies, such debarment will not result in a Developer Default.

(ii) Design-Build Work.

(A) During performance of the Design-Build Work, the Department has established a minimum requirement of 75% for local worker and/or veteran new hire participation on the Design-Build Work as a whole. New hire participation represents employees paid specifically for work performed on the project and may be randomly verified through the checking of payrolls. Hiring by subcontractors will count toward meeting the percentage goal.

(B) The Department and the Developer agree to manage the foregoing goals as follows:

(1) the Developer will submit for the Department's review and approval an initial Hiring Development Plan, and an updated Hiring Development Plan as further described herein. The initial and updated Hiring Development Plan will be submitted within 30 Days after the Project has achieved Financial Close and on January 30 of each year prior to achieving Project Completion. The Hiring Development Plan will define the Developer's approach to meeting the workforce minimum requirements set forth in Section 24.04(c)(ii)(A);

(2) the Developer will designate resources, including a liaison officer designated and made known to the Department who is assigned the responsibility of administering and promoting an active and inclusive Hiring Development Plan to ensure all programs related to the Hiring Development Plan are compliant with this Special Provision. The designation and identity of this officer will be submitted as part of the initial and updated Hiring Development Plan;

(3) the Developer will ensure that local workers and veterans have been given full and fair opportunity to participate in the hiring process for vacant positions;

(4) the Developer will make Good Faith Efforts to obtain local workers and veterans' participation in the execution and performance of this Agreement at or above the established local worker and veteran hiring goal set forth herein;

(5) the Developer will provide to the Department each calendar quarter, after approval of the Initial Hiring Development Plan, documentation of all local worker and veteran workforces; and

(6) each calendar quarter, the Developer will provide Good Faith Efforts documentation using Form C-66, VDOT Local Worker and Veteran Employment Report or equivalent tracking measures and other supplemental information as appropriate. Current workforce and local and veteran new hires

will be tracked by the number of employees and not how many hours such employee is paid. Form C-66 or Developer's equivalent report in a format otherwise acceptable to the Department, will be used to capture the Developer's workforce at contract execution and local workers and veterans hired and terminated during the course of the Project.

(C) During the performance of the Design-Build Work, the parties will work cooperatively to accomplish the local worker and veteran recruitment, hiring and on-the-job objectives, as established in the approved Hiring Development Plan and its subsequent updates. The Department will assist the Developer in meeting the Design-Build Work workforce minimum requirements set forth in Section 24.04(c)(ii)(A) by offering assistance in the following activities:

(1) the parties will jointly conduct outreach meetings for local workers and veterans; and

(2) the parties will jointly identify agencies or firms that actively employ or recruit local workers and veterans.

(D) The Developer acknowledges that the Department's assistance and cooperation will not eliminate or reduce the Developer's responsibility to achieve the Design-Build Work workforce minimum requirements set forth in Section 24.04(c)(ii)(A) or demonstrate Good Faith Efforts. The Developer 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 Developer will meet the workforce minimum requirements set forth herein or demonstrate that Good Faith Efforts have been made.

(E) When there is a workforce minimum requirement for the Design-Build Work, the Developer will make Good Faith Efforts to meet the workforce minimum requirement through obtaining enough local and veteran worker workforce participation or documenting the Good Faith Efforts it made to do so. The Department will not disregard showings of Good Faith Efforts. The Department must seriously consider the Developer's documentation of Good Faith Efforts. The Department will issue Good Faith Efforts Guidelines providing examples, procedures and reporting requirements for the Developer's consideration.

(F) During the performance of both the Design-Build Work and Operations and Maintenance Work, the following procedures will apply to the Hiring Development Plan for compliance purposes:

(1) Hiring: The Developer will use standard hiring practices, including interviews, to consider all qualified applicants in the defined local geographic area to meet the established local and veteran hiring goal. The Developer will make Good Faith Efforts to fill all available positions with local and veteran applicants. Local workforce development centers and the Virginia Employment Commission may be used for applicant referrals. The Developer is

encouraged to partner with local workforce development centers for local applicants;

(2) **New Hire:** Employees who work on the Project to whom the employer anticipates paying earnings include full-time, part-time, and temporary statuses that are employed for a specific project. New hires will include employees reporting to work for the first time or re-hires (employees who return to work after being laid off, furloughed, separated, granted a leave without pay, or terminated from employment); and

(3) **Good Faith Efforts Described:** The Department will determine if the Developer has demonstrated adequate Good Faith Efforts, and if given all relevant circumstances, those efforts were made actively and aggressively to meet the local and veteran hiring goal. Efforts to obtain local and veteran hiring goals are not Good Faith Efforts if they could not reasonably be expected to produce a level of local worker's participation sufficient to meet the local and veteran hiring goal set forth in this Special Provision. Good Faith Efforts may be determined by soliciting for vacant positions through reasonable and available means in the goal area, such as but not limited to, advertising, written notices to local workforce development centers and the Virginia Employment Commission.

(iii) **O&M Work.** During performance of the O&M Work, when contracting for such work the Developer will promote the participation of a local and veteran worker workforce participation on the Project. When any hiring is performed related to the O&M Work, 75% of all new hires will be calculated annually and will be either a local worker and/or a veteran. Hiring by subcontractors will count toward meeting the percentage goal.

(iv) **Veteran and Local Hires Reporting and Assessment.**

(A) The Developer, Design-Builder and each subcontractor will report to the Department quarterly, within 15 Days after each calendar quarter ends, on the Developer's efforts to (A) satisfy the local and veteran worker workforce minimum requirements set forth in Section 24.04(c)(ii)(A) or (B) demonstrate Good Faith Efforts to accomplish the local and veteran worker workforce minimum requirements.

(B) The Department will assess, confirm and communicate to the Developer within 30 Days after receiving each quarterly report whether the Developer has (A) satisfied the local worker and veteran workforce minimum requirements, (B) demonstrated Good Faith Efforts, or (C) failed to satisfy the requirements of clause (A) and (B), and the reasons why the Department has determined Good Faith Efforts has not been satisfied.

(C) The Developer will report compliance on Form C-66, VDOT Local Worker and Veteran Employment Report, in accordance with the instructions attached to the form or an equivalent report in a format otherwise acceptable to the Department.

(v) Failure to Demonstrate Veteran and Local Hires Good Faith Efforts Related to Design-Build Work.

(A) If the Department notifies the Developer pursuant to Section (d) that the Developer has failed to satisfy the requirements of Section 24.04(c)(iv) with respect to the local worker and veteran participation workforce minimum requirements for the Design-Build Work for a quarterly period, the Developer will have until the end of the next consecutive quarter to demonstrate that it has satisfied the requirements of Section 24.04(c)(iv) with respect to such local worker and veteran participation workforce minimum requirements.

(B) If the Developer has failed to satisfy the requirements of Section 24.04(c)(iv) with respect to the local worker and veteran participation workforce minimum requirements for the Design-Build Work for two consecutive quarters based on the determinations by the Department, the Developer will prepare and submit, at the Developer's sole cost and expense, a participation performance improvement plan ("Participation Performance Improvement Plan") for the Department's review and approval. The Participation Performance Improvement Plan will describe the specific actions and measures that the Developer will undertake to improve its performance with respect to satisfying the requirements of Section 24.04(c)(iv) with respect to the participation workforce minimum requirements for the Design-Build Work. The Developer will submit the Participation Performance Improvement Plan within 15 days after receiving notice from the Department that the Developer has failed to satisfy the requirements of Section 24.04(c)(iv). The Developer will reimburse the Department for its Allocable Costs in reviewing, approving and monitoring the Developer's compliance with the Participation Performance Improvement Plan until the Developer satisfies the requirements of Section 24.04(c)(iv).

(C) If the Developer has failed to satisfy the requirements of Section 24.04(c)(iv) with respect to the Veteran and Local Hires goals for the Design-Build Work for three consecutive quarters, the Department may debar or disqualify the Key Members from participating in Commonwealth procurements through the Department until the earlier to occur of (i) the Developer satisfies the requirements of Section 24.04(c)(iv) or (ii) twenty-four months after the effective date of the debarment. Only the Commissioner of Highways for the Department may waive the provisions of this Section 24.04(c)(v)(C).

(D) Any decision or action taken by the Department pursuant to Section 24.04(c) is subject to the dispute resolution procedures set forth in Article 21.

Section 24.05 Health, Safety and Welfare

The parties recognize and agree that protection of the health, safety and welfare of the public and all persons engaged in connection with the performance of the Developer's obligations pursuant to this Agreement is a priority. Accordingly, the Developer will comply with the following provisions, along with all other Laws and the Technical Requirements:

(a) the Developer will comply, and will require all Contractors to comply, with all construction safety and health standards established by Law, including the Commonwealth and Federal Occupational Health and Safety Acts. Neither the Developer nor any Contractor will 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 Section 107 of the Contract Work Hours and Safety Standards Act; and

(b) the Department will be entitled to require the Developer to suspend any Work or other activities related to the Project, which in the sole discretion 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; *provided*, that if it is determined in accordance with the dispute resolution procedures in Article 21 that the Developer was in compliance with its obligations under this Agreement, then the suspension order and other actions will be treated as a Department Change pursuant to Section 14.02.

Section 24.06 Labor, Employment and DBE/SWaM Related Matters

The Developer will comply, and will cause its Contractors to comply, with the provisions set forth in the Labor, Employment and DBE/SWaM Related Matters attached as Exhibit W.

Section 24.07 Federal Immigration Reform and Control Act

In accordance with Section 2.2-4311.1 of the Code of Virginia, the Developer certifies that it does not and agrees that it will not, during the Term, knowingly employ an unauthorized alien as defined in the Federal Immigration Reform and Control Act of 1986. The Developer further agrees that it will require all of its Contractors to certify that they do not and will not knowingly employ an unauthorized alien as defined by such Act.

ARTICLE 25.

MISCELLANEOUS

Section 25.01 Transfers by the Developer

(a) Lock-Up Period. During the Lock-up Period, the Developer will not, without the Department's approval, Transfer, or otherwise permit the Transfer of, any or all of the Developer's Interest to or in favor of any Person (a "Transferee") or permit any Person to:

(i) Transfer, or otherwise dispose of 50% or more of any direct or indirect ownership interest in the Developer;

(ii) grant any security interest, Lien or other encumbrance over its direct or indirect ownership interest in the Developer;

(iii) enter into any agreement in respect of any direct or indirect ownership interest in the Developer or in respect of any votes attached to any such shares held by such Person in the Developer, in each case (A) other than customary shareholder,

partnership or organizational agreements among the Equity Members as of the Agreement Date solely with respect to the governance and management of the Developer or (B) other than agreements for Transfers of less than 50% of any direct or indirect ownership interest in the Developer; or

(iv) agree, whether or not subject to any condition precedent or subsequent, to do any of the foregoing.

Notwithstanding the foregoing, this Section 25.01 will not prohibit or restrict the following:

(A) a Transfer to the Collateral Agent or trustee or such Person's nominee or transferee, as permitted in connection with the exercise of rights and remedies under the Project Financing Agreements, or a Transferee permitted or approved under the Direct Agreement;

(B) any other Transfer identified in clauses 1 through 6 of the definition of Change in Control; or

(C) any agreement to make any of the Transfers described in the preceding clauses (A) and (B) of this Section 25.01(a).

(b) Post Lock-Up Period. Following the Lock-up Period, the Developer will not Transfer, any or all of the Developer's Interest to or in favor of a Transferee, unless:

(i) the Department has approved such proposed Transferee based upon a determination in accordance with Section 25.01(c) (unless it is the Collateral Agent permitted under Article 7 or a Transferee that is permitted or has been approved under the Direct Agreement); and

(ii) the proposed Transferee (unless it is the Collateral Agent permitted under Article 7 or a Transferee that is permitted or has been approved under the Direct Agreement) enters into an agreement with the Department in form and substance reasonably satisfactory to the Department wherein the Transferee acquires the rights and assumes the obligations of the Developer and agrees to perform and observe all of the obligations and covenants of the Developer pursuant to this Agreement.

(c) The Department's approval of a proposed Transferee may be withheld only if the Department determines that the proposed Transfer is prohibited by Law or such proposed Transferee is not capable of performing the obligations and covenants of the Developer pursuant to this Agreement, which determination may be based upon, or take into account, one or more of the following factors, as applicable:

(i) the financial strength and integrity of the proposed Transferee, and its 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 its Key Personnel and each of its direct Contractors in operating toll roads or highways and performing other projects; and

(iv) the background of the proposed Transferee, each of its direct Contractors, and their 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.

(d) Except for a Transfer of all the Developer's Interest to the Collateral Agent upon its exercise of remedies under the Financing Assignments or to a Transferee that is permitted or has been approved under the Direct Agreement, no Transfer of all or any of the Developer's Interest will be made or have any force or effect if at the time of such Transfer there has occurred a Developer Default that has not been remedied or an event that with the lapse of time, the giving of notice or otherwise would constitute a Developer Default, unless the Transferee is prepared to cure such Developer Default in accordance with the Direct Agreement.

(e) A Change in Control of the Developer will be deemed to be a Transfer of the Developer's Interest for purposes of this Section 25.01.

(f) Any Transfer or other sale, transfer, disposition or other transaction made in violation of this Section 25.01 will be null and void *ab initio* and of no force and effect.

Section 25.02 Ethical Standards

(a) The Developer 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 policies including any amendments or modifications will include standards of ethical conduct concerning the following:

(i) restrictions on gifts and contributions to, and lobbying of, any State Party 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 Developer or its personnel or any Contractors;

(iv) restrictions on directors, members, officers or supervisory or management personnel of the Developer 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 Developer 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 Developer will 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 Developer will establish reasonable systems and procedures to promote and monitor compliance with the policy.

(c) Without limiting the foregoing provisions of this Section 25.02, the Developer further agrees: (i) no gifts, gratuities, or favors of any nature whatsoever will be given or offered by any Developer Party to personnel of the Department; and (ii) no Developer Party will 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 Developer Party or any of its employees, representatives, or agents of any person acting in its behalf have violated this provision, the Developer 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 25.03 Assignment by the Department

The Department may, subject to giving the Developer not less than 90 Days prior written notice or as required by Law, 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 Commonwealth as permitted by Law; *provided*, that the assignee (a) has assumed all of the Department's obligations, duties and liabilities pursuant to this Agreement and the Project Agreements then in effect and has provided the Developer with reasonable assurance of its legal authority and sufficient financial resources to honor and perform same and (b) will not be required to have financial resources in excess of those then available to the Department.

Section 25.04 Authorized Representatives

(a) Each of the Developer and the Department hereby designates the following individuals as its initial Developer Representative(s) and Department Representative(s), respectively, to administer this Agreement on its respective behalf:

(i) For the Developer:

Ricardo Bosch
Sven Kottwitz
Belen Marcos
Carlos Ugarte
I-66 Express Mobility Partners LLC
9600 Great Hills Trail, Suite 250E
Austin, TX 78759
Telephone: (512) 637-8545

(ii) For the Department:

Chief Engineer
Virginia Department of Transportation
1401 E. Broad Street
Richmond, VA 23219

(b) The Developer Representatives and the Department Representatives will be reasonably available to each other during the Term and will have the authority to issue instructions and other communications on behalf of the Developer and Department, respectively, and will be the recipient of notices and other written communications from the other party pursuant to this Agreement (except any notice initiating or relating to the dispute resolution procedures of Article 21 will be given in accordance with Section 25.05). However, such Representatives will not have the authority to make decisions or give instructions binding upon the Developer or the Department, except to the extent expressly authorized by the Developer or the Department, as the case may be, in writing. In the event the Developer or the Department designates different Representatives, it will give the other party written notice of the identity of and contact information for the new Developer Representative(s) or Department Representative(s), as the case may be.

Section 25.05 Notices

(a) Whenever under the provisions of this Agreement it will be necessary or desirable for one party to serve any notice, request, demand, report or other communication on another party, the same will be in writing and will 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: Commissioner of Highways
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

Virginia Department of Transportation
Northern Virginia District
4975 Alliance Drive
Fairfax, VA 22030
Attn: NOVA District Administrator

If to the Developer:

I-66 Express Mobility Partners LLC
9600 Great Hills Trail, Suite 250E
Austin, TX 78759
Attention: Legal Department
Telephone: (512) 637-8545

With copies to:

Gibson Dunn & Crutcher LLP
200 Park Avenue
New York, NY 10166
Attention: Tomer Pinkusiewicz
Telephone: (212) 351-2630
Facsimile: (212) 351-5230

(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 will be deemed delivered upon receipt, if served by mail or independent courier will 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 will be deemed delivered on the date of receipt as shown on the received facsimile (*provided*, that the original is thereafter delivered as aforesaid).

Section 25.06 Binding Effect

Subject to the limitations of Section 25.01 and Section 25.03, this Agreement will be binding upon and will 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 will 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 25.07 Relationship of Parties

(a) The relationship of the Developer to the Department will be one of an independent contractor, not an agent, partner, lessee, joint or co-venturer or employee, and neither the Department nor the Developer will have any rights to direct or control the activities of the other or their respective Affiliates, contractors or consultants, except as otherwise expressly provided in this Agreement.

