



CONCESSION AGREEMENT
for the
PRESIDIO PARKWAY PROJECT

Between

California Department of Transportation

and

[XXXXXXXXXXXXXXXXXXXX]

Contract # [XXXXXX]

Dated [XXXXXXX]

TABLE OF CONTENTS

ARTICLE 1 . DEFINITIONS; CONTRACT DOCUMENTS.....	2
1.1 Definitions.....	2
1.2 Contract Documents; Order of Precedence.....	2
1.3 Principal Developer Documents.....	3
1.4 Reference Documents	3
ARTICLE 2 . CONCESSION TERM.....	3
2.1 Grant of Concession	3
2.2 Term of Concession.....	4
ARTICLE 3 . DEPARTMENT REVIEW AND OVERSIGHT.....	5
3.1 Preliminary Planning and Engineering Activities	5
3.2 Governmental Approvals.....	5
3.2.1 General	5
3.2.2 Major Permit Delays	5
3.3 Submittals.....	6
3.3.1 General	6
3.3.2 Department Discretionary Approvals	6
3.3.3 Department Review and Comment.....	6
3.3.4 Submittals Not Subject to Prior Review, Comment or Approval	7
3.3.5 Other Department Approvals	7
3.3.6 Limitations on Developer’s Right to Rely	7
3.3.7 Time Periods	8
ARTICLE 4 . DESIGN AND CONSTRUCTION.....	9
4.1 Obligations of Developer.....	9
4.1.1 General Duties	9
4.1.2 Performance, Design and Construction Standards	10
4.2 Design Implementation and Submittals	10
4.3 Nonconforming and Defective Work.....	11
4.4 Project Right of Way Acquisition	11
4.5 Utility Adjustments	11
4.5.1 Developer’s General Responsibilities	11
4.5.2 Utility Agreements	12
4.5.3 Utility Adjustment Costs.....	12
4.5.4 Utility Enhancements.....	13

4.5.5	Utility Permit Applications	13
4.5.6	Assignment of Rights Against Utility Owners	13
4.5.7	Utility Owner Delay	13
4.6	Conditions to Commencement of Design Work	14
4.7	Conditions to Commencement of Construction Work	15
4.8	Construction Commencement Deadline and Project Schedule	16
4.9	Substantial Completion and Final Acceptance	16
4.9.1	Substantial Completion.....	16
4.9.2	Conditions to Substantial Completion	16
4.9.3	Final Acceptance	18
4.9.4	Milestone Payments and Adjustments	19
4.10	Hazardous Materials and Undesirable Materials Management.....	19
4.10.1	Developer's General Responsibilities	19
4.10.2	Pre-existing Hazardous Materials	20
4.10.3	Releases of Hazardous Materials	21
4.10.4	Assignment and Subrogation of Rights Against Third Parties	21
4.11	Environmental Compliance	21
4.12	Oversight, Meetings and Reporting.....	22
4.12.1	Oversight by the Department.....	22
4.12.2	Meetings.....	22
4.12.3	Reporting.....	22
4.13	Construction Warranties.....	22
4.14	Structural Defects in Phase I.....	23
ARTICLE 5 . OPERATIONS AND MAINTENANCE.....		24
5.1	Timing of O&M Work.....	24
5.2	Operation and Maintenance Standards and Requirements	24
5.2.1	General Obligations.....	24
5.2.2	Changes in Operation and Maintenance Standards.....	24
5.2.3	O&M Work During Construction.....	26
5.2.4	Management of Hazardous Materials and Undesirable Materials	26
5.2.5	Environmental Compliance	27
5.2.6	Utility Accommodation	27
5.2.7	Emergency Repair Work	27
5.3	Annual Budget	27
5.4	Oversight, Meetings and Reporting.....	28
5.4.1	Oversight by the Department.....	28

5.4.2	Meetings.....	28
5.4.3	Reporting.....	28
5.5	Renewal Work	28
5.6	Renewal Work Schedule.....	29
5.7	Renewal Work Reserve	30
5.7.1	Establishment.....	30
5.7.2	Funding	30
5.7.3	Use.....	31
5.7.4	Disposition Upon Establishment of Handback Requirements Reserve Account or Earlier Termination	31
5.7.5	Coordination with Lender Requirements.....	31
5.7.6	Renewal Work Letters of Credit.....	32
5.8	Policing, Security and Incident Response	32
5.8.1	Police Services.....	32
5.8.2	Security and Incident Response	33
5.9	Handback Requirements.....	33
5.9.1	Handback Condition	33
5.9.2	Handback Inspections	33
5.9.3	Renewal Work under Handback Requirements	33
5.10	Handback Requirements Reserve Account.....	34
5.10.1	Establishment.....	34
5.10.2	Funding	34
5.10.3	Use.....	35
5.10.4	Handback Requirements Letters of Credit.....	36
ARTICLE 6 . NONCOMPLIANCE POINTS		36
6.1	Noncompliance Points System.....	36
6.2	Assessment, Notification and Cure Process.....	37
6.2.1	Notification Initiated by Developer	37
6.2.2	Notification Initiated by the Department	37
6.2.3	Cure Periods	37
6.2.4	Notification of Cure	38
6.3	Assessment of Noncompliance Points	38
6.4	Monetary Deductions Assessed for Certain Noncompliance	40
6.4.1	General	40
6.4.2	Basis for Deductions.....	40
6.5	Provisions Regarding Dispute Resolution	40

6.6	Increased Oversight, Testing and Inspection	41
ARTICLE 7 . CONTRACTING AND LABOR PRACTICES		42
7.1	Disclosure of Contracts and Contractors	42
7.2	Responsibility for Work, Contractors and Employees	42
7.3	Key Contracts; Contractor Qualifications.....	43
7.3.1	Use of and Change in Key Contractors.....	43
7.3.2	Key Contract Provisions	43
7.3.3	Key Contract Amendments.....	45
7.4	Key Personnel	45
7.5	Contracts with Affiliates.....	46
7.6	Labor Standards and Job Training	46
7.7	Ethical Standards.....	47
7.8	UDBE/DBE Program.....	48
ARTICLE 8 . MANDATORY TECHNOLOGY ENHANCEMENTS AND SAFETY		
	COMPLIANCE	48
8.1	Conditions Requiring Mandatory Technology Enhancements	48
8.2	Cost and Financing of Mandatory Technology Enhancements.....	48
8.3	Safety Compliance.....	48
8.3.1	Safety Compliance Orders.....	48
8.3.2	Duty to Comply.....	49
ARTICLE 9 . DEVELOPER CLAIMS AND RELIEF EVENTS		49
9.1	Developer Claims.....	49
9.1.1	Claim Submission.....	49
9.1.2	Claim Deductible	49
9.1.3	CPI Adjustments to Deductibles	50
9.2	Relief Events.....	50
9.2.1	General	50
9.2.2	Delayed Availability Payments Due to Relief Events During Construction Period.....	50
9.2.3	Delayed Milestone Payments Due to Relief Events	52
9.2.4	Certain Relief Events Causing Closures During Operating Period	52
9.2.5	Defense to Noncompliance Points, Deductions and Developer Default.....	53
9.2.6	Mitigation.....	53
9.3	Method of Payment for Extra Work Costs and Delay Costs	53

9.4 Restoration of Financial Balance for Deferral of Compensation53

9.5 Disputes Related to Claims and Relief Events54

ARTICLE 10 . CHANGES IN THE WORK54

10.1 Department Changes.....54

10.2 Developer Change Proposals54

ARTICLE 11 . PAYMENTS TO DEVELOPER56

11.1 Timing and Basis for Availability Payments56

11.2 Availability Payment Calculation and Invoicing.....56

 11.2.1 Calculation of Availability Payment56

 11.2.2 Invoicing.....56

11.3 Disputed Amounts.....57

11.4 Interest on Payments58

11.5 Appropriations of Payments58

11.6 Tolling.....58

ARTICLE 12 . LENDERS’ RIGHTS.....60

12.1 Conditions and Limitations Respecting Lenders’ Rights60

12.2 Effect of Amendments.....60

12.3 Notices to Collateral Agent.....61

12.4 Opportunity to Cure and Step-In61

12.5 Substituted Entities61

12.6 Receivers.....62

12.7 Other Lender Rights.....63

12.8 Estoppel Certificates64

12.9 Lenders as Third-Party Beneficiaries of the Provisions of Article 12.....65

**ARTICLE 13 . EQUITY TRANSFERS AND CHANGE OF CONTROL; COMMITTED
INVESTMENT REQUIREMENT65**

13.1 Restrictions on Equity Transfers and Changes of Control of Developer65

ARTICLE 14 . FINANCIAL MODEL FOR THE PROJECT66

14.1 Financial Model.....66

14.2 Financial Model Updates.....67

ARTICLE 15 . PROJECT FINANCING AND REFINANCING67

15.1 Developer Right and Responsibility to Finance Project67

15.2 No Department Responsibility for Project Debt68

15.3	Mandatory Terms of Project Debt, Funding Agreements and Security Documents.....	69
15.4	Refinancing.....	70
15.4.1	Right of Refinancing	70
15.4.2	Notice, Consent and Documentation of Refinancing.....	70
15.4.3	Refinancing Limitations, Requirements and Conditions	71

ARTICLE 16 . INSURANCE, PAYMENT AND PERFORMANCE SECURITY, AND

	INDEMNITY	72
16.1	Insurance.....	72
16.1.1	Insurance Policies and Coverage	72
16.1.2	General Insurance Requirements	72
16.1.3	Lender Insurance Requirements.....	77
16.1.4	Prosecution of Claims.....	77
16.1.5	Application of Insurance Proceeds	78
16.1.6	Property Damage Caused By Terrorism.....	78
16.2	Performance, Payment and O&M Security.....	79
16.2.1	Performance Security	79
16.2.2	Payment Security	80
16.2.3	Operations and Maintenance Security	81
16.3	Letters of Credit	81
16.4	Indemnity by Developer	83

ARTICLE 17 . REPRESENTATIONS AND WARRANTIES85

17.1	Developer Representations and Warranties.....	85
17.2	Department Representations and Warranties	88
17.3	Survival of Representations and Warranties	89

ARTICLE 18 DEFAULT; SUSPENSION OF WORK.....89

18.1	Default by Developer; Cure Periods.....	89
18.1.1	Developer Default.....	89
18.1.2	Initial Notice and Cure Periods	91
18.2	Department Remedies for Developer Default.....	92
18.2.1	Termination	92
18.2.2	Immediate Department Entry and Cure of Wrongful Use	92
18.2.3	Remedies for Failure to Meet Safety Standards or Perform Safety Compliance	93
18.2.4	Department Step-in Rights	94

18.2.5	Damages; Offset	95
18.2.6	Persistent Developer Noncompliance	96
18.2.7	Suspension of Work	96
18.2.8	Warning Notices	97
18.2.9	Other Rights and Remedies	98
18.2.10	Cumulative, Non-Exclusive Remedies	98
18.2.11	Limitation on Developer's Liability for Certain Damages	98
18.3	Default by the Department; Cure Periods.....	99
18.3.1	Department Default	99
18.3.2	Cure Periods	99
18.4	Developer Remedies for Department Default.....	100
18.4.1	Termination	100
18.4.2	Damages and Other Remedies	100
18.4.3	Limitations on Remedies	100
ARTICLE 19 . TERMINATION		101
19.1	Termination for Convenience	101
19.2	Termination for Extended Relief Events	103
19.2.1	Notice of Conditional Election to Terminate	103
19.2.2	Developer Options Upon Department Notice	104
19.2.3	Department Options Upon Developer Notice	104
19.2.4	No Waiver	106
19.2.5	Concurrent Notices.....	106
19.2.6	Termination Compensation for Extended Relief Events.....	106
19.3	Termination for Developer Default	107
19.3.1	Developer Defaults Triggering Department Termination Rights	107
19.3.2	Compensation to Developer	107
19.4	Termination for Department Default or Suspension of Work; Termination by Court Ruling; Termination Based on Benchmark Interest Rate and Credit Spread Changes.....	109
19.4.1	Termination for Department Default.....	109
19.4.2	Termination for Suspension of Work.....	109
19.4.3	Termination by Court Ruling	110
19.5	Termination Procedures and Duties	110
19.5.1	Transition Plan	110
19.5.2	Relinquishment and Possession of the Project	111
19.5.3	Continuance or Termination of Key Contracts Prior to Work	

Completion	111
19.5.4 Other Close-Out Activities	112
19.6 No Separate Terminations of Agreement and Lease.....	114
19.7 Effect of Termination.....	114
19.7.1 Cessation of Developer’s Property Interest.....	114
19.7.2 Contracts and Agreements	114
19.8 Liability After Termination; Final Release	114
19.9 Payment of Termination Compensation	115
19.10 Exclusive Termination Rights	116
ARTICLE 20 . RESERVED RIGHTS	116
20.1 General.....	116
20.2 Reserved Business Opportunities	116
ARTICLE 21 . RECORDS; INTELLECTUAL PROPERTY	118
21.1 Maintenance and Inspection of Records	118
21.2 Audits.....	119
21.3 Public Records Law	120
21.4 Intellectual Property	121
21.5 Intellectual Property Escrows	122
ARTICLE 22 . FEDERAL REQUIREMENTS.....	123
22.1 Compliance with Federal Requirements.....	123
22.2 Cooperation with FHWA.....	123
ARTICLE 23 . ASSIGNMENT AND TRANSFER	124
23.1 Restrictions on Assignment, Subletting and Other Transfers	124
23.2 Assignment by the Department.....	124
23.3 Notice and Assumption	124
23.4 Change of Organization or Name.....	125
ARTICLE 24 . DISPUTE RESOLUTION PROCEDURES	125
24.1 General.....	125
24.2 Disputes Review Board.....	125
24.3 Regional Disputes Review Board.....	127
24.4 Statewide Disputes Review Board for Value Added Specifications	127
24.5 Right to Litigate Dispute, Suits By and Against the Department, Limitations of Actions, and Forum	127

24.6 Continuance of Work During Dispute 128

ARTICLE 25 . MISCELLANEOUS 128

25.1 Amendments..... 128

25.2 Waiver 128

25.3 Independent Contractor 128

25.4 Successors and Assigns 129

25.5 Designation of Representatives; Cooperation with Representatives 129

25.6 Survival..... 129

25.7 Limitation on Third-Party Beneficiaries..... 129

25.8 Governing Law..... 130

25.9 Notices and Communications 130

25.10 Miscellaneous Mandatory Financial Terms 131

25.11 Integration of Contract Documents..... 132

25.12 Severability 132

25.13 Headings 132

25.14 Construction and Interpretation of Agreement..... 132

25.15 Entire Agreement..... 133

25.16 Counterparts 133

LIST OF APPENDICES

<u>Appendix:</u>	<u>Name:</u>
-	
1	Definitions
2	Developer's Proposal Commitments
	2-A Project Schedule
	2-B Original Financial Model
	2-C Financial Model
	2-D Preliminary Corridor Master Plan
	2-E Management / Administration
	2-F Renewal Work Reserve
	2-G Operations and Maintenance
	2-G(1) Operations and Maintenance Plan
	2-G(2) System Integration Plan
	2-H Equity Members, Contractors and Key Personnel Commitment
	2-I Schedule of Values
	2-J Termination for Convenience Calculation Method
	2-K Equal Employment Opportunity Certification
	2-L UDBE/DBE Certification
	2-M Buy America Certification
	2-N Use of Contract Funds for Lobbying Certification
	2-O Debarment and Suspension Certification
	2-P Schedule of Technical Proposal Adjustments
	2-P(1) Roadway
	2-P(2) Structures
	2-P(3) Drainage
	2-P(4) Management / Administration
	2-P(5) Operations and Maintenance
	2-Q Schedule of Design Adjustments
3	Milestone Dates, Milestone Payments and Milestone Payment Adjustments
	3-A Milestone Dates and Milestone Amounts
	3-B Milestone Payment Adjustments
4	Right of Way Plans
	4-A Parcels Eligible for Cost Savings
5	Noncompliance Points System
6	Payment Mechanism
7	List of Initial Funding Agreements and Initial Security Documents
8	Insurance Coverage Requirements
9	Disputes
	9-A Form of Disputes Review Board Agreement
	9-B Disputes Review Board Procedures
	9-C Regional Disputes Review Board Procedures
10	Initial Designation of Authorized Representatives
11	Calculation and Payment of Refinancing Gains
12	O&M Periodic Reports and Records
13	Form of Direct Agreement
14	Form of Letter of Credit
15	Form of Performance Security, Payment Security and O&M Security
16	Intellectual Property License
17	UDBE/DBE Affirmative Action Program Plan

18	Additional Federal Requirements
	18-A Federal Provisions
	18-B FHWA Form 1273
	18-C Equal Employment Opportunity
19	List of Major Permits
20	Format for Baseline Report for Phase I

**CONCESSION AGREEMENT
PRESIDIO PARKWAY PROJECT**

This Concession Agreement ("**Agreement**") is entered into and effective as of _____, 20__ by and between:

- (a) the California Department of Transportation, a public agency of the State of California ("**the Department**"); and

- (b) _____, a _____ ("**Developer**").

BACKGROUND:

A. The Department in cooperation with the San Francisco County Transportation Authority (the "Authority") wishes to develop, design, construct, finance, operate and maintain the Presidio Parkway Project (the "**Project**") through a public-private partnership. The facility will consist of a new six-lane parkway-type roadway and a southbound auxiliary lane, between the Park Presidio Interchange and the new Presidio access at Girard Road, which will replace the existing Doyle Drive facilities along Route 101 in the City of San Francisco. The Department will be responsible for the design, financing and construction of Phase I of the Project; the Developer will be responsible for the design, and financing and construction of Phase II of the Project, as well as providing for the long-term operations and maintenance of both phases of the Project, all as provided in this Agreement.

B. The Department issued a Request for Qualifications for the Project on [XXXXXXXXXXXX] and addenda thereto (collectively, the "**RFQ**"). The Department issued these and all subsequent procurement documents for the Project pursuant to Section 143 of the California Streets and Highway Code (the "**PPP Law**"). The PPP Law grants the Department the authority to solicit proposals from and enter into agreements with private entities, or consortia thereof, for the building, operation, ownership or financing of transportation projects such as the Project.

C. On [XXXXXXXXXXXX], pursuant to the procurement process outlined in the RFQ, the Department selected [XXXXXX] short-listed proposers based on their respective financial and technical qualifications as detailed in their responses to the RFQ. The Department then issued a Request for Proposals to these short-listed proposers, which included various RFP documents and addenda thereto (collectively, the "**RFP**").

D. On [XXXXXXXXXXXX], the Department selected Developer as the best value proposer. The Department's decision was based on its overall evaluation of the proposals, and the Department's conclusion that Developer has offered the best value in its Proposal, based on Developer's Maximum Availability Payment, together with its approach to project management, design and construction, quality assurance and control, and operations and maintenance of the Project within the O&M Limits.

NOW, THEREFORE, in consideration of the sums to be paid by the Department to Developer, the Work to be financed and performed by Developer, the foregoing covenants and agreements set forth herein, the Parties hereby agree as follows:

ARTICLE 1. DEFINITIONS; CONTRACT DOCUMENTS

1.1 Definitions

Definitions for certain capitalized terms used in this Agreement and the other Contract Documents are contained in Appendix 1.

1.2 Contract Documents; Order of Precedence

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

1.2.1 In the event of any conflict, ambiguity or inconsistency among the Contract Documents, the order of precedence shall be as follows:

1. Supplemental Agreements and amendments to the Contract Documents;
2. Volume I (this Agreement, including all Appendices, except Appendix 2 which has a lower order of precedence);
3. Volume II (Technical Requirements), excepting the Manuals and Guidelines which have a lower order of precedence;
4. Volume III (Additional Mandatory Standards);
5. The Manuals and Guidelines; and
6. Appendix 2 to this Agreement, constituting Developer's Proposal Commitments.

1.2.2 Notwithstanding the order of precedence among Contract Documents set forth in this Section 1.2, in the event of any conflict, ambiguity or inconsistency between or among any of the provisions in this Agreement, or between provisions in this Agreement and any other Contract Document, the provisions that establish the higher quality, manner or method of performing the Work, exceed Best Management Practices, or use more stringent standards will prevail. If Developer's Proposal Commitments include statements, terms, concepts or designs that can reasonably be interpreted as offers to provide higher quality items than otherwise required by the other Contract Documents or to perform services or meet standards in addition to or better than those otherwise required, then Developer's obligations hereunder shall include compliance with all such statements, terms, concepts and designs. Additional details in a lower priority Contract Document shall be given effect except to the extent they conflict with requirements, provisions and practices contained in the higher priority Contract Document.

1.2.3 Notwithstanding the order of precedence among Contract Documents set forth in this Section 1.2, in the event of a conflict among the Manuals and Guidelines, the Department shall have the right to determine, in its sole discretion, which provision applies. Developer shall request in writing the Department's determination respecting the order of precedence involving the Manuals and Guidelines promptly upon becoming aware of any such conflict.

1.3 Principal Developer Documents

Except with the Department's prior written approval in its good faith discretion, Developer shall not (a) terminate or permit the termination of a Principal Developer Document except in the case of material uncured default or (b) agree to any amendment of any provision of a Principal Developer Document required by the Department as specified in Section 7.3.2 or elsewhere in this Agreement, or agree to any amendment thereof inconsistent with the terms of the Contract Documents. The foregoing does not, however, affect Developer's rights with respect to any Refinancing set forth in Section 15.4.

1.4 Reference Documents

1.4.1 The Department has provided the Reference Documents to Developer. The Reference Documents are for information only, and are not mandatory or binding on Developer, except to the extent information in the Reference Documents is expressly made a contractual requirement as part of the Technical Requirements. Developer is not entitled to rely on the Reference Documents as accurately describing existing conditions, presenting design, engineering, operating or maintenance solutions or directions, or defining means or methods for complying with the requirements of the Contract Documents, Governmental Approvals or Law.

1.4.2 The Department shall not be responsible or liable in any respect for any causes of action, claims or Losses whatsoever suffered by any Developer-Related Entity by reason of any use of information contained in, or any action or forbearance in reliance on, the Reference Documents.

1.4.3 The Department does not represent or warrant that the information contained in the Reference Documents is complete or accurate or that such information is in conformity with the requirements of the Contract Documents, Governmental Approvals or Laws. Developer shall have no right to submit a claim for Extra Work Costs, Delay Costs, time extensions or other relief on account of any incompleteness or inaccuracy in the Reference Documents, including any incompleteness or inaccuracies regarding the location, size, character and extent of Utilities, Hazardous Materials and subsurface conditions.

ARTICLE 2. CONCESSION TERM

2.1 Grant of Concession

2.1.1 Pursuant to the provisions of the PPP Law and subject to the terms and conditions of the Contract Documents, the Department hereby grants to Developer the exclusive right, and Developer accepts the obligation, to develop, design, construct and finance the Project and to enter into the Lease in the form attached as Appendix 3.

2.1.2 Developer shall have the right to enter onto Project Right of Way and other adjacent lands owned by the Department, the Presidio Trust or other governmental agencies for purposes of carrying out its obligations under this Agreement. Notwithstanding the foregoing, Developer shall be responsible for compliance with the terms and provisions of the Presidio Trust Right of Entry Agreement and the Programmatic Agreement, including paying all applicable charges and related fees charged or obtaining all consents or approvals for access by any Developer-Related Entity to the Project Right of Way to perform any Work required under this Agreement. The Department and SFCTA shall provide reasonable assistance to

Developer in obtaining the necessary consents or approvals required to access lands owned by the Presidio Trust or other governmental agencies as required pursuant to the Presidio Trust Right of Entry Agreement and the Programmatic Agreement for purposes of carrying out the Developer's responsibilities under this Agreement.

2.1.3 Developer shall have the exclusive right and obligation, during the Operating Period, to use, manage, operate, maintain and repair the Project, and to perform Renewal Work and Upgrades, pursuant to the terms of the Presidio Right of Entry Agreement, the Programmatic Agreement, this Agreement, the other Contract Documents, and the Principal Developer Documents.

2.1.4 Department and Developer acknowledge that they have executed two counterparts of the Lease and one counterpart of the Memorandum of Lease and placed them in a neutral escrow for safekeeping pursuant to the Lease Escrow Agreement. Upon the commencement of the Operating Period, and as a ministerial act, Department and Developer shall date the Lease and Memorandum of Lease, obtain acknowledgment of their signatures on the Memorandum of Lease by a California notary public, attach all legal descriptions pertaining to the Project Right of Way, excluding all air space, surface rights and subsurface rights within the horizontal limits of the Project Right of Way not required for operation and maintenance of the Project, and each Party shall deliver to the other Party, and the other Party shall accept, the Lease and Memorandum of Lease. Thereupon, the Lease shall take effect and the right of entry under Section 2.1.2 shall automatically cease to have effect (but the obligation under Section 2.1.2 to comply with the terms and provisions of the Presidio Trust Right of Entry Agreement shall continue in full force and effect). Developer, at its expense, shall have the right to record the Memorandum of Lease upon its delivery to Developer, and shall promptly deliver to Department a conformed copy of the Memorandum of Lease bearing all recording information.

2.1.5 Developer's rights granted in this Section 2.1 are limited by and subject to the terms and conditions of the Contract Documents, including the Department's sole ownership of fee simple title to the Project and the Department's and the Presidio Trust's ownership of the Project Right of Way and all improvements constructed thereon, subject to Developer's Interest including Developer's leasehold estate under the Lease.

2.2 Term of Concession

2.2.1 This Agreement shall take effect on the Effective Date, and shall remain in effect until the earlier of (a) [33] years after the Effective Date; or (b) the termination of this Agreement as provided herein (the "Term").

2.2.2 The Parties acknowledge that Developer's rights and obligations to finance and pay for development of the Project, manage, operate, maintain and repair the Project, and perform Renewal Work and Upgrades commence on the Effective Date notwithstanding the later commencement of the Lease, subject to issuance of NTP 1 and NTP 2, and the satisfaction of other conditions precedent to performance of the Work set forth in this Agreement.

ARTICLE 3. Department review and oversight

3.1 Preliminary Planning and Engineering Activities

3.1.1 Unless expressly provided otherwise in this Agreement for specific elements of the Work, Developer shall perform or cause to be performed all preliminary planning and engineering activities appropriate for design and construction of Phase II the Project.

3.1.2 Subject to Sections 4.10, 4.14 and 9.2, Developer shall bear the risk of any incorrect or incomplete review, examination and investigation by it of the Site and surrounding locations and of any incorrect or incomplete information resulting from preliminary engineering activities conducted by Developer, the Department or any other Person. The Department makes no warranties or representations as to any surveys, data, reports or other information provided by the Department or other Persons concerning surface conditions and subsurface conditions, including information related to Utilities and Hazardous Materials, affecting the Site or surrounding locations. Developer acknowledges that such information is for Developer's general reference only.

3.2 Governmental Approvals

3.2.1 General

3.2.1.1 Prior to the Effective Date, the Department has undertaken certain efforts and activities to secure certain Governmental Approvals as described in Appendix 19. Notwithstanding such efforts and activities, Developer shall be solely responsible for compliance with the requirements of the Governmental Approvals as well as securing and obtaining all remaining Governmental Approvals, including any revision, modification, amendment, supplement, renewal or extension thereof, required in connection with the Project or the Work. Developer shall not be entitled to submit a claim for any Extra Work Costs, Delay Costs, time extensions or other relief associated with securing and obtaining Governmental Approvals, except that: (a) Developer shall not be in default for failing to meet a Completion Deadline due to delays in obtaining Governmental Approvals, provided that such delays are beyond the reasonable control of the Developer-Related Entities, and (b) Developer may be entitled to submit a claim for delays in obtaining Major Permits as provided under Section 3.2.2.