(b) Officials, employees and agents of the Developer or the Department will in no event be considered employees, agents, partners or representatives of the other.

Section 25.08 No Third-Party Beneficiaries

Nothing contained in this Agreement is intended or will 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 25.09 Limitation on Consequential Damages

Except as expressly provided in this Agreement to the contrary, neither party will be liable to the other for punitive damages or special, indirect, incidental or consequential damages of any nature, whether arising in contract, tort (including negligence) or other legal theory. The foregoing limitation will not, however, in any manner:

(a) prejudice the Department's right to recover any or all of (i) Milestone Liquidated Damages, (ii) Project Completion Liquidated Damages, (iii) Lane Closure Liquidated Damages or (iv) Financial Close Liquidated Damages from the Developer as provided in this Agreement;

(b) limit the Developer's liability for any type of damage arising out of the Developer's obligation to indemnify, protect, defend and hold each State Indemnitee harmless from Third Party Claims under Article 15 and Section 16.03 of this Agreement;

(c) limit the Developer's liability for any type of damage to the extent covered by the proceeds of insurance required hereunder; or

(d) limit the amounts expressly provided to be payable by the Department or the Developer pursuant to this Agreement.

Section 25.10 Waiver

(a) No waiver by any party of any right or remedy pursuant to this Agreement or the other Project Agreements will be deemed to be a waiver of any other or subsequent right or remedy pursuant to this Agreement or the other Project Agreements. The consent by one party to any act by the other party requiring such consent will 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 will be deemed to waive, exhaust or impair any right, remedy or power of such party pursuant to this Agreement or any other Project Agreement, or to relieve the other party from the full performance of its obligations pursuant to this Agreement and the other Project Agreements.

(c) No waiver of any term, covenant or condition of this Agreement will be valid unless in writing and executed by the obligee party.

(d) The acceptance of any payment or payment by a party will 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 payment or (ii) continue, extend or affect (A) the service of any notice, any suit, arbitration 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 will 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 25.11 No Brokers

Except for any financial adviser or investment banker whose fee will be paid by the party retaining such adviser or banker (or in the case of a Developer Financial Party, by such party or the Developer), 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 25.12 Governing Law; Compliance with Law and Federal Requirements

(a) This Agreement will be governed by and construed in accordance with the Laws of the Commonwealth applicable to contracts executed and to be performed within the Commonwealth without regard to conflicts of laws principles.

(b) The Developer will keep fully informed of and comply and require its Contractors to comply with Law. The Developer will execute and file the documents, statements, and affidavits required under any Law required by or affecting this Agreement or the execution of the Work. The Developer will permit examination of any records made subject to such examination by such Law.

(c) The Developer will comply and require its Contractors to comply with all Laws applicable to the Project as a result of the costs of the Project being financed in part with Commonwealth funds, federal-aid funds and Commonwealth bond proceeds, including the applicable Federal Requirements attached as Exhibit S.

(d) The Developer acknowledges that FHWA has designated the Project as a "Major Project" under 23 USC § 106, which imposes certain reporting and coordination requirements on the Department. To assist the Department in the preparation of its financial plan in respect of the Department's obligations to FHWA, no later than June 30 of each year, commencing on the June 30 following the Commercial Closing Date, the Developer will provide to the Department and FHWA certain information, including, but not limited to, Project costs (including project development and construction costs, operating and maintenance costs and financing costs), cost and funding trends, cash flows, project status, Project Schedule and risk and response strategies. The Developer may be requested to provide other information as necessary in order to comply with FHWA's reporting requirements for Major Projects.

(e) The Developer 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 Developer will 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.

Section 25.13 Use of Police Power

Nothing in this Agreement limits the authority of the Department to exercise its regulatory and police powers granted by Law.

Section 25.14 Survival

The dispute resolution procedures, the indemnifications, limitations, releases, obligations to pay termination compensation and all other provisions which by their inherent character should survive expiration or earlier termination of this Agreement and/or completion of the

Work will survive the expiration or earlier termination of this Agreement and/or the completion of the Work.

Section 25.15 Subpoena

Except as provided for in Section 33.2-206 of the Code of Virginia, the Developer may subpoena any Department personnel; *provided*, that the Developer will 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 Developer's receipt of an invoice reasonably documenting the amount of such time provided.

Section 25.16 Construction and Interpretation of Agreement

(a) The language in all parts of this Agreement will 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 has been prepared jointly by the parties and has been the subject of arm's length and careful negotiation over a considerable period of time, 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 will not be interpreted or construed against the party preparing it, and instead other rules of interpretation and construction will be utilized.

(b) If any court of competent jurisdiction issues a final, non-appealable judicial order finding that a term or provision of this Agreement is invalid or unenforceable, the remainder of this Agreement will not be affected thereby and each other term and provision of this Agreement will 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 will 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 will 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. 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 expressly provided otherwise, all references to Articles and Sections refer to the Articles and Sections set forth in this Agreement. 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 will 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) The Project Agreements are intended to be complementary and consistent and to be read together as a complete agreement. In the event of any conflict, ambiguity or inconsistency between the Articles of this Agreement and the exhibits to this Agreement, the conflict or inconsistency will be resolved by applying the following order of document precedence, from highest to lowest:

- (i) Change Orders and amendments to the articles of this Agreement and Definitions;
- (ii) the Articles of this Agreement and Definitions;
- (iii) the Technical Requirements, as amended, including as amended due to approved and implemented ATCs; and
- (iv) the other exhibits to this Agreement, as amended.

Subject to the foregoing, any provision that establishes a higher quality, manner or method of performing Work (including statements, offers, terms, concepts or designs included in the Developer’s Conceptual Plan, Proposal Commitments and Alternative Technical Concepts set forth in Exhibit B-4), that establishes a better Good Industry Practice or that uses more stringent standards will prevail.

(g) A Project Agreement to which the Department is not a party will have no effect upon the terms and conditions of this Agreement or the construction or interpretation thereof.

(h) Any standard or specification with which the Developer is required to comply by a provision of this Agreement during the Construction Period, will be the specific edition or version identified in the Technical Requirements, and the Developer will not be required during the Construction Period to comply with any newer, updated or revised edition or version unless the parties so agree or the Developer is so directed by the Department as a Department Change.

Section 25.17 Counterparts

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

Section 25.18 Entire Agreement; Amendment

(a) This Agreement and the Project Agreements to which the Department and the Developer 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, including the interim agreement, 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 will 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 Act 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 Act, 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 25.19 Payment of Developer Damages and Other Amounts by the Department

(a) THE DEPARTMENT'S PAYMENT OF ANY DEVELOPER DAMAGES, LOSSES OR ANY OTHER AMOUNTS DUE AND OWING BY THE DEPARTMENT PURSUANT TO THIS AGREEMENT WILL BE SUBJECT TO APPROPRIATION BY THE GENERAL ASSEMBLY AND ALLOCATION BY THE CTB. Upon determination of Developer Damages or such other amounts due and owing by the Department, the Department will with all practical dispatch consistent in all respects with Law and its obligations pursuant to this Agreement:

(i) deliver to the Governor and the Director of the Department of Planning and Budget of the Commonwealth, before December 1 with respect to any such payment requested to be appropriated by the next regular session of the General Assembly, a statement of the amount of any such payment due or expected to be due and a request that the Governor include in his budget to be delivered to the next session of the General Assembly a provision that there be appropriated such amounts for such purpose to the extent required, from any legally available funds;

(ii) use its diligent efforts to have (A) the Governor include, in each biennial or any supplemental budget the Governor presents to the General Assembly, the amounts

set forth in any statement delivered pursuant to (i) above, (B) the General Assembly appropriate and reappropriate, as applicable, such amounts to or on behalf of the Department for the purpose of paying any Developer Damages or other amounts due and owing by the Department to the Developer pursuant to this Agreement, and (C) the CTB allocates such appropriated amounts as applicable for payment to the Developer; and

(iii) notify the Developer promptly upon becoming aware of any failure by (A) the Governor to include such amounts in his budget delivered to the next session of the General Assembly, (B) the General Assembly to appropriate such amounts during such next session of the General Assembly or (C) the CTB to so allocate such amounts for payment to the Developer.

(b) The parties hereto agree and acknowledge that, subject to appropriation, such obligation of the Department to pay the Developer Damages and other amounts was and is a material inducement and consideration for the execution and delivery of this Agreement by the Developer.

(c) The Department will pay any sum due pursuant to Section 20.03, Section 20.04(b)(iii), Section 20.05, Section 20.06 or Section 20.07 within 60 Days after the date of determination of the applicable termination compensation amount, or in the event of a dispute related to such sum, within 60 Days after the date that the dispute is settled or determined as provided herein; provided, in each case, that the Department may defer payment of such sum for an additional 270 Days if it reasonably determines that such additional period is necessary in order to obtain funds to pay such sum; provided further, that any payment of such sum will be made together with interest thereon (A) at the average earnings rate on the Commonwealth's Transportation Trust Fund or any successor thereto during the period that runs from the date such sum would have otherwise become due to the date that is 60 Days thereafter and (B) after such period, at the Bank Rate until the date of payment thereof; except that to the extent such payment is based on the Developer Debt or the amounts required for the Developer to achieve the Base Case Equity IRR, such amounts will be re-calculated as of the date of payment.

(d) Subject to the provisions of Section 25.19(c) regarding the Department's right to defer payment for an additional 270 Days, the Department will proceed to make payment to the Developer of the undisputed amount of any sum due pursuant to Section 20.03, Section 20.04(b)(iii), Section 20.05, Section 20.06 or Section 20.07 without regard to any ongoing dispute resolution procedures.

Section 25.20 Taxes

The Developer is solely responsible for the payment of Taxes accrued or arising out of the performance of its obligations pursuant to this Agreement.

Section 25.21 Payments to Department or Developer

(a) Except as otherwise expressly provided herein or in any Project Agreement, payments due to the Department or the Developer hereunder, as applicable, will be due and payable within 30 Days of receipt by the Developer or the Department, as applicable, of an invoice therefor, together with any supporting documentation.

(b) Each party will be entitled to deduct, offset or withhold from any amounts due from one party to the other party any amounts then due and owing from such other party.

(c) Except as otherwise provided, neither party is required to pay amounts due that are being contested in accordance with the dispute resolution procedures described in Article 21.

Section 25.22 Interest on Overdue Amounts

Any amount not paid when due pursuant to this Agreement will 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 Section 25.19(c)), which interest will be payable on demand. Interest will be compounded annually and payable on the date on which the related overdue amount is paid.

[SIGNATURE PAGE(S) TO FOLLOW]

EXECUTION VERSION

IN WITNESS WHEREOF, the parties, intending to be legally bound, have executed this Comprehensive Agreement relating to the Transform 66 P3 Project as of the date first written above.

**VIRGINIA DEPARTMENT OF
TRANSPORTATION,**

an REDACTED

By



EXECUTION VERSION

I-66 EXPRESS MOBILITY PARTNERS LLC,
a Delaware limited liability company

REDACTED

By: _____
Name: _____
Title: _____

By: _____
Name: _____
Title: _____



EXHIBIT A

DEFINITIONS

Acronym	Definition
AASHTO	American Association of State Highway and Transportation Officials
AID	Automatic Incident Detection
AMRL	AASHTO Materials Reference Laboratory
ASTM	American Society for Testing Materials
ATMS	Active Traffic Management System
BCOM	Virginia Department of General Services' Bureau of Capital Outlay Management
CCCS	Central Control Computer System
CCTV	Closed-Circuit Television
CI	Critical Infrastructure
CII	Critical Infrastructure Information
CII/SSI	Critical Infrastructure Information/Sensitive Security Information
CLRP	Constrained Long-Range Transportation Plan
CPI	Consumer Price Index
CPM	Critical Path Method
CPT	Cone Penetration Test
CPTED	Crime Prevention Through Environmental Design
CTB	Commonwealth Transportation Board
DBE/SWaM	Disadvantaged Business Enterprise/Small, Women- and Minority-owned Business Enterprise
DEM	Digital Elevation Model
DGS	Department of General Services
DMS	Dynamic Message Signs
DMT	Dilatometer Test
DMV	Department of Motor Vehicles
DTM	Digital Terrain Model
EDMS	Electronic Document Management System
EIR	Environmental Impact Review
ESC	Erosion and Sediment Control
ESCCC	Erosion and Sediment Control Contractor Certification
ETC	Electronic Toll Collection
ETTM	Electronic Toll and Traffic Management
FEMA	Federal Emergency Management Agency
FHWA	Federal Highway Administration
FI/RW	Field Inspection and Right of Way
FOIA	Freedom of Information Act
GAAP	Generally Accepted Accounting Principles
GFCI	Ground Fault Circuit Interrupter
GFE	Good Faith Effort
GUI	Graphical User-Interface

Acronym	Definition
Express/HOV	High Occupancy Toll/High Occupancy Vehicle
HOV	High Occupancy Vehicle
IAG	InterAgency Group
IDSP	Integrated Directional Sign Program
IIM or I&IM	Instructional and Informational Memorandum
IJR	Interchange Justification Report
IMR	Interchange Modification Report
IP	Intellectual Property
ISA	In Service Availability
ISO	International Organization for Standardization
IT	Information Technology
ITS	Intelligent Transportation System
IVHS	Intelligent Vehicle Highway System
LED	Light Emitting Diode
MMS	Maintenance Management System
MOI	Department Manual of Instructions for Material Division
MOT	Maintenance of Traffic
MPO	Metropolitan Planning Organization
MTBF	Mean Time Between Failure
MTTR	Mean Time To Repair
MUTCD	Manual on Uniform Traffic Control Devices
NEPA	National Environmental Policy Act
NFPA	National Fire Protection Association
NS	Norfolk Southern
ORT	Open Road Tolling
OSHA	Occupational Health and Safety
PA	Programmatic Agreement
PABs	Private Activity Bonds
PCI	Payment Card Industry
PDP	Project Development Plan
PPTA	Public-Private Transportation Act
PTZ	Pan Tilt Zoom
QMSP	Quality Management System Plan
RLD	Responsible Land Disturber Certification
ROD	Record of Decision
RUMS	Right of Way and Utilities Management System
SAT	Site Acceptance Testing
SIA	Schedule Impact Analysis
SPT	Standard Penetration Test
SRA	Safety Rest Area
STIP	State Transportation Improvement Plan
STRAHNET	Strategic Highway Network
SWaM	Small Woman-Owned and Minority Business
SYIP	Six-Year Improvement Plan

Acronym	Definition
SWM	Storm Water Management
SWPPP	Storm Water Pollution Prevention Plan
TIFIA	Transportation Infrastructure Finance and Innovation Act
TMP	Transportation Management Plan
TMS	Traffic Management System
UCC	Uniform Commercial Code
UPS	Uninterruptible Power Source
USDOT	United States Department of Transportation
VA SHPO	Virginia State Historic Preservation Officer
VCRI	Verification Cross Reference Index
VDOT	Virginia Department of Transportation
VPS	Violation Processing System
VSBA	Virginia Small Business Financing Authority
VPSTF	Virginia Petroleum Underground Storage Tank Fund
VSMMP	Virginia Stormwater Management Program
VSP	Virginia State Police
WMATA	Washington Metropolitan Area Transit Authority

1991 Easement means the *Easement Between Washington Metropolitan Transit Authority and Virginia Department of Transportation*, dated November 25, 1991.

Act is defined in the first Recital to the Agreement.

Actual Cumulative NPV of Gross Revenues means the sum of the net present value of the annual Gross Revenues from the Service Commencement Date through the specified date for the calculation year, discounted to the Financial Close Date using as a discount rate the Initial Equity IRR.

Actual TIFIA Financial Terms means the terms and conditions contained in the TIFIA Loan Documentation.

Adjustment Period End Date means the Financial Close Date.

Adjustment Period Start Date means 10:00 a.m. on the date Benchmark Rates and credit spreads are required to be submitted for approval in accordance with the ITP.

Administering Employees means employees of Developer and the Key Members whose work related to the Project has not been completed that are involved in the administration of Federal or Commonwealth funds.

Affiliate means, when used to indicate a relationship with a specified Person, a Person that: (a) directly or indirectly, through one or more intermediaries has a 10% or more voting or economic interest in such specified Person or (b) controls, is controlled by or is under common control with such specified Person, and a Person is deemed to be controlled by another Person, if controlled in any manner whatsoever that results in control in fact by that other Person (or that

other Person and any Person or Persons with whom that other Person is acting jointly or in concert), whether directly or indirectly and whether through share ownership, a trust, a contract or otherwise.

Affiliate Contract means a Contract with an Affiliate.

Affiliate Debt means any indebtedness incurred by the Developer to an Affiliate of the Developer unless the terms of such indebtedness are comparable to terms, or are no less favorable to the Developer than terms that could have been obtained on an arm's length basis from a Person that is not an Affiliate of the Developer.