3.2.1.2 Developer shall take all actions necessary to comply with and to maintain in full force and effect all Governmental Approvals, including performance of all measures required by the Contract Documents or Governmental Approvals, except to the extent that responsibility for performance of such measures is expressly assigned to the Department in the Contract Documents.

3.2.2 Major Permit Delays

3.2.2.1 Appendix 19 identifies the Major Permits and the expected time necessary to secure each of the Major Permits, commencing from the date on which Developer submits a complete application in accordance with the Contract Documents to the applicable Governmental Entity ("**Major Permits Deadline**"). Developer shall be entitled to seek a time extension under the Contract Documents due to delays in obtaining a Major Permit by the applicable Major Permits Deadline, provided that such delays are beyond the reasonable control of the Developer-Related Entities.

3.2.2.2 Notwithstanding the provisions in this Section 3.2.2, Developer shall not be entitled to any relief relating to delays in obtaining Major Permits for the following:

1. Extra Work Costs.
2. Delay Costs of any kind.
3. Delays that could have been mitigated by Developer through reasonable efforts.
4. Delays due to differences in the Indicative Preliminary Design and Developer's Final Design, unless such differences are due to a Department Change.

3.3 Submittals

3.3.1 General

This Section 3.3 sets forth uniform terms and procedures that shall govern all Submittals to the Department pursuant to the Contract Documents.

3.3.2 Department Discretionary Approvals

Certain Submittals are subject to the Department's approval in its sole or absolute discretion. If the Submittal is one where the Contract Documents indicate approval is required from the Department in its sole or absolute discretion, or good faith discretion, then the Department's lack of approval, determination, decision or other action within the applicable time period under the Contract Documents shall be deemed a disapproval. If approval is subject to the sole or absolute discretion of the Department, then its decision shall be final, binding and not subject to dispute resolution, and such decision shall not constitute a basis for any claim for Extra Work Costs, Delay Costs, time extensions or other relief. If the approval is subject to the good faith discretion of the Department, then its decision shall be binding unless it is finally determined through the Dispute Resolution Procedures by clear and convincing evidence that such decision was arbitrary or capricious.

3.3.3 Department Review and Comment

Whenever the Contract Documents indicate that a Submittal or other matter is subject to the Department's review and comment and the Department delivers no comments, exceptions, objections, or rejections within the applicable time period under the Contract Documents, then Developer may proceed thereafter at its election and risk, without prejudice to the Department's rights to later object or disapprove the Submittal on the basis that such Submittal is not in accordance with the requirements of the Contract Documents. No such failure or delay by the Department to object to or disapprove Work not in compliance with the Contract Documents within the applicable time period under the Contract Documents shall constitute a basis for any claim for Extra Work Costs, Delay Costs, time extensions or other relief.

3.3.4 Submittals Not Subject to Prior Review, Comment or Approval

Whenever the Contract Documents indicate that Developer is to deliver a Submittal to the Department but express no requirement for Department review, comment, disapproval, prior approval or other Department action, then Developer is under no obligation to obtain Department approval of the Submittal before proceeding with further Work, and the Department shall have the right, but is not obligated, to at any time review, comment on, take exception to, object to, reject or disapprove the Submittal on the basis that such Submittal is not in accordance with the requirements of the Contract Documents. No failure or delay by the Department in delivering comments, exceptions, objections, rejections or disapprovals with respect to the Submittal shall constitute a basis for any claim for Extra Work Costs, Delay Costs, time extensions or other relief.

3.3.5 Other Department Approvals

3.3.5.1 Whenever the Contract Documents indicate that a Submittal or other matter is subject to the Department's approval or consent but the approval or consent is one not governed by Section 3.3.2 concerning discretionary approvals, then the standard for approval shall be reasonableness.

3.3.5.2 Department's exception, objection, rejection or disapproval shall be deemed reasonable, valid and binding if based on any of the following grounds:

1. The Submittal or subject provision thereof fails to comply with any applicable covenant, condition, requirement, term or provision of the Contract Documents;
2. The Submittal or subject provision thereof is not to a standard equal to or exceeding Best Management Practice;
3. Developer has not provided all content or information required in respect of the Submittal or subject provisions thereof, provided that Developer shall have the subsequent opportunity to resubmit the Submittal with the required content or information; or
4. Adoption of the Submittal or subject provision thereof, or of any proposed course of action thereunder, would result in a conflict with or violation of any Law or Governmental Approval.

3.3.5.3 If the reasonableness standard applies and Department delivers no approval, consent, determination, decision or other action within the applicable time period under Section 3.3.7, then Developer may deliver to Department a written notice stating the date within which Department was to have decided or acted and that if Department does not decide or act within five Business Days after receipt of the notice, delay from and after lapse of the applicable time period may constitute Department-Caused Delay for which Developer may be entitled to relief under Article 9.

3.3.6 Limitations on Developer's Right to Rely

3.3.6.1 No review, comment, objection, rejection, approval, acceptance, concurrence, certification (including notices of Substantial Completion and Final

Acceptance), monitoring, testing, inspection, auditing or other oversight by or on behalf of the Department, and no lack thereof by the Department, shall constitute acceptance by the Department of Work that does not comply with the Contract Documents or waiver of any legal or equitable right held by the Department with respect to such Work under the Contract Documents or Law. The Department shall be entitled to exercise all rights and remedies under the Contract Documents or Law to bring the Work and the Project into compliance with requirements of the Contract Documents, regardless of whether previous review, comment, objection, rejection, approval, acceptance, certification, monitoring, testing, inspection, auditing or other oversight were conducted or given by the Department. Developer at all times shall have an independent duty and obligation to fulfill the requirements of the Contract Documents. Developer agrees and acknowledges that any such activity or failure to conduct any such activity by the Department:

5. Is solely for the benefit and protection of the Department;
6. Does not relieve Developer of its responsibility for the selection and the competent performance of all Developer-Related Entities;
7. Does not create or impose upon the Department any duty or obligation toward Developer to cause it to fulfill the requirements of the Contract Documents;
8. Shall not be deemed or construed as any kind of warranty, express or implied, by the Department;
9. May not be relied upon by Developer or used as evidence in determining whether Developer has fulfilled the requirements of the Contract Documents, except that the issuance of the notices of Substantial Completion and Final Acceptance may be relied upon and used as evidence to establish the commencement of the Department's payment obligations and Developer's entitlement to receive the Availability Payments and Milestone Payments (as applicable), nevertheless without waiving the Department's rights and remedies against Developer for failing to meet the requirements of the Contract Documents; and
10. May not be asserted by Developer against the Department as a legal or equitable defense to, or as a waiver of or relief from, Developer's obligation to fulfill the requirements of the Contract Documents.

3.3.6.2 To the maximum extent permitted by Law, Developer hereby releases and discharges the Department from any and all duty and obligation to cause Developer's Work or the Project to satisfy the standards and requirements of the Contract Documents.

3.3.7 Time Periods

3.3.7.1 Except as otherwise provided in this Section 3.3.7, whenever the Department is entitled to review and comment on, or to affirmatively approve, a Submittal, the Department shall have a period of [28] days after the date the Department receives an accurate and complete Submittal in conformance with the

Contract Documents to review, comment, or approve, as the case may be, the Submittal. The Department's review period for Developer's re-submission of a previously submitted Submittal shall be [14] days, unless provided otherwise in the Contract Documents. The Parties shall agree in good faith upon any necessary extensions of the review-comment-and-approval period to accommodate particularly complex or comprehensive Submittals.

3.3.7.2 If any provision of the Contract Documents expressly provides a longer or shorter period for the Department to act, such period shall control over the time period set forth in Section 3.3.7.1. If the time period for the Department to act should end on a day when the Department is closed or when Department employees are on furlough, the time period shall automatically be extended to the next day when the Department is open or when Department employees are no longer on furlough, as applicable.

3.3.7.3 Developer shall schedule, prioritize and coordinate all Submittals to allow an efficient and orderly Submittal review process. All time periods for the Department to act shall be extended by the period of any delay caused by the negligence, willful misconduct, or breach of applicable Law or contract by Developer or any Developer-Related Entity. In no event shall Developer be entitled to submit a claim for Extra Work Costs, Delay Costs, time extensions or other relief for such extension of the review period.

3.3.7.4 During any time that the Department is entitled under Section 6.6 to increase the level of its auditing, monitoring, inspection, sampling, measuring, testing and oversight of Developer's compliance with its obligations under this Agreement, the applicable period for the Department to act on any Submittals received during such time shall automatically be extended by [10] days.

ARTICLE 4. DESIGN AND CONSTRUCTION

4.1 Obligations of Developer

4.1.1 General Duties

In addition to performing all other requirements of the Contract Documents, Developer shall:

4.1.1.1 Furnish all design and other services, provide all materials, equipment and labor and undertake all efforts necessary or appropriate (excluding only those materials, services and efforts which the Contract Documents expressly specify will be undertaken by the Department or other Persons) to construct Phase II of the Project and to maintain it during construction and to achieve Substantial Completion no later than the Long Stop Date;

4.1.1.2 Ensure that the Project Manager or the superintendent identified in Developer's Statement of Qualifications for the Lead Contractor, or one of its Department-approved designees, is present at the Site at all times during the performance of Construction Work to perform the obligations required under [Section ___ of Division ___];

4.1.1.3 Comply with, and require that all Contractors comply with, all requirements of all applicable Laws;

4.1.1.4 Cooperate with the Department and Governmental Entities with jurisdiction in all matters relating to the Work, including their review, inspection and oversight of the design and construction of the Project; and

4.1.1.5 Exercise commercially reasonable efforts to mitigate delay and damages due to delay regardless of the cause of the delay, including by re-sequencing, reallocating, or redeploying Developer's and its Contractors' forces to other work, as appropriate.

4.1.2 Performance, Design and Construction Standards

4.1.2.1 Developer shall perform the D&C Work in accordance with (a) Best Management Practice, (b) the requirements, terms and conditions set forth in the Contract Documents, (c) all Laws, and (d) the requirements, terms and conditions set forth in all Governmental Approvals.

4.1.2.2 Developer shall use reasonable care to identify any provisions in the Technical Volumes that are erroneous, create a potentially unsafe condition, or are or become inconsistent with Best Management Practice. Whenever Developer knows or, in the exercise of reasonable care should have known that a provision of the Technical Volumes is erroneous, creates a potentially unsafe condition or is or becomes inconsistent with Best Management Practice, Developer shall have the duty to notify the Department in writing of such fact and of the changes to the provision that Developer believes are the minimum necessary to render it correct, safe and consistent with Best Management Practice. If Developer commences or continues any D&C Work affected by the change after the need for the change was identified, or should have been identified through the exercise of reasonable care, Developer shall bear the risk of loss and any additional costs associated with redoing the Work already performed in accordance with the Contract Documents.

4.1.2.3 References in the Technical Volumes to the Manuals and Guidelines or other publications governing the D&C Work prior to Substantial Completion shall mean the most recent editions in effect as of the date the Department issued the RFP, unless expressly provided otherwise.

4.1.2.4 The Parties anticipate that from time to time after the Department issues the RFP the Department will adopt, through revisions to the existing Manuals and Guidelines or through new manuals and publications, changed, added or replacement standards, criteria, requirements, conditions, procedures, specifications and other provisions relating to the D&C Work of general application to comparable Department projects. Pursuant to Section 10.1 and subject to Section 8.2.1, the Department shall have the right to add such changed, added or replacement standards, criteria, requirements, conditions, procedures, specifications and other provisions to the Technical Volumes in accordance with the Contract Documents.

4.2 Design Implementation and Submittals

Developer, through the appropriately qualified and licensed design professionals

identified in Developer's Project Management Plan, shall prepare designs, plans and specifications in accordance with the Contract Documents.

4.3 Nonconforming and Defective Work

4.3.1 As directed by the Department in its sole discretion and as specified in the Contract Documents, the Developer shall be responsible for removing, replacing and otherwise correcting Nonconforming Work discovered by the Department. If the Department elects to accept Nonconforming Work, the Department may recover the amounts determined under [Section __ of Division __].

4.3.2 Subject to Section 18.2.11, nothing contained in the Contract Documents shall in any way limit the right of the Department to assert claims for damages resulting from patent or latent defects in the Work for the period of limitations prescribed by applicable Law, and the foregoing shall be in addition to any other rights or remedies the Department may have hereunder or under Law.

4.4 Project Right of Way Acquisition

4.4.1 The Project shall be situated entirely within the Project Right of Way all of which is either owned by the Department or the Presidio Trust; provided the parties hereby acknowledge that the rehabilitation or replacement work relating to the outfall facility will take place on lands owned by the National Parks Service. If Developer identifies additional Project Right of Way or other lands or property rights as needed to construct Phase II, Developer shall be responsible for all costs incurred by the Department in the acquisition of the additional Project Right of Way or other lands or property rights, and shall bear the sole risk and cost of any time and cost impacts to the Work related to such acquisition. Developer shall sequence and schedule the Work based on the anticipated Project ROW clear dates and dates relating to completion of the acquisition of the other lands or property rights identified in the Contract Documents to avoid and minimize potential impacts to the Work. Subject to Developer's rights to claim a Relief Event under clause (c) of the definition of Department-Caused Delays, Developer shall not be entitled to submit a claim for Extra Work Costs, Delay Costs, time extensions or other relief for impacts that could have been avoided through proper sequencing and scheduling of the Work.

4.4.2 Developer shall be solely responsible for obtaining any real property that is not Project Right of Way which Developer deems desirable for the Project, including temporary permits and leases needed for construction staging, in accordance with the Contract Documents.

4.4.3 Requests by Developer for any additional right of way, whether permanent or temporary, shall be submitted and processed in accordance with [Section __ of Division __].

4.5 Utility Adjustments

4.5.1 Developer's General Responsibilities

4.5.1.1 Developer shall be responsible for coordinating and causing all Utility Adjustments necessary for the timely construction, operation and maintenance of the Project in accordance with the Contract Documents. Developer shall ensure that all Utility Adjustments, whether performed by Developer or a Utility

Owner, complies with the Contract Documents and applicable Utility Agreement. Except with respect to Developer's rights to claim a Relief Event for Utility Owner Delays pursuant to Section 4.5.7, Developer shall not be entitled to submit a claim for Extra Work Costs, Delay Costs, time extensions or other relief related to the Utility Adjustment Work or Utilities located within or outside the Project Right of Way or otherwise impacted by, or having an impact on, the Project or the Work.

4.5.1.2 If a Utility Owner performs all or any part of the Utility Adjustment, Developer shall coordinate, monitor, and otherwise undertake the necessary efforts to enable such Utility Owner to perform such work timely, in coordination with the Work, and in compliance with the Contract Documents and applicable Utility Agreement.

4.5.1.3 The Department will endeavor to cooperate with Developer with respect to Developer's contractual obligations for coordinating with Utility Owners. Notwithstanding the foregoing, Developer shall be solely responsible for performing its obligations under the Contract Documents related to the Utility Adjustment Work and such cooperation or failure to cooperate by the Department shall not relieve Developer from fulfilling such obligations.

4.5.2 Utility Agreements

Developer shall be responsible for negotiating, preparing and executing Utility Agreements to accomplish the Utility Adjustment in accordance with the Contract Documents. The Department agrees to cooperate as reasonably requested by Developer in pursuing any such Utility Agreements. All Utility Agreements shall be: (a) reasonably acceptable to the Department; (b) consistent with the requirements of the Contract Documents related to the applicable Utility Adjustment; and (c) submitted to the Department as provided in [Section __ of Division __].

4.5.3 Utility Adjustment Costs

4.5.3.1 Except for Betterment costs which are the responsibility of the Utility Owner, Developer is responsible for all costs of the Utility Adjustment Work. Developer shall fulfill this responsibility either by performing the Utility Adjustments Work itself at its own cost, or by reimbursing the Utility Owner for the Utility Adjustment Work. Developer is solely responsible for collecting directly from the Utility Owner any reimbursement due for Betterment costs or other costs for which the Utility Owner is considered responsible under applicable Law.

4.5.3.2 If for any reason Developer is unable to collect any amounts due to Developer from any Utility Owner, then (a) the Department shall have no liability for such amounts, (b) Developer shall have no right to collect such amounts from the Department or to offset such amounts against amounts otherwise owing from Developer to the Department, and (c) Developer shall have no right to suspend the Work or to exercise any other remedies against the Department on account of such failure to pay.

4.5.3.3 For each Utility Adjustment, Developer shall maintain or cause a Utility Owner to maintain cost records in accordance with the recordkeeping and audit requirements of the Contract Documents and applicable Law, including 23

CFR Part 645, Subpart A. Developer shall obtain from the Utility Owner a complete set of records of the Utility Owner's costs incurred for any Utility Adjustment Work. All records maintained pursuant to this Section 4.5.3.3 shall be in a format compatible with any related estimates and in sufficient detail for analysis. For both Utility Owner costs and Developer costs, the totals for each cost category shall be shown in such manner as to permit comparison with the categories stated on the estimate.

4.5.4 Utility Enhancements

Developer shall respond to any requests by Utility Owners that Developer design and/or construct Betterments or Utility Owner Projects (collectively, "**Utility Enhancements**"), although Developer is not required to agree to such requests. Any Betterment performed as part of a Utility Adjustment, whether by Developer or by the Utility Owner, shall be subject to the requirements of this Section 4.5 as if it were a Utility Adjustment. Developer shall perform any work on a Utility Owner Project only by separate contract outside of the Work. Any proposed Utility Enhancement shall be subject to the Department's prior approval. Under no circumstances shall Developer proceed with any Utility Enhancement that is incompatible with the Project or is not in compliance with the Contract Documents. Developer shall not be entitled to any Extra Work Costs, Delay Costs, time extension or other relief as the result of any Utility Enhancement, whether performed by Developer or by the Utility Owner, and shall be responsible for and liable to the Department for any deficiencies relating to any Utility Enhancements.

4.5.5 Utility Permit Applications

For reasons unrelated to a Utility Adjustment, it is anticipated that from time to time during the Construction Work, Utility Owners might apply for utility permits to install new Utilities that would cross or longitudinally occupy those areas of the Project that are subject to the Department's permitting jurisdiction, or to modify, upgrade, relocate or expand existing Utilities within such areas. For such utility permit applications pending as of or submitted after the Effective Date, Developer shall assist the Department in its consideration of each utility permit application in accordance with the Contract Documents. Further, Developer shall make available upon request the most recent Project design information and/or As-Built Record Plans, as applicable, to the applicants, shall assist each applicant with information regarding the location of other proposed and existing Utilities, and shall use commercially reasonable efforts to coordinate work schedules with such applicants as appropriate to avoid interference with the Project Schedule by their activities.

4.5.6 Assignment of Rights Against Utility Owners

In the event of good-faith and bona fide colorable potential claims on behalf of Developer for wrongful actions or inactions of a Utility Owner within the Project Right of Way, the Department agrees that, upon receipt of a written request from Developer, the Department in its reasonable discretion will assign to Developer the Department's rights of recovery, as such may exist, under any existing agreement between the Department and a Utility Owner, including any utility permits, utility relocation agreements, or other agreements.

4.5.7 Utility Owner Delay

4.5.7.1 Developer shall be entitled to seek compensation under Sections 9.2.2 and 9.2.3 and a time extension under the Contract Documents for a

Utility Owner Delay, provided that all of the following conditions have been met:

1. A Qualifying Utility Agreement exists between Developer and the Qualifying Utility Owner; and
2. Developer has established by evidence reasonably satisfactory to the Department that: (a) the subject Utility Adjustment is necessary and Developer has provided a reasonable plan for same to the Qualifying Utility Owner, (b) the time for completion of the Utility Adjustment in the Project Schedule is reasonable, (c) Developer has complied with its obligations to coordinate with the Qualifying Utility Owner under the Contract Documents, including [Section ___ of Division ___], (d) Developer has furnished the Qualifying Utility Owner and the Department with sufficient advance notice regarding the potential impact of the Utility Owner Delay, and (e) Developer has pursued all commercially reasonable options to avoid the Utility Owner Delay, including the enforcement of any rights that Developer may have against the Qualifying Utility Owner under the Qualifying Utility Agreement.

4.5.7.2 Notwithstanding the provisions in this Section 4.5.7, Developer shall not be entitled to any relief relating to a Utility Owner Delay for the following:

1. Extra Work Costs.
2. Delay Costs of any kind.
3. Utility Owner Delays that could have been mitigated by Developer through reasonable efforts.

4.6 Conditions to Commencement of Design Work

Upon the satisfaction of the conditions set forth in this Section 4.6, the Department shall issue NTP 1 to Developer authorizing commencement of the Design Work. Any Design Work performed by Developer prior to issuance of NTP 1 shall be at Developer's sole risk and expense. The conditions to the Department's issuance of NTP 1 are:

4.6.1 The Performance Security and Payment Security required under Section 16.2.1.1 and Section 16.2.2.1, respectively, have been obtained and are in full force and effect, and Developer has delivered to the Department, as applicable, certified and conformed copies of the bond(s), original letter of credit and the original multiple obligee rider. If Developer procures the surety bonds directly, Developer shall deliver to the Department the originals of the applicable bond(s);

4.6.2 Insurance Policies required under Section 16.1 and Appendix 8 for the Design Work have been obtained and are in full force and effect, and Developer has delivered to the Department written binders of insurance verifying coverage from the relevant Insurers of such Insurance Policies;

4.6.3 Developer has caused to be developed and delivered to the Department and the Department has approved or accepted Developer's Project Schedule for the Design Work and Project Management Plan;

4.6.4 Developer has provided a fully functional field office as set forth in [Section ___ of Division ___]; and

4.6.5 All representations and warranties of Developer set forth in this Agreement and the Principal Developer Documents to which Developer is a party shall be and remain true and correct.

4.7 Conditions to Commencement of Construction Work

Developer shall not commence or permit commencement of the Construction Work, or of any portion thereof, until the Department's issuance of NTP 2 for the Construction Work. The Department shall issue NTP 2 when all of the conditions in this Section 4.7 have been satisfied:

4.7.1 The Performance Security and Payment Security required under Sections 16.2.1.2 and 16.2.2.2, respectively, have been obtained and are in full force and effect, and Developer has delivered to the Department, as applicable, certified and conformed copies of the applicable bond(s), the original letter of credit and the original multiple obligee rider. If Developer procures the surety bonds directly, Developer shall deliver to the Department the originals of the applicable bond(s);

4.7.2 Insurance Policies required under Section 16.1 and Appendix 8 for the Construction Work and O&M Work have been obtained and are in full force and effect, and Developer has delivered to the Department written binders of insurance verifying coverage from the relevant Insurers of such Insurance Policies;

4.7.3 All Governmental Approvals necessary to begin the applicable portions of the Construction Work and O&M Work have been obtained and Developer has furnished to the Department fully executed copies of such Governmental Approvals;

4.7.4 Developer has satisfied all applicable pre-construction requirements contained in the NEPA/CEQA Approval and other Governmental Approvals for the applicable portion of the Construction Work;

4.7.5 Developer has caused to be developed and delivered to the Department and the Department has approved or accepted Developer's Project Schedule for the Construction Work, the Construction Quality Plan, the Vibration Monitoring Plan and O&M Plan and all component parts thereof;

4.7.6 Developer has satisfied all other requirements of the Contract Documents that are required to be satisfied prior to commencement of the applicable portion of the Construction Work and O&M Work, including delivery to the Department of all Submittals relating to the applicable portion of the Construction Work and O&M Work required by the Project Management Plan or Contract Documents, in the form and content required by the Project Management Plan or Contract Documents;

4.7.7 All representations and warranties of Developer set forth in this Agreement and the Principal Developer Documents to which Developer is a party shall be and remain true and correct;

4.7.8 Developer is not then in receipt of any notice of Developer Default from the Department unless any such default has been cured;

4.7.9 Developer is not then in receipt of any notice of default from any Lender unless any such noticed default has been cured, and no Lender has otherwise indicated that it is unwilling or unable to presently fund Developer's costs of the D&C Work and O&M Work; and

4.7.10 The Department has given its final acceptance of the work to be performed in Phase I of the Project.

4.8 Construction Commencement Deadline and Project Schedule

4.8.1 Developer shall commence the Construction Work no later than the Construction Commencement Deadline.

4.8.2 Developer shall perform the D&C Work in accordance with the Project Schedule. Each Project Schedule submission and update shall comply with [Section __ of Division __ and other provisions set forth in the Technical Requirements].

4.9 Substantial Completion and Final Acceptance

4.9.1 Substantial Completion

Developer shall exercise its best efforts to achieve Substantial Completion on or before the Scheduled Substantial Completion Date. Failure to achieve Substantial Completion by the Long Stop Date is a Developer Default under Section 18.1.

4.9.2 Conditions to Substantial Completion

4.9.2.1 The Department will issue a notice of Substantial Completion upon satisfaction of all the following conditions for the entire Project:

1. Developer has completed the design and construction of Phase II of the Project in accordance with the Contract Documents, including all Project equipment required to be installed and commissioned by Developer, except for Punch List items;
2. All lanes of traffic as set forth in the Design Documents are in their final configuration and Developer has certified that such lanes can be opened to traffic;
3. The relevant systems and equipment installed by Developer have passed the tests required under the Contract Documents and Developer has delivered to the Department all reports, data and documentation relating to such tests;
4. All Utility Adjustment Work and other work that Developer is obligated to perform for or on behalf of third parties as required by the Contract Documents complies with the requirements of the applicable agreements with such third parties, and Developer has paid for all work by third parties that Developer is obligated to pay for, other than disputed amounts;
5. Developer has received, and paid all associated fees due and owing for, all applicable Governmental Approvals and other third-party approvals required for use and operation of the Project, and there exists no uncured violation of

the terms and conditions of any such Governmental Approval or other third-party approvals;

6. All plans, manuals and reports for the O&M Work to be performed during the Operating Period have been submitted and accepted by the Department as required under the Contract Documents;
7. Developer has made all deposits to the Intellectual Property Escrow required at or prior to Substantial Completion pursuant to Section 21.5;
8. There exist no uncured Developer Defaults (except any Developer Default which will be cured by achieving Substantial Completion);
9. The O&M Security required under Section 16.2.3 has been obtained and is in full force and effect, and Developer has delivered to the Department, as applicable, certified and conformed copies of the bond, original letter of credit and the original multiple obligee rider. If Developer procures the surety bond directly, Developer shall deliver to the Department the originals of the bond; and
10. Developer has prepared and submitted the Punch List in accordance with the procedures and schedules set forth in the Project Management Plan.

4.9.2.2 Approximately [60] days prior to the date on which Developer expects to achieve Substantial Completion, Developer shall provide written notice to the Department so as to allow the Department to promptly commence its review of those conditions to Substantial Completion amenable to being reviewed at the time of the notice. Developer shall thereafter provide the Department with written notification of the date Developer determines it has achieved Substantial Completion. During the [14]-day period following receipt of such notice, Developer and the Department shall meet and confer to facilitate the Department's determination of whether Developer has met the criteria for Substantial Completion.

4.9.2.3 Within [14] days following such meeting, the Department shall conduct an inspection of the Project and its components, a review of the Final Design Documents, Construction Documents, other Submittals and such other investigation as may be necessary to evaluate whether Substantial Completion is achieved.

4.9.2.4 Within the [14]-day period described in Section 4.9.2.3, the Department shall either (a) issue the written notice of Substantial Completion, effective as of the date that the conditions to Substantial Completion were actually satisfied; or (b) notify Developer in writing of the reasons why Substantial Completion has not been achieved. If the Department and Developer cannot agree as to the date of Substantial Completion, such Dispute shall be resolved according to the Dispute Resolution Procedures; provided, however, that the Parties may proceed directly to the Disputes Review Board and need not comply with subsections 1 through 4 as described in Section 24.2.1.

4.9.2.5 In connection with the Department's issuance of the notice of Substantial Completion, the Department shall have the right in its reasonable discretion to add items to the Punch List to address incomplete work or work in need of repair.

Any Dispute regarding whether an item added by the Department is appropriately included on the Punch List shall be resolved according to the Dispute Resolution Procedures. The notice of Substantial Completion will indicate the actual date on which Developer achieved Substantial Completion.

4.9.3 Final Acceptance

4.9.3.1 Developer shall achieve Final Acceptance by the Final Acceptance Deadline. The Department will issue a written notice of Final Acceptance at such time as all of the following have occurred for the entire Project:

1. All Punch List items have been completed to the reasonable satisfaction of the Department;
2. Developer demonstrates to the Department's reasonable satisfaction that Developer has acquired and properly stored, or arranged for immediate availability, a reasonable inventory of all spare parts, spare components, spare equipment, special tools, materials, expendables and consumables necessary for operation and maintenance of the Project as identified in the O&M Plan for the Operating Period;
3. All Submittals for the D&C Work that Developer is required by the Contract Documents to submit after Substantial Completion have been submitted to the Department;
4. The Department has received a complete set of the Critical As-Built Record Documentation in the form required by the Contract Documents and the As-Built Schedule required under [Section ___ of Division ___];
5. If any Governmental Entity with jurisdiction requires any form of certification of design, engineering or construction with respect to the Project or any portion thereof, including any certifications from the Engineer of Record and Architect of Record for the Project, Developer has caused such certificates to be delivered and has concurrently issued identical certificates to the Department; and
6. There exist no uncured Developer Defaults (except any Developer Default which will be cured by achieving Final Acceptance).

4.9.3.2 Developer shall provide the Department with written notification when Developer determines that it has achieved Final Acceptance. During the [20]-day period following receipt of such notification, Developer and the Department shall meet and confer to facilitate the Department's determination of whether to issue a written notice of Final Acceptance.

4.9.3.3 Within [20] days following such meeting, the Department shall conduct an inspection of the Punch List items, a review of the As-Built Record Plans, other Submittals and such other investigation as may be necessary to evaluate whether Final Acceptance is achieved.

4.9.3.4 Within the [20]-day period described in Section 4.9.3.3, the Department shall either (a) issue a notice of Final Acceptance effective as of the date that the conditions to Final Acceptance were actually satisfied; or (b) notify Developer in writing of the reasons why Final Acceptance has not been achieved. If the Department and Developer cannot agree as to the date of Final Acceptance, such Dispute shall be resolved according to the Dispute Resolution Procedures; provided, however, that the Parties may proceed directly to the Disputes Review Board and need not comply with subsections 1 through 4 as described in Section 24.2.1. The notice of Final Acceptance will indicate the actual date on which Developer achieved Final Acceptance.

4.9.4 Milestone Payments and Adjustments

4.9.4.1 Subject to the adjustments described in Section 4.9.4.3, Developer shall be entitled to receive from the Department the payments (“**Milestone Payments**”) on the dates and in the amounts set for in Appendix 3.

4.9.4.2 Developer shall submit an invoice in a format acceptable to the Department’s Chief Financial Officer for the applicable Milestone Payment. Upon receipt of the invoice, the Department shall make payment to Developer in accordance with the requirements set forth in Public Contract Code Section 10261.

4.9.4.3 The Milestone Payments shall be subject to adjustment in accordance with Appendix 3-B of the Agreement. If the total amount of adjustments under Appendix 3-B of the Agreement exceed the total amount of all Milestone Payments, the Department shall be entitled to deduct such excess amounts from the Availability Payments. Developer acknowledges that such adjustments to the Milestone Payments are reasonable in order to compensate Department for damages it will incur by reason Developer’s failure to comply with the performance standards applicable to the period prior to Substantial Completion. Such damages include loss of use, enjoyment and benefit of the Project and connecting to Department transportation facilities and transportation facilities owned and operated by other Governmental Agencies by the general public, injury to the credibility and reputation of Department’s transportation improvement program with policy makers and with the general public who depend on and expect availability of service, which injury to credibility and reputation may directly result in loss of ridership on the Project and connecting Department transportation facilities and facilities owned and operated by other Governmental Agencies, and additional costs of administering this Agreement (including engineering, legal, accounting, overhead and other administrative costs). 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.

4.10 Hazardous Materials and Undesirable Materials Management

4.10.1 Developer’s General Responsibilities

4.10.1.1 Developer shall manage, treat, handle, store, remediate, remove, transport (where applicable) and dispose of all Hazardous Materials or Undesirable Materials encountered in performing the Work, including contaminated soil and groundwater, in accordance with applicable Law, Governmental Approvals, and all

applicable provisions of the Contract Documents, including [Section ___ of Division ___]. If during the course of the Work, a Release of Hazardous Materials occurs or Developer otherwise encounters Hazardous Materials or Undesirable Materials, Developer shall follow the procedures and perform the activities as set forth in the Contract Documents.

4.10.1.2 Except as set forth in Sections 4.10.2 and 4.10.3, Developer shall not be entitled to submit a claim for any Extra Work Costs, Delay Costs, time extensions or other relief associated with discovering, encountering, managing, treating, handling, storing, remediating, removing, transporting or disposing of Hazardous Materials or Undesirable Materials, including contaminated soil and groundwater.

4.10.2 Pre-existing Hazardous Materials

4.10.2.1 Developer shall be solely responsible for all costs, including Extra Work Costs and Delay Costs, relating to Pre-existing Hazardous Materials, except that Developer and the Department shall allocate the risk of Extra Work Costs as follows:

1. The first US\$_____ of Extra Work Costs (“**Pre-existing Hazardous Materials Deductible**”) directly attributable to discovering, encountering, managing, treating, handling, storing, remediating, removing, transporting and disposing of Pre-existing Hazardous Materials shall be borne solely by Developer.
2. The next US\$_____ of Extra Work Costs (“**Tiered Pre-existing Hazardous Materials Deductible**”) directly attributable to discovering, encountering, managing, treating, handling, storing, remediating, removing, transporting and disposing of Pre-existing Hazardous Materials shall be borne [50]% by Developer and [50]% by the Department.
3. The Department shall compensate Developer for [100]% of the Extra Work Costs directly attributable to discovering, encountering, managing, treating, handling, storing, remediating, removing, transporting and disposing of Pre-existing Hazardous Materials in excess of the Tiered Pre-existing Hazardous Materials Deductible.

4.10.2.2 Developer shall not be entitled to seek, nor shall Developer be entitled to charge against any of the deductibles established under Section 4.10.2.1, the following:

1. Extra Work Costs covered by insurance obtained for the Project.
2. Extra Work Costs that could have been avoided by the exercise of reasonable efforts to mitigate and reduce costs.
3. Extra Work Costs associated with the investigation of and planning for Pre-existing Hazardous Materials prior to the completion of the Final Design.
4. Delay Costs of any kind.

4.10.2.3 The remaining amounts of the Pre-existing Hazardous Materials Deductible and the Tiered Pre-existing Hazardous Materials Deductible shall be adjusted in accordance with Section 9.1.3.

4.10.2.4 Nothing in this Section 4.10.2 shall prejudice Developer's right to seek a non-compensable time extension under the Contract Documents or compensation under Sections 9.2.2 and 9.2.3.

4.10.2.5 As between Developer and the Department, the Department shall be considered the sole generator of Pre-existing Hazardous Materials, provided that such Pre-existing Hazardous Materials are handled and disposed of by Developer in accordance with the Contract Documents. The foregoing shall not preclude or limit any rights or remedies that the Department may have against Developer-Related Entities, third parties and/or prior owners, lessees, licensees and occupants of the Project ROW. To the extent permitted by Law, the Department agrees to hold harmless and indemnify Developer for Losses arising out of or related to Third-Party Claims with respect to Pre-existing Hazardous Materials discovered or encountered by Developer during the performance of the Work, provided that: (1) the Pre-existing Hazardous Materials were not known or reasonably discoverable by Developer or any Developer-Related Entity and (2) such Losses were not the result of the negligence, willful misconduct, or breach of applicable Law or contract by Developer or any Developer-Related Entity.

4.10.3 Releases of Hazardous Materials

For Releases of Hazardous Materials as set forth in clause (l) of the definition of Relief Event by a third party who is not a Developer-Related Entity, Developer shall be entitled to seek a non-compensable time extension under the Contract Documents and compensation under Sections 9.2.2 and 9.2.3. In no event shall Developer be entitled to Extra Work Costs or Delay Costs for such Releases of Hazardous Materials. For Releases of Hazardous Materials as set forth in clause (l) of the definition of Relief Event by the Department, Developer shall be entitled to submit a claim for Extra Work Costs, Delay Costs, time extensions and other relief under the Contract Documents.

4.10.4 Assignment and Subrogation of Rights Against Third Parties

In the event of good-faith and bona fide claims on behalf of Developer related to Releases of Hazardous Materials by a third party who is not a Developer-Related Entity, the Department agrees that, upon receipt of a written request from Developer, the Department in its reasonable discretion will assign and subrogate its rights of recovery to Developer, as such may exist.

4.11 Environmental Compliance

Throughout the course of the D&C Work, Developer shall comply with all Environmental Laws and perform or cause to be performed all environmental mitigation measures required under the Contract Documents and the Environmental Approvals, including the NEPA/CEQA Approval, the approvals and consents obtained under the Programmatic Agreement and similar Governmental Approvals for the D&C Work, and shall comply with all other conditions and requirements thereof. Developer, at its sole cost and expense, shall also abide by and comply with the commitments contained in the [EIR/EIS] and subsequent re-evaluations that are

submitted [30] days prior to the Proposal Submittal Date which may identify additional commitments. If the Department directs Developer to comply with commitments contained in re-evaluations submitted after such [30]-day period that affect the D&C Work, such directive shall be deemed a Department Change. Notwithstanding the foregoing, Developer shall be responsible, and bear the sole risk for any costs and delays, for complying with any environmental re-evaluations or modifications in the approvals and consents obtained under the Programmatic Agreement that are required due to differences between the Indicative Preliminary Design and Developer's Final Design, unless such differences are due to a Department Change.

4.12 Oversight, Meetings and Reporting

4.12.1 Oversight by the Department

The Department shall have the right but not the obligation to perform oversight and auditing relating to the D&C Work in accordance with the Contract Documents.

4.12.2 Meetings

4.12.2.1 Developer shall conduct regular progress meetings at least once a month during the Construction Period. The Department shall be invited to participate in such progress meetings. At the Department's request, Developer will require its design consultants and construction contractors to attend these progress meetings.

4.12.2.2 In addition to the regularly scheduled meetings required under the Contract Documents, the Department and Developer, through their respective Authorized Representatives, shall meet from time to time at the other Party's request to discuss and resolve matters relating to the D&C Work.

4.12.2.3 Developer shall schedule all meetings with the Department at a date, time and place reasonably convenient to both Parties and, except in cases of urgency, shall provide the Department with written notice and a meeting agenda at least [three] Business Days in advance of each meeting.

4.12.3 Reporting

Developer shall submit all reports relating to the D&C Work in the form, with the content and within the time required under the Contract Documents.

4.13 Construction Warranties

4.13.1 Developer shall obtain from all Contractors appropriate representations, warranties, guarantees and obligations with respect to design, materials, workmanship, equipment, tools and supplies furnished by such Contractors, which shall extend not only to Developer but also to Utility Owners and any third parties for whom Work is being performed. All representations, warranties, guarantees and obligations of Contractors (a) shall be written so as to survive all Department and Utility Owner inspections, tests and approvals and (b) shall provide that upon any termination of the Agreement prior to the expiration of such representations, warranties, guarantees and obligations they shall automatically be enforceable by the Department. To the extent that any Contractor warranty or guaranty would be voided by reason of Developer's negligence or failure to comply with the requirements of the Contract

Documents in incorporating material or equipment into the Work, Developer shall be responsible for correcting any defects in the Work performed by such Contractor.

4.13.2 The Contractor warranties are in addition to all rights and remedies available under the Contract Documents or applicable Law, and shall not limit Developer's liability or responsibility imposed by the Contract Documents or applicable Law with respect to the Work, including liability for design defects, latent construction defects, strict liability, breach, negligence, willful misconduct or fraud.

4.14 Structural Defects in Phase I

4.14.1 Not later than [3] months after the issuance of NTP 2 and, to the extent possible, before Department issues a final acceptance of Phase I of the Project, Department and Developer shall complete an inspection of Phase I and agree upon a baseline asset condition report prepared by Department that evaluates the physical condition of Phase I as of the date of such report (the "Baseline Report"). The Baseline Report shall be in the format set forth in Appendix 20.

4.14.2 Except as provided in Section 4.14.5, prior to the Substantial Completion Date, Department shall elect either to (a) undertake the rehabilitation or repair of any defect in Phase I construction identified in the Baseline Report, at its sole cost, or (b) direct Developer to undertake such rehabilitation or repair and pay Developer the cost thereof, as determined by Department and Developer using the same methodology as employed by Department for other State highway projects for similar purposes. The Baseline Report shall be revised to reflect completion of any such rehabilitation or repair.

4.14.3 Except as provided in Section 4.14.4, Developer shall be deemed to have accepted Phase I of the Project in its then current condition on the Substantial Completion Date, without right to any claim or relief.

4.14.4 If Developer encounters any Structural Latent Defect after the date of the Baseline Report, Developer (a) shall be responsible for undertaking the rehabilitation of such Structural Latent Defect as well as any resulting increased costs of operating and maintaining the Project, and (b) subject to the following terms and conditions, shall be entitled to receive compensation from Department and performance relief as provided in Section 9.2:

4.14.4.1 The Structural Latent Defect must be identified and described with specificity in a written report received by Department within [3-5] years after the date of the Baseline Report;

4.14.4.2 The costs to be compensated must not be attributable to substandard maintenance and repair; and

4.14.4.3 Section 4.14.5 must not be applicable.

4.14.5 If any Developer-Related Entity is or was a contractor or subcontractor (at any tier) for Phase I construction work, then:

4.14.5.1 Developer shall be responsible for (a) undertaking the rehabilitation of any and all defects in Phase I of the Project, and all damage to Phase I or Phase II of the Project attributable to any defects in Phase I of the Project, caused by the acts or

omissions of such contractor or subcontractor, and (b) paying any resulting increased costs of operating and maintaining the Project; and

4.14.5.2 Developer shall not be entitled to any compensation or relief for such rehabilitation or such increased costs of operating and maintaining the Project.

ARTICLE 5. OPERATIONS AND MAINTENANCE

5.1 Timing of O&M Work

Developer shall perform O&M Work within the Construction Period O&M Limits starting on the date of issuance of NTP 2 through the day before the Substantial Completion Date as described in Section 5.2.3 and shall perform O&M Work within the Operating Period O&M Limits starting on the Substantial Completion Date through the end of the Term.

5.2 Operation and Maintenance Standards and Requirements

5.2.1 General Obligations

5.2.1.1 Developer shall carry out the O&M Work within the applicable O&M Limits in accordance with (a) Best Management Practice, as it evolves from time to time, (b) the requirements, terms and conditions set forth in the Contract Documents as the same may change from time to time, (c) all Laws, and (d) the requirements, terms and conditions set forth in all Governmental Approvals. If Developer encounters a contradiction between subsections (a) through (d), Developer shall advise the Department of the contradiction and the Department shall instruct Developer as which subsection shall control in that instance. Developer is responsible for keeping itself informed of current Best Management Practice.

5.2.1.2 [Section ___ of Division ___] sets forth certain minimum performance requirements related to the O&M Work. Developer's failure to comply with such requirements shall entitle the Department to the rights and remedies set forth in the Contract Documents, including the assessment of Noncompliance Points, liquidated damages, deductions from payments otherwise owed to Developer, and termination for Developer Default.

5.2.2 Changes in Operation and Maintenance Standards

5.2.2.1 The Department shall have the right to adopt at any time, and Developer acknowledges it must comply with, all changes and additions to, and replacements of, the Technical Volumes relating to the O&M Work. Without limiting the foregoing, the Parties anticipate that from time to time after the Effective Date, the Department will adopt Non-Discriminatory O&M Changes that will apply to the O&M Work. Developer shall be responsible for keeping itself informed of any Non-Discriminatory O&M Changes to the Manuals and Guidelines. For any other changed, added or replacement standards, criteria, requirements, conditions, procedures, specifications and other provisions to the Technical Volumes, the Department shall provide written notice to Developer, whereupon they shall constitute amendments, and become part, of the Technical Volumes. Non-Discriminatory O&M Changes that

encompass matters that are addressed in the Technical Volumes as of the Effective Date shall replace and supersede inconsistent provisions of such Technical Volumes.

5.2.2.2 If a Non-Discriminatory O&M Change requires major repair, reconstruction, rehabilitation, restoration, renewal or replacement of any Element during the performance of the O&M Work, Developer shall perform the major repair, reconstruction, rehabilitation, restoration, renewal or replacement not later than the first to occur of (a) any deadline prescribed by the Department for the Non-Discriminatory O&M Change, (b) the date when Developer performs the Renewal Work on such Element; (c) the date when Developer is obligated to perform Renewal Work on such Element; and (d) provided the Department gives no less than [30] days prior written notice to Developer, the date the Department first applies the Non-Discriminatory O&M Changes to projects that the Department manages or operates. If, however, the Department adopts the Non-Discriminatory O&M Change prior to the Substantial Completion Date, the Department shall issue a written notice informing Developer when to implement such Non-Discriminatory O&M Change. Following commencement of any Work pursuant to this Section 5.2.2.2, Developer shall diligently prosecute the Work until completion, and in any event by any deadline for completion required by the Department for such Non-Discriminatory O&M Change. Should Developer dispute the timing for commencement of Work as described in this Section 5.2.2.2, Developer may submit the Dispute for resolution in accordance with the Dispute Resolution Procedures; pending such resolution Developer shall prosecute the Work in accordance with the Department's directive.

5.2.2.3 If a Non-Discriminatory O&M Change requires construction or installation of new improvements at, for or on the Project, Developer shall complete construction and installation of the new improvements according to the implementation period required by the Department for such Non-Discriminatory O&M Change. Should Developer dispute the timing for commencement of Work as described in this Section 5.2.2.3, Developer may submit the issue for resolution in accordance with the Dispute Resolution Procedures; pending such resolution Developer shall diligently prosecute the Work in accordance with the Department's directive.

5.2.2.4 Developer shall be obligated to implement a Discriminatory O&M Change only after the Department issues a written directive therefore pursuant to Article 10. Such directive shall indicate the schedule, if applicable, for the completion of such work required by the Discriminatory O&M Change.

5.2.2.5 For purposes of subsection (d) of Section 5.2.2.2, a change, addition or replacement shall be deemed to have been first applied by the Department when the Department commences implementing actions on any other project that the Department manages or operates.

5.2.2.6 Subject to Section 5.2.2.7, (a) for Extra Work relating to capital expenditures required by Non-Discriminatory O&M Changes (whether such Extra Work is caused by one or more Non-Discriminatory O&M Changes) occurring prior to the Substantial Completion Date, Developer shall be entitled to recover only those Extra Work Costs incurred in excess of an aggregate deductible of US\$_____, and (b) for Extra Work required by Non-Discriminatory O&M changes (whether Extra Work is caused by one or more Non-Discriminatory O&M changes) occurring after the Substantial Completion Date, Developer shall be entitled to recover only those Extra

Work Costs incurred in excess of an aggregate deductible of US\$_____ (collectively, the “**Non-Discriminatory O&M Change Deductible**”). The Non-Discriminatory O&M Change Deductible reflects the Parties’ agreement that: (a) Developer will bear the financial risks for Extra Work Costs incurred due to Non-Discriminatory O&M Changes up to the Non-Discriminatory O&M Change Deductible and (b) the Department will compensate Developer for Extra Work Costs incurred due to Non-Discriminatory O&M Changes in excess of the Non-Discriminatory O&M Change Deductible, provided that each Claim complies with [Section __ of Division __]. The Non-Discriminatory O&M Change Deductible shall be adjusted in accordance with Section 9.1.3.

5.2.2.7 Developer shall be entitled to Extra Work Costs pursuant to subsection (b) of Section 5.2.2.6 only if the Department directs Developer to implement the Non-Discriminatory O&M Changes prior to the date when Developer performs or is scheduled to perform the Renewal Work (if any) on the affected Element or otherwise outside the ordinary course of performing the O&M Work. Developer shall not be entitled to any Extra Work Costs for implementing Non-Discriminatory O&M Changes if Developer replaces the affected Element during the ordinary course of performing the O&M Work.

5.2.3 O&M Work During Construction

5.2.3.1 For O&M Work performed during construction, Developer shall be required to comply with the maintenance performance standards identified in [Section __ of Division __].

5.2.3.2 The O&M Plan submitted by Developer shall identify the planned activities, resources and level of effort for the O&M Work to be performed during construction in accordance with [Section __ of Division __]. No later than [30] days prior to commencement of the Construction Work within a Construction Zone, the Parties shall review such planned activities, resources and level of effort, and Developer shall modify the O&M Plan as reasonably requested by the Department to take into account changes in Project conditions that require adjustment to the planned O&M Work.

5.2.3.3 For the O&M Work performed during ongoing Construction Work, Developer shall provide traffic management in accordance with the Contract Documents, including detour and traffic diversion plans.

5.2.3.4 Developer shall perform any O&M Work that is required, and in a manner, to ensure that the Project is maintained in a condition that poses no threat to the health or safety of any Person or physical damage to the Project.

5.2.4 Management of Hazardous Materials and Undesirable Materials

In performing the O&M Work, Developer shall manage, treat, handle, store, remediate, remove, transport (where applicable) and dispose of all Hazardous Materials and Undesirable Materials, including contaminated soil and groundwater, in accordance with applicable Law, Governmental Approvals and all applicable provisions of the Contract Documents. The provisions of Section 4.10 shall apply to the O&M Work, including those provisions related to Pre-existing Hazardous Materials and Releases of Hazardous Materials.

5.2.5 Environmental Compliance

Throughout the course of the O&M Work, Developer shall comply with all Environmental Laws and perform or cause to be performed all environmental mitigation measures required under the Contract Documents, including the Programmatic Agreement and the consents and approvals obtained thereunder and the Environmental Approvals, including the NEPA/CEQA Approval and similar Governmental Approvals for the O&M Work, and shall comply with all other conditions and requirements thereof. Developer, at its sole cost and expense, shall also abide by and comply with the commitments contained in the [EIR/EIS] and subsequent re-evaluations and Environmental Approvals required for the Renewal Work that may identify additional commitments.

5.2.6 Utility Accommodation

5.2.6.1 It is anticipated that from time to time during the O&M Work, Utility Owners will apply for additional utility permits to install new Utilities that would cross or longitudinally occupy areas of the Project that are subject to the Department's permitting jurisdiction, or to modify, repair, upgrade, relocate or expand existing Utilities within such areas. In such circumstances, the provisions of Section 4.5.5 shall apply.

5.2.6.2 Throughout the performance of the O&M Work, Developer shall monitor Utilities and Utility Owners within the Project Right of Way for compliance with applicable utility permits, the Department regulations, policies and other requirements, and other applicable Law and Governmental Approvals, and shall use diligent efforts to obtain the cooperation of each Utility Owner having Utilities within the Project Right of Way in accordance with the Contract Documents.

5.2.7 Emergency Repair Work

5.2.7.1 Developer shall be responsible for procuring and overseeing temporary and/or permanent emergency repair work for the Project. Unless specified otherwise by the Department, Developer shall solicit competitive bids for such work in accordance with policies and procedures established by the Department. The Department shall provide oversight relating to emergency repair work in accordance with the Contract Documents.

5.2.7.2 Developer shall ensure that such repair work is performed in accordance with the Contract Documents and State and federal Law applicable to such repair work, including the requirements of the FHWA Emergency Relief Manual. Further, Developer shall maintain estimates, cost records and supporting documentation in accordance with such Laws, and in a form and content to enable the Department to seek reimbursement for eligible costs from FHWA or FEMA, if applicable.

5.3 Annual Budget

5.3.1 For each Fiscal Year beginning after commencement of the O&M Work, Developer shall file with the Department an annual budget for performing the O&M Work for such full or partial Fiscal Year. Developer shall submit the first annual budget to the Department not later than [60] days before the anticipated start of the O&M Work, as notified by the

Department. Developer shall submit each subsequent annual budget to the Department not later than [60] days before the beginning of the Fiscal Year to which the annual budget applies.

5.3.2 If Developer delivers an annual budget to the Collateral Agent for the senior Project Debt, it shall serve as the annual budget to be delivered to the Department. Otherwise, each such annual budget shall be in a form acceptable to the Department, acting reasonably. Each annual budget shall contain budgeted Availability Payments and expenses (showing separately forecasted costs for the Fiscal Year of Renewal Work consistent with the updated Renewal Work Schedule and Handback Requirements). Developer may incorporate the updated Renewal Work Schedule as part of the annual budget.

5.4 Oversight, Meetings and Reporting

5.4.1 Oversight by the Department

The Department shall have the right but not the obligation to perform oversight and auditing relating to the O&M Work in accordance with the Contract Documents.

5.4.2 Meetings

5.4.2.1 Developer shall schedule all progress and periodic meetings with its Lead Operations and Maintenance Firm at a date, time and place reasonably convenient for the Department to attend and, except in the case of urgency, shall provide the Department with written notice and an agenda for such meetings at least [five] Business Days in advance of each meeting. The Department is authorized to attend all such meetings and is permitted to raise any questions, concerns or opinions without restriction.

5.4.2.2 In addition to the regularly scheduled meetings set forth in [Section ___ of Division ___], the Department and Developer, through their respective Authorized Representatives, shall meet from time to time at the other Party's request to discuss and resolve matters relating to the O&M Work or Project.

5.4.3 Reporting

Developer shall submit all reports relating to the O&M Work in the form, with the content and within the time required under the Contract Documents.

5.5 Renewal Work

5.5.1 Developer shall diligently perform Renewal Work as and when necessary to maintain compliance with such performance measures and standards. Developer also shall perform Renewal Work according to the other applicable terms of the Technical Volumes, including, when applicable, the Handback Requirements. Developer shall use the Renewal Work Schedule, as updated from time to time, for scheduling and performing Renewal Work.

5.5.2 No later than [90] days after the end of each Calendar Year, Developer shall deliver to the Department a written report of the Renewal Work performed as required under [Section ___ of Division ___]. The report also shall set forth the total draws and deposits made from and to the Renewal Work Reserve in the immediately preceding Calendar Year and the date, amount and use of each draw (including any use for Compliance Work or Handback

Requirements work).