Agreement or **Comprehensive Agreement** means the Comprehensive Agreement Relating to the Transform 66 P3 Project, dated as of the Agreement Date, and all exhibits and schedules thereto, as supplemented or further amended from time to time.

Agreement Date means the date written on the cover page of the Agreement, which date will be the date on which the parties have executed and delivered the Agreement.

Agreement Year means (a) the period beginning on the Financial Close Date and ending on the first June 30 (or, if the Developer has a fiscal year ending December 31 and so elects, ending on the first December 31) following the Financial Close Date, (b) each succeeding full calendar year or full fiscal year, as relevant, during which the Agreement remains in effect, and (c) the period beginning on July 1 or January 1 of the calendar year or fiscal year, as relevant, in which the Agreement terminates and ending on the date of termination. For purposes of assessing the Net Cost Impact of a Compensation Event, the partial year commencing with the date of the Compensation Event and ending on the earlier of (i) the following December 31 or June 30, as applicable, or (ii) the termination of the Agreement, will be treated as an Agreement Year.

Airspace means any and all real property, including the surface of the ground, within the vertical column extending above and below the surface boundaries of the Project Right of Way and not necessary or required for the Project (including Project Enhancements) or developing, permitting, designing, financing, constructing, installing, equipping, operating, maintaining, tolling, repairing, reconstructing, restoring, rehabilitating, renewing or replacing the Project (including Project Enhancements) or the Developer's timely fulfillment of its obligations under the Project Agreements.

Allocable Costs means:

(a) for services performed using Department or Developer personnel, materials and equipment, the sum of:

(i) an amount equal to the reasonable fully burdened hourly rate (including overhead and fringe benefits) of each employee providing such services multiplied by the actual number of hours such employee performs such services; plus

(ii) the reasonable cost of all materials used, including sales taxes, freight and delivery charges and any allowable discounts; plus

(iii) reasonable and documented out-of-pocket costs and expenses of each employee (including travel, meals and lodging costs), subject to any limitations and requirements on such costs and expenses set forth in the Department's travel guidelines; plus

(iv) the costs for the use, operating, maintenance, fuel, storage and other costs of all deployed tools (excluding small tools) and equipment, calculated at hourly rates determined from the most current volume of the Rental Rate Blue Book published by Nielsen/DATAQUEST, Inc. of Palo Alto, California, or its successors, or at any lesser hourly rate the Department may approve from time to time in its sole discretion, without area adjustment, but with equipment life adjustment made in accordance with the rate adjustment tables, *provided*, that if rates are not published for a specific type of tool or equipment, the Department will establish a rate for it that is consistent with its cost and use in the industry; and

(b) if the services are performed by a contractor under contract with the Department or the Developer, the sum of:

(i) all reasonable amounts owing under such contract; *provided*, that if the contract is an Affiliate Contract, the lesser of the contract amount or the amount that would be reasonably obtained in an arm's length transaction for comparable services with a person that is not an Affiliate; plus

(ii) the amount to reimburse the Department or the Developer for the actual and documented reasonable costs of administering the contract, but not to exceed 10% of the value of the contract; plus

(iii) all reasonable costs the Department or the Developer reasonably incurs to enforce or pursue remedies for the contractor's failure to perform in accordance with the contract, except in the case of a contract that is an Affiliate Contract.

Alternative Facility means the following:

(a) Additional general-purpose lanes within the I-66 Corridor encompassing the Express Lanes during the term of the Agreement; *provided*, general purpose lanes do not include the use of auxiliary lanes for any of their intended uses or the use of the shoulder between auxiliary lanes as an additional travel lane for incident management, maintenance and construction activities; and

(b) The expansion of the Orange Line within the I-66 Corridor encompassing the Express Lanes within the 10 years following the Agreement Year in which the Project Completion Date occurs.

Alternative Technical Concepts are innovative concepts that deviate from the Technical Requirements for design, construction, operation and maintenance of the Project, or otherwise require a modification of the Technical Requirements, that were included as part of Developer's Proposal and have been accepted by the Department for inclusion in the Project.

Annual Budget is defined in Section 9.07(a).

Approved for Construction (“AFC”) Documents means all drawings, specifications, revisions thereto, and any other items necessary to construct the Work, sealed by a professional engineer licensed by the Commonwealth.

As-Built Schedule means the last Project Schedule Update submitted to and approved by the Department in accordance with the Technical Requirements.

Asset means an individual component, system or subsystem of the Project, as identified in the first column of the Performance Requirements Baseline Table.

Assumed TIFIA Financial Terms means TIFIA Credit Assistance that contains the terms in the Indicative TIFIA Term Sheet (as such term is defined in the ITP).

Authorized Representatives means the individuals identified in Section 25.04.

Bank Rate means the prime rate of interest announced publicly by *The Wall Street Journal* (or its successors) as the so-called “prime rate.”

Base Case Equity IRR means the nominal post-tax Internal Rate of Return on Committed Investment over the full Term projected in the Base Case Financial Model or the Base Case Financial Model Update, as applicable.

Base Case Financial Model means Initial Base Case Financial Model adjusted at Financial Close pursuant to Section 7.06(b).

Base Case Financial Model Update is defined in Section 6.02(a).

Base Case Traffic Model means the traffic and revenue model and the assumptions and information used by or incorporated in the model to provide the Transform 66 P3 Project Investment Grade Traffic and Revenue Study dated January 2016, the results of operation of which are incorporated into the Base Case Financial Model.

Baseline Schedule means the Baseline Schedule, as approved by the Department in accordance with the terms hereof following review of the Initial Baseline Schedule, identifying the major Work activities in sufficient detail to enable the Department to monitor and evaluate design and construction progress pursuant to the Technical Requirements.

Basis Points or **bp** means one hundredth of one percent (0.0001).

Benchmark Rates means the rates for TIFIA financing, bonds, and bank debt contained in Exhibit P.

Breakage Costs means any prepayment premiums or penalties, make-whole payments or other prepayment amounts (including premiums) that the Developer must pay under any Project Financing Agreement as a result of the early repayment of Developer Debt prior to its scheduled maturity date.

Business Day means any day on which the Department is officially open for business.

Capital Beltway Comprehensive Agreement means the Amended and Restated Comprehensive Agreement Relating to the Route 495 HOT Lanes in Virginia Project, dated as of December 19, 2007, between the Department and CBE.

CBE means Capital Beltway Express LLC, a Delaware limited liability company.

Casualty Cost is defined in Section 17.07(a)(ii).

Change in Control means (a) the Transfer of 50% or more of the equity interests in the Developer by the Equity Members as of the Agreement Date, or (b) any Transfer of interest or other transaction of any type or description, including by or through voting securities, asset transfer, contract, merger, acquisition, succession, dissolution, liquidation or otherwise, that results, directly or indirectly, in a change in possession of the power to direct or control or cause the direction or control of the management of the Developer or a material aspect of its business. A change in the power to direct or control or cause the direction or control of the management of a shareholder, member, partner or joint venture member of the Developer may constitute a Change in Control of the Developer if such shareholder, member, partner or joint venture member possesses the power to direct or control or cause the direction or control of the management of the Developer; *provided*, that the following will not constitute a Change in Control:

(1) a change in possession of the power to direct or control the management of the Developer or a material aspect of its business due solely to bona fide open market transactions in securities effected on a recognized public stock exchange, excluding such transactions involving an initial public offering of the Developer;

(2) a change in possession of the power to direct or control the management of the Developer or a material aspect of its business due solely to a bona fide transaction involving securities or beneficial interests in the ultimate parent organization of a shareholder, member, partner or joint venture member of the Developer, unless the transferee in such transaction is at the time of the transaction suspended or debarred or subject to a proceeding to suspend or debar from bidding, proposing or contracting with any Federal department or agency or State Party;

(3) an upstream reorganization or transfer of direct or indirect interests in the Developer so long as there occurs no change in the entity with ultimate power to direct or control or cause the direction or control of the management of such person, whether directly or indirectly and whether through share ownership, a trust, a contract or otherwise;

(4) the exercise of preferred or minority equity holder veto or voting rights (whether provided by Law or by the Developer's organizational documents) over major business decisions of the Developer;

(5) the grant of Financing Assignments in accordance with the Agreement, or the exercise of Lender remedies thereunder, including foreclosure; or

(6) transfers of direct or indirect ownership interests in the Developer (as applicable) between or among (i) Persons that are under common “control” (within the meaning of control contemplated by the definition clause (b) of Affiliate) or (ii) any fund or entity managed directly or indirectly by a shareholder, member or partner of the Developer or any Affiliate, provided it can be demonstrated to the Department, for its prior approval (of only the following matters), that such transfers (a) do not affect the direction or control of the management of the Developer and (b) continue to permit ongoing performance by the Developer under this Agreement.

Change in Law means (a) the enactment of any Law after the Setting Date or (b) any change, amendment to, repeal or revocation of any Law or in the interpretation or application thereof by any Governmental Authority after the Setting Date; excluding, however, any change in or new Law enacted but not yet effective as of the Setting Date.

Change Order means a written order issued by the Department to the Developer delineating changes in the Work or in the terms or conditions of the Technical Requirements, as applicable, in accordance with Section 14.02.

Change Proposal is defined in Section 14.02(b).

Change Proposal Estimate is defined in Section 14.02(b)(ii).

Chief Engineer means the Department’s Chief Engineer.

Claim means any and all claims, disputes, disagreements, causes of action, demands, suits, proceedings, damages, injuries, liabilities, obligations, losses, costs and expenses.

Code of Virginia means the Code of Virginia of 1950, as amended from time to time.

Collateral Agent means the Institutional Lender (or representatives thereof) acting on behalf of or at the direction of the other Lenders or the Person or Persons so designated in an intercreditor agreement or other document executed by all Lenders to whom Financing Assignments are outstanding at the time of execution of such document, a copy of which will be delivered by the Developer to the Department.

Commencement of Use means the date an Alternative Facility is opened for normal and continuous use by the travelling public or when a Project Enhancement is substantially completed.

Commissioner of Highways (Commissioner) means the appointed chief executive officer of the Department or any successor in function.

Committed Investment means (a) any form of direct investment by Equity Members, including the purchase of equity shares in the Developer; (b) any bona fide indebtedness of the Developer for funds borrowed that: (i) is held by any Equity Member and (ii) is subordinated in priority of payment and security to all Developer Debt held by Persons who are not Equity Members; or (c) an irrevocable on-demand letter of credit issued by or for the account of an

Equity Member naming the Developer or the Collateral Agent as beneficiary and guaranteeing the provision of the direct investment or loan referenced in clause (a) or (b) of this definition.

Commonwealth or **State** means the Commonwealth of Virginia.

Commonwealth Transportation Board (CTB) means a board of the Commonwealth affiliated with the Department.

Communications Plan means the plan developed by the Developer setting forth the Developer's approach to communicating with road users and other stakeholders affected by the development and operation of the Project, as described in more detail in the Technical Requirements.

Compensation Event means any of the following events:

- (a) Department-Caused Delays;
- (b) the development or implementation of any Department Change or Department Project Enhancement pursuant to the Agreement;
- (c) any Discriminatory Change in Law;
- (d) an Alternative Facility, to the extent provided for in Section 12.05;
- (e) any Significant Force Majeure Event to the extent the Department or the Developer elects to continue the Agreement pursuant to Section 20.03;
- (f) in connection with a challenge to the NEPA Documents, the issuance by a court having jurisdiction over the Project of an injunction or other order enjoining or estopping the Developer or the Department from the performance of its rights or obligations pursuant to the Agreement, in any case for more than 45 Days in the aggregate;
- (g) in connection with a delay attributable to (i) a Utility Owner's refusing to enter or delay in entering into a two-party agreement on terms customary for utility providers affected by projects of a similar size and scope or (ii) a Utility Owner failing to perform its obligations under a two-party agreement (as described in the Technical Requirements) in accordance with the terms of such agreement, where such delay (or delays resulting from such failures by multiple Utility Owners) causes one or more Critical Path activities approved by the Department to be adversely impacted for a period of 180 days in the aggregate. The computation of 180 days in the aggregate shall treat any day of delay that runs concurrently with another day of delay, regardless of whether it is a delay caused by the Utility Owner or a different Utility Owner, as a single day and not as two days;
- (h) the occurrence of a Significant Reserved Rights event within or immediately adjacent to the Express Lanes or the Design-Build Project Right of Way;
- (i) the Department's lack of good and sufficient title or right to enter or occupy any parcel that the Department owns as of the Agreement Date;

(j) subject to the condition that the Developer has not failed to perform as is required and necessary in the preparation and submission of a Design Exception or Design Waiver, a Design Exception or Design Waiver necessary to perform the Work in accordance with the RFP Conceptual Plans is not timely granted or is revoked;

(k) a Tax Imposition;

(l) an order by the Department suspending tolls on, or diverting traffic onto, the Express Lanes, other than as provided in the Agreement;

(m) the issuance by a court having jurisdiction over the Project of any injunction or other order enjoining or stopping the Department from the performance of its rights or obligations pursuant to the Agreement, in any case for more than 45 Days in the aggregate;

(n) any change in Law taking effect prior to the Project Completion Date that specifically affects the physical construction of the Project Assets in such a way that directly increases the costs of the Work

(o) discovery within or immediately adjacent to the Express Lanes or the Design-Build Right of Way of archeological, paleontological or cultural resources (including historic properties), excluding any such resources known to Developer prior to the Setting Date or that would have become known to Developer by undertaking reasonable investigation prior to the Setting Date;

(p) discovery within or immediately adjacent to the Express Lanes or the Design-Build Right of Way of any threatened or endangered species (regardless of whether the species is listed as threatened or endangered prior to the Setting Date), excluding any such presence of species known to Developer prior to submission of the Proposal or that would have become known to Developer by undertaking reasonable investigation prior to the Setting Date;

(q) any failure to obtain, or delay in obtaining, a USACE 404 Individual Permit within 240 Days of the Developer's submittal of a complete (as determined by the U.S. Army Corps of Engineers) permit application therefor, or any change in the design concept of the Project or any portion thereof resulting from judicial or administrative action taken with respect to a legal challenge to such USACE 404 Individual Permit as compared to the design concept indicated in the alternative that was the subject of such USACE 404 Individual Permit, except to the extent the change in design concept had already been incorporated into the Developer's design schematics;

(r) any failure to obtain, or delay in obtaining, any of the Major Environmental Permits within 240 Days of the Developer's submittal of a complete permit application(s) therefore;

(s) a WMATA-Caused Compensation Delay; or

(t) any change in Law during the Term that, with respect to Interstate 66 between Interstate 495 in Fairfax County and U.S. Route 29 in the Rosslyn area of Arlington County, (i) prior to the imposition of tolling thereon, prohibits tolling of any vehicles with less than two

occupants (other than motorcycles) between 5:30 a.m. and 9:30 a.m. and between 3:00 p.m. and 7:00 p.m. on weekdays or (ii) at any time after the imposition of tolling thereon, permits non-HOV-3 vehicles to travel at reduced tolls or without tolls between 5:30 a.m. and 9:30 a.m. and between 3:00 p.m. and 7:00 p.m. on weekdays.

provided, that each of the above events does not arise by reason of:

- (1) the negligence or misconduct of a Developer Party; or
- (2) any act or omission by a Developer Party in breach of the provisions of the Agreement or any other Project Agreement.

Compensation Event Notice is defined in Section 14.01(a)(i).

Completed Work Value means the greater of zero and an amount equal to $(A - (B + C))$, where:

A = the total Contract Price (as defined in the Design-Build Contract);

B = the estimated cost to complete all of the Work required to be undertaken in order to achieve Project Completion; and

C = the Department's estimate of all those costs (internal and external) that it is reasonably likely to incur in retendering the Agreement.

Comprehensive I-66 Corridor has the meaning given in the third recital.

Concession Fee means the amount shown in the Initial Base Case Financial Model as the Concession Fee, as may be adjusted at Financial Close pursuant to Section 7.06(b).

Condemnation Certificate means the certificate filed with the appropriate Circuit Court certifying the amount of the offer made by the Developer to the property owner for a Right of Way parcel for which the Developer seeks condemnation.

Construction Cost Index means the Construction Cost Index for the 20-city average as published by Engineering News-Record, for which the base year is 1913 United States Department of Labor, Bureau of Labor Statistics, for which the base year is 1913 = 100, or if such publication ceases to be in existence, a comparable index selected by the Department and approved by Developer, acting reasonably. For example, the Construction Cost Index for April 2015 was 9992.34.

Construction Documentation means all Design Documentation, Approved for Construction Documents, and all shop drawings, working drawings, fabrication plans, material and hardware descriptions, specifications, construction quality control reports, construction quality assurance reports and samples necessary for construction of the Project and/or the Utility Relocations included in the Work, in accordance with the Agreement and the other Project Agreements.

Construction Escrow Documents is defined in Section 18.05(a).