5.5.3 If at any time the Department determines that Developer has failed to complete any part of the Renewal Work within the time required under the Contract Documents, the Department shall give written notice thereof to Developer. If Developer has failed to complete the Renewal Work within [30] days after the Department delivers such notice, then the Department shall have the right, but not the obligation, to perform and complete such Renewal Work at the expense and for the account of Developer, and to make draws from the Renewal Work Reserve to pay the costs of such action, subject to the Lenders' rights to cure such failure and the Lenders' rights in and to the Renewal Work Reserve established in the Financing Documents. If the amounts in the Renewal Work Reserve are insufficient or the Department is unable to make draws from the Renewal Work Reserve, the Department shall have the right to use and apply payments otherwise payable to Developer by the Department under this Agreement to pay the costs of such action. The foregoing remedy is in addition to any other remedies available to the Department under the Contract Documents on account of such failure, including the assessment of Noncompliance Points, and its right to intervene immediately and without notice to address Safety Compliance.

5.5.4 Developer may, by notice to the Department, object to any demand by the Department under Section 5.5.3 on the grounds that Developer has completed the Renewal Work specified in the Department's demand or that such Renewal Work is not then required, which notice shall give details of the grounds for objection. Promptly after the delivery 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 Developer delivers such notice, either Party may refer the matter for resolution in accordance with the Dispute Resolution Procedures.

5.6 Renewal Work Schedule

5.6.1 [60] days prior to the beginning of each Calendar Year, Developer shall submit a Renewal Work Schedule and updates as required under [Section ___ of Division ___]. Developer's preparation of the updated Renewal Work Schedule shall include revisions as reasonably indicated by experience and then-existing conditions respecting the Project, changes in estimated costs of Renewal Work, Renewal Work Reserve funding and drawing plan and schedule, changes in technology, changes in Developer's planned means and methods of performing Renewal Work, and other relevant factors. The updated Renewal Work Schedule shall show the revisions, if any, to the prior Renewal Work Schedule and include an explanation of reasons for revisions. If no revisions are proposed, Developer shall include an explanation of the reasons no revisions are necessary. The updated Renewal Work Schedule also shall set forth, by Element, Developer's planned draws from the Renewal Work Reserve during the forthcoming five Calendar Years.

5.6.2 At the Department's request, Developer and its Lead Operations and Maintenance Firm, if any, shall promptly meet and confer with the Department to review and discuss the original or updated Renewal Work Schedule.

5.6.3 Within [30] days after receipt of the original and each updated Renewal Work Schedule, the Department shall have the right to object to or disapprove the original or updated Renewal Work Schedule or any elements thereof. Comments, objections and disapprovals by the Department shall be based on whether the original or updated Renewal Work Schedule and underlying assumptions are reasonable, realistic and consistent with the Contract Documents.

5.6.4 Within [30] days after receiving written notice of comments, objections, recommendations and disapprovals from the Department, Developer shall submit to the Department a revised original or updated Renewal Work Schedule rectifying such matters and, for matters it disagrees with, a written notice setting forth those comments, objections, recommendations and disapprovals that Developer disputes, which notice shall give details of Developer's grounds for dispute. If Developer fails to give such notice within such time period, it shall be deemed to have accepted the comments, objections and recommendations and the original or updated Renewal Work Schedule, as applicable, shall thereupon be deemed revised to incorporate the comments and recommendations and to rectify the objections. After timely delivery of any such notice, Developer and the Department shall endeavor in good faith to reach agreement as to the matters listed in the notice. If no agreement is reached as to any such matter within [30] days after Developer delivers its notice, either Party may refer the Dispute for resolution in accordance with the Disputes Resolution Procedures.

5.6.5 The portions of the original or updated Renewal Work Schedule submitted by Developer that are not in Dispute shall go into effect and govern, while the immediately preceding Renewal Work Schedule (if any) shall remain in effect and govern until resolution as to those portions of the submitted Renewal Work Schedule that are in Dispute.

5.7 Renewal Work Reserve

5.7.1 Establishment

5.7.1.1 Developer shall establish and fund a reserve account (the "**Renewal Work Reserve**") that may be used for the purposes set forth in Section 5.7.3. The Renewal Work Reserve shall at a minimum be in the amount identified in Appendix 2-F and shall be established under arrangements that, subject to the prior rights of the Lenders in and to the Renewal Work Reserve established in the Financing Documents, will ensure its availability to the Department if the Department exercises its option to perform the Renewal Work in accordance with Section 5.5.3.

5.7.1.2 Developer shall provide to the Department the details regarding the account, including the name, address and contact information for the depository institution and the account number. Developer shall inform the depository institution of all of the Department's rights and interests with respect to the Renewal Work Reserve, which shall be subordinate to the rights of the Lenders in and to the account as provided in the Financing Documents, including the Department's right to draw on the Renewal Work Reserve as provided in Section 5.5.3. Developer shall deliver such notices to the depository institution and execute such documents as may be required to establish and perfect the Department's interest in the Renewal Work Reserve under the Uniform Commercial Code as adopted in the State, which interest shall be subordinate to the rights of the Lenders under the Financing Documents as provided herein.

5.7.1.3 In lieu of establishing the Renewal Work Reserve, Developer may deliver to the Department Renewal Work Letters of Credit, on the terms and conditions set forth in Section 5.7.6.

5.7.2 Funding

Developer shall make deposits to the Renewal Work Reserve at the frequencies or intervals and in the amounts as determined by the Lenders under the Funding Agreements, as

such requirements may be waived or amended by the Lenders. Notwithstanding the foregoing, Developer shall obtain the Department's reasonable consent, in writing, if the amount deposited to the Renewal Work Reserve is less than the amount set forth therefor in Developer's Proposal.

5.7.3 Use

In addition to any other uses of the Renewal Work Reserve permitted by the Lenders under the Funding Agreements, Developer will have the right to draw from the Renewal Work Reserve for the following purposes:

1. Costs of Renewal Work;
2. Costs of Compliance Work; and
3. Costs of work pursuant to the Handback Requirements.

If Developer intends to spend from the Renewal Work Reserve less than [90]% of the amount set forth in the applicable Renewal Work Schedule for the scheduled Renewal Work, Developer shall obtain the reasonable consent of the Department in writing. Any amounts deposited to the Renewal Work Reserve for the scheduled Renewal Work, as updated in accordance with this Section 5.7, in excess of the amount spent by Developer in performing such Renewal Work may be distributed to Developer only with the reasonable consent of the Department in writing.

5.7.4 Disposition Upon Establishment of Handback Requirements Reserve Account or Earlier Termination

5.7.4.1 The Renewal Work Reserve shall be used to establish and fund the Handback Requirements Reserve Account as and within the time required under Section 5.10.1. Upon establishment and funding of the Handback Requirements Reserve Account, Developer's obligations to fund the Renewal Work Reserve pursuant to this Section 5.7 shall terminate.

5.7.4.2 If this Agreement is terminated for any reason prior to the establishment of the Handback Requirements Reserve Account, including termination due to Developer Default, the Department's interest in the Renewal Work Reserve shall terminate.

5.7.5 Coordination with Lender Requirements

5.7.5.1 It is the Parties' intent that any major maintenance or Renewal Work reserve required by the Lenders serve as the Renewal Work Reserve required under this Section 5.7.

5.7.5.2 Except as otherwise provided in this Agreement, no provisions of Financing Documents shall have any effect on the applicability and enforcement of any other provisions of the Contract Documents pertaining to Renewal Work, the Renewal Work Schedule or the Renewal Work Reserve.

5.7.6 Renewal Work Letters of Credit

5.7.6.1 In lieu of establishing the Renewal Work Reserve, Developer may deliver one or more letters of credit (each, a “**Renewal Work Letter of Credit**”), on the terms and conditions set forth in this Section 5.7.6 and Section 16.3. If the Renewal Work Reserve has been previously established, Developer at any time thereafter may substitute one or more Renewal Work Letters of Credit for all or any portion of the amounts required to be on deposit in the Renewal Work Reserve, on the terms and conditions set forth in this Section 5.7.6 and Section 16.3. Upon receipt of the required substitute Renewal Work Letter of Credit, amounts in the Renewal Work Reserve shall be released to Developer equal to the face amount of the substitute Renewal Work Letter of Credit. The amount of the Renewal Work Letter of Credit shall be subject to adjustment in accordance with Section 5.7.2.

5.7.6.2 The Department shall be named as a beneficiary under the Renewal Work Letter of Credit and shall have the right to draw on the Renewal Work Letter of Credit if: (a) Developer has failed to pay or perform as and when due any obligation with respect to Renewal Work under the Contract Documents for which the Renewal Work Letter of Credit is held, (b) the financial institution issuing the Renewal Work Letter of Credit fails to meet the requirements set forth in Section 16.3.2.2 and Developer fails to provide a substitute letter of credit issued by a qualified financial institution within [30] days, or (c) Developer for any reason fails to deliver a new or replacement Renewal Work Letter of Credit, on the same terms by not later than [14] days before such expiration date, in which event the Department shall deposit the proceeds from drawing on the expiring Renewal Work Letter of Credit into the Renewal Work Reserve.

5.7.6.3 In the event the Department draws on a Renewal Work Letter of Credit, the Department shall have the right to use and apply the proceeds of such drawing as provided in Section 5.5.3.

5.7.6.4 The Department’s interest in the Renewal Work Letter of Credit shall terminate at the same time as its interest in the Renewal Work Reserve terminates under Section 5.7.4.

5.8 Policing, Security and Incident Response

5.8.1 Police Services

5.8.1.1 Developer acknowledges that any Governmental Entity empowered to enforce all applicable Laws is free to enter the Project at any and all times to carry out its law enforcement duties. No provision of this Agreement is intended to surrender, waive or limit any police powers of any Governmental Entity, and all such police powers are hereby expressly reserved.

5.8.1.2 The Department and Developer shall not have any liability or obligation to each other resulting from, arising out of or relating to the failure of a public law enforcement agency to provide services, or its negligence or misconduct in providing services.

5.8.2 Security and Incident Response

5.8.2.1 Except as expressly set forth herein, Developer is responsible for the safety and security of the Project and the workers and public thereon during the performance of the Work.

5.8.2.2 Developer shall comply with all rules, directives and guidance of the U.S. Department of Homeland Security and comparable State agency and shall coordinate and cooperate with the Department and all other Governmental Entities providing security, first responder and other public emergency response services in accordance with the Contract Documents.

5.8.2.3 Developer shall perform and comply with the provisions of the Technical Volumes concerning Emergencies, Incident Response, safety and security, including implementing all procedures, plans, protocols and requirements set forth in [Section ___ of Division ___].

5.9 Handback Requirements

5.9.1 Handback Condition

5.9.1.1 Upon the Termination Date, Developer shall transfer the Project, including any Upgrades, to the Department, at no charge to the Department, in the condition and meeting all of the requirements set forth in [Section ___ of Division ___] ("**Handback Requirements**").

5.9.1.2 In the event of the earlier termination of this Agreement, Developer shall only be required to comply with the requirements of this Section 5.9 to the extent that any Renewal Work was scheduled to have been performed prior to the Early Termination Date.

5.9.2 Handback Inspections

The Department will conduct inspections of the Project at the times and according to the terms and procedures specified in the Handback Requirements.

5.9.3 Renewal Work under Handback Requirements

Developer shall diligently perform and complete all Renewal Work required to be performed and completed prior to reversion of the Project to the Department, based on the required adjustments and changes to the Renewal Work Schedule resulting from the inspections and analysis under the Handback Requirements. Developer shall complete all such work:

5.9.3.1 Prior to the Termination Date, if transfer of the Project is to occur at the natural expiration of the Term; or

5.9.3.2 As close as possible to the Early Termination Date, but only for Renewal Work scheduled to be performed as of the Early Termination Date. If Developer fails to complete such work prior to the Early Termination Date, the Department shall deduct the cost of completing such work from the amount of

compensation, if any, payable to Developer as a result of the early termination of this Agreement.

5.10 Handback Requirements Reserve Account

5.10.1 Establishment

5.10.1.1 Beginning [four] full Calendar Years before the expected end of the Term, Developer shall establish a reserve account (the “**Handback Requirements Reserve Account**”) exclusively available for the uses set forth in Section 5.10.3. Developer shall provide to the Department the details regarding the account, including the name, address and contact information for the depository institution and the account number. The Department shall have a first priority perfected security interest in the Handback Requirements Reserve Account.

5.10.1.2 In lieu of Developer establishing the Handback Requirements Reserve Account, Developer may deliver to the Department Handback Requirements Letters of Credit on the terms and conditions set forth in Section 5.10.4 and Section 16.3.

5.10.2 Funding

5.10.2.1 The Financial Model projects the amount of funds to be held in the Handback Requirements Reserve Account to fund the Renewal Work necessary to meet the Handback Requirements. Amounts in the Renewal Work Reserve shall be transferred and used to fund the Handback Requirements Reserve Account pursuant to Section 5.7.4.1. Beginning on the [36th] month prior to the expected end of the Term, if amounts then on deposit in the Handback Requirements Reserve Account are insufficient to pay the costs of the Work required to meet the Handback Requirements as estimated by the Parties in accordance with [Section __ of Division __], Developer shall deposit each month in the Handback Requirements Reserve Account an amount from the Monthly Disbursement to fund the shortfall (the “**Monthly Handback Reserve Deposit**”). The Monthly Handback Reserve Deposit will be calculated in accordance with Section 5.10.2.2. If Developer does not have sufficient funds to pay the full amount of the Monthly Handback Reserve Deposit, then Developer will deposit an additional amount from the subsequent Monthly Disbursement(s) to fund the prior month’s shortfall.

5.10.2.2 The Monthly Handback Reserve Deposit shall equal the Renewal Amount as estimated following each inspection of the Project, less any amounts then on deposit in the Handback Requirements Reserve Account, divided by the number of months remaining in the Term.

5.10.2.3 The Monthly Handback Reserve Deposit will be subject to adjustment following each annual inspection of the Project taking into account the Renewal Amount determined annually as provided in [Section __ of Division __] and the amount of funds then on deposit in the Handback Requirements Reserve Account. If the Renewal Amount has not been determined at the beginning of each Calendar Year as provided in [Section __ of Division __], the Monthly Handback Reserve Deposit shall equal the Monthly Handback Reserve Deposit for the prior year.

5.10.2.4 Funds held in the Handback Requirements Reserve Account may be invested and reinvested only in Eligible Investments. Eligible Investments in the Handback Requirements Reserve Account must mature during the Term, or the principal of and accrued interest on such Eligible Investments must be available for withdrawal at any time during the Term without penalty. All interest earned or profits realized from Eligible Investments in the Handback Requirements Reserve Account shall be retained therein.

5.10.2.5 If Developer fails to make the deposit of any Monthly Handback Reserve Deposit when due, including funding any prior month's shortfall as required in Section 5.10.2.1, the Department shall be entitled to deduct the amount of the Monthly Handback Reserve Deposit from the Monthly Disbursement due to Developer at the time of payment of the Monthly Disbursement to Developer, and shall deposit such amount to the Handback Requirements Reserve Account on behalf of Developer.

5.10.3 Use

5.10.3.1 Developer shall be entitled to draw funds from the Handback Requirements Reserve Account in such amounts and at such times as needed only to pay for the Renewal Work as required by the Handback Renewal Work Plan prepared in accordance with [Section ___ of Division ___]. Amounts in the Handback Requirements Reserve Account can only be used for the purposes described in this Section 5.10.3.1 and are not available as security for repayment of Project Debt or making Distributions. The use of amounts in the Handback Requirements Reserve Account for any purpose other than as permitted in this Section 5.10.3.1 shall be a Developer Default. Prior to drawing funds from the Handback Requirements Reserve Account, Developer shall give written notice to the Department of the amount to be drawn and the purpose for which funds will be used. The Department shall have **[10]** days from the date of the receipt of such notice to disapprove the draw from the Handback Requirements Reserve Account. The Department may disapprove the draw only if the requested amount and/or purposes for which the funds will be used does not comply with the Handback Renewal Work Plan. If the Department fails to disapprove the draw within the **[10]** day period following receipt of notice, Developer shall be entitled to draw funds from the Handback Requirements Reserve Account in the manner described in the notice to the Department.

5.10.3.2 If, after recalculation of the Renewal Amount following any of the annual inspections provided for in the Handback Requirements, the amount on deposit in the Handback Requirements Reserve Account exceeds the Renewal Amount, Developer shall be entitled to draw any surplus amount and no further Monthly Handback Reserve Deposits shall be made until the next inspection and determination of the Renewal Amount.

5.10.3.3 On the Termination Date, any amounts held in the Handback Requirements Reserve Account shall be paid to Developer, less any costs (including professional fees, staff costs, overheads and administrative expenses), if any, the Department reasonably expects to incur to perform the Work necessary to meet the Handback Requirements as of the Termination Date.

5.10.4 Handback Requirements Letters of Credit

5.10.4.1 In lieu of establishing the Handback Requirements Reserve Account, Developer may deliver to the Department one or more letters of credit (each, a “**Handback Requirements Letter of Credit**”), on the terms and conditions set forth in this Section 5.10.4 and Section 16.3. If the Handback Requirements Reserve Account has been previously established, Developer at any time thereafter may substitute one or more Handback Requirements Letters of Credit for all or any portion of the amounts required to be on deposit in the Handback Requirements Reserve Account, on the terms and conditions set forth in this Section 5.10.4. Upon receipt of the required substitute Handback Requirements Letter of Credit, the Department shall authorize the release to Developer of amounts in the Handback Requirements Reserve Account equal to the face amount of the substitute Handback Requirements Letter of Credit. If the face amount of all Handback Requirements Letters of Credit is less than the total amount required to be funded to the Handback Requirements Reserve Account prior to expiration of the Handback Requirements Letter of Credit, Developer shall be obligated to pay, when due, the shortfall into the Handback Requirements Reserve Account. Alternatively, Developer may deliver a Handback Requirements Letter of Credit with a face amount equal to at least the total amount required to be funded to the Handback Requirements Reserve Account during the period up to the expiration of the Handback Requirements Letter of Credit, or may deliver additional Handback Requirements Letters of Credit or cause the existing Handback Requirements Letter of Credit to be amended to cover the shortfall before deposits of the shortfall to the Handback Requirements Reserve Account are due. The Department shall be named as the sole beneficiary under the Handback Requirements Letter of Credit.

5.10.4.2 The Department shall have the right to draw on the Handback Requirements Letter of Credit upon the Termination Date in an amount equal to any costs (including professional fees, staff costs, overheads and administrative expenses) the Department reasonably expects to incur as a consequence of Developer’s failure to comply with the Handback Requirements. Further, the Department shall have the right to draw on the Handback Requirements Letter of Credit if (a) for any reason Developer fails to deliver to the Department a new or replacement Handback Requirements Letter of Credit, on the same terms, by not later than [14] days before such expiration date or (b) the financial institution issuing the Handback Requirements Letter of Credit fails to meet the requirements set forth in Section 16.3.2.2 and Developer fails to provide a substitute letter of credit issued by a qualified financial institution within [30] days thereafter. In such event, the Department shall deposit the proceeds from drawing on the expiring Handback Requirements Letter of Credit into the Handback Requirements Reserve Account.

ARTICLE 6. NONCOMPLIANCE POINTS

6.1 Noncompliance Points System

6.1.1 Appendix 5 to this Agreement sets forth a table for the identification of Developer breaches or failures in performance of obligations under the Contract Documents (“**Noncompliance**”) that will result in the assessment of Noncompliance Points and the cure period (if any) available to Developer for each such Noncompliance. Noncompliance Points are a system to measure Developer performance levels during the design, construction and

operations and maintenance phases of the Project and trigger the remedies set forth in this Article 6.

6.1.2 The table set forth in Appendix 5 contains a representational, but not exhaustive, list of Noncompliance possible under the Contract Documents. Accordingly, subject to Section 6.1.3, the Department may from time to time add an entry to such table describing a Noncompliance under the existing Contract Documents that was not previously included in the table, establishing the Noncompliance Points applicable to such Noncompliance and setting a cure period therefor. The Department shall notify Developer in writing whenever the Department separately proposes to make such additions to Appendix 5. Developer shall have [15] days after receipt of any recommended additions or adjustments to deliver written comments. Thereafter, the Department shall render its decision regarding whether and on what terms to incorporate the proposed additions to Appendix 5 by written notice to Developer. The Department's right to make additions or adjustments to Appendix 5 is not intended to expand Developer's existing contractual obligations as set forth in the Contract Documents, but rather to add existing contractual obligations as set forth in the Contract Documents to the list of Noncompliance for which Noncompliance Points may be assessed.

6.1.3 The Department's right to add existing contractual obligations to Appendix 5 is limited to those contractual obligations which Developer has previously failed to comply with; provided that the Department has furnished Developer with prior written notice of such failure and Developer has subsequently violated such contractual obligations after receipt of such notice. Further, the Department shall have no right to assess Noncompliance Points on account of a Noncompliance that occurs prior to the date it is added to Appendix 5.

6.2 Assessment, Notification and Cure Process

6.2.1 Notification Initiated by Developer

As an integral part of Developer's self-monitoring obligations, Developer shall notify the Department in writing of the occurrence of any Noncompliance specified in Appendix 5, as it may be revised from time to time. Developer shall deliver such notice in writing as soon as reasonably practicable, and in any event within [seven] days, after Developer first obtains knowledge of or first should have reasonably known of the Noncompliance. The notice shall describe the Noncompliance in reasonable detail and shall identify the applicable cure period. Within [ten] days of receiving the notice, the Department shall deliver to Developer a written notice setting forth the Department's determination whether the Noncompliance was cured during the cure period and, if not, whether to assess Noncompliance Points (a "notice of determination").

6.2.2 Notification Initiated by the Department

If the Department believes there has occurred any Noncompliance specified in Appendix 5, as it may be revised from time to time, the Department may deliver to Developer a notice of determination setting forth the Noncompliance, the applicable cure period and the Noncompliance Points to be assessed with respect thereto.

6.2.3 Cure Periods

6.2.3.1 Developer shall have the cure period (if any) for each Noncompliance set forth in Appendix 5.

6.2.3.2 Developer's cure period (if any) with respect to such Noncompliance shall be deemed to start upon the date Developer first obtained knowledge of, or first reasonably suspected, the Noncompliance. For this purpose, if the notice of the Noncompliance is initiated by the Department, Developer shall be deemed to first obtain knowledge of the Noncompliance not later than the date of delivery of the notice to Developer.

6.2.3.3 Each of the cure periods set forth in Appendix 5, as revised from time to time, shall be the only cure period for Developer applicable to the Noncompliance.

6.2.4 Notification of Cure

When Developer determines that it has completed cure of any Noncompliance for which it is being assessed Noncompliance Points, Developer shall deliver written notice to the Department identifying the Noncompliance, stating that Developer has completed cure and briefly describing the cure, including any modifications to the Project Management Plan and Quality Plan to protect against future similar Noncompliance. Thereafter, the Department shall promptly inspect to verify completion of the cure and shall, if it verifies completion of the cure, deliver to Developer a written certification of cure. The Department may, via written notice of rejection, reject any Developer notice of cure if it determines that Developer has not cured the Noncompliance and shall, upon making this determination, deliver a written notice of rejection to Developer. Any Dispute regarding certification or non-certification of cure shall be resolved according to the Dispute Resolution Procedures.

6.3 Assessment of Noncompliance Points

6.3.1 If at any time (a) any report indicates or the Department is notified or otherwise becomes aware of a Noncompliance or (b) the Department serves notice of determination under Section 6.2.2, then, without prejudice to any other right or remedy available to the Department, the Department may assess Noncompliance Points in accordance with Appendix 5, as revised from time to time, subject to the following terms and conditions:

6.3.1.1 The date of assessment shall be deemed to be the date of the initial notification under Section 6.2.

6.3.1.2 The number of points listed in Appendix 5 for any particular Noncompliance is the maximum number of Noncompliance Points that may be assessed for each event or circumstance that is a Noncompliance. The Department may, but is not obligated to, assess less than the maximum.

6.3.1.3 Upon occurrence of the Noncompliance entitling the Department to assess Noncompliance Points, and to the extent the Department has determined to assess Noncompliance Points, the Department shall only allocate the percent thereof set forth in the following table prior to expiration of the applicable cure period. If the Noncompliance is not fully and completely cured by the expiration of the applicable cure period, the remaining percentage of Noncompliance Points indicated in the following table shall be deemed assessed, without further notice.

Notification Category:	Percent Assessed Prior to Expiration of Applicable Cure Period (if any):	Remaining Percent Assessed (a) if No Cure Period or (b) After Expiration of Applicable Cure Period without Full and Complete Cure (totaling 100%):
Notification initiated by Developer under <u>Section 6.2.1</u>	0%	100%
Notification initiated by the Department under <u>Section 6.2.2</u>	100%*	0%

* This 100% allocation of Noncompliance Points may be reduced in accordance with Section 6.3.1.5.

6.3.1.4 For the purpose of applying the foregoing table, if the Department, on the one hand, and Developer, on the other hand, deliver concurrent written notices under Section 6.2 of the same Noncompliance, Developer’s notice shall prevail. Notices shall be deemed to be concurrent if each sends its written notice before actually receiving the written notice from the other. Knowledge of the other’s written notice obtained prior to actual receipt of the notice shall have no effect on determining whether concurrent notice has occurred.

6.3.1.5 Appendix 5 assigns certain instances of Noncompliance a fast cure period, which is a shorter cure period within the full cure period allowed for the associated Noncompliance (“**Fast Cure Period**”). If the Department has delivered to Developer a notice of determination under Section 6.2.2 for one of the instances of Noncompliance that has a Fast Cure Period assigned to it in Appendix 5, and if Developer cures the relevant Noncompliance within the Fast Cure Period, the Department will assess Noncompliance Points at the rate of 50% of the Noncompliance Points that would otherwise be assessed in relation to that Noncompliance. Fast Cure Periods and their related reduced amounts of Noncompliance Points do not apply to circumstances where Developer delivers a written notice of a Noncompliance under Section 6.2.1.

6.3.2 If a Noncompliance is capable of being remedied but is not fully and completely cured within the applicable cure period or Interval of Recurrence (if any), then continuation of such Noncompliance beyond such cure period or Interval of Recurrence, as applicable, shall be treated as a new and separate Noncompliance, without necessity for further notice, for the purpose of assessing Noncompliance Points. Accordingly, a new cure period or Interval of Recurrence, as applicable, equal to the prior cure period or Interval of Recurrence shall commence upon expiration of the prior cure period or Interval of Recurrence, without further notice; and the Noncompliance Points and the assessment percentages set forth in Section 6.3.1.3 shall again apply. Regardless of the continuing assessment of Noncompliance Points under this Section 6.3.2, the Department shall be entitled to exercise its step-in rights under Section 18.2.4 and, if applicable, its work suspension rights under Section 18.2.7, after expiration of the initial cure period or Interval of Recurrence available to Developer. However, if

and when the Department commences to exercise its step-in rights (after any prior opportunity of Lenders to exercise their step-in rights has expired without exercise), Noncompliance Points shall no longer accrue with regard to the subject Noncompliance. If the Noncompliance is one for which no cure period is provided, then continuation thereof shall not be treated as a new or separate Noncompliance.

6.3.3 Developer is responsible for keeping and providing the Department with current records of the number of assessed Noncompliance Points for Noncompliance, the date of each assessment, and the date when the Noncompliance were cured.

6.4 Monetary Deductions Assessed for Certain Noncompliance

6.4.1 General

In addition to Noncompliance Points, certain instances of Noncompliance shall result in monetary deductions as set forth in the Contract Documents.

6.4.2 Basis for Deductions

6.4.2.1 Developer acknowledges that the monetary deductions assessed in accordance with the Contract Documents are reasonable liquidated damages in order to compensate the Department for:

1. The Department's increased costs of administering this Agreement, including the increased costs of monitoring and oversight and could also include obligations to pay or reimburse Governmental Entities with regulatory jurisdiction over the Project for their increased costs of monitoring and enforcing Developer's compliance with applicable Governmental Approvals;
2. Potential harm to the credibility and reputation of the Department's transportation improvement program with policy makers and with the general public; and
3. Potential harm and detriment to Users, which may include additional wear and tear on vehicles and increased costs of congestion, travel time and accidents.

6.4.2.2 Developer further acknowledges that such increased costs, and harm and detriment to Users, would be difficult and impracticable to measure and prove, because, among other things, the costs of monitoring and oversight prior to increases in the level thereof will be variable and extremely difficult to quantify; the nature and level of increased monitoring and oversight will be variable depending on the circumstances; and the variety of factors that influence use of and demand for the Project make it difficult to sort out causation of the matters that will trigger these liquidated damages.

6.5 Provisions Regarding Dispute Resolution

6.5.1 Developer may object to the assessment of Noncompliance Points or the starting point for the cure period respecting any Noncompliance listed in Appendix 5 by delivering to the Department written notice of such objection not later than [20] days after the Department

delivers its written notice of such Noncompliance.

6.5.2 Developer may object to any Department decision under Section 6.1.2 regarding whether and on what terms to add instances of Noncompliance to Appendix 5, including the number of Noncompliance Points to be assigned to such Noncompliance, by delivering to the Department written notice of such objection not later than [20] days after the Department delivers its written decision.

6.5.3 Developer may object to the Department's rejection of any Developer notice of cure given pursuant to Section 6.2.4 by delivering to the Department written notice of such objection not later than [20] days after the Department delivers its written notice of rejection.

6.5.4 If for any reason Developer fails to deliver its written notice of objection within the applicable time period, Developer shall be conclusively deemed to have accepted the matters set forth in the applicable Department notice, and to have irrevocably waived its rights and be forever barred from challenging them.

6.5.5 If Developer gives timely notice of objection and the Parties are unable to reach agreement on any matter in Dispute within [ten] days of such objection, either Party may refer the matter for resolution according to the Dispute Resolution Procedures.

6.5.6 In the case of any Dispute as to the number of Noncompliance Points to assign for Noncompliance added to Appendix 5, the sole issue for decision shall be how many Noncompliance Points should be assigned in comparison with the number of Noncompliance Points set forth in Appendix 5 for Noncompliance of equivalent severity.

6.5.7 Pending the resolution of any Dispute arising under this Section 6.5, the provisions of this Article 6 shall take effect as if the matter were not in Dispute; provided that if the final decision regarding the Dispute is that (a) the Noncompliance Points should not have been assessed, (b) the number of Noncompliance Points must be adjusted, or (c) the starting point or duration of the cure period must be adjusted, then the number of Noncompliance Points assigned or assessed and the related liabilities of Developer shall be adjusted to reflect such decision. Pending a decision by the applicable disputes review board, the Department shall not exercise any remedies it may have for a Noncompliance except for the assessment of the applicable Noncompliance Points and monetary deductions.

6.5.8 Pending the resolution of any Dispute arising under this Section 6.5, the number of Noncompliance Points in Dispute shall not be counted for the purpose of determining whether the Department may declare a Persistent Developer Noncompliance.

6.6 Increased Oversight, Testing and Inspection

6.6.1 If at any time (a) Developer is assessed more than [50] Noncompliance Points in any one year period; (b) more than [100] Noncompliance Points in any [three] year period; or (c) Developer accumulates more than [75] instances of Noncompliance included in Appendix 5, as it may be amended, in any [three] year period, then, in addition to other remedies available under the Contract Documents, the Department shall be entitled, at Developer's expense, to increase the level of monitoring, inspection, sampling, measuring, testing, auditing and oversight of the Project and Developer's compliance with its obligations under this Agreement, to such level as the Department sees fit, until such time as Developer has demonstrated to the reasonable satisfaction of the Department that Developer:

6.6.1.1 Has reduced the number of Noncompliance Points below the threshold triggering such heightened scrutiny;

6.6.1.2 Is diligently pursuing cure of all other instances of Noncompliance that have resulted in assessment of Noncompliance Points, has a written plan on how to cure the instances of Noncompliance, and has a deadline by which it will remedy each instance of Noncompliance;

6.6.1.3 Has cured any then-existing Developer Defaults, except a Developer Default based on a Persistent Developer Noncompliance; and

6.6.1.4 Will perform and is capable of performing its obligations under the Contract Documents.

6.6.2 The foregoing does not preclude the Department, at its sole discretion and expense, from increasing its level of monitoring, inspection, sampling, measuring, testing, auditing and oversight at other times.

ARTICLE 7. CONTRACTING AND LABOR PRACTICES

7.1 Disclosure of Contracts and Contractors

7.1.1 Developer shall provide the Department with a list of all Contracts and the Contractors thereunder with each monthly report required under this Agreement or the Technical Volumes. Developer shall allow the Department ready access to all Contracts and records regarding Contracts and shall deliver to the Department, (a) within [ten] days after execution, copies of all Key Contracts, guarantees thereof and amendments and supplements to Key Contracts and guarantees thereof, and (b) within [ten] days after receipt of a request from the Department, copies of all other Contracts and amendments and supplements thereto as may be requested.

7.1.2 As soon as Developer identifies a potential first-tier Contractor, but in no event later than [15] days prior to the scheduled initiation of Work by such proposed Contractor, Developer shall notify the Department in writing of the name, address, phone number and authorized representative of such Contractor.

7.2 Responsibility for Work, Contractors and Employees

7.2.1 Developer shall retain or cause to be retained only Contractors that are qualified, experienced and capable in the performance of the portion of the Work assigned. Developer shall assure that each Contractor has at the time of execution of the Contract, and maintains at all times during performance of the assigned Work, all licenses required by applicable Laws.

7.2.2 The retention of Contractors by Developer will not relieve Developer of its responsibilities hereunder or for the quality of the Work or materials or services provided by it. Developer will at all times be held fully responsible to the Department for the negligence, willful misconduct, or breach of applicable Law or contract by Contractors.

7.2.3 Each Contract shall include terms and conditions sufficient to ensure both the acknowledgement and compliance by the Contractor with the Contract Documents and its

requirements, and shall include those terms that are specifically required by the Contract Documents to be included therein.

7.2.4 Developer shall require each Contractor to familiarize itself with the requirements of any and all applicable Laws, including those Laws applicable to the use of federal-aid funds, and the conditions of any required Governmental Approvals.

7.2.5 Nothing in this Agreement will create any contractual relationship between the Department and any Contractor. No Contract entered into by or under Developer shall impose any obligation or liability upon the Department to any Contractor or any of its employees.

7.2.6 Developer shall supervise and be fully responsible for the negligence, willful misconduct, or breach of applicable Law or contract by any member or employee of Developer or any Developer-Related Entity, as though all such individuals were directly employed by Developer.

7.3 Key Contracts; Contractor Qualifications

7.3.1 Use of and Change in Key Contractors

Developer shall retain, employ and utilize the firms and organizations specifically listed in Appendix 2-H to fill the corresponding Key Contractor positions listed therein. Developer shall not terminate any Key Contract with a Key Contractor, or permit or suffer any substitution or replacement (by way of assignment of the Key Contract, transfer to another of any material portion of the scope of work, or otherwise) of such Key Contractor, except in the case of material default by the Key Contractor or with the Department's prior written approval in its good faith discretion. For Key Contractors not identified in Appendix 2-H, Developer's selection thereof shall be subject to the Department's prior written approval in its good faith discretion.

7.3.2 Key Contract Provisions

Each Key Contract shall:

7.3.2.1 Require the Key Contractor to carry out its scope of work in accordance with the Contract Documents, the Governmental Approvals, applicable Law, and plans, systems and manuals developed and used by Developer pursuant to the Contract Documents;

7.3.2.2 Include a covenant to maintain all licenses required by applicable Law;

7.3.2.3 Set forth a standard of professional responsibility or a standard for commercial practice equal to the requirements of the Contract Documents and in accordance with Best Management Practice for work of similar scope and scale;

7.3.2.4 Set forth warranties, guaranties and liability provisions of the Key Contractor in accordance with Best Management Practice for work of similar scope and scale;

7.3.2.5 Expressly state that all remaining warranties and guarantees, express or implied, shall inure to the benefit of the Department and its successors and assigns upon expiration of the term or earlier termination of the Agreement;

7.3.2.6 Require the Key Contractor to procure the applicable Payment Security, Performance Security and O&M Security (as applicable) required under Section 16.2, if any, prior to commencement of any work by or on behalf of the Key Contractor;

7.3.2.7 In the case of each Key Contractor that has provided a Payment Security and/or Performance Security with the Department named as a dual obligee, expressly provide that the Key Contractor shall have no right to suspend or demobilize unless and until it delivers to the Department written notice of Developer's breach or default;

7.3.2.8 Require the personal services of and not be assignable by the Key Contractor without Developer's and the Department's prior written consent, provided that this provision shall not prohibit the subcontracting of portions of the Work;

7.3.2.9 Expressly include the requirements and provisions set forth in this Agreement applicable to Contractors regarding Intellectual Property rights and licenses;

7.3.2.10 Expressly require the Key Contractor to participate in meetings between Developer and the Department concerning matters pertaining to such Key Contractor, its work or the coordination of its work with other Contractors, provided that all direction to such Key Contractor shall be provided by Developer, and provided further that nothing in this Section 7.3.2.10 shall limit the authority of the Department to give such direction or take such action as in its opinion is necessary to remove an immediate and present threat to the safety of life or property;

7.3.2.11 Include an agreement by the Key Contractor to participate in any dispute resolution proceeding pursuant to Article 24, if such participation is requested by either the Department or Developer;

7.3.2.12 Without cost to Developer or the Department and subject to the Lender's rights under the Direct Agreement, expressly permit assignment to the Department of all Developer's rights under the Key Contract, contingent only upon delivery of written request from the Department pursuant to Section 19.5.3.1, allowing the Department to assume the benefit of Developer's rights with liability only for those remaining obligations of Developer accruing after the date of assumption, such assignment to include the benefit of all Key Contractor warranties, indemnities, guarantees and professional responsibility;

7.3.2.13 Expressly state that any acceptance of assignment of the Key Contract to the Department shall not operate to make the assignee responsible or liable for any breach of the Key Contract by Developer or for any amounts due and owing under the Key Contract for work or services rendered prior to assignment;

7.3.2.14 Subject to the Lender's rights under the Direct Agreement, expressly include a covenant acknowledging that, upon receipt of written notice from the Department, the Department is entitled to exercise step-in rights under this Agreement,

without any necessity for a consent or approval from Developer or the making of a determination whether the Department validly exercised its step-in rights, and include a waiver and release by Developer of any claim or cause of action against the Key Contractor arising out of or relating to its recognition of the Department's rights in reliance on any such written notice from the Department;

7.3.2.15 Expressly include requirements that the Key Contractor (a) will maintain usual and customary books and records for the type and scope of operations of business in which it is engaged (e.g., constructor, equipment supplier, designer, service provider), (b) permit audit thereof by both Developer and the Department and (c) provide progress reports to Developer appropriate for the type of work it is performing sufficient to enable Developer to provide the reports it is required to furnish the Department under this Agreement;

7.3.2.16 Include the right of Developer to terminate the Key Contract in whole or in part upon any Termination for Convenience of this Agreement or any termination of this Agreement under Sections 19.2 or 19.4, in each case without liability of Developer or the Department for the Key Contractor's lost profits or business opportunity; and

7.3.2.17 Expressly provide that any purported amendment with respect to any of the foregoing matters without the prior written consent of the Department shall be null and void.

7.3.3 Key Contract Amendments

Developer shall not amend any Key Contract with respect to any of the foregoing matters without the Department's prior written consent in its sole discretion.

7.4 Key Personnel

7.4.1 Developer shall retain, employ and utilize the individuals specifically listed in Appendix 2-H or in the Project Management Plan to fill the corresponding Key Personnel positions listed therein. Developer shall not, prior to Substantial Completion, change or substitute any such individuals except due to retirement, death, disability, incapacity, or voluntary or involuntary termination of employment.

7.4.2 Developer shall notify the Department in writing of any proposed replacement for any Key Personnel position. The Department shall 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.

7.4.3 Developer shall cause each individual filling a Key Personnel position to dedicate the full amount of time necessary for the proper preparation, prosecution and performance of the Work.

7.4.4 Developer shall provide the Department with phone and cell phone numbers and email addresses for all Key Personnel. The Department requires the ability to contact Key Personnel 24 hours per Day, seven Days per week.

7.5 Contracts with Affiliates

7.5.1 Developer shall have the right to have the Work performed by Affiliates only under the following terms and conditions:

7.5.1.1 Developer shall execute a written Contract with the Affiliate;

7.5.1.2 The Contract shall comply with all applicable provisions of this Article 7, be consistent with Best Management Practice, and be in form and substance substantially similar to Contracts then being used by Developer for similar work with unaffiliated Contractors;

7.5.1.3 The Contract shall set forth the scope of Work and all the pricing, terms and conditions respecting the scope of Work;

7.5.1.4 The pricing, scheduling and other terms and conditions of the Contract shall be no less favorable to Developer than those that Developer could reasonably obtain in an arms' length, competitive transaction with an unaffiliated Contractor. Developer shall bear the burden of proving that the same are no less favorable to Developer; and

7.5.1.5 No Affiliate shall be engaged to perform any Work which (a) any Contract Document indicates are to be performed by an independent or unaffiliated Contractor or (b) would be inconsistent with Best Management Practice.

7.5.2 Before entering into a written Contract with an Affiliate or any supplement or amendment thereto, Developer shall submit a true and complete copy of the proposed Contract to the Department for review and comment. The Department shall have [20] Days after receipt to deliver its comments to Developer. If the Contract with the Affiliate is a Key Contract, it shall be subject to the Department's approval as provided in Section 7.3.1.

7.6 Labor Standards and Job Training

7.6.1 In the performance of its obligations under the Contract Documents, Developer at all times shall comply with, and require by contract that all Contractors and vendors comply with, all applicable federal and State labor, occupational safety and health Laws.

7.6.2 All individuals performing the Work shall have the skill and experience and all licenses or certifications required to perform the Work assigned to them in accordance with the Contract Documents. In addition to any other rights and remedies under the Contract Documents, the Department shall have the right to require Developer to remove any person who fails to meet such requirements in accordance with [Section ___ of Division ___].

7.6.3 Developer shall comply with [Section ___ of Division ___] regarding on-the-job training. No later than [30] days prior to the start of the Construction Work, the Department will meet with Developer for a training evaluation meeting to finalize and agree upon the number of trainees, equal employment goals, proficiencies for selected training classifications, and the initial schedule for training.

7.7 Ethical Standards

7.7.1 Within [90] days after the Effective Date, Developer shall adopt written policies establishing ethical standards of conduct for all Developer-Related Entities, including Developer's supervisory and management personnel in dealing with (a) the Department and (b) employment relations in connection with the Project. Such policy shall be subject to review and comment by the Department prior to adoption. Such policy shall include standards of ethical conduct concerning the following:

7.7.1.1 Restrictions on gifts and contributions to, and lobbying of, the Department and any of its commissioners, directors, officers and employees;

7.7.1.2 Protection of Developer's Project employees from unethical practices in selection, use, hiring, compensation or other terms and conditions of employment, or in firing, promotion and termination of employees;

7.7.1.3 Protection of Developer's Project 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 any Developer-Related Entity;

7.7.1.4 Restrictions on directors, members, officers or supervisory or management personnel of any Developer-Related Entity 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;

7.7.1.5 Restrictions on use of 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 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

7.7.1.6 Adherence to the Department's organizational conflict of interest rules and policies applicable to the Project, as amended from time to time following written notice by the Department to Developer.

7.7.2 Developer shall cause its directors, members, officers and supervisory and management personnel, and require those of all other Developer-Related Entities, to adhere to and enforce the adopted policy on ethical standards of conduct for the Project. Developer shall establish reasonable systems and procedures to promote and monitor compliance with the policy.

7.7.3 No funds received from the Department pursuant to this Agreement may be expended for lobbying any Governmental Entity, including the State or Federal legislature, the judicial branch, any State agency, or any county, city or other Governmental Entity.

7.8 UDBE/DBE Program

7.8.1 The Department has an overall State-wide, race-neutral Underutilized Disadvantaged Business Enterprise (“**UDBE/DBE**”) goal to spend at least [___]% of the funding associated with highway contracts with certified UDBE/DBEs. Race-neutral means that the Department believes that the [___]% overall goal can be achieved through the normal competitive procurement process using UDBE/DBEs as prime contractors, subcontractors or subconsultants. Under 49 Code of Federal Regulations Part 26, if the Department’s goal is not achieved, the Department may be required to return to a race-conscious program where goals are imposed on individual contracts that have federal funds.

7.8.2 In accordance with [Section ___ of Division ___], Developer shall comply with all applicable requirements in the UDBE/DBE Program and include provisions to implement the UDBE/DBE Program in every Contract to which it is a party. Further, Developer shall require that such provisions be included in all Contracts at lower tiers, so that such provisions will be binding upon each Contractor. Developer agrees to comply with the approved UDBE/DBE Affirmative Action Program Plan attached as Appendix 17.

ARTICLE 8. MANDATORY TECHNOLOGY ENHANCEMENTS AND SAFETY COMPLIANCE

8.1 Conditions Requiring Mandatory Technology Enhancements

Subject to Section 8.2, Developer at its expense shall be obligated to make Technology Enhancements on the systems it provides as and when necessary (a) to correct defects, (b) under the Renewal Work Schedule, (c) to meet the provisions of the Technical Volumes; and (d) to comply with changes and additions to, and replacements of, the Technical Volumes relating to the Work (collectively, “**Mandatory Technology Enhancements**”).

8.2 Cost and Financing of Mandatory Technology Enhancements

8.2.1 Developer acknowledges and represents that the cost of Mandatory Technology Enhancements and future financing thereof are incorporated into the Financial Model. No Mandatory Technology Enhancement required to be performed prior to Substantial Completion shall entitle Developer to any claim against the Department.

8.2.2 Mandatory Technology Enhancements required to be performed after Substantial Completion may qualify as a Non-Discriminatory O&M Change or Discriminatory O&M Change, as applicable, under Section 5.2.2.

8.3 Safety Compliance

The Department is entitled from time to time to issue Safety Compliance Orders to Developer with respect to the Project to correct a specific safety condition or risk involving the Project that the Department has reasonably determined exists through investigation or analysis.

8.3.1 Safety Compliance Orders

8.3.1.1 The Department shall use good-faith efforts to inform 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 shall consult with 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 required Work.

8.3.1.2 Subject to conducting such prior consultation, the Department may issue Safety Compliance Orders to Developer at any time from and after the Effective Date.

8.3.2 Duty to Comply

8.3.2.1 Subject to Section 8.3.1, Developer shall implement all Safety Compliance as expeditiously as reasonably possible following issuance of the Safety Compliance Order. Developer shall diligently prosecute the work necessary to achieve such Safety Compliance until completion.

8.3.2.2 Developer shall be entitled to submit a Claim for Extra Work Costs, Delay Costs or time extensions relating to compliance with a Safety Compliance Order as provided in Article 9. Notwithstanding the provisions in this Section 8.3.2.2, Developer shall not be entitled to any compensation, extension of time or other claim against the Department to the extent that the Safety Compliance Order is the result of the negligence, willful misconduct, or breach of applicable Law or contract by Developer or any Developer-Related Entity.

ARTICLE 9. DEVELOPER CLAIMS AND RELIEF EVENTS

9.1 Developer Claims

9.1.1 Claim Submission

If Developer believes that it is entitled to Extra Work Costs, Delay Costs, time extension or other relief under the Contract Documents, Developer shall submit a Claim and comply with the claims procedures and requirements as set forth in [Section __ of Division __].

9.1.2 Claim Deductible

9.1.2.1 Except as provided in Section 9.1.2.2, each Claim seeking the recovery of Extra Work Costs and Delay Costs, as applicable, shall be subject to the Claim Deductible. The Claim Deductible reflects the Parties' agreement that: (a) Developer will bear the financial risks for Extra Work Costs and Delay Costs, as applicable, for each Claim, up to the Claim Deductible; and (b) the Department will compensate Developer for Extra Work Costs and Delay Costs, as applicable, in excess of the Claim Deductible, provided that each Claim complies with [Section __ of Division __].

9.1.2.2 The Claim Deductible shall not apply to a Claim seeking recovery for the following:

1. Department Change;

2. Department-Caused Delay;
3. Non-Discriminatory O&M Change, which is subject to the Non-Discriminatory O&M Change Deductible;
4. Pre-existing Hazardous Materials, which is subject to the Pre-existing Hazardous Materials Deductible and the Tiered Pre-existing Hazardous Materials Deductible;
5. Structural Latent Defects for Phase I;
6. Compensation under Sections 9.2.2 and 9.2.3; or
7. Department Default.

9.1.3 CPI Adjustments to Deductibles

The amounts remaining in the Non-Discriminatory O&M Change Deductible, Pre-existing Hazardous Materials Deductible, the Tiered Pre-existing Hazardous Materials Deductible and the Claim Deductible shall be adjusted annually at the beginning of each Calendar Year after the Effective Date by a percentage equal to the percentage adjustment in the CPI between the CPI for October of the second immediately preceding Calendar Year and the CPI for October of the immediately preceding Calendar Year.

9.2 Relief Events

9.2.1 General

Developer shall be entitled to certain compensation and performance relief for Relief Events in accordance with this Section 9.2. Except as otherwise provided in this Agreement, the remedies provided under this Section 9.2 shall not preclude Developer's other remedies provided under the Contract Documents and Developer shall be entitled to Extra Work Costs, Delay Costs, time extensions and other relief for Relief Events in accordance with the Contract Documents.

9.2.2 Delayed Availability Payments Due to Relief Events During Construction Period

9.2.2.1 The Parties acknowledge that Developer may incur certain losses due to delays in commencement of Availability Payments by the Baseline Substantial Completion Date. For the delay in receiving Availability Payments beyond the Baseline Substantial Completion Date, the Department agrees to compensate Developer for its losses, but only to the extent such losses are caused by Relief Event Delays. Such compensation shall be calculated in accordance with the formula set forth in Section 9.2.2.2.

9.2.2.2 Subject to the other limitations set forth in this Section 9.2.2, the total compensation owed to Developer for the delay in receiving Availability Payments shall be as follows:

1. an amount equal to the greater of:

- (a) [85]% of the MAP divided by 365, multiplied by the number of days of Relief Event Delays; or
- (b) the lesser of the amount of: (i) debt service (except the repayment of principal scheduled to be funded by Milestone Payments which have been delayed by a Relief Event Delay) scheduled to be paid as shown in the Financial Model during the period commencing on the Baseline Substantial Completion Date and ending on the Scheduled Substantial Completion Date, prorated for the number of days of Relief Event Delays; (ii) the actual amount of debt service (except the repayment of principal scheduled to be funded by Milestone Payments which have been delayed by a Relief Event Delay) scheduled to be paid during such period, prorated for the number of days of Relief Event Delays; or (iii) the MAP divided by 365, multiplied by the number of days of Relief Event Delays;

minus

- 2. the proceeds from any delayed start up or business interruption insurance policy procured to cover any loss of Availability Payment during the period commencing on the Baseline Substantial Completion Date and ending on the Scheduled Substantial Completion Date, prorated for the number of days of Relief Event Delays, excluding any insurance proceeds paid to Developer to cover the loss of the Availability Payment, if any, during the [90] day period provided in Sections 9.2.2.3.

9.2.2.3 If a Deductible Relief Event causes a Relief Event Delay, no compensation shall be due or payable for the first [90] days of Relief Event Delays attributable to such Deductible Relief Event, and such deductible shall not be included in calculating the number of days of Relief Event Delays under Section 9.2.2.2. Such [90] day deductible shall be cumulative and apply in the aggregate for all Deductible Relief Events. If a Relief Event Delay is caused concurrently by a Deductible Relief Event and a non-Deductible Relief Event, such delay shall be deemed caused solely by the Deductible Relief Event.

9.2.2.4 In no event shall Developer be entitled to compensation under this Section 9.2.2 in excess of [270] days for Relief Event Delays in the aggregate. If Relief Event Delays exceed [270] days in the aggregate, the Parties' rights and remedies shall be as set forth in Section 19.2.

9.2.2.5 Compensation owed under this Section 9.2.2 shall be paid monthly, commencing on the last day of the month when Substantial Completion would have been achieved had the Relief Event Delays not occurred and continuing on the last day of each month thereafter until all compensation owed under this Section 9.2.2 is paid. The amount paid each month shall not exceed the amount of compensation owed for 30 days of Relief Event Delays, and any remaining amounts shall be paid in the subsequent month(s).

9.2.2.6 Notwithstanding any provision to the contrary, Developer shall not be entitled to any payments under this Section 9.2.2 under any of the following circumstances: (a) if Developer achieves Substantial Completion on or before the Baseline Substantial Completion Date; or (b) to the extent that payment for Relief Event

Delays would compensate Developer for loss of Availability Payments earlier than the Baseline Substantial Completion Date.

9.2.2.7 Claims under this Section 9.2.2 shall be submitted and subject to the claims procedures and requirements set forth in [Section ___ of Division ___], and Developer shall be required to prove the existence, cause, effect, and timing of a Relief Event Delay in accordance with [Section ___ of Division ___].

9.2.3 Delayed Milestone Payments Due to Relief Events

9.2.3.1 If a Relief Event Delay extends Final Acceptance beyond the date scheduled in the initial Project Schedule included in Appendix 2-A, Developer shall be entitled upon Final Acceptance to submit a claim for the additional interest incurred resulting from a delay in making any Project Debt principal payment beyond the date scheduled in the Financial Model (before the occurrence of the Relief Event Delay), provided that: (a) such Project Debt principal payment was scheduled to be funded by one or more Milestone Payments; (b) receipt of the applicable Milestone Payment was delayed by a Relief Event Delay; and (c) the delay in making such Project Debt principal payment was directly caused by the delayed receipt of the applicable Milestone Payment. The compensation owed under this Section 9.2.3 shall be calculated based on the number of days of Relief Event Delays (up to [270] days) multiplied by the daily interest charged for the relevant principal amount under the applicable Funding Agreement.

9.2.3.2 If a Deductible Relief Event causes a Relief Event Delay, no compensation shall be due or payable for the first [90] days of Relief Event Delays attributable to such Deductible Relief Event, and such deductible shall not be included in calculating the number of days of Relief Event Delays under Section 9.2.3.1. Such [90] day deductible shall be cumulative and apply in the aggregate for all Deductible Relief Events. If a Relief Event Delay is caused concurrently by a Deductible Relief Event and a non-Deductible Relief Event, such delay shall be deemed caused solely by the Deductible Relief Event.

9.2.3.3 Claims under this Section 9.2.3 shall be submitted and subject to the claims procedures and requirements set forth in [Section ___ of Division ___], and Developer shall be required to prove the existence, cause, effect, and timing of a Relief Event Delay in accordance with [Section ___ of Division ___].