Construction Notice to Proceed (Construction NTP) means the notice to proceed issued pursuant to Section 8.03(a).

Construction Period means the period commencing on the Agreement Date through the Project Completion Date.

Construction Quality Management Plan means the plan developed by the Developer that provides the organization, relationship and procedures that define clear lines of responsibility and well defined approach for meeting Project requirements and innovation in construction approach, as described in more detail in Attachment 1.3 of the Technical Requirements.

Consultant means any Person at the time retained by or on behalf of the Department or the Developer, which Person is experienced and has a national and favorable reputation in the matters for which such Person is so employed.

Consumer Price Index (CPI) means the “Consumer Price Index – U.S. City Averages for all Urban Consumers, All Items” (not seasonally adjusted), or its successor, as published by the U.S. Department of Labor, Bureau of Labor Statistics, or its successor; *provided*, that if the CPI is changed so that the base year of the CPI changes, the CPI will be converted in accordance with the conversion factor published by the U.S. Department of Labor, Bureau of Labor Statistics, or its successor. If the CPI is discontinued or substantially altered, the applicable substitute index will be that chosen by the Secretary of the Treasury for the Department of Treasury’s Inflation-Linked Treasuries as described at 62 Fed. Reg. 846-847 (Jan. 6, 1997), or if no such securities are outstanding, will be determined by the parties in accordance with general market practice at that time.

Contract means any contract, subcontract, or other form of agreement to perform any part of the Work or provide any materials, equipment or supplies for the Project and/or the Utility Relocations included in the Work, on behalf of the Developer or any other Person with whom any Contractor has further subcontracted any part of the Work, at all tiers.

Contractor means any Person with whom the Developer has entered into any Contract to perform any part of the Work or provide any materials, equipment or supplies for the Project and/or the Utility Relocations included in the Work, on behalf of the Developer, and any other Person with whom any Contractor has further subcontracted any part of the Work, at all tiers. The term “Contractor” will include the Design-Build Contractor and the O&M Contractor.

Cost is defined in Section 3.03(b).

Credit Balances means proceeds of Developer Debt and contributed and unreturned cash Equity Contributions, as well as Toll Revenues and interest earnings, that are held as cash and credit balances in accounts held by or on behalf of the Developer, including in Lender accounts and reserve accounts, but excluding the Handback Requirements reserve.

Critical Path means the longest chain(s), in terms of time, of logically connected activities on a Project Schedule ending with Project Completion.

Day or day means a calendar day.

DBE Performance Improvement Plan means the plan submitted and approved by the Department pursuant to Section 24.04(a)(v)(B) with respect to improving the Developer's performance.

DBE/SWaM Design-Build Contract Value means the Design-Build Contract price, less the value of the items listed in Attachment 2, as set forth in the Developer's Proposal.

DBE/SWaM Plan means the plan developed by the Developer that defines the Developer's approach to meet the DBE/SWaM participation goal, as described in more detail in Attachment 1.3 of the Technical Requirements.

Defect means a deterioration in the condition or performance of an Asset, whether by design, construction, installation, damage or wear, affecting the condition, use, functionality or operation of any Project Asset, which would cause or have the potential to cause one or more of the following:

- (a) a hazard, nuisance or other risk to public or worker health or safety, including the health and safety of road users;
- (b) a structural deterioration of the affected Project Asset;
- (c) damage to a third party's property or equipment;
- (d) damage to the Environment; or
- (e) failure of the affected Project Asset to meet a Performance Requirement.

Definitions means this Exhibit A.

Delay Event means:

- (a) with respect to any time between the Agreement Date and the Project Completion Date, the occurrence of one or more of the following before the Project Completion Date:
 - (i) a Force Majeure Event;
 - (ii) an unreasonable and unjustifiable failure by a Governmental Authority to issue, or an unreasonable and unjustified delay by a Governmental Authority in issuing, any Governmental Approval or other authorization required for the Project or the Work;
 - (iii) issuance by a Governmental Authority of competent jurisdiction of an injunction or other order enjoining or estopping either the Department or the Developer from the performance of its rights or obligations under the Agreement;

(iv) a Change in Law that imposes one or more changed or additional requirements that directly and materially adversely impact the performance of the Work and that could not have been reasonably anticipated by a reasonable developer;

(v) the development or implementation of any Department Change or Department Project Enhancement pursuant to the Agreement;

(vi) Department-Caused Delay;

(vii) the performance of Work by the Department within or immediately adjacent to the Express Lanes or the Design-Build Right of Way;

(viii) a delay attributable to (i) a Utility Owner's refusal to enter or delay in entering into a two-party agreement on terms customary for utility providers affected by projects of a similar size and scope, *provided*, the Developer has exercised diligent efforts to obtain the Utility Owner's acceptance or (ii) a Utility Owner failing to perform its obligations under a two-party agreement (as described in the Technical Requirements) in accordance with the terms of such agreement, and such failure following the Developer's diligent efforts to obtain the Utility Owner's cooperation;

(ix) any failure to obtain, or delay in obtaining a USACE 404 Individual Permit within 120 Days of the Developer's submittal of a complete (as determined by the U.S. Army Corps of Engineers) permit application therefor, or any change in the design concept of the Project or any portion thereof resulting from judicial or administrative action taken with respect to a legal challenge to such USACE 404 Individual Permit as compared to the design concept indicated in the alternative that was the subject of such USACE 404 Individual Permit, except to the extent the change in design concept had already been incorporated into the Developer's design schematics;

(x) discovery of a Utility which could not have been reasonably discovered pursuant to, or the existence of which could not have been reasonably inferred from, the Developer's examinations, investigations, review, inspections and other activities undertaken prior to the Setting Date.;

(xi) the Department's lack of good and sufficient title or right to enter or occupy any parcel that the Department owns as of the Agreement Date;

(xii) a Design Exception or Design Waiver necessary to perform the Work in accordance with the RFP Conceptual Plans is not timely granted or is revoked *provided* that the Developer has not failed to perform as is required and necessary in submission of the Design Exception or Design Waiver;

(xiii) the discovery of a Significant Hazardous Environmental Condition;

(xiv) any failure to obtain, or delay in obtaining, any of the Major Environmental Permits within 120 Days of the Developer's submittal of a complete permit application therefore; or

(xv) a WMATA-Caused Delay.

(b) with respect to the Operating Period following the Project Completion Date, the occurrence of one or more of the following during the Operating Period:

(i) a Force Majeure Event;

(ii) issuance by a Governmental Authority of competent jurisdiction of an injunction or other order enjoining or estopping either the Department or the Developer from the performance of its rights or obligations under the Agreement;

(iii) a Change in Law occurring after the Service Commencement Date that imposes one or more changed or additional requirements that directly and materially adversely impact the performance of the Work and that could not have been reasonably anticipated by a reasonable developer;

(iv) the development or implementation of any Department Change or Department Project Enhancement pursuant to the Agreement; or

(v) Department-Caused Delay; and

(c) which in either case under clause (a) or (b) above results in a delay or interruption in the performance by the Developer of any obligation under the Agreement, *provided*, that the Delay Events do not include any delay that:

(i) could have been reasonably avoided by a Developer Party;

(ii) is caused by the negligence or misconduct of a Developer Party;

(iii) is caused by any act or omission by a Developer Party in breach of the provisions of the Agreement or any other Project Agreement;

(iv) arises by reason of lack or insufficiency of funds or failure to make payment of monies or provide required security on the part of any Developer Party;

(v) except to the extent the same constitutes a Force Majeure Event, arises by reason of any strike, labor dispute or other labor protest involving any Person retained, employed or hired by a Developer Party or its Representatives to supply materials or services for or in connection with the Project or any strike, labor dispute or labor protest caused by or attributable to any act (including any pricing or other price or method of operation) or omission of a Developer Party or its Representatives;

(vi) except to the extent the same constitutes a Force Majeure Event, arises by reason of any weather condition (including any flooding) whether or not such weather conditions or the severity of such weather conditions are not or have not ordinarily or customarily been encountered or experienced; or

(vii) arises by reason of the development, redevelopment, construction, modification, maintenance or change in the operation of any existing or new mode of transportation (including mass transit facilities or operations, a road, street or highway) that results in the reduction of Toll Revenues or in the number of vehicles using the Express Lanes, other than an Alternative Facility to the extent provided in Section 12.05.

Delay Event Notice is defined in Section 13.01(a).

Demobilization Costs means the amount necessary to reimburse the reasonable out-of-pocket and documented costs and expenses incurred by the Developer to demobilize and terminate Contracts between the Developer and third parties or Affiliates for performance of Work, excluding the Developer's non-contractual liabilities and indemnity liabilities (contractual or non-contractual) to third parties or Affiliates.

Demonstration and Performance Testing has the meaning given in the Technical Requirements.

Department means the Virginia Department of Transportation, an agency of the Commonwealth, and any other Commonwealth agency duly succeeding to the powers, authorities and responsibilities of the Department invoked by or pursuant to the Agreement.

Department-Caused Delay means any of the following events, to the extent they result in a material delay or interruption in performance of any obligation under the Agreement, and provided such events are beyond the Developer's control and are not due to any act, omission, negligence, recklessness, willful misconduct, breach of contract or Law of any of the Developer Parties and further provided that such events (or the effects of such events) could not have been avoided by the exercise of caution, due diligence, or reasonable efforts by the Developer:

(a) Failure of the Department to issue the Construction Notice to Proceed within 14 Days after the Developer has fulfilled the conditions set forth in Section 8.03;

(b) Department Changes;

(c) Failure of the Department to provide responses to proposed schedules, plans, Design Documentation, condemnation and acquisition packages, and other submittals and matters submitted to the Department after the effective date for which response is required under this Agreement as an express prerequisite to the Developer's right to proceed or act, within the time periods (if any) indicated in this Agreement, or if no time period is indicated, within a reasonable time, taking into consideration the nature, importance and complexity of the submittal or matter, following delivery of notice from the Developer requesting such action in accordance with the terms and requirements of this Agreement;

(d) an unreasonable delay or failure by the Department in performing any of its material obligations pursuant to the Agreement;

(e) any delay or interference with the Design-Build Work or physical damage to the Design-Build Work directly attributable to the Department's separate contractors working in the Project Right of Way; or

(f) a suspension of the Early Work in accordance with the provisions set forth in Section 10.07(e).

Any proper suspension of Work pursuant to Section 10.07 (other than pursuant to paragraph (e) thereof) will not be considered a Department-Caused Delay.

Department Change means (a) a change to the Work pursuant to a Change Order or a Directive Letter issued pursuant to Section 14.02(d)(i) except to the extent that such change constitutes a Department Project Enhancement and (b) any other event that the Agreement expressly states will be treated as a Department Change.

Department Default is defined in Section 19.03.

Department Project Enhancements means any extensions of, additions to, or major modifications of the Project within the Project Right of Way undertaken by the Department pursuant to Section 12.02, except as part of maintenance, repair, reconstruction, rehabilitation, restoration or replacement of any improvements and assets.

Department Projects is defined in Section 12.04(a).

Department Protected TIFIA Financial Terms means TIFIA Credit Assistance that contains the terms attached hereto as Exhibit H.

Department Representative means the individual designated in accordance with Section 25.04.

Department Shared Assets means those components of the Department's transportation network existing as of the Agreement Date or constructed, renovated or improved by the Developer as part of the Project that are set forth in the Technical Requirements.

Department Termination Amount means the greater of (i) 100% of the Developer Debt Termination Amount, plus Demobilization Costs, and (ii) the Project Value, plus Demobilization Costs, less any Credit Balances; *provided, however*, that Credit Balances will not be deducted from the Project Value unless the Project Value is increased on account of such Credit Balances.

Depositary means a savings bank, a savings and loan association or a commercial bank or trust company which would qualify as an Institutional Lender, designated by the Developer and approved by the Department, to serve as depositary pursuant to the Agreement; provided, that so long as Developer Debt is outstanding, the Depositary will be the Collateral Agent.

Design-Build Contract means the contract, dated as of December 8, 2016 between the Developer and the Design-Build Contractor for the Project, containing provisions that incorporate the required terms set forth in Exhibit E attached hereto, as it may be amended or supplemented.

Design-Build Contract Indexation Date is defined in Section 7.06(b)(iv)(A).

Design-Build Contract Price means the price as defined in the Design-Build Contract

Design-Build Contractor means FAM Construction, LLC, a Delaware limited liability company, and its permitted successors and assigns.

Design-Build Performance Security is defined in Section 17.08(b).

Design-Build Right of Way means active construction areas on the Project Right of Way during the Construction Period.

Design-Build Work means the services provided by the Design-Build Contractor under the Design-Build Contract for the construction of the Project Assets.

Design-Build Work Guarantee is defined in Section 17.08(b).

Design Documentation means such plans, drawings, specifications and other design documentation (including design standards, design or durability reports, models, samples and calculations) in computer readable and written formats prepared by or on behalf of the Developer for the purposes of the performance of the Work or any component thereof in accordance with the Agreement.

Design Exceptions and Design Waivers have meanings given such terms in the Technical Requirements.

Design Public Hearing Documentation means documents approved by the Department's Chief Engineer following a required public hearing relative to design of the Project.

Design Quality Management Plan means the plan developed by, and set forth in the Proposal of, the Developer that provides the organization, relationship and procedures that define clear lines of responsibility and well defined approach for meeting Project requirements and innovation in design approach, as described in more detail in Attachment 1.3 of the Technical Requirements.

Developer means I-66 Express Mobility Partners LLC, a Delaware limited liability company, and its permitted successors and assigns.

Developer Damages means the amount calculated pursuant to Section 14.01(b).

Developer Debt means bona fide indebtedness (including subordinated indebtedness) for or in respect of funds borrowed (including bona fide indebtedness with respect to any financial insurance issued for funds borrowed) or for the value of goods or services rendered or received, the repayment of which has specified payment dates and is secured by one or more Financing Assignment including principal, capitalized interest, accrued interest, customary and reasonable lender, financial insurer, agent and trustee fees, costs, expenses and premiums with respect thereto, payment obligations under interest rate and inflation rate hedging agreements or other derivative facilities with respect thereto, reimbursement obligations with respect thereto, lease financing obligations, and Breakage Costs but excluding:

(a) indebtedness of the Developer or any shareholder, member, partner or joint venture member of the Developer that is secured by anything less than the entire Developer's Interest, such as indebtedness secured only by an assignment of economic interest in the Developer or of rights to cash flow or dividends from the Developer;

(b) any increase in indebtedness to the extent resulting from an agreement or other arrangement Developer enters into or first becomes obligated to repay after it was aware (or should have been aware, using reasonable due diligence) of the occurrence or prospective occurrence of an event of termination, including the Developer's receipt of a notice of termination for convenience under Section 20.07 and occurrence of a Department Default of the type entitling the Developer to terminate this Agreement, but excluding a rescue refinancing approved by the Department;

(c) any debt for which notice has not been given to the Department in accordance with the Agreement (together with the related Project Financing Agreements); and

(d) any default interest unless such default interest has accrued as a result of Department Default.

Developer Debt Termination Amount means the aggregate of (without double counting): all principal, interest, banking fees and premiums on financial insurance policies, costs and expenses and other amounts properly incurred owing or outstanding to any person or entity that provides Developer Debt by the Developer under or pursuant to the Project Financing Agreements on the date of expiration of the Agreement, including any Breakage Costs.

Developer Default is defined in Section 19.01.

Developer Default Termination Amount means:

(a) with respect to termination prior to the Service Commencement Date, the lesser of (i) the Completed Work Value and (ii) 80% of the Developer Debt Termination Amount; and

(b) with respect to termination following the Service Commencement Date, the lesser of (i) the Project Value and (ii) 100% of the Developer Debt Termination Amount;

in each case with respect to clause (a) and (b), less:

(1) Credit Balances; provided, however, that Credit Balances will not be deducted from the Project Value unless the Project Value is increased on account of such Credit Balances;

(2) unpaid and/or accrued default interest;

(3) Breakage Costs;

(4) any other amounts referred to in the definition of Developer Debt that arise as a consequence of the termination of the Agreement or the acceleration of or requirement to mandatorily prepay the Developer Debt (this clause (4) only to be taken into account if the Developer Default Termination Amount is based on the Developer Debt Termination Amount);

(5) Non-Reimbursable Developer Damages; provided, however, that Non-Reimbursable Developer Damages will only be deducted from Developer Debt and only to the extent the Non-Reimbursable Developer Damages were used to make Distributions; and

(6) Allocable Costs incurred by the Department in terminating the Agreement for Developer Default.

Developer Financial Party means any guarantor of the Developer's material and executory obligations under the Agreement or any Equity Member of the Developer with material financial obligations to the Developer, unless such obligations have been satisfied or are fully secured under the terms of the Equity Funding Guaranties.

Developer Management Plan means the plan developed by the Developer that describes the Developer's managerial approach, strategy, and quality procedures to design, build, operate and maintain the Project and achieve all requirements of the Agreement, as described in more detail in the Technical Requirements.

Developer Marks means the Developer's name and/or other trademarks, service marks and trade names owned or licensed by the Developer.

Developer Party means the Developer and any Affiliate and any agents, Representatives, officers, directors, employees and Contractors of the Developer or any Affiliate, and will include the Design-Build Contractor and the O&M Contractor.

Developer Project Agreements means the Design-Build Contract, the O&M Agreement and any new construction contract entered into by the Developer for a substantial rebuild of the Work.

Developer Project Enhancement means any extensions of, additions to, or major modifications to the Project undertaken by the Developer pursuant to Section 12.01.

Developer Representative means an individual designated in accordance with Section 25.04.

Developer's Interest means the interest of the Developer in the Project created by the Agreement and the rights and obligations of the Developer pursuant to the Agreement, which will constitute contract rights.

Development Contract means any agreement that is entered into by the Department and the Developer from time to time that sets forth the parties' rights and obligations with respect to the design and construction of a Project Enhancement, which will include such terms as may be mutually agreed by the Developer and the Department.

Deviation means any material proposed or actual change, modification, alteration or exception from any of the Technical Requirements.

Direct Agreement means the agreement executed among the Department, the Developer and the Collateral Agent, in the form attached as Exhibit Q.

Directive Letter means an order issued by the Department in accordance with Section 14.02 directing the Developer to perform Work.

Disadvantaged Business Enterprise Program (DBE) means the Federal program designed to support socially and economically disadvantaged firms working with transportation agencies.

Discriminatory Change in Law means the adoption of any State Law or any change in any State Law or in the interpretation or application thereof during the Term that, except as otherwise provided within this definition:

(a) has the effect of discriminating solely against the Project, the Developer or operators of toll roads in the Commonwealth, except where such State Law or change in State Law or in interpretation or application (1) is in response, in whole or in part, to any failure to perform or breach of the Agreement or other Project Agreement, violation of Law or Governmental Approval, culpable act, omission or negligence on the part of any Developer Party or (2) is otherwise permitted under the Agreement;

(b) permits vehicles other than Permitted Vehicles to travel on the Project;

(c) permits vehicles then paying tolls to travel on the Project at reduced tolls or without tolls, including decreases in then existing High Occupancy Requirements; or

(d) limits the Developer's right to impose, charge, collect and enforce tolls and incidental charges in accordance with Section 5.01.

None of the following will be a Discriminatory Change in Law:

(i) the development and operation of any existing or new mode of transportation (including a road, street, highway or mass transit facility) that results in the reduction of Toll Revenues or in the number of vehicles using the Project;

(ii) any changes in Taxes of general application; or

(iii) the exercise by the Commonwealth of its regulatory and police powers.

A Safety Compliance Order will not be deemed to be a Discriminatory Change in Law. For purposes of the definition of "Discriminatory Change in Law," the term "Governmental Authority" means the government of the Commonwealth or of any department, commission, board, bureau, agency or other regulatory or governmental authority established under the laws of the Commonwealth.

Dispute means any Claim, dispute, disagreement or controversy between the Department and the Developer concerning their respective rights and obligations under the Project Agreements, including concerning any alleged breach or failure to perform and remedies.

Distribution means:

(a) any distribution, dividend, repayment of shareholder loan or other payment, monetary or in-kind, made by the Developer to any Equity Members, including from the proceeds of any Refinancing, on account of equity investment in the Developer;

(b) any payment by the Developer to an Affiliate other than pursuant to an Affiliate Contract to which the Department has consented in accordance with Section 24.02(k) or which does not require the Department's consent in accordance with Section 24.02(k); or

(c) the early release of any contingent funding liabilities to any Equity Member.

Division Administrator for Civil Rights means the Department's division administrator for civil rights.

Document Management Plan means the plan developed by the Developer to define the document management approach for all Work Product, as described in more detail in the Technical Requirements.

E-ZPass means an electronic toll collection system used in the Commonwealth of Virginia and as part of the "E-ZPass Interagency Group".

E-ZPass Interagency Group means an association of toll agencies that operates the E-ZPass electronic toll collection program.

Early Work means the work identified in Exhibit B-3.

Early Work Amount is defined in Section 8.02(e).

Electronic Toll Collection Agreement means the agreement between the Developer and the Department executed in accordance with Exhibit K.

Eligible Security Issuer means any Person which has a credit rating for long-term, unsecured debt of not less than "A-/A3" from one of the Rating Agencies, and has an office in Richmond, Virginia or in New York, New York at which the letter of credit can be presented for payment by facsimile or by electronic means.

Emergency means any unplanned event within the Project Right of Way that:

(a) presents an immediate or imminent threat to the long term integrity of any part of the infrastructure of the Project, to the Environment, to property adjacent to the Project or to the safety of road users or the traveling public;

(b) has jeopardized the safety of road users or the traveling public; or

(c) is a declared state of emergency pursuant to Commonwealth or Federal Law.

Environment means soil, surface waters, groundwaters, land, stream sediments, surface or subsurface strata and ambient air.

Environmental Assessment means the Tier 2 Final Environmental Assessment dated June 21, 2016, including all appendices thereto.

Environmental Laws means any Laws applicable to the Project regulating or imposing liability or standards of conduct concerning or relating to the regulation, use or protection of human health, the Environment or Hazardous Substances, including, by way of example and not limitation, the Comprehensive Environmental Response, Compensation and Liability Act of 1980, 42 USC Section 9601 *et seq.*, the Resource Conservation and Recovery Act, 42 USC Section 6901 *et seq.*, the Federal Clean Water Act, 33 USC Section 1351 *et seq.*, the Occupational Safety and Health Act, 29 USC Section 651 *et seq.*, as currently in force or as hereafter amended.

Environmental Management Plan means the plan developed by the Developer that sets forth the Developer's approach to environmental management, including remediation of hazardous substances, as described in more detail in Attachment 1.3 of the Technical Requirements.

Equity Contribution Amount means one or more equity contributions in the aggregate amount shown, as of the date of this Agreement, in the Initial Base Case Financial Model and, as of the Financial Close Date, in the Base Case Financial Model.

Equity Contributions means (without duplication) cash and Equity Funding Agreements, each in form and substance acceptable to the Department in its sole discretion.

Equity Funding Agreements means the equity funding agreements, dated the Financial Close Date, by and among the Equity Sponsors, the Developer and the Collateral Agent, with respect to the capital commitments for the Project.

Equity Funding Guaranty is defined in Section 17.08(a).

Equity IRR means the nominal post-tax Internal Rate of Return calculated on the Committed Investment on a cash on cash basis over the full Term projected in the Base Case Financial Model.

Equity Letter of Credit is defined in Section 17.08(a).

Equity Member means any Person with a direct equity interest in the Developer.

Equity Sponsors means (x) Cintra Global Ltd. and (y) Meridiam Infrastructure North America Fund II, LP, Meridiam Infrastructure North America Fund II (Domestic), LP, Meridiam Infrastructure North America Fund II AIV, LP and Meridiam Infrastructure North America Fund II AIV II, LP.

Escrow Agent means SunTrust Bank, and its successors and assigns, or such other entity serving as escrow agent pursuant to the Escrow Agreement.

Escrow Agreement means the Escrow Agreement dated as of December 8, 2016 among the Developer, the Department and the Escrow Agent which will be in substantially the form

attached as Exhibit D, as it may be amended or supplemented from time to time in accordance with its terms.

Escrow Documents is defined in Section 18.05(a) and includes any documents submitted on or after the Agreement Date pursuant to Section 18.05(d).

ETC Services means electronic toll collection services.

ETTM means electronic toll and traffic management.

ETTM Data means all data generated by or accumulated in connection with the operation of the ETTM System, including but not limited to customer lists, customer identification numbers, customer account information and billing records and other customer specific information.

ETTM Equipment means the automatic vehicle identification equipment, video monitoring equipment, vehicle occupancy detection equipment, toll violator systems, and electronic toll collection equipment, including its components, systems and subsystems; the traffic management system equipment; communications equipment, and all associated hardware and physical infrastructure and other computer hardware and software necessary to meet the performance specifications for ETTM.

ETTM Facilities means the administration/operations building, toll gantries and technical cabinets, utility connections, lighting facilities and other facilities associated with electronic toll and traffic management.

ETTM System means the ETTM Facilities, ETTM Equipment and the Software which monitors, controls or executes the ETTM Equipment, all of which will meet the minimum performance criteria established by the Technical Requirements.

Exempt Refinancing has the meaning set forth in Section 7.08(c).

Exempt Vehicles means (a) maintenance vehicles of the Department and its contractors and snow removal vehicles of the Department and its contractors, each in the performance of its duties related to the Express Lanes; (b) emergency vehicles and law-enforcement vehicles using the Project for the performance of their duties; and (c) maintenance vehicles of WMATA and its contractors in the performance of its duties related to WMATA facilities located adjacent to the Express Lanes.

Existing Lanes means the GP Lanes that will be impacted by construction of the Project.

Express Lanes means the high occupancy toll lanes and the associated entry and exit ramps within the Project Right of Way that are separated from the adjacent GP Lanes, and the use of which is restricted pursuant to Section 5.01.

FAST Act means the Fixing America's Surface Transportation Act of 2015, as amended.

Federal means of or relating to the central government of the United States of America.

Federal Requirements means the provisions required to be part of federal-aid contracts relating to highway projects and applicable to the Project, including the provisions set forth in Exhibit S.

Financial Close means satisfaction of all of the conditions set forth in Section 7.06.

Financial Close Adjustment Protocol attached as Exhibit X.

Financial Close Date means the date on which Financial Close occurs.

Financial Close Deadline means the date by which Financial Close must occur, which is 210 Days following the Agreement Date, which date may be extended according to the procedures set forth in Section 7.06(c).

Financial Close Liquidated Damages is defined in Section 8.10(a).

Financial Close Security means the irrevocable standby letter of credit in the amount of a minimum of \$20 million and a maximum of \$45 million provided by the Developer to the Department pursuant to Section 6.1.2 of the ITP and issued by an Eligible Security Issuer, with the exact amount of the Financial Close Security being based on \$20 million plus the amount the Developer proposes to be advanced under the terms of the SIB Loan.

Financial Model Auditor means any independent, recognized auditor engaged by the Developer, reasonably acceptable to the Department, who will audit the Base Case Financial Model and modifications to the Financial Model Formulas, and perform such other services as are required in the Agreement.

Financial Model Formulas means the financial formulas that the Developer and the Department have agreed upon as of the Agreement Date as a basis for the Base Case Financial Model and any updates pursuant to the Agreement but without the data and the information used by or incorporated in the Base Case Financial Model or Base Case Financial Model Update.

Financing Assignment is defined in Section 7.07(a).

Financing Escrow Documents is defined in Section 18.05(a).

Fitch Ratings mean Fitch Ratings, and any successor thereto which is a nationally recognized rating agency.

FONSI means the Finding of No Significant Impact related to the Project issued by the FHWA on June 22, 2016.

Force Majeure Event means the occurrence of any of the following events that materially and adversely affects performance of the Developer's obligations, provided that such events (or the effects of such events) could not have been avoided by the exercise of reasonable caution, due diligence, or efforts by the Developer:

(a) war (including civil war and revolution), invasion, armed conflict, violent act of foreign enemy, military or armed blockade, or military or armed takeover of the Project, in each case occurring within the Commonwealth;

(b) any act of terrorism or sabotage that causes direct physical damage to or otherwise directly causes interruption to construction or direct losses during operation of the Project;

(c) nuclear explosion or contamination, in each case causing direct physical damage to the Project or radioactive contamination of the Project;

(d) riot and civil commotion on or in the immediate vicinity of the Project;

(e) flood, earthquake, hurricane, tornado and other significant storm or weather occurrence, in each case that causes direct physical damage to the Project; and

(f) fire or explosion not attributable to the Developer or any Developer Party that directly impacts a material element of the physical improvements to the Project or that materially impacts performance of the Work.

General Assembly means the General Assembly of the Commonwealth.

Generally Accepted Accounting Principles (GAAP) means such accepted accounting practice as conforms at the time to generally accepted accounting principles in the United States of America, consistently applied.

Good Faith Efforts means the adequate demonstrated effort required by the Developer and its Contractors to achieve the DBE and SWaM goals or other requirements in Section 24.04, as set forth in Section 24.06.

Good Industry Practice means the industry practices and standards that would be exercised by a prudent and experienced developer, designer, engineer, contractor, operator or maintenance provider engaged in the same kinds of undertakings and under similar circumstances as those applying to the Work.

Governmental Approvals means all local, regional, state and Federal agreements, studies, findings, permits, approvals, authorizations, certifications, consents, decisions, exemptions, filings, leases, licenses, registrations, rulings and other governmental authorizations required to be obtained or completed under Law prior to undertaking any particular activity contemplated by the Agreement, a Development Contract or a Change Order. The term "Governmental Approvals" includes NEPA Documents and the USACE 404 Individual Permit.

Governmental Authority means any court, Federal, state, or local government, department, commission, board, bureau, agency or other regulatory or governmental authority, but will not include the Department.

GP Lanes means the general purpose traffic lanes (in either or both directions) along the I-66 Corridor.

Gross Revenues means the amount calculated as follows:

- (a) Toll Revenues; plus
- (b) proceeds of business interruption or similar insurance against loss of revenues from operation of the Project; plus
- (c) all other amounts derived from or in respect of the operation of the Project which constitute revenues of the Developer in accordance with GAAP, including any interest income the Developer earns on any funds on deposit in any bank account or securities account; plus
- (d) the amounts paid or to be paid by the Department to the Developer as a result of a Compensation Event within the current calendar year that compensates for Net Revenue Impact and Net Cost Impact pursuant to the Agreement; plus
- (e) all amounts received or retained by the Developer pursuant to Section 22.05; minus
- (f) total credits and refunds of Toll Revenues made by the Developer to customers and users on account of Toll Revenue previously collected.

Handback Period is defined in Section 20.02(f).

Handback Requirements is defined in Section 4.6 of the Technical Requirements.

Handback Reserve Account is defined in Section 20.02(e).

Hazardous Environmental Condition means the presence of any Hazardous Substances on, in, under or emanating from the Project Right of Way that is present at concentrations or in quantities that: (a) may present an imminent or substantial safety or health hazard for the Department, the Developer or their respective employees, agents, representatives or independent contractors, the general public or the surrounding environment or (b) are required to be removed or remediated as a matter of Law or in accordance with the requirements of any Governmental Authority.

Hazardous Substance means, but is not limited to, any solid, liquid, gas, odor, heat, sound, vibration, radiation or other substance or emission which is or could be considered a contaminant, pollutant, dangerous substance, toxic substance, Hazardous Waste, solid waste, or hazardous material which is or becomes regulated by Laws or which is classified as hazardous or toxic under Laws.

Hazardous Waste means a waste that is (a) listed as a hazardous waste in 40 CFR Section 261.31 to 261.33, and (b) exhibits one of the following characteristics: ignitability, corrosivity, reactivity or toxicity, or is otherwise defined as a hazardous waste by Law.

Health, Safety and Security Plan means the plan developed by the Developer that defines the health, safety and security activities required during the design and construction of the Project, as described in more detail in the Technical Requirements.

High Occupancy Requirement means the number of Persons in accordance with Law applicable to the Project required to be traveling in a vehicle for the vehicle to use the Express Lanes without payment of a toll.

High Occupancy Vehicle or **HOV** means a Permitted Vehicle traveling with at least the number of Persons required by the High Occupancy Requirement.

Hiring Development Plan means the plan developed by the Developer that describes its approach to complying with the Department's geographic labor and veterans hiring preference workplan, approved by the FHWA on October 7, 2015.

I-66 Corridor has the meaning given in the fourth recital.

Incident means any unplanned event within the Project Right of Way that causes potential or actual disruption to the free flow of traffic.

Initial Base Case Financial Model means the Financial Model Formulas and the assumptions and information, including, but not limited to, projections and calculations with respect to revenues, expenses, the repayment of Developer Debt, applied to the Financial Model Formulas and which is prepared on the basis of the Base Case Traffic Model as of the Agreement Date.

Initial Baseline Schedule means the initial design and construction schedule, proposed by the Developer and submitted to the Department, which is attached as Exhibit B-2.

Initial Equity IRR means the nominal post-tax Internal Rate of Return on Committed Investment on a cash on cash basis over the full Term as defined in the Initial Base Case Financial Model.

Initial Pre-Refinancing Equity IRR means nominal post-tax Internal Rate of Return on Committed Investment on a cash on cash basis over the full Term projected in the Base Case Financial Model or the Base Case Financial Model Update with all refinancing assumptions turned off.

Initial Project Financing Agreements means the Project Agreements so identified in Exhibit N.