9.2.4 Certain Relief Events Causing Closures During Operating Period

If a Relief Event described in clause (a) or (l) of the definition thereof results in a Closure of one or more Segments, and Developer uses commercially reasonable efforts to mitigate the effects of such Relief Event and the resulting Closure, then such a Closure shall be deemed a Permitted Closure for as long as such Closure persists or up to [30] days, whichever is less. If such Closure persists more than [30] days, it shall not be deemed to be a Permitted Closure after the first [30] days. If such Closure persists for more than [60] days, then notwithstanding any Unavailability Event, in relation to the Segment or Segments affected by such Closure each Hour, beginning on the [61st] day and continuing for as long as such Closure persists or up to [270] additional days, whichever is less, shall use an Hourly Unavailability Factor of [0.2] for the purposes of calculating the Hourly Unavailability Adjustments for these Hours as described in Appendix 6.

9.2.5 Defense to Noncompliance Points, Deductions and Developer Default

9.2.5.1 Developer shall be entitled to rely upon the occurrence of a Relief Event as a defense against the accrual of Noncompliance Points, assessment of monetary deductions for Noncompliance and against the occurrence of a Developer Default where the events giving rise to the Relief Event would otherwise have caused such an accrual of Noncompliance Points, assessment of monetary deductions for Noncompliance or caused a Developer Default, as the case may be.

9.2.5.2 Developer shall not be excused from compliance with the Contract Documents, applicable Laws or Governmental Approvals due to the occurrence of a Relief Event, except for its temporary inability to comply as a direct result of a Relief Event.

9.2.6 Mitigation

Developer shall take all steps necessary on a commercially reasonable basis to mitigate the consequences of any Relief Event, including all steps that would generally be taken in accordance with Best Management Practice.

9.3 Method of Payment for Extra Work Costs and Delay Costs

9.3.1 The Department shall compensate Developer for amounts due for Extra Work Costs and Delay Costs: (a) as periodic payments over the Term; (b) as an adjustment to the MAP over the Term; (c) as progress payments invoiced as Work is completed; (d) through an extension of the Term if the event giving rise to the Claim occurs after the Construction Period; or (e) through any combination of the above, as determined by the Department in its sole discretion. Subject to Section 9.4.3, the Department shall pay for any Extra Work Costs and Delay Costs resulting from Department Changes as progress payments invoiced as Work is completed.

9.3.2 The Department shall provide Developer with a written notice of the method chosen for paying Developer for the amounts owed under this Article 9. The Parties shall conduct all discussions and negotiations to determine any compensation amount, and Developer shall provide the Department with all data, documents and information pertaining thereto, on an open book basis.

9.3.3 The compensation amounts described in this Article 9 shall represent the sole right to compensation and damages for the adverse financial effects of the event giving rise to the Claim or Relief Event. In exchange for the payment by the Department of any such compensation amounts, Developer shall execute a full, unconditional, irrevocable waiver, release and acknowledgement of satisfaction by Developer, in form reasonably acceptable to the Department, of any claim for Extra Work Costs, Delay Costs or other rights to compensation or other monetary relief associated with such event that is not the subject of a Dispute.

9.4 Restoration of Financial Balance for Deferral of Compensation

9.4.1 If the Department elects to compensate Developer through Deferral of Compensation, Developer shall be entitled to additional compensation to restore the losses in Equity IRR and debt service ratios in the Financial Model as a result of the Deferral of Compensation.

9.4.2 Developer shall provide the Department with the total amount of compensation that Developer considers owed to restore the Equity IRR and debt service ratios in the Financial Model as a result of the Deferral of Compensation, including supporting calculations and documentation. If the Department disagrees with the amount sought by Developer, the Department shall pay the undisputed portion to Developer and the disputed portion shall be resolved according to the Dispute Resolution Procedures. In no event shall Developer be entitled to any compensation for losses unrelated and not directly caused by the Deferral of Compensation.

9.4.3 If through mutual consent of the Parties, the Department is to compensate Developer through Deferral of Compensation for any Extra Work Costs and Delay Costs resulting from a Department Change, the Equity IRR assumed to be earned on the additional invested equity in connection with the Department Change shall be equal to [XXXXX] %.

9.5 Disputes Related to Claims and Relief Events

Any Dispute as to whether Developer is entitled to Extra Work Costs, Delay Costs, time extensions or other relief as provided in this Article 9 shall be resolved according to the Dispute Resolution Procedures.

ARTICLE 10. CHANGES IN THE WORK

10.1 Department Changes

10.1.1 The Department reserves the right to make alterations or changes in the Work (including reductions in the scope of the Work up to a cap of [10] % of the Design and Construction Costs as set forth in the Schedule of Values) pursuant to Section ___ of Division ___].

10.1.2 If Developer deems that additional compensation or a time extension is due for Extra Work which is directed by the Department, Developer shall submit a Claim in accordance with Section 9.1. If the Department Change results in a reduction to the scope of the Work, the Department shall be entitled to [50] % of the net reduction in direct labor, material and equipment costs associated with the Department Change, which shall be paid by the Developer to the Department: (a) as periodic payments over the Term; (b) as an adjustment to the MAP over the Term; (c) through a reduction in the Term; or (d) through any combination of the above, as mutually agreed upon by the Parties. The Department shall, by directing Developer to perform Extra Work, reinvest the remaining [50] % of the net reduction in direct labor, materials and equipment costs associated with the Department Change into the Project during the Term in such manner as it may in its discretion deem appropriate.

10.2 Developer Change Proposals

10.2.1 Developer may, by submittal of a written Change Proposal using a form approved by the Department, request the Department to: (a) approve modifications to the Technical Volumes; (b) approve modifications to Developer's Proposal Commitments that do not require modifications to the Technical Volumes; or (c) approve adjustments to the Project ROW parcels identified in Appendix 4-A. The Department will not consider any Change Proposals under subpart (c) of this Section 10.2.1 that are submitted later than [XXXXXXXXXXXXX]. The Change Proposal shall set forth Developer's detailed estimate of net

cost impact (positive or negative) and schedule impact of the requested change.

10.2.2 The Department, in its sole discretion may accept or reject any Change Proposal submitted by Developer pursuant to Section 10.2.1. If such Change Proposal is accepted by the Department, Developer shall implement the change in accordance with all applicable requirements contained in the Contract Documents (as amended to reflect the Department-approved Change Proposal, if applicable), the Project Management Plan, Best Management Practice, and all applicable Laws.

10.2.3 Developer shall be solely responsible for payment of any increased Design and Construction Costs, finance or other costs, additional risks, and any Project Schedule delays or other impacts resulting from a Change Proposal accepted by the Department.

10.2.4 To the extent a change under Section 10.2.1(a) results in a cost savings to Developer, the Department shall be entitled to a credit in the amount of [50]% of the savings related to the direct labor, materials and equipment costs associated with the change. Such credit shall be paid by Developer to the Department in the manner described in Section 10.1.2.

10.2.5 To the extent a change solely under Section 10.2.1(b) results in a cost savings to Developer, the Department shall not be entitled to share in any savings related to the Design and Construction Costs.

10.2.6 To the extent a change under Section 10.2.1(c) results in a reduction in the number of parcels identified in Appendix 4-A necessary for the construction of the Project and does not require a modification to the Project configuration nor affect any elements or functionality as set forth in the Technical Volumes, Developer shall share in [50]% of the savings to the Department in real estate costs. The parties agree that the real property values assigned to each parcel as identified in Appendix 4-A shall be the values used in determining the real property savings as described in this Section 10.2.6. However, Developer shall not be entitled to a share in any savings in real estate costs if a change under Section 10.2.1(c) requires a modification to the Project configuration or affects any elements or functionality as set forth in the Technical Volumes. The Department shall pay any amounts due to Developer under this Section 10.2.6 upon submission of a signed payment request setting forth the parcel or parcels to which it is entitled to share in savings. Such payment request may be submitted no earlier than the Substantial Completion Date.

10.2.7 For any Change proposal accepted by the Department, the Department shall be entitled to the full savings related to the financing costs associated with any Design and Construction Cost savings. The Department shall apply the credit in the manner described in Section 10.1.2.

10.2.8 No Change Proposal shall be required to implement any change to the Work that is not specifically regulated or addressed by the Contract Documents or applicable Law.

ARTICLE 11. PAYMENTS TO DEVELOPER

11.1 Timing and Basis for Availability Payments

11.1.1 Upon Substantial Completion of the Project, the Department will begin making Availability Payments to Developer as provided in this Article 11. Developer is not entitled to earn any Availability Payments before the Early Completion Date.

11.1.2 The Availability Payments are based on the Project being open and available for public travel as measured through Developer's conformance with the Contract Documents, including the minimum operating and maintenance requirements set forth in [Section ___ of Division ___].

11.2 Availability Payment Calculation and Invoicing

11.2.1 Calculation of Availability Payment

11.2.1.1 Availability Payments shall be calculated and earned by Developer according to the methodology set forth in Appendix 6. The Availability Payments payable during any given Fiscal Year during the Operating Period shall never exceed the MAP for that year, adjusted for inflation, as described in Appendix 6.

11.2.1.2 Each Availability Payment constitutes a single, all-inclusive payment with no fixed component and no separation of payments for operations, capital, maintenance, Renewal Work, Handback Renewal Work or Upgrades. In addition to any other deductions or withholdings allowed under this Agreement, the Availability Payments shall be subject to adjustment for Unavailability Events in accordance with Appendix 6. Developer acknowledges that such adjustments to the Availability Payments are reasonable in order to compensate Department for damages it will incur by reason Developer's failure to comply with the performance standards applicable during the Operating Period. Such damages include loss of use, enjoyment and benefit of the Project and connecting to Department transportation facilities and transportation facilities owned and operated by other Governmental Agencies by the general public, injury to the credibility and reputation of Department's transportation improvement program with policy makers and with the general public who depend on and expect availability of service, which injury to credibility and reputation may directly result in loss of ridership on the Project and connecting Department transportation facilities and facilities owned and operated by other Governmental Agencies, and additional costs of administering this Agreement (including engineering, legal, accounting, overhead and other administrative costs). 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.

11.2.2 Invoicing

11.2.2.1 Monthly Disbursements shall be made by the Department

to Developer as payments for portions of each Quarterly Payment. Upon its receipt of a [monthly] invoice therefor, the Department shall pay Developer a [Monthly] Disbursement in accordance with the requirements set forth in **[INSERT RELEVANT DEPARTMENT PAYMENT STATUTES / REGULATIONS]**. Notwithstanding the foregoing, the Department has no obligation to make a [Monthly] Disbursement until Developer submits a proper monthly invoice therefor in accordance with this Section 11.2.

11.2.2.2 Developer shall submit the invoice no later than the [10th] day of the month for the prior month's Monthly Disbursement. The invoice must set forth the amount of the Monthly Disbursement due and the calculation of the Monthly Disbursement due, including the calculation of the Quarterly Settlement Amount, if any. In addition, the invoice must be accompanied by an attachment containing information that can be used by the Department in verifying the Quarterly Settlement Amount. Such attachment shall include: (a) the calculation of the actual Availability Payment earned during the prior month using the methodology set forth in Appendix 6; (b) a description of any Unavailability Events and O&M Violations, including the date and time of occurrence and duration; (c) any adjustments to reflect previous over-payments and/or under-payments; and (d) any other amount due and payable from Developer to the Department or from the Department to Developer under this Agreement. Any interest payable in respect of any amounts owed shall be set forth and submitted in a separate invoice. The Department shall return any invoices that are incomplete and/or incorrect in any material respect to Developer for correction and resubmission.

11.2.2.3 The Quarterly Settlement Amount for the prior Quarter, if any, shall be included in the Monthly Disbursement for the first month of each Quarter. The Department will verify each Quarterly Settlement Amount by (a) examining the monthly invoices for the applicable Quarter, (b) verifying the results reported therein by Developer, including through the Department's independent oversight and spot auditing process, and (c) reconciling the amounts paid with the actual Quarterly Payment earned and any other amount due and payable from Developer to the Department or from the Department to Developer under this Agreement.

11.2.2.4 The Department shall not be required to pay any monthly invoice if Developer has failed to file the reports required to be filed for that month as required by Appendix 12, unless and until the required report is filed. If it is determined that any monthly report required to be filed pursuant to Appendix 12 is found to be inaccurate, which, had it been accurate, would have revealed that an Unavailability Event or O&M Violation had occurred, then the Department shall not be required to pay any monthly invoice submitted by Developer unless and until a revised report which is accurate to the reasonable satisfaction of the Department is subsequently submitted to the Department. Once the required or revised reports are filed, the Department shall process the monthly invoice for payment. The failure to file a monthly report or the filing of an inaccurate report may result in the assessment of Noncompliance Points.

11.3 Disputed Amounts

11.3.1 Either Developer or the Department shall have the right to dispute, in good faith, any amount specified in an invoice submitted pursuant to this Article 11. The Party disputing any such amount will pay the amount of the invoice in question that is not in dispute and will be entitled to withhold the balance pending resolution of the Dispute.

11.3.2 Developer and the Department will use their reasonable efforts to resolve any Dispute in question within [30] days after the Dispute arises. If they fail to resolve the Dispute within that period, then the Dispute shall be resolved according to the Dispute Resolution Procedures.

11.3.3 Any amount determined to be due pursuant to the Dispute Resolution Procedures will be paid within [20] days following resolution of the Dispute, together with interest thereon in accordance with Section 11.4.3.

11.4 Interest on Payments

11.4.1 Interest on undisputed amounts owed to Developer under this Agreement shall be in accordance with the requirements set forth in Public Contract Code Section 10261.5.

11.4.2 If as a result of any inaccuracy in an invoice any overpayment is made by the Department to Developer then, in addition to the adjustments to a Monthly Disbursement as provided in Section 11.2.2.2, the Department shall be entitled to deduct or receive as a payment from Developer interest thereon at the Late Payment Rate from the date of payment of the invoice by the Department to the date the overpayment is deducted or paid. The right of the Department to deduct the interest from the Quarterly Payment or the Monthly Disbursement and/or to receive a payment from Developer is without prejudice to any other rights the Department may have under this Agreement.

11.4.3 Amounts determined to be due pursuant to the Dispute Resolution Procedures shall accrue interest solely as set forth in [Section __ of Division __].

11.5 Appropriations of Payments

11.5.1 The Parties hereto acknowledge that the source of funds for payment of the Availability Payments, the Milestone Payments and other amounts due to Developer under this Agreement is subject to the availability of funds appropriated by the State legislature and approved by the State governor. The Department shall include the Maximum Availability Payment and the Milestone Payments in its proposed State Transportation Improvement Program Fund Estimate for adoption by the California Transportation Commission and in its legislative budget request prepared in accordance with the Budget Acts and Executive Orders of the years covered by this Agreement. Payment will be made in accordance with, and within the time specified in Public Contract Code Section 10261 *et seq.*

11.5.2 Nothing in this Section 11.5 shall prejudice Developer's right to declare a Department Default under Section 18.3.1.1.

11.6 Tolling

11.6.1 Developer shall be authorized to impose tolls and user fees for use of the Project subject to prior compliance with and satisfaction of all of the following conditions:

11.6.1.1 Developer shall give to the Department written notice of its intent to exercise the right to impose toll and user fees, as well as the Developer's proposed schedule of toll rates or user fee rates and plan to construct and operate the toll collection facilities;

11.6.1.2 Developer shall obtain the approval of the Golden Gate Bridge Highway and Transportation District, the Metropolitan Transportation Commission, and the Authority to (a) the exercise of such authority to impose tolls and user fees and (b) the toll rates or user fee rates, which approval shall be governed by and consistent with the requirements of that certain Memorandum of Understanding ("MOU") dated November 26, 2008;

11.6.1.3 Developer's exercise of the right to impose tolls and user fees as provided in this Section 11.6.1 shall not affect, alter or supersede the MOU;

11.6.1.4 Developer must obtain all necessary environmental approvals and governmental permits required in order to exercise the right to impose tolls and user fees including compliance with all legal requirements including CEQA and NEPA requirements;

11.6.1.5 Developer shall obtain the prior written approval of the Department in its good faith discretion to (a) the toll rates or user fee rates, which approval shall be consistent with the approvals given as provided in Section 11.6.1.2; and (b) amendments or supplements to the Technical Provisions establishing the standards and specifications for the design, construction, operation and maintenance of the tolling system; and

11.6.1.6 The Department and the Authority have agreed on the use and disposition of excess toll and user fee revenue payable to Department under Section 11.6.3, consistent with Streets and Highways Code Section 143(j)(1).

11.6.2 In the event Developer decides to exercise the right to impose tolls and user fees as provided in this Section 11.6, the Department shall be relieved of its obligation to make Availability Payments as provided in Article 11 in an amount equal to the amount of tolling and user fees received by the Developer. All adjustments to Availability Payments for Unavailability Events and O&M Violations shall continue to be calculated in accordance with Appendix 6, and the excess thereof (if any) over the amount of any Availability Payment remaining due (if any) shall be due and payable to the Department, as liquidated damages, on the same date that each invoice and attachment is required to be delivered to Department under Section 11.2.2.2.

11.6.3 In the event Developer decides to exercise the right to impose tolls and user fees as provided in this Section 11.6, Developer shall pay to the Department [___% of] all toll revenues received each month which exceed in amount the Availability Payments that would be owing to Developer (assuming no adjustments for Unavailability Events and O&M Violations) had Developer not exercised its authority to toll set forth in this Section 11.6. Such payments to the Department shall constitute the excess toll or user fee revenue governed by Streets and Highways Code Section 143(j)(1), shall not be available to Developer or its Lenders, and shall be subject to disposition as determined by the Department and the Authority.

11.6.4 In the event Developer decides to exercise the right to impose tolls and user fees as provided in this Section 11.6, the tolling system shall be an open road, barrier-free, electronic tolling system that does not interrupt the flow of traffic on the Project or its approaches.

ARTICLE 12. LENDERS' RIGHTS

12.1 Conditions and Limitations Respecting Lenders' Rights

12.1.1 No Funding Agreement or related Security Document shall be valid or effective, and no Lender shall be entitled to the rights, benefits and protections of this Article 12 or the Direct Agreement, unless the Funding Agreement and related Security Document are in compliance with Section 15.3.

12.1.2 No Funding Agreement or Security Document relating to any Refinancing shall be valid or effective, and no Lender shall be entitled to the rights, benefits and protections of this Article 12 or the Direct Agreement, unless the Refinancing is in compliance with Section 156.4.

12.1.3 No Funding Agreement or Security Document shall be binding upon the Department in the enforcement of its rights and remedies as provided herein and by Law, and no Lender shall be entitled to the rights, benefits and protections of this Article 12 or the Direct Agreement, unless and until the Department has received a copy (certified as true and correct by the Collateral Agent) of the original thereof bearing, if applicable, the date and instrument number or book and page of recordation or filing thereof, including a copy of a specimen bond, note or other obligation (certified as true and correct by the Collateral Agent) secured by such Security Document, together with written notice of the address of the Collateral Agent to which notices may be sent. In the event of an assignment of any such Funding Agreement or Security Document, such assignment shall not be binding upon the Department unless and until the Department has received a certified copy thereof, which copy shall, if required to be recorded, bear the date and instrument number or book and page of recordation thereof, together with written notice of the assignee thereof to which notices may be sent. In the event of any change in the identity of the Collateral Agent, such change shall not be binding upon the Department unless and until the Department has received a written notice thereof signed by the replaced and substitute Collateral Agent and setting forth the address of the substitute Collateral Agent to which notices may be sent.

12.1.4 No Lender shall be entitled to the rights, benefits and protections of this Article 12 unless the Funding Agreements in favor of the Lender are secured by senior or first priority Security Documents or which would entitle the Lender to receive (a) a senior or first priority security interest upon satisfaction or payment of any senior Project Debt by the Lender or (b) any security interest that is extended in connection with Project Debt provided under U.S. Department of Transportation's Transportation Infrastructure Finance and Innovative Act (TIFIA) program, and the Department shall only enter into Direct Agreements with such Lenders. For avoidance of doubt, no Lender holding Project Debt secured by an Equity Members Security Document shall have any rights, benefits or protections under this Article 12 and the Department shall not be required to enter into a Direct Agreement with such a Lender.

12.1.5 To further evidence the rights, benefits and protections afforded to Lenders, the Department will enter into a Direct Agreement at a Lender's request.

12.2 Effect of Amendments

Subject to Article 10, while any Security Document is in effect, no agreement between the Department and Developer for the modification or amendment of this Agreement that in any way could reasonably be expected to have a material adverse effect on the rights or interests of the Lender(s) shall be binding on the Lender(s) under such Security Document without the

Collateral Agent's consent.

12.3 Notices to Collateral Agent

As long as any Project Debt secured by any Security Document shall remain outstanding, the Department shall promptly provide the Collateral Agent with a copy of any notice it sends to Developer concerning an actual or potential Developer Default, including Warning Notices.

12.4 Opportunity to Cure and Step-In

As long as any Project Debt secured by any Security Document shall remain outstanding, the following provisions shall apply with respect to any such Security Document and the related Lender or Lenders and Funding Agreements.

12.4.1 Upon the occurrence of a Developer Default and expiration of the relevant cure period, if any,, without a full or complete cure, the Department shall not terminate this Agreement until it first delivers to the Collateral Agent notice of its intent to terminate and provides the Collateral Agent a reasonable opportunity to cure such Developer Default, as provided in the Direct Agreement. The Lenders shall have the right (but not the obligation) to remedy such Developer Default or cause the same to be remedied by a Substituted Entity; and the Department shall deem such performance by or at the instigation of the Lender or Substituted Entity as if the same had been done by Developer as provided in the Direct Agreement.

12.4.2 Any curing of any Developer Default by the Collateral Agent shall not be construed as an assumption by the Collateral Agent of any obligations, covenants or agreements of Developer under the Contract Documents or any Principal Developer Documents, except that the Collateral Agent shall be responsible for the work, services and actions taken or performed by or on behalf of the Collateral Agent.

12.4.3 Except as set forth in this Agreement or in the Direct Agreement, the Department shall not be precluded from or delayed in exercising any remedies, including termination of this Agreement due to the accumulation of Noncompliance Points during the step-in period and the Department's rights to cure Developer Default at Developer's expense; provided, however, the Department shall not be entitled to exercise its right of termination due to Noncompliance Points accumulated prior to such step in.

12.5 Substituted Entities

12.5.1 Any payment to be made or action to be taken by the Collateral Agent as a prerequisite to keeping this Agreement in effect shall be deemed to have been made or taken by the Collateral Agent if such payment is made or action is taken by a Substituted Entity proposed by the Collateral Agent and reasonably approved by the Department. The Department shall have no obligation to recognize any claim to Developer's Interest by any person or entity that has acquired Developer's Interest by, through, or under any Security Document or whose acquisition shall have been derived immediately from any holder thereof, unless such person or entity is a Substituted Entity reasonably approved by the Department.

12.5.2 The Department shall have no obligation to approve a person or entity as a Substituted Entity unless the Lender demonstrates to the Department's reasonable satisfaction

that: (a) the proposed Substituted Entity and its contractors collectively have the financial resources, qualifications and experience to timely perform Developer's obligations under the Contract Documents and Key Contracts; (b) the proposed Substituted Entity and its contractors, each of their respective direct and indirect beneficial owners, any proposed key personnel, each of their respective officers and directors and each of their respective affiliates have a good and sound background and reputation (including the absence of criminal, civil or regulatory claims or actions against any such Person, and each such Person's adherence to Best Management Practice, contract terms and applicable standards regarding past or present performance on other Department projects); and (c) the proposed Substituted Entity and its contractors are in compliance with the Department's rules, regulations and adopted written policies regarding organizational conflicts of interest. The Department will approve or disapprove a proposed Substituted Entity within [60] days after it receives from the Lender a request for approval together with: (i) such information, evidence and supporting documentation concerning the identity, financial resources, qualifications, experience and potential conflicts of interest of the proposed Substituted Entity and its contractors as the Department may reasonably request; and (ii) such evidence of organization, authority, incumbency certificates, certificates regarding debarment or suspension, and other certificates, representations and warranties as the Department may reasonably request. The Department will evaluate the financial resources, qualifications, experience and potential conflicts of interest of the proposed Substituted Entity and its contractors using the same standards and criteria that it is then currently applying, or if there is no current application, then the same standards and criteria it most recently applied, to the evaluation of Persons responding to Department requests for qualifications for concession or similar agreements for comparable projects and facilities. If for any reason the Department does not act within such [60]-day period, or any extension thereof by mutual agreement of the Department and the Lender, the Department shall be deemed to approve of the Substituted Entity. Notwithstanding the foregoing, any entity that is wholly owned by a Lender or group of Lenders shall be deemed a Substituted Entity, without necessity for Department approval, upon delivery to the Department of documentation proving that the entity is duly formed, validly existing and wholly owned by the Lender, including a certificate signed by an executive officer of each Lender in favor of the Department certifying, representing and warranting such ownership.

12.5.3 A Lender may request approval of more than one Substituted Entity. A Lender may request approval at any time or times. Any approval by the Department of a Substituted Entity shall expire (unless otherwise agreed in writing by the Department) one year after the approval is issued if the Substituted Entity has not succeeded to Developer's Interest within that period of time. The Department may revoke an approval if at any time prior to succeeding to Developer's Interest the Substituted Entity ceases to be in compliance with the Department's rules and regulations regarding organizational conflicts of interest. If the Substituted Entity succeeds to Developer's Interest, then the Department shall not be entitled to terminate due to Noncompliance Points accumulated by Developer prior to its replacement by the Substituted Entity, provided the Noncompliance that resulted in such Noncompliance Points are being cured by the Substituted Entity as quickly as practicable using commercially reasonable efforts. Once all instances of Noncompliance have been cured, the Department shall cancel any Noncompliance Points accrued prior to succession.

12.6 Receivers

12.6.1 The appointment of a receiver at the behest of Developer shall be subject to the Department's prior written approval in its sole discretion. The appointment of a receiver at the behest of any Lender shall be subject to the following terms and conditions:

12.6.1.1 The Department's prior approval shall not be required for the appointment of the receiver or the selection of the Person to serve as receiver;

12.6.1.2 Whenever any Lender commences any proceeding for the appointment of a receiver, it shall serve on the Department not less than [five] days' prior written notice of the hearing for appointment and of the Lender's pleadings and briefs in the proceeding;

12.6.1.3 The Department may appear in any such proceeding to challenge the selection of the Person to serve as receiver, but waives any other right to oppose the appointment of the receiver; and

12.6.1.4 The Department may at any time seek an order for replacement of the receiver by a different receiver.

12.6.2 No receiver appointed at the behest of Developer or any Lender shall have any power or authority to replace the Lead Contractor or the Lead Operations and Maintenance Firm except by reason of default or unless the replacement is a Substituted Entity reasonably approved or deemed approved by the Department.

12.7 Other Lender Rights

12.7.1 In addition to all other rights herein granted, the Lender shall have the same rights as Developer under this Agreement with respect to curing any Developer Default. The Department shall permit the Collateral Agent and its Substituted Entity the same access to the Project and Project Right of Way as is permitted to Developer hereunder. The Department hereby consents to Developer constituting and appointing any Collateral Agent as Developer's authorized agent and attorney-in-fact with full power, in Developer's name, place and stead, and at Developer's sole cost and expense, to enter upon the Project and Project Right of Way and to perform all acts required to be performed herein and in any Principal Developer Document, but only in the event of a Developer Default or a default under the Lender's Funding Agreement or Security Document. The Department shall accept any such performance by or on behalf of the Collateral Agent as though the same had been done or performed by Developer.