Institutional Lender means:

(a) the United States of America, any state thereof or any agency or instrumentality of either of them, any municipal agency, public benefit corporation or public authority, advancing or insuring mortgage loans or making payments which, in any manner, assist in the financing, development, operation and maintenance of projects;

(b) any (i) savings bank, commercial bank, investment bank, trust company (whether acting individually or in a fiduciary capacity) or insurance company organized and existing under the laws of the United States of America or any state thereof, (ii) foreign insurance company or commercial bank qualified to do business as an insurer or commercial bank as

applicable under the laws of the United States of America or any state thereof, (iii) pension fund, hedge fund, foundation or university or college endowment fund, (iv) entity which is formed for the purpose of securitizing mortgages, whose securities are sold by public offering or to qualified investors under the U.S. Securities Act of 1933, as amended, (v) Person engaged in making loans in connection with the securitization of mortgages, to the extent that the mortgage to be made is to be so securitized in a public offering or offering to qualified investors under the U.S. Securities Act of 1933, as amended, within one year of its making (*provided*, that an entity described in this clause (b) only qualifies as an Institutional Lender if it is subject to the jurisdiction of state and Federal courts in the Commonwealth in any actions);

(c) any “qualified institutional buyer” under Rule 144(a) of the Securities Act of 1933 or any other similar Law hereinafter enacted that defines a similar category of investors by substantially similar terms;

(d) the holders of debt issued by a PABs Issuer or the trustee for such holders, so long as the indenture trustee for such holders of debt itself is an Institutional Lender; or

(e) any other financial institution or entity designated by the Developer and approved by the Department (*provided*, that such institution or entity, in its activity under the Agreement, is acceptable under then current guidelines and practices of the Commonwealth);

provided, that each such entity (other than entities described in clause (b)(iv) and clause (c) of this definition) or combination of such entities if the Institutional Lender is a combination of such entities will have individual or combined assets, as the case may be, of not less than \$1 billion; and *provided further*, that an entity described in clause (b)(iv) of this definition must have assets of not less than \$100 million.

Insurance Requirements means Exhibit V.

Intellectual Property means the ETTM books and records, Escrow Documents, copyrights (including moral rights), trade marks (registered and unregistered), designs (registered, including applications, and unregistered), patents (including applications), circuit layouts, Source Code and Source Code Documentation, plant varieties, business and domain names, inventions, trade secrets, proposals, copyrightable works, customer and supplier lists and information, and other results of intellectual activity, copies and tangible embodiments of all of the foregoing (in whatever form or medium) and licenses granting any rights with respect to any of the foregoing (to the extent assignable), in each case, relating to the Project.

Intermediate Milestones means the P&R Milestone and the Route 28 Signalization Milestone.

Internal Rate of Return or **IRR** means the discount rate that makes the net present value of all cash flows from an investment equal to zero.

ITP means the documents titled Instructions to Proposers with respect to the Project issued by the Department on July 29, 2016 as amended, revised, supplemented or otherwise modified from time to time.

Key Member means (a) the Developer and the Design-Build Contractor with respect to the Design-Build Work or (b) the Developer and the O&M Contractor with respect to the O&M Work.

Key Personnel means the individuals designated by a Proposer in its Technical Proposal in response to Exhibit B, Section 3.2.5 of the ITP.

Known Pre-Existing Hazardous Substances means Hazardous Substances:

- (a) identified in Exhibit R;
- (b) which the Developer should have known were present within the Project Right of Way based on the contents of Exhibit R, as of the Agreement Date; and
- (c) which were actually known by the Developer to be present within the Project Right of Way as of the Agreement Date.

Lane Closure Liquidated Damages is defined in Section 8.14.

Law means all laws, treaties, ordinances, judgments, Federal Requirements, decrees, injunctions, writs and orders of any Governmental Authority, and all rules, regulations, orders, formal interpretations and permits of any Governmental Authority having jurisdiction over construction of the Project or the Project Right of Way, performance of the Work, or operation of the Project, or the health, safety or environmental condition of the Project or the Project Right of Way, as the same may be in effect from time to time. Laws include the Code of Virginia and the Uniform Act.

Lenders means each of the Institutional Lenders that are parties to the Project Financing Agreements, including the Collateral Agent, and their respective successors and assigns who also qualify as Institutional Lenders subject to Section 7.07(a)(i).

Lenders' Base Case means the base case prepared by the Lenders' Traffic Advisor in connection with the underwriting of the initial Senior Developer Debt.

Lenders' Low Case means the low case prepared by the Lenders' Traffic Advisor in connection with the underwriting of the initial Senior Developer Debt.

Letter of Credit means an irrevocable, unconditional letter of credit in favor of the Department (or where indicated, the Developer or the Collateral Agent with the Department as permitted transferee), in form and content reasonably acceptable to the Department that:

- (a) is payable within three Business Days in U.S. dollars upon presentation of a sight draft and a certificate confirming that the Department (or, where indicated, the Collateral Agent or the Developer) has the right to draw under such letter of credit from time to time in the amount of such sight draft and confirming such other matters that may be required under the Letter of Credit, without presentation of any other document, statement or authorization;

(b) is issued by a commercial bank or trust company that (i) has a combined capital and surplus of at least \$1,000,000,000, (ii) is a national banking association, a state bank chartered in one of the states of the United States, or the U.S. branch of a foreign bank, and (iii) is not an Affiliate of the Developer;

(c) is issued by a commercial bank or trust company that has a current credit rating of at least A- or its equivalent from at least two nationally recognized Rating Agencies (or such other credit rating as is acceptable to the Department in its discretion and approved by the Department prior to the submission of the letter of credit);

(d) provides that, if the issuer of the Letter of Credit fails to maintain the ratings specified above in clause (c), then the Letter of Credit may be drawn upon in full within 30 Days unless the Developer or other applicable account party provides a replacement Letter of Credit that meets the requirements of the Agreement or provides additional security acceptable to the Department in its sole discretion;

(e) has an initial term as specified in the Agreement, to the extent applicable;

(f) provides for the continuance or extension of its term for a period of at least one year or, if earlier, until the end of the term for which the Letter of Credit is required or as otherwise provided for in the Agreement;

(g) provides that the office for presentment of sight drafts specified in the Letter of Credit will be located at a specified street address in the City of New York, New York; and

(h) provides that it may be drawn upon in accordance with its terms within ten Business Days of its scheduled expiration date unless, prior to such tenth Business Day, the Department (or, where indicated, the Collateral Agent or the Developer) has received evidence that the scheduled expiration date of such Letter of Credit has been extended or continued in accordance with the provisions hereof or that the replacement letter of credit meeting the requirements of the Agreement has been provided to the intended beneficiary of the expiring Letter of Credit.

Lien means any pledge, lien, security interest, mortgage, deed of trust or other charge or encumbrance of any kind, or any other type of preferential arrangement (including any agreement to give any of the foregoing, any conditional sale or other title retention agreement, any lease in the nature of a security instrument and the filing of or agreement to file any financing statement under the Virginia Uniform Commercial Code).

Life Cycle Maintenance Plan means the plan produced annually by the Developer identifying Major Maintenance and Handback Requirements needs, the estimated costs and timing of those needs and such other information as may be reasonably requested by the Department, as described in Section 9.03(b) and the Technical Requirements.

Limited Notice to Proceed (LNTP) means the applicable limited notice or notices to proceed issued pursuant to Section 8.02(a).

List of Project Financing Agreements and Financing Assignments means Exhibit N.

List of Required Items or **LORI List** means an itemized list of Work that remains to be completed with respect to the Project Assets after Service Commencement has been achieved and before Project Completion, the existence, correction and completion of which will have no material or adverse effect on the normal, uninterrupted and safe use and operation of the Project Assets.

Local Worker means a person whose primary residence is within or adjacent to the county(ies), city(ies), region and/or area impacted by the construction or operation of the Project. Local Workers include those individuals living in the following counties: Fairfax, Arlington, Prince William, Loudoun, Stafford, Fauquier, Culpeper, Rappahannock, Warren and Clarke.

Lock-up Period means the period commencing on the Agreement Date and ending on the second anniversary of the Project Completion Date.

Long Stop Date means the date that is 365 Days following the Project Completion Date; as such date may be extended for Delay Events from time to time in accordance with the terms of the Agreement.

Losses means, with respect to any Person, any losses, liabilities, judgments, damages, fees (including legal fees), penalties, fines, sanctions, charges or out-of-pocket and documented costs or expenses actually suffered or incurred by such Person, including as a result of any injury to or death of persons or damage to or loss of property.

Maintenance Management System (MMS) means the system required under the Technical Requirements to record inventory, failures, repairs, maintenance activities, inspections performed, communications, and notifications of Incidents and Defects.

Maintenance of Traffic (MOT) Plan means the plan developed by the Developer that sets forth the Developer's approach to maintenance of traffic, as described in more detail in the Technical Requirements.

Maintenance Rating Program (MRP) means the Department's Maintenance Rating Program.

Major Environmental Permits means (i) Virginia Department of Environmental Quality Wetland Permits (Section 401 of CWA) and (ii) the Virginia Marine Resource Commission Permit.

Major Maintenance means maintenance, repair, renewal, reconstruction or replacement of any portion or component of the Project Assets, as applicable, of a type which is not normally included as Ordinary Maintenance.

Major Maintenance Performance Security means any Performance Bond, surety, Letter of Credit, guaranty or similar instrument procured in accordance with the terms of this Agreement as set forth in Section 17.08(e).

Major Maintenance Reserve Fund means a deposit account established by the Developer at a financial institution which qualifies as an Institutional Lender under clause (b) of

the definition thereof for the exclusive purpose of holding funds to pay for Tasks of Major Maintenance as described in Section 9.04, together with all amounts from time to time contained therein.

Mass Transit Vehicles and Commuter Buses means vehicles providing scheduled transportation services to the general public over designated routes with specified stops and for the purposes of Section 5.01(b).

Milestone Liquidated Damages is defined in Section 8.10(b).

Monthly Progress Reports means those reports prepared by the Developer or its contractors that are required pursuant to the Agreement for monthly delivery to the Department Representative that reflect the status of and information related to the development and operation of the Project.

Moody's means Moody's Investor Service, Inc. and any successor thereto which is a nationally recognized rating agency.

NEPA means the National Environmental Policy Act, 42 U.S.C. Section 4321 *et seq.*, as amended and as it may be amended from time to time.

NEPA Documents means the Environmental Assessment and the FONSI.

Net Cost Impact means the aggregate value of any net increase in the Developer's costs (including the Developer's Allocable Costs to the extent applicable), reflected on an annual basis, directly attributable to a Compensation Event, as compared with what the Developer's costs (including the Developer's Allocable Costs, to the extent applicable) would have been absent the occurrence of the Compensation Event, less the increased costs that can reasonably be mitigated by the Developer. Net Cost Impact will:

(a) exclude:

(i) third-party entertainment costs, lobbying and political activity costs, costs of alcoholic beverages, costs for first class travel in excess of prevailing economy travel costs, and costs of club memberships, in each case to the extent that such costs would not be reimbursed to an employee of the Department in the regular course of business;

(ii) unallowable costs under the following provisions of the Federal Contract Cost Principles, 48 CFR Section 31.205: Section 31.205-8 (contributions or donations), Section 31.205-13 (employee morale, health, welfare, food service, and dormitory costs and credits), Section 31.205-14 (entertainment costs), Section 31.205-15 (fines, penalties, and mischarging costs), Section 31.205-27 (organization costs), Section 31.205-34 (recruitment costs), Section 31.205-35 (relocation costs), Section 31.205-43 (trade, business, technical and professional activity costs), Section 31.205-44 (training and education costs), and Section 31.205-47 (costs related to legal and other proceedings); and

(b) exclude amounts paid or to be paid to Affiliates that have not been approved by the Department pursuant to Section 24.02(k) that are in excess of the pricing the Developer could reasonably obtain in an arms' length, competitive transaction with an unaffiliated Contractor; and

(c) take into account any savings in costs, including finance costs, attributable to the Compensation Event.

Net Cost Saving means the aggregate value of any decrease in the Developer's costs reflected on an annual basis directly attributable to a Compensation Event, a Deviation, whether proposed, approved or unauthorized, a change in the Technical Requirements, whether or not such change constitutes a Department Change, or Non-Conforming Work waived by the Department, as compared with what the costs would have been absent occurrence of a Compensation Event, Deviation or Non-Conforming Work but excluding any savings in costs taken into account to reduce the Net Cost Impact attributable to such Compensation Event.

Net Revenue Impact means:

(a) any net increase or decrease in Gross Revenues directly attributable to a Compensation Event;

(b) in the case of a net decrease in Gross Revenues, less any savings in Project operating and maintenance costs resulting from the Compensation Event (excluding any savings in costs subtracted from Net Cost Impact for the same Compensation Event) as compared with what the Gross Revenues would have been absent occurrence of the Compensation Event;

(c) in the case of a net increase in Gross Revenues, less any incremental increase in Project operating and maintenance costs resulting from the Compensation Event (excluding any increase in costs included in Net Cost Impact for the same Compensation Event); less

(d) any lost Gross Revenues that can reasonably be mitigated by the Developer (excluding any mitigation of costs subtracted from Net Cost Impact for the same Compensation Event).

Nominal Equity IRR means a blended nominal post-tax rate of return on contributed unreturned Equity Contributions and Subordinate Debt over the full Term (excluding potential extensions of the Term) equal to the percentage therefor shown in the Base Case Financial Model at Financial Close.

Non-Compliance Points means the points that may be assessed for Performance Shortfalls, as set forth in Exhibits U-1 and U-2.

Non-Compliance Points Liquidated Damages has the meaning given in Section 11.05(a).

Non-Compliance Points Table means the table attached as Exhibits U-1 and U-2 showing the Performance Shortfalls.

Non-Conforming Work means Work that does not conform to the requirements of the Agreement, relevant Governmental Approvals, Law or the Design Documentation, including but not limited to Deviations not approved in writing by the Department.

Non-Permitted Closure is defined in Section 8.14.

Non-Reimbursable Developer Damages means that portion of any Developer Damages previously paid to the Developer that compensated the Developer for Net Cost Impacts and/or Net Revenue Impacts attributable to the period after the effective date of termination of the Agreement.

Notice to Commence Right of Way (ROW) Acquisition means a notice issued by the Department, providing the Developer with the right and obligation to initiate an offer and/or to acquire a property.

O&M Agreement or Operations and Maintenance Agreement means the Contract between the Developer and the O&M Contractor, to the extent that the O&M Work is not self-performed by the Developer, pursuant to which the O&M Contractor will operate and maintain the Project, as it may be amended or supplemented.

O&M Contractor or Operations and Maintenance Contractor means the Developer or any Person entering into a Contract with the Developer to perform 30% or more of the O&M Work.

O&M Work means any and all operation, management, administration, maintenance, repair, preservation, modification, reconstruction, rehabilitation, restoration, renewal and replacement of the Project during the Operating Period, including Major Maintenance and potential Project Enhancements, except to the extent that such Work is furnished pursuant to the Design-Build Contract.

Open Book Basis means allowing the Department to review all underlying assumptions and data associated with each Base Case Financial Model, Base Case Financial Model Update, Net Revenue Impact, Net Cost Saving, pricing or compensation (whether of the Developer or the Department) or adjustments thereto, including assumptions as to costs of the Work, schedule, composition of equipment spreads, equipment rates, labor rates, productivity, estimating factors, design and productivity allowance, contingency and indirect costs, risk pricing, discount rates, interest rates, inflation and deflation rates, traffic volumes and related data including vehicle categories, Gross Revenues, changes in toll rates, and other items reasonably required by the Department to satisfy itself as to the reasonableness and accuracy of the amount.

Open Road Tolling (ORT) means an electronic toll collection system without toll plazas, where drivers will be charged the toll without having to stop, slow down, or stay in a given lane.

Operating Costs means all reasonable and prudently incurred costs incurred and paid for by the Developer in connection with the performance of the Work during the Operating Period, including:

(a) (i) costs for operation and maintenance and consumables, (ii) payments under any lease (other than a financing lease constituting Developer Debt), (iii) payments pursuant to the agreements for the management, operation and maintenance of the Project, (iv) Taxes, (v) insurance, (vi) payments for Oversight Services, (vii) police services and costs for any security, (viii) Permit Fee payments to the Department (other than Transit Funding Payments and Support for Corridor Improvements), (ix) payment of Department Share of Net Cost Saving, (x) the Developer's reasonable Allocable Costs, (xi) capital expenditures including the cost of implementing any Change (as and to the extent set forth in the related Change Order or Directive Letter) or Safety Compliance Order, and (xii) any other reasonable expense paid for the enhancement, expansion, major maintenance, repair, reconstruction, rehabilitation, renewal and replacement of the Project.

(b) Operating Costs do not include: (i) debt service payments or financing costs or fees, (ii) any Distributions, (iii) entertainment costs, lobbying and political activity costs not related to the business and operations of the Developer, (iv) costs of alcoholic beverages, costs for first class travel in excess of prevailing economy travel costs, and costs of club memberships, in each case, to the extent that such costs would not be reimbursed to an employee of the Department in the regular course of business, (v) non-cash charges, such as depreciation, amortization or other bookkeeping entries of a similar nature, or (vi) liquidated damages payable pursuant to the Agreement.

Operating Period means the period commencing on the Service Commencement Date through the end of the Term.

Operations and Maintenance Plan means the plan developed by the Developer that identifies the methods, systems and procedures for performing the O&M Work, as described in more detail in the Technical Requirements.

Ordinary Maintenance means maintenance actions taken place to preserve the current condition of assets that are routine in nature and may be performed and funded annually. The actions may include pot hole repair, mowing, shoulder repair, guardrail repair, removal of roadside hazards, etc.

OSPS means the Operating Speed Performance Standard described in the Technical Requirements.

OSPS Improvement Plan is defined in Section 5.07(a).

Oversight Services means those services and functions the Department has the right or obligation to perform or to cause to be performed under Law or any Project Agreement in order to monitor, review, approve, administer or audit the Work.

P&R Facilities means the park-and-ride facilities to be delivered by the Developer pursuant to the Technical Requirements.

P&R Milestone means a minimum of 960 spaces at or near Balls Ford or Gainesville (University Boulevard) P&R lots to support the Transportation Management Plan during construction.

PABs means private activity bonds allocated and issued pursuant to Section 142(a) (15) and (m) of the Internal Revenue Code of 1986, as amended.

PABs Issuer means VSBFA.

Participation Performance Improvement Plan has the meaning given in Section 24.04(c)(v)(B).

Performance Bond means a performance bond made on official forms furnished by the Department, executed by a surety company rated in one of the two top categories by two nationally recognized rating agencies or at least A- (A minus) or better or Class VIII or better by “AM Best & Company and authorized to do business in the Commonwealth in accordance with the Laws of the Commonwealth and the rules and regulations of the State Corporation Commission.

Performance Requirement means a performance requirement with respect to the O&M Work, as set forth in the Performance Requirements Baseline Table for each Asset.

Performance Requirements Baseline Table means the table included in the Technical Requirements, as may be updated pursuant to the Agreement, which sets forth the Performance Requirements for each Asset.

Performance Security means (i) the Equity Funding Guaranties, the Design-Build Performance Security, the Design-Build Work Guarantee, the Major Maintenance Performance Security, any Performance Bond, and a Letter of Credit or (ii) any surety bond, letter of credit, guaranty or similar instrument acceptable to the Department in its reasonable discretion procured in accordance with the terms of this Agreement.

Performance Shortfalls are those breaches or failures of the Developer in the performance of its duties which creates incidents for which the Department may assess Non-Compliance Points in accordance with Exhibits U-1 and U-2.

Permit is defined in Section 4.01.

Permit Fee means the payments received by the Department as compensation for the Department’s grant to the Developer of the Permit, as set forth in Exhibit J.

Permitted Encumbrance means, with respect to the Project:

- (a) the rights and interests of the Developer under the Agreement;
- (b) inchoate materialmen’s, mechanics’, workmen’s, repairmen’s, employees’, carriers’, warehousemen’s or other similar Liens arising in the ordinary course of business of the Project or the Department’s performance of its obligations hereunder, and either (A) not delinquent or (B) which are being contested by the Department (but only for so long as such contestation effectively postpones enforcement of any such Lien);

(c) any recorded or unrecorded easement, right, claim, license, privilege, covenant, condition, right-of-way or servitude, or other similar reservation, right, limitation or restriction, relating to, affecting or encumbering the Project or the development, use or operation of the Project (including, but not limited to, easements and rights-of-way for utilities and utility facilities), or any defect or irregularity in the title to the Project, including, but not limited to those discoverable by a physical inspection or survey of the Project, that does not materially interfere with the operations of the Projects or the right and benefits of the Developer and the Department under the Agreement;

(d) any zoning, building, environmental, health or safety Law now or hereafter in effect relating to, affecting or governing the Project or the development, use or operation of the Project, together with all amendments, modifications, supplements or substitutions thereto or therefore; and

(e) any right reserved to or vested in any Governmental Authority (other than the Department) by any statutory provision.

Permitted Vehicles means (a) any vehicle with two axles or more including motorcycles; (b) Mass Transit Vehicles and Commuter Buses and school buses; and (c) Exempt Vehicles. Permitted Vehicles will not include any vehicle pulling a trailer except (1) Exempt Vehicles and (2) any multi-axle vehicle that consists of a truck-tractor/straight truck power unit and a single trailer.

Person means any individual (including, the heirs, beneficiaries, executors, legal representatives or administrators thereof), corporation, partnership, joint venture, trust, limited liability company, limited partnership, joint stock company, unincorporated association or other entity or a Governmental Authority.

Planned Refinancing means a Refinancing that is planned by the Developer and the terms of which are included in the Initial Base Case Financial Model.

Pre-Existing Hazardous Substances means Known Pre-Existing Hazardous Substances and Unknown Pre-Existing Hazardous Substances.

Pre-Existing Structure means a Structure that exists within the Project Right of Way prior to the Agreement Date.

Preferred Proposer has the meaning given such term in the ITP.

Project means the development, design, financing, construction, operation, maintenance and tolling of the Project Assets and the development, design, financing, and construction of the Transferred Project Assets, all as more particularly described in Exhibit B-1.

Project Agreements means the VDOT Project Agreements, the Developer Project Agreements, the Direct Agreement and all other agreements identified in Section 3.02, as those agreements may be amended, superseded or replaced during the Term.

Project Assets means the Express Lanes and other assets (including Transferred Project Assets until such time as they are transferred under this Agreement) constructed, maintained or held by the Developer pursuant to the Agreement (or any applicable portion of such assets).

Project Completion means the occurrence of all the events and satisfaction of all the conditions with respect to the Work as set forth in Section 8.09(b).

Project Completion Certificate means the certificate issued by the Department pursuant to Section 8.09(c).

Project Completion Date means the date which is no later than August 31, 2022, as such date may be extended for Delay Events from time to time in accordance with the terms of the Agreement, and as indicated on the Project Completion Certificate; provided, however, that in no event will the Project Completion Date be later than six months after the Service Commencement Date.

Project Completion Liquidated Damages is defined in Section 8.10(c).

Project Development Plans means the project development plans developed by the Developer pursuant to the Technical Requirements.

Project Documentation means Construction Documentation and Design Public Hearing Documentation.

Project Enhancement Account means a concession payments account created in accordance with Section 33.2-1528 of the Code of Virginia.

Project Enhancements means, collectively, Developer Project Enhancements and Department Project Enhancements.

Project Financing Agreements means the Financing Assignments and any other documents evidencing Developer Debt (including Refinancings) obtained in compliance with the terms of the Agreement, together with any and all amendments and supplements thereto.

Project Purposes means the development, permitting, design, financing, acquisition, construction, installation, equipping, management, operation, maintenance, tolling and administration of the Project, in each case in accordance with the Agreement.

Project Right of Way or **Right of Way (ROW)** means any real property within the I-66 Corridor (which term is inclusive of all estates and interests in real property, including easements), which is the more inclusive of the following:

- (a) necessary for performance of the Work, including temporary and permanent easements, and ownership and operation of the Project; or
- (b) shown on the approved ROW Acquisition and Relocation Plan.

Project ROW Acquisition Work means the Work associated with acquisition of the Project Right of Way, other than that Project Right of Way currently owned by the Department (which will be made available to the Developer) as set forth in the ROW Acquisition and Relocation Plan.

Project Schedule means the Initial Baseline Schedule, Baseline Schedule, Project Schedule Updates or the As-Built Schedule, as applicable.

Project Schedule Update means the schedule attached to the Monthly Progress Report submitted to the Department, as described in more detail in the Technical Requirements.

Project Value means the sum of (i) fair market value of the projected Distributions for the remainder of the Term without taking into consideration any terminations pursuant to Article 20 and (ii) the fair market value of Developer Debt outstanding as of the date of the calculation; such sum will include Developer Damages for adverse Net Cost Impacts and Net Revenue Impacts accruing after the effective date of termination from Compensation Events occurring prior to termination, determined according to the appraisal procedures set forth in Section 20.11.

Proposal has the meaning given in the ITP.

Proposal Due Date has the meaning given in the ITP.

Proprietary Intellectual Property means any Intellectual Property that is patented or copyrighted by the Developer, the Department or any other Person, as applicable, or any of its respective contractors or subcontractors, or, if not patented or copyrighted, is created, held and managed as a trade secret or confidential, proprietary information by the Developer, the Department or any other Person, as applicable, or any of its respective contractors or subcontractors, but excludes any item of Intellectual Property that is produced for multiple purposes and is not unique to the technology that is being applied to or for the Project.

Proprietary Work Product means any Work Product that is created, held and managed as a trade secret or confidential proprietary information by the Developer or any of its Contractors, excluding traffic data from the Project pursuant to Section 18.04(a).

Public Funds Amount means \$0.

Qualified Proposer means a Proposer that received the Department's Request for Proposals following review of Part Two of the Department's Request for Qualifications.

Quality Management System Plan (QMSP) means the plan developed by the Developer that defines the quality management systems during the design, construction and operations and maintenance phases of the Project, as described in more detail in the Technical Requirements.

Railroad Easements is defined in Section 8.05(g).

Rating Agency means any nationally recognized statistical rating organization, such as Moody's, DBRS, Fitch Ratings, or S&P or any similar entity, or any of their respective successors.

Rating Base Case means the base case(s), prepared by a Rating Agency, which is utilized to establish the final rating for Senior Developer Debt and the TIFIA Credit Assistance.

Rating Case means the low case(s), prepared by a Rating Agency, which is utilized to establish the final rating for Senior Developer Debt and the TIFIA Credit Assistance.

Refinancing means, at any time after the Financial Close Date:

(a) any amendment, variation, novation or supplement of any Developer Debt, Project Financing Agreement or Financing Assignment that results in a change in the amount owed for Developer Debt;

(b) the issuance by the Developer of any Developer Debt other than the Developer Debt incurred pursuant to the Project Financing Agreements, secured or unsecured, including issuance of any reimbursement agreement respecting a letter of credit;

(c) the disposition of any rights or interests in, or the creation of any rights of participation in respect of, any Developer Debt, Project Financing Agreement or Financing Assignment or the creation or granting of any other form of benefit or interest in any Developer Debt, Project Financing Agreement or Financing Assignment, or the revenues, assets or other contracts of the Developer whether by way of security or otherwise; or

(d) any other arrangement put in place by the Developer or another person which has an effect similar to clause (a), (b) or (c) of this definition;

excluding, however, any capitalization of interest or accretion of principal or other committed increases on any Developer Debt incurred or committed on or prior to the Agreement Date, that is not part of any planned refinancing.

Refinancing Gain means, for any Refinancing, other than an Exempt Refinancing and other than as set forth below, an amount equal to the greater of zero and the amount equal to $(A - B) - C$, where:

A = the net present value of the Distributions to be made over the remaining Term following the Refinancing, as projected immediately prior to the Refinancing (taking into account the effect of the Refinancing and any previous Refinancings which resulted in no Refinancing Gain (other than any Exempt Refinancing under Section 7.08(c)(ii)) being paid to the Department and using the relevant Base Case Financial Model as updated (including as to the performance of the Project) so as to be current immediately prior to the Refinancing);

The intention is to share in incremental increases in Distributions above the Base Case Financial Model projections of Distributions resulting solely from the initial financing and Refinancings. Among other things, the Parties will (a) include in Distributions under factor "A" of the Refinancing Gain definition changes to any Distributions made prior to the date of

Refinancing or projected to be made, resulting from changes to the financing terms (including changes to equity funding arrangements resulting therefrom) as compared to the Base Case Financial Model, and (b) adjust Distributions under factor “a” of the Refinancing Gain definition to reflect changes in equity contributions paid or projected to be paid to the Developer resulting from changes to the financing terms as compared to the Base Case Financial Model.

B = the net present value of the Distributions to be made over the remaining Term following the Refinancing, as projected immediately prior to the Refinancing (but without taking into account the effect of the Refinancing or any previous Refinancings which resulted in no Refinancing Gain (other than any Exempt Refinancing under Section 7.08(c)(ii)) being paid to the Department and using the Base Case Financial Model as updated (including as to the performance of the Project) so as to be current immediately prior to the Refinancing); and

C = any adjustment equal to the aggregate Distributions that would be required to increase the pre-Refinancing Equity IRR to the Nominal Equity IRR, calculated immediately prior to (and without giving effect to) the Refinancing.

Remaining PABs Proceeds means the aggregate of PABs proceeds received on the Financial Close Date minus all amounts contemplated as per the Initial Base Case Financial Model to be paid on the Financial Close Date.

Remedial Actions is defined in Section 16.01(b).

Replacement Agreements has the meaning ascribed thereto in the Direct Agreement.

Representative means, with respect to any Person, any director, officer, employee, official, lender (or any agent or trustee acting on its behalf), partner, member, owner, agent, lawyer, accountant, auditor, professional advisor, consultant, engineer, contractor, other Person for whom such Person is, under Law, responsible or other representative of such Person and any professional advisor, consultant or engineer designated by such Person as its “Representative.”

Request for Change Proposal means a written notice issued by the Department to the Developer pursuant to Section 14.02(b).

Reserved Rights means the Department’s right and opportunity to develop and pursue, anywhere in the world, entrepreneurial, commercial and business activities that are ancillary or collateral to the use, enjoyment and operation of the Project and Project Right of Way as provided in the Agreement and the collection, use and enjoyment of Toll Revenues as provided in the Agreement. The Reserved Rights reserved to the Department include but are not limited to all the following:

(a) all rights to finance, design, construct, use, possess, operate and maintain any passenger or freight rail facility, roads and highways (state and local) or other mode of transportation in the Airspace, including tunnels, flyovers, frontage roads, crossings, interchanges and fixed guide-ways, and to grant to others such rights;

(b) all rights to install, use, lease, grant infeasible rights of use, sell and derive revenues from electrical and fiber optic conduit, cable, capacity, towers, antennas and associated

equipment or other telecommunications equipment, hardware and capacity, existing over, on, under or adjacent to any portion of the Project Right of Way installed by anyone, whether before or after the Agreement Date, and all software which executes such equipment and hardware and related documentation, except for the capacity of any such improvement installed by the Developer that is necessary for and devoted exclusively to the operation of the Project;

(c) all rights to use, sell and derive revenues from ETTM Data and other data generated from operation of the Project or any ETTM System, except use of such data as required solely for operation of the Project and enforcement and collection of tolls and incidental charges;

(d) all ownership, possession and control of, and all rights to develop, use, operate, lease, sell and derive revenues from, the Airspace, including development and operation of service areas, rest areas and any other office, retail, commercial, industrial, residential, retail or mixed use real estate project within the Airspace;

(e) all rights to install, use and derive information, services, capabilities and revenues from ITS, except installation and use of any such systems and applications by the Developer as required solely for operation of the Project. For avoidance of doubt, if the Developer installs any such systems or applications, all use and capacity thereof not necessary for operation of the Project is reserved to, and will be the sole property of, the Department;

(f) all rights to use, install, maintain, repair, or authorize the use, installation, maintenance or repair, of Utilities;

(g) all rights to market, distribute, sell and derive revenues from any goods, products or merchandise depicting, utilizing or exploiting any name, image, logo, caricature or other representation, in any form or medium, of the Department or the Project, or that may be confused with those of the Department or the Project;

(h) all rights and opportunities to grant to others sponsorship and advertising rights with respect to the Project or any portion thereof, except for a non-exclusive license for the Developer to use the name in connection with Project operations;

(i) all rights to revenues and profits derived from the right or ability of electronic toll account customers to use their accounts or transponders to purchase services or goods other than payment of tolls;

(j) any other commercial or noncommercial development or use of the Airspace or electronic toll collection technology for other than operation of the Project; and

(k) all ownership, possession and control of, and all rights to develop, use, lease, sell and derive revenues from, carbon credits or other environmental benefits generated by or resulting from the development, use, operation or maintenance of the Project.

Response is defined in Section 10.05(a).

Responsible Charge Engineer means the individual identified by the Developer, who must be a registered Professional Engineer in the Commonwealth of Virginia and who will communicate regularly with the Department and will be vested with the authority to act on behalf of the Developer, and who is responsible for (i) rejecting or approving both the engineering and construction work in progress and the final product, (ii) ensuring all engineering services are performed by professionals properly licensed in the Commonwealth of Virginia and plans are signed and sealed by such professional, (iii) meeting the Developer's obligations under the contract, and (iv) avoiding and resolving disputes.

Responsible Public Entity has the meaning assigned to such term in Section 33.2-1800 of the Code of Virginia and, for purposes hereof, means the Department.

Restoration Funds is defined in Section 17.07(a)(iii).

Revenue Sharing Payments means those payments required to be made by the Developer to the Department pursuant to Section 7.04.

RFP Conceptual Plans means the schematic drawings used as the basis for the Request for Proposals that were developed by the Department in coordination with the Tier 2 NEPA Environmental Assessment and the I-66 Interchange Justification Report and its supporting technical documents, and are available at <http://transform66.org>.