12.7.2 The creating or granting of a Security Document shall not be deemed to constitute an assignment or transfer of this Agreement or Developer's Interest, nor shall any Lender, as such, be deemed to be an assignee or transferee of this Agreement or Developer's Interest so as to require such Lender, as such, to assume the performance of any of the terms, covenants or conditions on the part of Developer to be performed hereunder or thereunder. No Lender, nor any owner of Developer's Interest whose ownership shall have been acquired by, through, or under any Security Document or whose ownership shall have been derived immediately from any holder thereof, shall become liable under the provisions of this Agreement unless and until such time as the Lender or such owner becomes the owner of Developer's Interest. Upon any permitted assignment of this Agreement and Developer's Interest by a Lender or any owner of Developer's Interest whose ownership shall have been acquired by, through, or under any Security Document or whose ownership shall have been derived immediately from any holder thereof, the assignor shall be relieved of any further liability which may accrue hereunder or thereunder from and after the date of such assignment, provided that the assignee is a Substituted Entity and executes and delivers to the Department an assumption agreement as required under Section 23.1.1.2.

12.7.3 The Department consents to the exercise by Lender of its rights with respect to Developer's Interest under its Security Documents, this Article 12, the Direct Agreement or otherwise, whether by judicial proceedings or by virtue of any power contained in the Security Documents, or by any conveyance from Developer to Lender in lieu of foreclosure thereunder, or any subsequent transfer from Lender to a Substituted Entity. The foregoing does not affect the obligation to obtain approval of Persons as Substituted Entities pursuant to Section 12.5.

12.7.4 Whenever the Department or Developer obtains knowledge of any condemnation proceedings affecting the Project or Project Right of Way, it shall promptly give notice thereof to the Collateral Agent. Each Lender shall have the right to intervene and be made a party to any such condemnation proceedings, and the Department and Developer do hereby consent that each Lender may be made such a party or an intervener.

12.8 Estoppel Certificates

12.8.1 At any time and from time to time, within [15] days after written request of any Lender or proposed Lender, the Department, without charge and based upon its knowledge, shall certify by written instrument duly executed and acknowledged, to any Lender or proposed Lender as follows:

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

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

12.8.1.3 As to the existence of any Developer Default of which it has knowledge;

12.8.1.4 As to the existence of events which, by the passage of time or notice or both, would constitute a Developer Default of which it has knowledge;

12.8.1.5 As to the then accumulated amount of Noncompliance Points;

12.8.1.6 As to the existence of any Claims by the Department regarding this Agreement;

12.8.1.7 As to the Effective Date and the commencement and expiration dates of the Term;

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

12.8.1.9 Whether the Lender and its Security Documents, or the proposed Lender and its proposed Security Documents, meet the conditions and limitations set forth in Section 12.1; and

12.8.1.10 As to any other matters of fact relating to this Agreement as may be reasonably requested.

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

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

12.9 Lenders as Third-Party Beneficiaries of the Provisions of Article 12

The Lenders are expressly recognized as being intended, direct third-party beneficiaries under the provisions of this Article 12 and may enforce any rights, remedies or claims conferred, given or granted thereunder.

ARTICLE 13. EQUITY TRANSFERS AND CHANGE OF CONTROL; COMMITTED INVESTMENT REQUIREMENT

13.1 Restrictions on Equity Transfers and Changes of Control of Developer

13.1.1 No Equity Transfers by or among Equity Members shall be allowed during the Term of this Agreement, except as provided in this Section 13.1.1 and Section 13.1.6.

13.1.1.1 No Equity Transfers by or among Equity Members are allowed from the Effective Date to the second anniversary of the Substantial Completion Date.

13.1.1.2 [Two] years following the Substantial Completion Date, Equity Transfers by or among Equity Members are allowed until [six] years from the Substantial Completion Date, provided that one or more of the initial Equity Members identified in Appendix 2-H collectively maintain more than [50]% of the equity interest in Developer.

13.1.1.3 After [six] years from the Substantial Completion Date, Equity Transfers by or among Equity Members are allowed.

13.1.1.4 If any Equity Transfer pursuant to Sections 13.1.1.2 or 13.1.1.3 would result in a Change of Control, such Equity Transfer shall be subject to the Department's prior reasonable approval in writing; and, if such Equity Transfer occurs prior to or without the Department's prior reasonable approval in writing, the Equity Transfer shall be deemed to be denied. The Department shall have the right to request information from Developer related to the potential Change of Control, including information to determine the impact on the technical capabilities and financial standing of Developer and Equity Members that may result from the Change of Control.

13.1.1.5 Notwithstanding the provisions in this Section 13.1.1, Equity Transfers by an Equity Member to its Affiliates falling under clauses (a) through (c) of the definition thereof are allowed after the Effective Date. For purposes of this Section 13.1 only, an Equity Member whose role (and role of its Affiliates involved in

the Project, if any) is restricted solely to financial matters and who have no role in the performance of the Work, shall be deemed Affiliated to infrastructure funds managed by such Equity Member (or by one of its Affiliates).

13.1.2 No less than [90] days prior to the expected date of an Equity Transfer pursuant to Section 13.1, Developer shall provide the Department information regarding the proposed Equity Transfer to enable the Department to evaluate whether the Equity Transfer is permitted, including: (a) the names of the transferor and transferee; (b) the three most recent audited financial statements of the transferee (if applicable); (c) the percentage of equity interest to be transferred; (d) the expected date of the Equity Transfer; (e) details of the Affiliate relationship between the transferor and the transferee (if applicable); (f) information demonstrating whether the Equity Transfer will result in a Change of Control; and (g) experience of the proposed equity transferee on similar projects as an investor, contractor or operator.

13.1.3 Provided that Developer furnished the Department the information required under Section 13.1.2, the Department shall provide written notice to Developer no later than [30] days before the expected date of the Equity Transfer if the Department concurs that such Equity Transfer is permitted under Section 13.1.1. If the proposed Equity Transfer would result in a Change of Control, the Department shall also provide written notice to Developer within such period if the Department approves of such Equity Transfer. If the Department fails to provide its concurrence or approval, as applicable, such Equity Transfer shall not be permitted, subject to Developer's right to submit a Dispute in accordance with the Dispute Resolution Procedures.

13.1.4 Notwithstanding the foregoing, the exercise of a Lender's rights under the Security Documents to foreclose on the pledge of a shareholder, general partner or member's interest in Developer or otherwise acquire such interest by or through the exercise of a Lender's rights under the Security Documents that would otherwise result in a Change of Control shall not in and of itself constitute a Change of Control. However, any Person acquiring such interest shall be subject to the Department's prior reasonable approval in writing. Notwithstanding the foregoing, the acquisition of such interest by any entity that is wholly owned by a Lender or group of Lenders shall not require Department approval, provided that (a) the Department is furnished documentation proving that the entity is duly formed, validly existing and wholly owned by the Lender (including a certificate signed by an executive officer of each Lender in favor of the Department certifying, representing and warranting such ownership) and (b) the remaining Lenders have not exercised any rights to step in or to cure a Developer Default.

13.1.5 Any Equity Transfer or Change of Control in violation of this Section 13.1 shall be null and void *ab initio* and the Department, at its option, may declare any such attempted action to be a Developer Default.

13.1.6 Nothing in this Section 13.1 shall prejudice Developer's right to cure a Developer Default under Section 18.1.2.3.

ARTICLE 14. FINANCIAL MODEL FOR THE PROJECT

14.1 Financial Model

14.1.1 Copies of the Original Financial Model and Financial Model are attached hereto as Appendix 2-B and Appendix 2-C, respectively.

14.1.2 In the event the Department is requested to disclose the Original Financial Model or Financial Model and Developer has identified the Original Financial Model or Financial Model as confidential material, the Department will promptly notify Developer so that Developer may seek a protective order or other appropriate remedy. If it wishes to protect the materials from disclosure, Developer shall seek court protection immediately on an emergency basis. In the event that such protective order or other remedy is not timely sought or obtained by Developer, the Parties agree that the Department may and will release the Original Financial Model or Financial Model if the Department concludes that such disclosure is required by the Public Records Law.

14.2 Financial Model Updates

14.2.1 As agreed to from time to time by the Parties, the Financial Model may be updated to reflect changes in this Agreement. The Financial Model Update will become the Financial Model and will be attached to this Agreement by amendment.

14.2.2 Developer shall prepare the Financial Model Updates and shall provide the Department with each Financial Model Update and a complete set of the updated and revised assumptions, and other data that form a part of the Financial Model as updated, including updated and revised projections and calculations with respect to revenues, expenses, the payment of Project Debt and Distributions to Equity Members. The Department may require that the Financial Model Updates be audited by an independent audit firm satisfactory to the Department prior to Financial Model Update becoming a part of this Agreement. The Parties shall bear equally in the cost of the audit. The audit of the Financial Model Update may be the same one required by the Lenders.

14.2.3 The Department shall have the right at all times to gain access, on an open book basis, to the Financial Model and each Financial Model Update and the set of updated and revised assumptions and other data that form part of each such model. The Department shall have the right to challenge the validity, accuracy or reasonableness of any Financial Model Update or the related updated and revised assumptions and data. In the event of a challenge, the immediately preceding Financial Model Update that has not been challenged (or, if there has been no unchallenged Financial Model Update, the Financial Model) shall remain in effect pending the outcome of the challenge or until a new Financial Model Update is issued and not challenged.

14.2.4 In no event shall the Financial Model Formulas be changed except with the prior written agreement of both Parties.

ARTICLE 15. PROJECT FINANCING AND REFINANCING

15.1 Developer Right and Responsibility to Finance Project

15.1.1 Developer is solely responsible for obtaining and paying for all financing, at its own cost and risk and without recourse to the Department, necessary for the acquisition, design, permitting, development, construction, equipping, operation, maintenance, modification, reconstruction, rehabilitation, restoration, renewal and replacement of the Project. Developer will diligently pursue its obligations to obtain the necessary financing as described in Appendix 7 to this Agreement (List of Initial Funding Agreements and Initial Security Documents).

15.1.2 The Department will reasonably assist Developer in implementing those portions of its financial plan requiring issuance of debt by other Governmental Entities and in securing approvals from such Governmental Entities. Developer, however, is responsible for obtaining the necessary approval and implementation processes and for achieving Financial Close. The Department does not bear any risk for the failure of Developer to obtain funding from these potential sources, and such failure, if any, shall not diminish Developer's obligations under this Agreement.

15.1.3 If Developer seeks to utilize PABs or TIFIA Loans, then Developer bears all risks relating to a delay in receiving the necessary approvals and for compliance with all Federal Requirements. At Developer's written request, the Department will cooperate in good faith in order to assist Developer's efforts to obtain necessary federal approvals for PABs or TIFIA Loans.

15.1.4 Notwithstanding the foreclosure or other enforcement of any security interest created or perfected by a Financing Document, Developer shall remain liable to the Department for the payment of all sums owing to the Department under this Agreement and for the performance and observance of all of Developer's covenants and obligations under this Agreement.

15.2 No Department Responsibility for Project Debt

15.2.1 All Project Debt or other obligations issued or incurred by Developer, a Developer-Related Entity or the PABs Issuer in connection with this Agreement or the Project shall be issued or incurred only in the name of Developer, a Developer-Related Entity or the PABs Issuer. The Department shall have no obligation to pay debt service on any debt issued or incurred by Developer, a Developer-Related Entity or the PABs Issuer. The Department shall have no obligation to join in, execute or guarantee any note or other evidence of indebtedness of Developer, a Developer-Related Entity or the PABs Issuer, any other Funding Agreement or any Security Document.

15.2.2 None of the State, the Department, or any other agency, instrumentality or political subdivision of the State, and no board member, director, officer, employee, agent or representative of any of them, has any liability whatsoever for payment of the principal sum of any Project Debt, any other obligations issued or incurred by Developer, a Developer-Related Entity or the PABs Issuer in connection with this Agreement or the Project, or any interest accrued thereon or any other sum secured by or accruing under any Funding Agreement or Security Document. Except for a violation by the Department of its express obligations to Lenders set forth in Article 12 and the Direct Agreement, no Lender is entitled to seek any damages or other amounts from the Department, whether for Project Debt or any other amount. The Department's review of any Financing Documents or other Project financing documents is not a guarantee or endorsement of the Project Debt, any other obligations issued or incurred by Developer, a Developer-Related Entity or the PABs Issuer in connection with this Agreement or the Project, or any traffic and revenue study, and is not a representation, warranty or other assurance as to the ability of Developer, a Developer-Related Entity or the PABs Issuer to perform its obligations with respect to the Project Debt or any other obligations issued or incurred by Developer, a Developer-Related Entity or the PABs Issuer in connection with this Agreement or the Project, or as to the adequacy of the Milestone Payments or Availability Payments to provide for payment of the Project Debt or any other obligations issued or incurred by Developer in connection with this Agreement or the Project. The foregoing does not affect the Department's liability to Developer or a Developer-Related Entity under Article 19 for

Termination Compensation that is measured in whole or in part by outstanding Project Debt.

15.3 Mandatory Terms of Project Debt, Funding Agreements and Security Documents

Project Debt, Funding Agreements and Security Documents, including the Initial Project Debt, Initial Funding Agreements and Initial Security Documents (as listed in Appendix 7 to this Agreement) and any amendments or supplements thereto, shall comply with the following terms and conditions:

15.3.1 The Security Document may only secure Project Debt the proceeds of which are used exclusively for the purpose of (a) either acquiring, designing, permitting, building, constructing, improving, equipping, modifying, operating, maintaining, reconstructing, restoring, rehabilitating, renewing or replacing the Project, (b) making Distributions, but only from the proceeds of refinancings permitted under this Agreement, (c) Rescue Refinancing, including making protective advances intended to prevent or remedy a default under this Agreement or a Funding Agreement or both, (d) refinancing any Project Debt under subsections (a), (b), or (c) above, including paying the reasonable costs of closing the Refinancing (including Lender fees, advisor fees and the fees of legal counsel), (e) to fund reserves relating to the Project, and (f) paying closing costs with respect to Project Debt, financing costs and fees, and interest costs;

15.3.2 The Security Document may only secure Project Debt and Funding Agreements issued and executed by (a) Developer or a Developer-Related Entity, (b) its permitted successors and assigns, (c) a special purpose entity that owns Developer but no other material assets and has purposes and powers limited to the Project and the Work, (d) any special purpose subsidiary wholly owned by such entity, or (e) the PABs Issuer;

15.3.3 No Security Document or other instrument purporting to mortgage, pledge, encumber, or create a lien, charge or security interest on or against Developer's Interest shall extend to or affect the fee simple interest of the Department in the Project or the fee simple interest of the Department in the Project Right of Way or the Department's rights or interests under the Contract Documents;

15.3.4 Any number of permitted Financing Documents may be outstanding at any one time, and any Security Document permitted hereunder may secure two or more separate loans from two or more separate Lenders, provided that each such loan and the Security Documents securing the same comply with the provisions of this Article 15;

15.3.5 The Department shall not have any obligation to any Lender pursuant to this Agreement, except for the express obligations to Lenders set forth in Article 12, the Direct Agreement or any other instrument or agreement signed by the Department in favor of such Lender or Collateral Agent, provided that the Collateral Agent has notified the Department of the existence of its Security Documents;

15.3.6 Each Funding Agreement shall contain an agreement of the Lender to be bound by the provisions of Section 16.5;

15.3.7 Each Funding Agreement and Security Document shall require that the Collateral Agent deliver to the Department, concurrently with delivery to Developer or any other Person, every notice of election to sell, notice of sale or other notice required by Law or by the Security Document in connection with the exercise of remedies under the Funding Agreement or Security Document; and

15.3.8 No Financing Documents shall grant to the Lender any right to apply funds in the Handback Requirements Reserve Account or to apply proceeds from any Handback Requirements Letter of Credit to the repayment of Project Debt, to any other obligation owing the Lender or to any other use except the uses set forth in Section 5.10.3, and any provision purporting to grant such right shall be null and void; provided, however, that the foregoing shall not preclude any Lender or Substituted Entity from, following foreclosure or transfer in lieu of foreclosure, automatically succeeding to all rights, claims and interests of Developer in and to the Handback Requirements Reserve Account.

15.4 Refinancing

15.4.1 Right of Refinancing

With the prior consent of the Department in writing by the Department's Authorized Representative, which consent shall not be unreasonably delayed or withheld, Developer from time to time may consummate Refinancings under the Funding Agreements on terms and conditions acceptable to Developer and in compliance with Sections 15.4.2 and 15.4.3; provided that the Department's consent shall not be required for an Exempt Refinancing or a Rescue Refinancing so long as Developer shall: (a) notify the Department at least [30] days in advance of such Exempt Refinancing or Rescue Refinancing and (b) include in such notice facts to support the basis on which Developer believes the Refinancing constitutes an Exempt Refinancing or a Rescue Refinancing. The Department's approval of a Refinancing shall be based on confirming compliance with Sections 15.4.2 and 15.4.3 and agreement on the amount, if any, of Refinancing Gain payable to the Department upon the closing of the Refinancing. The Department shall have no obligations or liabilities in connection with any Refinancing except to deliver estoppel certificates pursuant to Section 12.8 and to allow for the inclusion of the new Lender to be added to the Direct Agreement.

15.4.2 Notice, Consent and Documentation of Refinancing

15.4.2.1 In connection with any proposed Refinancing, except a Refinancing that is exempt from approval as provided in Section 15.4.1, Developer shall as soon as practicable submit to the Department a summary outline of the proposed Refinancing, together with a schedule setting forth the various activities, each with schedule durations, to be accomplished from the commencement through the close of the proposed Refinancing. At least [35] days prior to the proposed date for closing the Refinancing, Developer shall submit to the Department draft proposed Financing Documents, and all other relevant background information regarding the proposed Refinancing, including the proposed term sheet and the financial model showing how Developer has calculated the Refinancing Gain, if any, following the procedures set forth in Appendix 11 (Calculation and Payment of Refinancing Gains), and any other matters required by Appendix 11. The Department shall have up to [20] days to review and determine whether the proposed Refinancing (a) will result in a Refinancing Gain and (b) is an Exempt Refinancing, and, if applicable, select the means for payment of its portion of the Refinancing Gain. If the Department approves the draft proposed Financing Documents for further processing, Developer shall submit final drafts of these documents, including updated versions of the background information previously submitted to the Department, for final review and approval not later than [ten] days prior to the proposed date for closing the Refinancing. Developer shall only proceed with the Refinancing upon receipt of prior written consent from the Department, which will be provided no later than [5] days after receiving the final documents. If Developer

proceeds with the Refinancing, it shall deliver to the Department copies of all signed Financing Documents in connection with the Refinancing as well as a final calculation of the Refinancing Gains not later than [ten] days after close of the Refinancing, together with a revised Financial Model reflecting the final terms of the Refinancing and showing Developer's final calculation of the Refinancing Gains. No later than [15] days after close of the Refinancing, the Department and Developer shall meet and confer to agree upon the final calculation of the Refinancing Gain, at which time Developer shall pay the Department its portion of the Refinancing Gain if the selected means of payment was a lump sum payment.

15.4.2.2 With respect to a Rescue Refinancing, at least [30] days prior to the proposed date for closing the Refinancing, Developer shall submit to the Department the proposed term sheet, the financial model and the other documents required by Appendix 11 (Calculation and Payment of Refinancing Gains) showing how Developer has calculated the Refinancing Gains following the procedures set forth in Appendix 11 or demonstrating that the Rescue Refinancing will not produce Refinancing Gains. The Department will have up to [20] days to review and dispute Developer's calculation of Refinancing Gains, provide comments and determine whether such calculations have been made in accordance with the requirements of Appendix 11.

15.4.3 Refinancing Limitations, Requirements and Conditions

Proposed Refinancings are subject to the following limitations, requirements and conditions precedent:

15.4.3.1 Other than an Exempt Refinancing and a Rescue Refinancing, no Refinancing is permitted prior to the Substantial Completion Date, except to the extent Developer demonstrates to the Department's reasonable satisfaction that (a) the Committed Investment will continue to meet or exceed the minimum amount described in Section 13.2.1, and (b) the Refinancing will produce Refinancing Gain in which the Department will be entitled to a portion in accordance with this Section 15.4.3.

15.4.3.2 If the Department renders any assistance or performs any requested activity in connection with a Refinancing apart from delivering an estoppel certificate, then concurrently with, and as a condition precedent to Developer's right to close a Refinancing, Developer shall reimburse the Department all Department's Recoverable Costs that the Department incurs in connection therewith. The Department shall deliver to Developer a written invoice and demand therefor prior to the scheduled date of closing. If for any reason the Refinancing does not close, Developer shall reimburse such Department's Recoverable Costs and such other fees, costs and expenses within [ten] days after the Department delivers to Developer a written invoice and demand therefor.

15.4.3.3 The Refinancing Gain will be calculated in accordance with Appendix 11. The Parties shall negotiate in good faith to determine the Refinancing Gain, and if the Parties fail to agree, the Dispute shall be resolved in accordance with the Dispute Resolution Procedures.

15.4.3.4 The Department will receive a payment equal to [50]% of any of Refinancing Gains received in connection with any Refinancing other than an Exempt

Refinancing. The Department will receive its portion of the Refinancing Gains in the manner provided in Appendix 11.

15.4.3.5 Developer shall bear all risks for any Refinancing that negatively affects its Equity IRR, debt coverage ratios or financial performance.

ARTICLE 16. INSURANCE, PAYMENT AND PERFORMANCE SECURITY, AND INDEMNITY

16.1 Insurance

16.1.1 Insurance Policies and Coverage

Developer shall procure and maintain, or cause to be procured or maintained, the Insurance Policies identified in this Section 16.1 and in Appendix 8 strictly in accordance with the minimum coverage requirements and terms of coverage as set forth in Appendix 8 and in this Section 16.1.

16.1.2 General Insurance Requirements

16.1.2.1 Insurers

All insurance required hereunder shall be procured from insurers that at the time coverage commences are licensed to do business in the State and have a current policyholder's management and financial size category rating of not less than "AX" according to A.M. Best's Financial Strength Rating and Financial Size Category, except as otherwise provided in Appendix 8 or approved in writing by the Department in its reasonable discretion.

16.1.2.2 Deductibles and Self-Insured Retentions

Except to the extent expressly provided otherwise in the Contract Documents, Developer or its Contractor, as the case may be, shall be responsible for paying all insurance deductibles and the Department shall have no liability for deductibles, self-insured retentions and claim amounts in excess of the required coverage. In the event that any required coverage involves a self-insured retention, the entity responsible for the self-insured retention shall have an authorized representative issue a letter to the Department, at the same time the Insurance Policy is to be procured, stating that it shall protect and defend the Department to the same extent as if an insurer provided coverage for the Department.

16.1.2.3 Primary Coverage

Each policy shall provide that the coverage thereof is primary and noncontributory with respect to all named and additional insureds. For each property policy, such policy shall provide that the coverage thereof is primary and noncontributory with respect to all insureds, as their interest may appear. Any insurance or self-insurance beyond that specified in this Agreement that is maintained by an insured or any such additional insured shall be excess of such insurance and shall not contribute with it.

16.1.2.4 Verification of Coverage

1. At each time Developer is required to initially obtain or cause to be obtained

each Insurance Policy, and thereafter not less than [30] days prior to the expiration date of each Insurance Policy, Developer shall deliver to the Department a written binder of insurance, provided that if common commercial practice in the insurance industry calls for a shorter period prior to renewal for issuance of the insurance binder documenting such renewal, then such shorter period shall apply. The binder of insurance shall be on the most recent ACORD form consistent with the required coverage, without disclaimer. The Department may, in its reasonable discretion, accept a written binder in a standard form other than the ACORD form. Each required binder must be in standard form, state the identity of all Insurers, named insureds and additional insureds, state the type and limits of coverage, deductibles and termination provisions of the policy, include as attachments all additional insured endorsements, and be signed by an authorized representative of the insurance company shown on the certificate, including its licensed agent or broker. Each required binder must be personally and manually signed by a representative or agent of the insurance company shown on the binder with a statement that he/she is an authorized representative or agent of such insurance company and is authorized to bind it to the coverage, limits and termination provisions shown on the binder. The binder must be original, state the signer's company affiliation, title and phone number, state the identity of all Insurers, named insureds and additional insureds, state the type and limits of coverage, deductibles, subrogation waiver, termination provisions of the policy and other essential policy terms, list and describe all endorsements, include as attachments all additional insured endorsements, and include a statement that coverage may not be cancelled by the insurer for any reason except for non-payment of premium, unless such statement would conflict with different cancellation requirements in Appendix 8.

2. In addition, as soon as they become available, Developer shall deliver to the Department (a) a true and complete copy of each such Insurance Policy or modification, or renewal or replacement Insurance Policy and all endorsements thereto and (b) satisfactory evidence of payment of the premium therefor.
3. If Developer has not provided the Department with the foregoing proof of coverage and payment within [ten] days after receipt of written request therefor, the Department may, upon [three] Business Days written notice to Developer, in addition to any other available remedy, without obligation and without further inquiry as to whether such insurance is actually in force, obtain such an Insurance Policy; and Developer shall reimburse the Department for the cost thereof upon demand. In addition, the Department shall have the right, without obligation or liability, to suspend all or any portion of Work, during any time that such proofs of coverage, in compliance with this Section 16.1, have not been provided.

16.1.2.5 Contractor Insurance Requirements

1. Developer shall cause each Contractor to provide insurance that complies with the terms and limits described in Appendix 8 and this Section 16.1 in circumstances where the Contractor is not covered by Developer-provided

liability insurance. Developer shall cause each such Contractor to include the additional insureds specified in the applicable insurance policies as required under Appendix 8. Developer shall cause each such Contractor to require that its insurer agree to waive any subrogation rights the insurers may have against such additional insureds. If requested by the Department, Developer shall promptly provide certificates of insurance evidencing coverage for each Contractor.

2. During the Construction Period, a Contractor Controlled Insurance Program is acceptable to satisfy all insurance requirements, provided that it otherwise meets the requirements described in Appendix 8 and this Section 16.1.

16.1.2.6 Project-Specific Insurance

All insurance coverage required to be provided by Developer, the Lead Contractor, Lead Engineering Firm and Lead Operations and Maintenance Firm shall be purchased specifically and exclusively for the Project and extend to all aspects of the Work, with coverage limits devoted solely to the Project. Insurance coverages with dedicated Project-specific limits and identified premiums are acceptable, provided that they otherwise meet all requirements described in Appendix 8 and this Section 16.1.