Route 28 Signalization Milestone means improvements on Route 28 that eliminate four signals (at the EC Lawrence Park entrance, at the Braddock Road/Walney Road intersection, and two signals at the I-66/route 28 interchange).

ROW Acquisition and Relocation Plan means the plan developed by the Developer that defines the approach to acquisition of the Project Right of Way and, to the extent permitted by Section 8.05, any other real property or real property rights as set forth in Section 8.05, as described in more detail in the Technical Requirements.

ROW Costs means the actual amount paid or payable to a property owner for the acquisition of Project Right of Way and any other real property and real property rights as set forth in Section 8.05, which includes any relocation, settlement, or damage costs. For the avoidance of doubt, ROW Costs do not include any acquisition activities and/or property management services required for the acquisition of Project Right of Way and any other real property and real property rights as set forth in Section 8.05.

S&P means Standard & Poor's Rating Service, a division of The McGraw-Hill Companies, Inc. or any successor thereto.

Safety Compliance Order means any written order or directive of the Department issued after the Service Commencement Date that directs the Developer to undertake certain improvements to the Project (a) to correct a specific safety condition affecting the Project, which the Department has determined to exist by investigation or analysis, or (b) to conform to changes in safety standards or methodologies agreed to or adopted by the Department for similar portions of comparable State Highways.

Schedule Impact Analysis (SIA) has the meaning given in the Technical Requirements.

Scope of Work and Schedules and Early Work means Exhibit B.

Segmental Construction Notice to Proceed (SCNTP) means the notice to proceed issued pursuant to Section 8.03(d).

Semi-Annual Period has the meaning given in Exhibit J.

Senior Developer Debt means Developer Debt secured by a Lien on the Developer's Interest that is senior to or on parity with any other Lien on the Developer's Interest.

Senior Loan Agreement means a loan agreement, dated the Financial Close Date, to be entered between the PABs Issuer and the Developer, with respect to the initial financing of the Project.

Service Commencement means the opening of the Project for normal and continuous operations and use by the traveling public, after occurrence of all the events and satisfaction of all the conditions therefor set forth in Section 8.08(c).

Service Commencement Certificate means the certificate issued by the Department pursuant to Section 8.08.

Service Commencement Date means the date on which Service Commencement is achieved, as indicated in the Service Commencement Notice to Proceed.

Service Commencement Notice to Proceed has the meaning ascribed thereto in Section 8.08(c)(i).

Setting Date means the date that is 21 Business Days prior to the Proposal Due Date posted in the ITP.

Shareholder Loan means any Subordinated Debt made by any Equity Members to the Developer.

SIB Loan has the meaning ascribed thereto in Section 7.06(d).

Signage Plan is defined as the Construction Documentation associated with the signage elements of the Project.

Significant Force Majeure Event means one or more Force Majeure Events occurring after the Agreement Date (a) that (i) has the effect of causing physical damage or destruction to the Project Assets or surrounding infrastructure within the Project Right of Way, and (ii) results in the Project Assets being substantially unavailable for public use or use by the Developer or the suspension or substantial reduction of toll collections for a period in excess of (A) 180 consecutive Days; or (B) a period otherwise agreed to by the parties; or (b) which halts the performance of the Work by the Design-Build Contractor during the Construction Period for a period in excess of 180 consecutive Days; *provided* that such Force Majeure Event will not

become a Significant Force Majeure Event by reason of the Developer or the Design Build Contractor's failure to mitigate or cure the result of such Force Majeure Event through the exercise of reasonably diligent efforts.

Significant Force Majeure Termination Amount means the aggregate of (a) the Developer Debt Termination Amount, (b) all amounts at par paid by the Equity Members in the form of Equity Contributions up to and until the termination date less all amounts received by the Equity Members from the Developer as Distributions up to the termination date, (c) all Demobilization Costs; (d) less Credit Balances; and (e) less proceeds of insurance that is required to be carried pursuant to Section 17.01 received and paid in respect of such Significant Force Majeure Event.

Significant Force Majeure Termination Notice is defined in Section 20.03.

Significant Hazardous Environmental Condition means during the Construction Period the presence on, in or under the Project Right of Way of Unknown Pre-Existing Hazardous Substances, Third-Party Hazardous Substances or Known Pre-Existing Hazardous Substances of a scale and scope materially greater than identified in Exhibit R, and where such scale and scope materially and adversely affects the Developer's ability to meet the Project Completion Date notwithstanding the Developer's exercise of reasonably diligent efforts to mitigate or cure the material and adverse impact on Developer's ability to meet the Project Completion Date.

Significant Reserved Rights means the exercise by the Department of any of its Reserved Rights that materially and adversely affect the Developer's (1) right to impose, charge, collect and enforce tolls and incidental charges in accordance with Section 5.01 or (2) ability to perform its obligations under this Agreement.

Six-Year Improvement Program (SYIP) means the CTB's approved allocation of funding in accordance with Article 1.1, Chapter 1, Title 33.2 of the Code of Virginia.

Small, Women-Owned, and Minority Business (SWaM) means the Commonwealth program to support small, women-owned and minority groups in doing business with the Commonwealth.

Software means (a) computer instructions, including programs, routines and databases and applications supplied, procured or developed by the Developer or the Department in connection with the operation of the Project or in connection with Reserved Rights, including but not limited to that which monitors, controls or executes on ETTM Equipment or ITS equipment or hardware, and (b) all modifications, updates and revisions made to the matter described in clause (a) above, including those made to correct errors or to support new models of computer equipment and/or new releases of operating systems.

Source Code and Source Code Documentation mean Software written in programming languages, such as C and Fortran, including all comments and procedural code, such as job control language statements, in a form intelligible to trained programmers and capable of being translated into object or machine readable code for operation on computer equipment through assembly or compiling, and accompanied by documentation, including flow charts, schematics,

statements of principles of operations, architectural standards, and commentary, explanations and instructions for compiling, describing the data flows, data structures, and control logic of the software in sufficient detail to enable a trained programmer through study of such documentation to maintain and/or modify the Software without undue experimentation. Source Code and Source Code Documentation also include all modifications, additions, substitutions, updates, upgrades and corrections made to the foregoing items.

Source Code Escrows is defined in Section 18.06(b).

State Highway means any highway designated a State Highway pursuant to Title 33.2, Chapter 3, Code of Virginia.

State Indemnitee means any of the State Parties and their respective Representatives.

State Law means any Law or any change in any Law by any State Party.

State Party means the Commonwealth, the CTB, the Department or any other agency, instrumentality or political subdivision of the Commonwealth.

Steering Committee means the executive-level committee established by the Developer and the Department to provide executive-level business guidance on issues relating to the Project, which will include the Design-Build Contractor during the Construction Period and, solely with respect to issues involving Design-Build Work, after the Construction Period.

Stipend Payment Agreement has the meaning given such term in the ITP.

Structure is defined in Section 3.14.1 of the Technical Requirements.

Subordinate Debt means (a) Affiliate Debt or Shareholder Loans or (b) any other Developer Debt that would be paid at the same level of priority as the payment of any Distributions or that would be payable at a level of priority after all payments other than Distributions are made. The term "Subordinate Debt" does not include any Developer Debt constituting loans, guaranties and other credit support under TIFIA.

Substituted Developer means any person or entity selected by the Lenders (acting through the Collateral Agent) and approved by the Department in accordance with the Direct Agreement to perform the Developer's obligations and succeed to the Developer's Interests after any such Lender, or any such Person, acquires the Developer's Interests by foreclosure or transfer in lieu of foreclosure, or after the Collateral Agent takes possession and control of the Project in accordance with the Direct Agreement.

Support for Corridor Improvements means \$350,000,000 on a present value basis computed at a 6.14% discount rate over the term of this Agreement that must be paid by the Developer to the Department to support various improvements to the I-66 corridor, as set forth more fully in the Base Case Financial Model.

SWaM Performance Improvement Plan is the plan submitted and approved by the Department pursuant to Sections 24.04(b)(v)(B) with respect to improving the Developer's performance.

Task is defined in Section 9.03(b).

Tax means any Federal, state, local or foreign income, gross receipts, license, payroll, employment, excise, severance, stamp, occupation, premium, windfall profits, environmental (including taxes under Section 59A of the Internal Revenue Code of 1986, as amended), customs duties, permit fees, capital stock, franchise, profits, withholding, social security (or similar), unemployment, disability, real property, personal property, sales, use, transfer, registration, value added, alternative or add-on minimum, estimated or other tax, levy, impost, stamp tax, duty, fee, withholding or similar imposition of any kind whatsoever payable, levied, collected, withheld or assessed at any time, including any interest, penalty or addition thereto, whether disputed or not including in each case utility rates or rents.

Tax Imposition means:

(a) any state or local property tax or similar ad valorem tax or charge (including property taxes under Section 58.1-3203 of the Code of Virginia, as amended from time to time) or recordation tax on a deed, release or other document recorded in connection with the Agreement, unless recorded by or at the behest of the Developer; and

(b) any license fee or sales, use, receipts or similar tax on or measured by receipts or revenues levied, rated, charged, imposed or assessed by the Commonwealth or any county, city or town of the Commonwealth with respect to Toll Revenues paid to or collected by the Developer for travel on the Project;

but excluding (i) any taxes of general application on overall net income or (ii) any taxes levied, rated, charged, imposed or assessed in connection with any Transfer during the Term of all or any portion of the Developer's Interest or of any interest in the Developer.

Technical Requirements means Exhibit C (including all Attachments thereto), as the same may be revised in accordance with the Agreement.

Term is defined in Section 3.05.

Third-Party Claim means any Claim asserted against a State Indemnitee by any Person who is not a party to the Agreement or an Affiliate of such party.

Third-Party Hazardous Substances means any Hazardous Substances introduced or brought onto the Project Right of Way by a Person other than a Developer Party (including, without limitation, the Department).

TIFIA means The Transportation Infrastructure Finance and Innovation Act of 1998.

TIFIA Credit Assistance means funding made available to the Developer under the TIFIA Loan Documentation.

TIFIA Lender means the United States Department of Transportation.

TIFIA Loan Documentation means a loan agreement between the Developer and the TIFIA Lender pursuant to which TIFIA Credit Assistance is provided, and a subordination and intercreditor agreement, in each case, that is in a form agreed and readily executable by the parties (other than the completion of terms of an administrative, non-substantive or ministerial nature), together with any related agreements and documents delivered therewith.

Toll Revenues means:

(a) all amounts received by or on behalf of the Developer applicable to vehicles for the privilege of traveling on the Project imposed pursuant to the Agreement and from any other permitted use or operation of the Project, including without limitation fees, tolls, rates, incidental charges and other charges (including administrative charges such as late fees, insufficient funds fees, etc.);

(b) amounts received pursuant to any collection or enforcement action, judgment or settlement with respect to any of the foregoing revenues; and

(c) amounts the Developer receives as contractual liquidated or other contract damages with respect to any of the foregoing revenues.

Total Financing Amount means the sum of the Equity Contribution Amount, the initial principal amount of the PABs, the Benchmark TIFIA Credit Assistance amount and other Developer Debt (including Shareholder Loans) at Financial Close. The Total Financing Amount will not include the Public Funds Amount.

Traffic and Revenue Study means any study of the projected traffic and Toll Revenue for the Project prepared by or on behalf of the Developer, as well as all data, charts, tables, analyses and other documentation assembled or prepared in connection therewith and all existing and future updates, reissuances, supplements and amendments thereto.

Traffic Management System (TMS) means any application of computer, electronics and/or telecommunications equipment and software and supporting fixtures and equipment whose function is to provide information, data and/or services to the traveling public or the Department or to manage and control traffic, and any future systems or services conceived or developed for the same or similar purposes.

Transfer means to sell, convey, assign, sublease, mortgage, encumber, transfer or otherwise dispose of.

Transferee is defined in Section 25.01(a).

Transferred Project Assets means those assets listed in Exhibit O that are to be designed, financed, and constructed by the Developer and transferred to Department at Project Completion.

Transit Funding Payments means those payments required to be made by Developer to the Department in accordance with Section 7.03.

Transition Plan is defined in Section 20.01.

Transportation Management Plan (TMP) is defined in Section 8.12(a).

Transportation Trust Fund means the Commonwealth's Transportation Trust Fund, which is codified in Section 33.2-1524 of the Code of Virginia.

Trustee means the trustee under the trust indenture relating to the PABs.

Uniform Act is defined in Section 8.05(a)(ii).

Unknown Pre-Existing Hazardous Substances means any Hazardous Substances present on the Project Right of Way or portion thereof as of the date that the Developer assumes responsibility of such Project Right of Way or portion pursuant to Section 16.01(a) and which are not Known Pre-Existing Hazardous Substances.

USACE 404 Individual Permit means the permit required by the U.S. Army Corps of Engineers pursuant to Section 404 of the Clean Water Act.

Utilities Plan means the plan developed by the Developer that defines the Utility coordination activities during the design and construction of the Project, as described in more detail in the Technical Requirements.

Utility means a public, private, cooperative, municipal and/or government line, facility or system used for the carriage, transmission and/or distribution of cable television, electric power, telephone, data or other telecommunications, telegraph, water, gas, oil, petroleum products, steam, chemicals, sewage, storm water not connected with the highway drainage and similar systems that directly or indirectly serve the public. The term "Utility" specifically excludes (a) storm water lines connected with the highway drainage, and (b) traffic signals, street lights, and electrical systems within the Project Right of Way.

Utility Owner means the owner or franchisee of any Utility (including both privately held and publicly held entities, cooperative utilities, and municipalities and other governmental agencies).

Utility Relocation means the removal, relocation and/or protection in place (including provision of temporary services as necessary) of any and all Utility facilities that have to be removed, relocated and/or protected in place in order to permit construction of the Project.

VDOT Project Agreements means the Agreement, the Escrow Agreement and the Electronic Toll Collection Agreement.

Veteran means any person that meets the definition of "veteran" in either 5 USC §2108 or 38 USC § 101. For the purpose of this Agreement, veterans must reside in the Commonwealth to be considered part of the veteran workforce.

Violation Processing Services Agreement means an agreement the Developer and the Department may enter into to govern utilization of the Department's violation processing system in accordance with Section 5.01(f)(i), which will be in the form then in use by the Department.

Virginia Petroleum Underground Storage Tank Fund (VPSTF) is defined in Section 16.01(e).

Warranty Period is defined in Section 8.11(a).

WMATA-Caused Compensation Delay is defined in Section 8.05(f).

WMATA-Caused Delay is defined in Section 8.05(f).

WMATA Easement Area means the area described in the 1991 Easement.

WMATA Easement Impacts means impacts to WMATA arising from Developer's performance of Work within the WMATA Easement Area.

WMATA Incidental Impacts means impacts to WMATA's transit operations as a result of Developer's Work that is not WMATA Work.

WMATA Reimbursable Costs means costs incurred by WMATA to ensure the safety of WMATA's passengers and equipment, and maintenance of WMATA's operating schedules, to the extent those costs are incurred due to WMATA Work, WMATA Easement Impacts, or WMATA Incidental Impacts.

WMATA Work means (i) construction of or work on assets owned by WMATA, or (ii) Work within the WMATA Easement Area.

Work means collectively, the finance, development, planning, design, acquisition, installation, construction, completion, management, equipment, operation, repair and maintenance and any other services identified in the Agreement to be performed by the Developer.

Work Product means all the data, information, documentation and other work product produced, prepared, obtained or deliverable by or on behalf of the Developer or the Department, as applicable, for the Project or the Project Right of Way, including but not limited to designs, drawings, plans and specifications, record and as-built plans and specifications, engineering documents, geotechnical soils and soil boring data, analyses, reports and records, property acquisition files, agreements and documents (including records of payment and related correspondence, title policies, parcel diaries and all construction documents relating to the Work or Project Enhancements), engineers' and inspectors' diaries and reports, Utility Relocation plans and agreements, right of way record maps and surveys, traffic and revenue studies, and other feasibility data, analyses, studies and reports, correspondence and memoranda relevant to design or construction decisions, contracting plans, air quality monitoring data, environmental reviews, studies and reports, mitigation studies and reports, data, assessments, studies and reports regarding Hazardous Substance investigations, testings, borings, monitoring and analyses, manifests regarding handling, storage or transportation of Hazardous Substances,

correspondence and agreements relating to Governmental Approvals, change orders, final quantities, pile driving records, records of accidents and traffic management, field test records and reports, concrete pour records, surfacing depth check records, grade and alignment books, cross-section notes, drainage notes, photographs, false work and form plans, records of construction materials, ETTM Equipment and ETTM Facilities records and reports, and any other documents which can be reasonably described as technical or engineering documents. Work Product expressly excludes, however, documents and information which the Developer and the Department mutually agree in writing, or which a court determines, to be exempted or protected from public disclosure under Section 18.02 and which is not conceived or first reduced to practice for the Project Purposes, such as proprietary financial and pricing information of the Developer.