16.1.2.7 Endorsements and Waivers

All Insurance Policies Developer is required to provide hereunder shall contain or be endorsed to comply with all requirements specified in the Contract Documents, as well as the following provisions, provided that, for the workers' compensation and professional liability policies, only subsections (3) and (7) below shall be applicable:

1. Any failure on the part of a named insured to comply with reporting provisions or other conditions of the policies, any breach of warranty, any action or inaction of a named insured or others, or any change in ownership of all or any portion of the Project or Developer's Interest shall not affect coverage provided to the other named insureds or additional insureds (and their respective members, directors, officers, employees, agents and Project consultants);
2. The insurance shall apply separately to each named insured and additional insured against whom a claim is made or suit is brought, except with respect to the limits of the insurer's liability;
3. Each policy shall be endorsed to state that coverage cannot be canceled, voided, suspended, lapsed, modified or reduced in coverage or in limits except after [60] days' (or for non-payment of premium, [10] days') prior written notice by registered or certified mail, return receipt requested, has been given to the Department. Such endorsement shall not include any limitation of liability of the insurer for failure to provide such notice;
4. Endorsements adding additional insureds to required policies shall contain no limitations, conditions, restrictions or exceptions to coverage beyond those that apply under the policy generally, and shall state that the interests and protections of each additional insured shall not be affected by any

misrepresentation, act or omission of a named insured or any breach by a named insured of any provision in the policy which would otherwise result in forfeiture or reduction of coverage. The commercial general liability policy shall contain an endorsement providing additional insureds with coverage for "completed operations;"

5. The commercial general liability policy shall cover liability arising out of the acts or omissions of Developer's employees engaged in the Work and employees of Contractors to the extent Contractors are provided coverage under such liability policy;
6. The automobile liability insurance policy shall be endorsed as required to include Motor Carrier Act Endorsement-Hazardous Materials Clean up (MCS-90) for those Contractors who will at any time transport Hazardous Materials; and
7. Unless specified otherwise in Appendix 8, each policy shall provide coverage on an "occurrence" basis and not a "claims made" basis.

16.1.2.8 Waivers of Subrogation

The Department and Developer waive all rights against each other, against each of their agents, employees and Project consultants, and against Contractors and their respective members, directors, officers, employees, subcontractors and agents for any claims to the extent covered and paid by insurance obtained pursuant to this Section 16.1, except such rights as they may have to the proceeds of such insurance. Developer shall require all Contractors to provide similar waivers in writing each in favor of all other parties specified above. Each policy for which Developer is required to provide coverage for the additional insureds shall include a waiver of any right of subrogation against the additional insureds (and their respective members, directors, officers, employees, agents and Project consultants).

16.1.2.9 No Recourse

Except as may be inclusive within the MAP or as expressly provided otherwise in this Section 16.1, there shall be no recourse against the Department for payment of premiums or other amounts with respect to the insurance Developer is required to provide hereunder.

16.1.2.10 Support of Indemnifications

The insurance coverage Developer is required to provide hereunder shall support but is not intended to limit Developer's indemnification obligations under the Contract Documents.

16.1.2.11 Adjustments in Coverage Amounts

1. At least once every [two] years during the Term (commencing initially on the Substantial Completion Date), the Department and Developer shall review and adjust, as appropriate, the per occurrence and aggregate limits for the Insurance Policies that have stated dollar amounts set forth in Appendix 8.
2. In determining adjustments, Developer and the Department shall take into account (a) claims and loss experience for the Project, (b) the condition of the

Project, (c) the Safety Compliance and Noncompliance Points record for the Project, and (d) then prevailing Best Management Practice for insuring comparable transportation projects.

3. Any Dispute regarding insurance limit adjustments shall be resolved according to the Dispute Resolution Procedures.

16.1.2.12 Inadequacy and Unavailability of Required Coverages

If Developer demonstrates to the Department's reasonable satisfaction that it has used diligent efforts in the global insurance and reinsurance markets to procure the required insurance coverages, and if despite such diligent efforts and through no fault of Developer any of such coverages (or any of the required terms of such coverages, including policy limits) become completely unavailable or unavailable at commercially reasonable rates from insurers meeting the financial requirements set forth in Section 16.1.2.1, the Department will consider in good faith alternative insurance packages and programs that provide coverage as comparable to that contemplated in this Section 16.1 as is possible under then-existing insurance market conditions. For purposes of this Section 16.1.2.12, commercially reasonable rates are rates equal to or less than [200]% of the benchmark for the Insurance Policy at issue as described in Section 16.1.2.13. The Department will be entitled to a credit for any insurance premium savings resulting from the modification or elimination of the insurance requirements, and the Department will act as the insurer of last resort to cover the unavailable insurance policy or portion thereof. In the alternative and at the Department's sole option, the Department may terminate this Agreement if the insurance coverages required under this Agreement become completely unavailable or unavailable at commercially reasonable rates from insurers meeting the financial requirements set forth in Section 16.1.2.1, with the Termination Compensation owed to Developer being calculated pursuant to Section 19.2.6. If the required insurance coverage is available in the market, the Department's decision to approve or disapprove a variance from the requirements of this Section 16.1 shall be final and not subject to the Dispute Resolution Procedures.

16.1.2.13 Insurance Premium Benchmarking

4. Except as otherwise provided in Appendix 8, Developer shall bear the full risk of any insurance premium increases from the Effective Date until NTP 2, and shall not be entitled to any claim for relief for such increases. The Department will allocate the risk of significant increases in insurance premiums through an insurance benchmarking process as set forth in Appendix 8. In no event shall the Department participate in any insurance premium risk associated with additional or extended coverages beyond those required under Appendix 8, or changes in premiums that are not the result of market-based factors. The benchmarking process will occur at each insurance renewal period, but no less than [triennially] (unless the Parties mutually agree to a longer term), through the procedures described in Appendix 8.

16.1.2.14 Defense Costs

Unless otherwise agreed to in writing by the Department in its reasonable discretion, no defense costs shall be included within or erode the limits of coverage of any of the Insurance Policies, except that defense costs may be included within the limits of coverage of professional

liability and pollution liability policies.

16.1.2.15 Contesting Denial of Coverage

If any Insurer under an Insurance Policy described in Sections 16.1.1 and 16.1.3 denies coverage with respect to any claims reported to such Insurer, Developer and the Department shall cooperate in good faith to establish whether and to what extent to contest, and how to fund the cost of contesting, the denial of coverage; provided that if the reported claim is a matter covered by an indemnity in favor of the Department or the denial is the result of Developer's failure to comply with an insurance requirement, then Developer shall bear all costs of contesting the denial of coverage.

16.1.3 Lender Insurance Requirements

If under the terms of any Funding Agreement or Security Document Developer is obligated to, and does, carry insurance coverage with higher limits, lower deductibles or self-insured retentions, or broader coverage than required under this Agreement, Developer's provision of such insurance shall satisfy the applicable requirements of this Agreement provided such policy meets all the other applicable requirements of this Section 16.1. If Developer carries insurance coverage in addition to that required under this Agreement, then Developer shall include the Department and its respective members, directors, officers, employees, agents and Project consultants as additional insureds thereunder, under additional insured endorsements as described in Section 16.1.2.7.4, and shall provide to the Department the proofs of coverage and copy of the policy described in Section 16.1.2.4. If, however, Developer demonstrates to the Department that inclusion of such Persons as additional insureds will increase the premium, the Department shall elect either to pay the increase in premium or forego additional insured status.

16.1.4 Prosecution of Claims

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

16.1.4.2 The Department agrees to promptly notify Developer of the Department's incidents, potential claims, and matters which may give rise to a Department insurance claim, to tender to the insurer the Department's defense of the claim under such Insurance Policies, and to cooperate with Developer as necessary for Developer to fulfill its duties hereunder.

16.1.4.3 If in any instance Developer has not performed its obligations respecting insurance coverage set forth in this Agreement or is unable to enforce and collect any such insurance for failure to assert claims in accordance with the terms of the Insurance Policies or to prosecute claims diligently, then for purposes of determining Developer's liability and the limits thereon or determining reductions in compensation due from the Department to Developer on account of available insurance, Developer shall be treated as if it has elected to self-insure up to the full amount of insurance coverage which would have been available had Developer performed such obligations. Nothing in this Section 16.1.4 or elsewhere in this Section 16.1 shall be construed to treat Developer as electing to self-insure where 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 set forth in this Section 16.1.

16.1.4.4 In the event that an Insurer providing any of the Insurance Policies required by this Agreement becomes the subject of bankruptcy proceedings, becomes insolvent, or is the subject of an order or directive limiting its business activities given by any Governmental Entity, including the State Department of Insurance, Developer shall exercise best efforts to promptly and at its own cost and expense secure alternative coverage in compliance with the insurance requirements contained in this Section 16.1 so as to avoid any lapse in insurance coverage.

16.1.4.5 If in any instance Developer has not promptly performed its obligation to report to applicable insurers and process any potential insurance claim tendered by the Department, then the Department may, but is not obligated to, report the claim directly to the insurer and thereafter process the claim.

16.1.5 Application of Insurance Proceeds

All insurance proceeds received for physical property damage to the Project under any Insurance Policies required under Appendix 8, other than any business interruption insurance maintained as part of such Insurance Policies, shall be first applied to repair, reconstruct, rehabilitate, restore, renew, reinstate and replace each part or parts of the Project in respect of which such proceeds were received.

16.1.6 Property Damage Caused By Terrorism

16.1.6.1 Subject to the provisions in this Section 16.1.6, the Department shall, as of the Effective Date and continuing throughout the Term, pay for the Extra Work Costs to repair or replace tangible property damage to the Project caused by Terrorism. However, the Department shall not be responsible for tangible property damage to any tools, machinery, equipment, protective fencing, job trailers, scaffolding or other items used in the performance of the Work but not intended for permanent installation into the Project that is caused by Terrorism.

16.1.6.2 Developer shall bear the first US\$_____ of Extra Work Costs per occurrence to repair or replace tangible property damage to the Project caused by Terrorism ("**Terrorism Occurrence Deductible**"). In the event of multiple occurrences, Developer's obligation under this Section 16.1.6.2 shall not exceed US\$_____ during any one Calendar Year ("**Terrorism Annual Maximum Deductible**"). Multiple

acts of Terrorism that are part of a single effort shall be one occurrence for purposes of this Section 16.1.6.2.

16.1.6.3 The Terrorism Occurrence Deductible and Terrorism Annual Maximum Deductible shall be adjusted annually at the beginning of each Calendar Year after the Effective Date by a percentage equal to the percentage adjustment in the CPI between the CPI for October of the second immediately preceding Calendar Year and the CPI for October of the immediately preceding Calendar Year.

16.1.6.4 If tangible property damage to the Project is caused by Terrorism, Developer shall, within [5] days of such occurrence, submit to the Department written notice thereof. Within [20] days of such notice, or such extended period of time as the parties agree is reasonable under the circumstances, Developer shall submit complete written and photographic documentation supporting its Claim, and provide detailed quantification of the damages caused thereby. Such written documentation shall include detailed identification of the tangible property damage, the scope of necessary repair work, the proposed approach to performing the necessary repair work, and the projected costs of repair together with a supporting cost-loaded repair schedule. The Department shall within [20] days, or such extended period of time as the parties agree is reasonable under the circumstances, evaluate the documentation supplied by Developer and provide its provisional determination of the cost to repair the tangible property damage to the Project, which determination shall be subject to the Dispute Resolution Procedures. Developer shall comply with any Department request for explanation, elaboration or additional information reasonably necessary to facilitate the Department's analysis.

16.1.6.5 Unless specified otherwise by the Department, Developer shall comply with the requirements for performance of emergency repair work and maintenance of documents as set forth in Section 5.2.7 and other provisions of the Contract Documents.

16.2 Performance, Payment and O&M Security

16.2.1 Performance Security

16.2.1.1 Developer shall, as a condition to the commencement of Design Work and the Department's issuance of NTP 1 obtain Performance Security in an amount equal to ___ Million United States Dollars (US\$ __,000,000) securing Developer's performance of the Design Work necessary to enable Developer to obtain NTP 2. The Performance Security required by this Section 16.2.1.1 shall be released upon Developer's submission of the Performance Security required by Section 16.2.1.2.

16.2.1.2 Developer shall, as a condition to the Department's issuance of NTP 2 and the commencement of Construction Work and O&M Work, obtain Performance Security in an amount equal to _____ Million United States Dollars (US\$ __,000,000), securing Developer's performance of: (a) the D&C Work; and (b) the O&M Work performed during the Construction Period.

16.2.1.3 If the Performance Security required by this Section 16.2.1 is in the form of a surety bond, it must be in the form set forth in Appendix 15, and must be issued by a surety or an insurance company authorized to issue bonds in the State that

is rated in the top two categories by two of the three nationally recognized rating agencies or at least A- or better and “AX” or better according to A.M. Best’s Financial Strength Rating and Financial Size Category except as otherwise approved in writing by the Department in its reasonable discretion. The surety bond must include a multiple obligee rider in the form of Appendix 15-D. Developer may elect to procure the surety bond directly rather than rely upon its design-build contractor to do so as contemplated by the forms contained in Appendix 15. If Developer makes this election, a multiple obligee rider is not necessary, and the language of the bond form may be adjusted to reflect the election, but only as necessary to eliminate references to the design-build contractor and to add the Department. Subject to the Lender’s rights under the Direct Agreement, proceeds from a call on the surety bonds by Developer shall be placed in a trust account and used solely for purposes of remedying the underlying performance default and the payment of any other moneys due under [Section __ of Division __]. If the Performance Security is in the form of a letter of credit, the letter of credit must be in the form of Appendix 14, and comply with the requirements of Section 16.3. In satisfying its obligations under this Section 16.2.1, Developer may switch from a compliant surety bond to a compliant letter of credit (or vice versa) provided that Developer gives the Department [30] days prior written notice of its intention to switch and provided that at all times there remains in place a compliant surety bond or a compliant letter of credit.

16.2.2 Payment Security

16.2.2.1 Developer shall, as a condition to commencement of Design Work and the Department’s issuance of NTP 1, obtain a Payment Security in the amount of ___ Million United States Dollars (US\$___,000,000) securing Developer’s obligation to pay for labor and materials associated with the Design Work necessary to enable Developer to obtain NTP 2. The Payment Security required by this Section 16.2.2.1 shall be released upon Developer’s submission of the Payment Security required by Section 16.2.2.2.

16.2.2.2 Developer shall, as a condition to the Department’s issuance of NTP 2 and the commencement of Construction Work, obtain a Payment Security in an amount equal to ___ Million United States Dollars (US\$___,000,000), securing Developer’s obligation to pay for labor and materials in connection with the: (a) D&C Work; and (b) the O&M Work performed during the Construction Period.

16.2.2.3 If the Payment Security required by this Section 16.2.2 is issued in the form of a bond it must be issued in the form set forth in Appendix 15, and must be issued by a surety or an insurance company authorized to issue bonds in the State that is rated in the top two categories by two of the three nationally recognized rating agencies or at least A- or better and “AX” or better according to A.M. Best’s Financial Strength Rating and Financial Size Category except as otherwise approved in writing by the Department in its reasonable discretion. If the Payment Security is issued in the form of a bond it must include a multiple obligee rider in the form of Appendix 15-D. Developer may elect to procure the Payment Security directly rather than rely upon its design-build contractor to do so as contemplated by the forms contained in Appendix 15. If Developer makes this election, and the Payment Security is issued in the form of a bond, a multiple obligee rider is not necessary, and the language of the bond form may be adjusted to reflect the election, but only as necessary to eliminate references to the design-build contractor and to add the Department. If the Performance Security is in

the form of a letter of credit, the letter of credit must be in the form of Appendix 14, and comply with the requirements of Section 16.3. In satisfying its obligations under this Section 16.2.1, Developer may switch from a compliant surety bond to a compliant letter of credit (or vice versa) provided that Developer gives the Department [30] days prior written notice of its intention to switch and provided that at all times there remains in place a compliant surety bond or a compliant letter of credit.

16.2.3 Operations and Maintenance Security

16.2.3.1 Developer shall, as a condition to Substantial Completion, obtain O&M Security in an amount equal to the budgeted costs of the following [two] year's O&M Work, excluding Renewal Work and work required to meet the Handback Requirements, securing Developer's performance of the O&M Work. The amount of the O&M Security shall be adjusted biennially to reflect such budgeted costs. The O&M Security must be in the form of a bond or a letter of credit. If the O&M Security is in the form of bond, it must be in the form set forth in Appendix 15, and must be issued by a surety or an insurance company authorized to issue bonds in the State that is rated in the top two categories by two of the three nationally recognized rating agencies or at least A- or better and "AX" or better according to A.M. Best's Financial Strength Rating and Financial Size Category except as otherwise approved in writing by the Department in its reasonable discretion. The surety bond must also include a multiple obligee rider in the form of Appendix 15-D. Developer may elect to procure the surety bond directly rather than rely upon its O&M Contractor to do so as contemplated by the forms contained in Appendix 15. If Developer makes this election, a multiple obligee rider is not necessary, and the language of the bond form may be adjusted to reflect the election, but only as necessary to eliminate references to the O&M Contractor and to add the Department. The surety bond may provide for a specific expiration date, in which case Developer shall renew or replace the O&M Security no later than [14] days prior to the expiration date. If the O&M Security is in the form of a letter of credit, the letter of credit must comply with the requirements of Section 16.3 and be in the form of Appendix 14. In satisfying its obligations under this Section 16.2.3, Developer may switch from a compliant surety bond to a compliant letter of credit (or vice versa) provided that Developer gives the Department [30] days prior written notice of its intention to switch and provided that at all times there remains in place a compliant surety bond or a compliant letter of credit.

16.2.3.2 The Department reserves the right to require Developer to furnish a Payment Security securing Developer's obligation to pay for labor and materials associated with any Renewal Work. If the Department requests such a Payment Security, the Department shall reimburse Developer the premium costs of such Payment Security.

16.3 Letters of Credit

16.3.1 Any terms and conditions applicable to a particular letter of credit which Developer is required to or may provide under this Agreement are set forth in the provisions of this Agreement describing such letter of credit. Wherever in the Contract Documents Developer has the option or obligation to deliver to the Department a letter of credit, the provisions of this Section 16.3 shall apply:

16.3.2 The letter of credit shall:

16.3.2.1 Be a direct pay, standby letter of credit;

16.3.2.2 Be issued by a financial institution in the form of Appendix 14 and acceptable to the Department's Chief Financial Officer. If the bank issuing the letter of credit fails to maintain an unsecured long-term debt rating of at least ["A"] from one of the major national rating agencies, Developer shall provide a substitute letter of credit issued by a qualified financial institution within [30] days of the date that the prior financial institution failed to maintain compliance with the requirements of this Section 16.3 or otherwise furnish additional security acceptable to the Department's Chief Financial Officer as may be required from time to time to protect the interests of the Department;

16.3.2.3 Be consistent with the requirements of this Section 16.3;

16.3.2.4 Be payable immediately, conditioned only on written presentment from the Department to the issuer of a sight draft drawn on the letter of credit and a certificate stating that the Department has the right to draw under the letter of credit in the amount of the sight draft, up to the amount due to the Department, without requirement to present the original letter of credit;

16.3.2.5 Be in place for the entire period of time for which the letter of credit is providing security. Letters of credit with an expiration date shall provide for automatic renewal no later than [30] days prior to the expiration date;

16.3.2.6 Allow for multiple draws; and

16.3.2.7 Name the Department as payee. The letter of credit shall not provide for dual or multiple beneficiaries.

16.3.3 The Department shall have the right to draw on the letter of credit, without prior notice unless otherwise expressly provided in the Contract Documents with respect to the letter of credit, and use and apply the proceeds as provided in the Contract Documents for such letter of credit, if (a) Developer has failed to pay or perform when due the duty, obligation or liability under the Contract Documents for which the letter of credit is held or (b) Developer for any reason fails to deliver to the Department a new or replacement letter of credit, on the same terms, by not later than [14] days before such expiration date, unless the applicable terms of the Contract Documents expressly require no further letter of credit with respect to the duty, obligation or liability in question. For all draws conditioned on prior written notice from the Department to Developer, no such notice shall be required if it would preclude draw before the expiration date of the letter of credit. Draw on the letter of credit shall not be conditioned on prior resort to any other security of Developer.

16.3.4 Developer's sole remedy in connection with the improper presentment or payment of sight drafts drawn under letters of credit shall be to obtain from the Department a refund of the proceeds which are misapplied and the reasonable costs Developer incurs as a result of such misapplication; provided that at the time of such refund Developer increases the amount of the letter of credit to the amount (if any) then required under applicable provisions of this Agreement. Developer acknowledges that the presentment of sight drafts drawn upon a letter of credit could not under any circumstances cause Developer injury that could not be remedied by an award of money damages, and that the recovery of money damages would be an adequate remedy. Accordingly, Developer covenants (a) not to request or instruct the issuer

of any letter of credit to refrain from paying any sight draft drawn under the letter of credit and (b) not to commence or pursue any legal proceeding seeking, and Developer irrevocably waives and relinquishes any right, to enjoin, restrain, prevent, stop or delay any draw on any letter of credit.

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

16.3.6 In the event the Department's rights and interests under this Agreement are assigned, Developer shall cooperate so that concurrently with the effectiveness of such assignment, either replacement letters of credit for, or appropriate amendments to, the outstanding letters of credit shall be delivered to the assignee naming the assignee as beneficiary, at no cost to Developer.

16.4 Indemnity by Developer

16.4.1 Subject to Section 16.4.2, Developer shall release, defend, indemnify and hold harmless the Indemnified Parties from and against any and all liabilities, damages, claims, fines, causes of action, suits, judgments, investigations, legal or administrative proceedings, demands and Losses, in each case if asserted or incurred by or awarded to any third party, to the extent caused by:

16.4.1.1 The breach or alleged breach of this Agreement or any Principal Developer Document by any Developer-Related Entity;

16.4.1.2 The failure or alleged failure by any Developer-Related Entity to comply with the Governmental Approvals, any applicable Environmental Laws or other Laws (including Laws regarding Hazardous Materials management);

16.4.1.3 Any alleged patent, trademark, or copyright infringement or other allegedly improper appropriation or use by any Developer-Related Entity of trade secrets, patents, proprietary information, know-how, copyright rights, inventions or other third-party proprietary rights in performance of the Work, or arising out of any use in connection with the facility of methods, processes, designs, information, or other items furnished or communicated to the Department or another Indemnified Party pursuant to the Contract Documents; provided that this indemnity shall not apply to any infringement resulting from the Department's failure to comply with specific written instructions regarding use provided to the Department by Developer;

16.4.1.4 The actual or alleged negligence, willful misconduct or breach of applicable Law or contract of any Developer-Related Entity in or associated with performance of the Work, regardless of whether the claimed loss was caused in part by an Indemnified Party;

16.4.1.5 Any and all claims by any governmental or taxing authority claiming Taxes based on gross receipts, purchases or sales, the use of any property or income of any Developer-Related Entity with respect to any payment for the Work made to or earned by any Developer-Related Entity;

16.4.1.6 Any and all stop notices and/or liens filed in connection with the Work, including all expenses and attorneys', accountants' and expert witness fees and costs incurred in discharging any stop notice or lien, provided that the Department is not in default in payments owing to Developer with respect to such Work;

16.4.1.7 Any actual or threatened Release of Hazardous Materials by any Developer-Related Entity;

16.4.1.8 The claim or assertion by any other contractor of inconvenience, disruption, delay or loss caused by interference by any Developer-Related Entity with or hindering the progress or completion of work being performed by the other contractor, or failure of any Developer-Related Entity to cooperate reasonably with other contractors in accordance therewith;

16.4.1.9 Any dispute between Developer and a Utility Owner, or any Developer-Related Entity's performance of, or failure to perform, the obligations under any Utility Agreement;

16.4.1.10 (a) Any Developer-Related Entity's breach of or failure to perform an obligation that the Department owes to a third person, including Governmental Entities, under Law or under any agreement between the Department and a third person, where the Department has delegated performance of the obligation to Developer under the Contract Documents, or (b) the negligence, willful misconduct or breach of applicable Law or contract of any Developer-Related Entity which render the Department unable to perform or abide by an obligation that the Department owes to a third person, including Governmental Entities, under any agreement between the Department and a third person, where the agreement is previously disclosed or known to Developer;

16.4.1.11 The fraud, bad faith, arbitrary or capricious acts, willful misconduct, negligence or violation of Law or contract by any Developer-Related Entity in connection with Developer's performance of real property acquisition services under the Contract Documents;

16.4.1.12 Inverse condemnation, trespass, nuisance or similar taking of or harm to real property by reason of (a) the failure of any Developer-Related Entity to comply with Best Management Practice, requirements of the Contract Documents, O&M Plan or Governmental Approvals respecting control and mitigation of construction activities and construction impacts, (b) the intentional misconduct or negligence of any Developer-Related Entity, or (c) the actual physical entry onto or encroachment upon another's property outside the Project Right of Way by any Developer-Related Entity; or

16.4.1.13 Errors, inconsistencies or other defects in the design or construction of the Project.

16.4.2 Subject to Section 16.4.4 and the releases and disclaimers herein, including all the provisions set forth in Section 3.3.6, Developer's indemnity obligation shall not extend to any Loss to the extent caused by:

16.4.2.1 The sole negligence, reckless or willful misconduct, bad faith or fraud of such Indemnified Party;

16.4.2.2 A Relief Event, subject to Developer's obligations as provided for in this Agreement; or

16.4.2.3 The Department's material breach of any of its obligations under the Contract Documents.

16.4.3 In claims by an employee of Developer, a Contractor, anyone directly or indirectly employed by them or anyone for whose acts they may be liable, the indemnification obligation under this Section 16.4 shall not be limited by a limitation on the amount or type of damages, compensation or benefits payable by or for Developer or a Contractor under workers' compensation, disability benefit or other employee benefits laws.

16.4.4 Developer's indemnity obligations under this Section 16.4 for any joint or comparative fault of any Developer-Related Entity and the Department shall be limited to an aggregate amount of US\$____,000,000 ("**Joint and Comparative Fault Indemnification Limit**"). The remaining amounts in the Joint and Comparative Fault Indemnification Limit shall be adjusted annually at the beginning of each Calendar Year after the Effective Date by a percentage equal to the percentage adjustment in the CPI between the CPI for October of the second immediately preceding Calendar Year and the CPI for October of the immediately preceding Calendar Year.

ARTICLE 17. REPRESENTATIONS AND WARRANTIES

17.1 Developer Representations and Warranties

Developer hereby represents and warrants to the Department as follows:

17.1.1 The Original Financial Model and Financial Model Formulas (a) were prepared by or on Developer's behalf in good faith, (b) are the same financial formulas that Developer utilized and is utilizing in the Financial Model, in making its decision to enter into this Agreement and in making disclosures to potential equity investors and Lenders under the Initial Funding Agreements, and (c) as of the Effective Date are suitable for making reasonable projections.

17.1.2 The Original Financial Model and Financial Model (a) were prepared by or on Developer's behalf in good faith, (b) were audited and verified by an independent recognized model auditor prior to the Effective Date, (c) fully disclose all cost, revenue and other financial assumptions and projections that Developer has used or is using in making its decision to enter into this Agreement and in making disclosures to Lenders under the Initial Funding Agreements and (d) as of the Effective Date represent the projections that Developer believes in good faith are the most realistic and reasonable for the Project; provided, however, that such projections (i) are based upon a number of estimates and assumptions, (ii) are subject to significant business, economic and competitive uncertainties and contingencies, and (iii) accordingly are not a representation or warranty 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.

17.1.3 Developer has reviewed all applicable Laws relating to Taxes, has taken into account all requirements imposed by such Laws in preparing the Original Financial Model and Financial Model, and agrees to pay, prior to delinquency, all applicable Taxes. Further, Developer accepts sole responsibility and agrees that it shall have no right to compensation or

other claim due to its misinterpretation of such Laws or incorrect assumptions regarding the applicability of Taxes.

17.1.4 Developer and its Contractor(s) have maintained, and throughout the term of this Agreement shall maintain, all required authority, license status, professional ability, skills and capacity to perform the Work.

17.1.5 Without limiting its rights and remedies expressly granted hereunder, Developer has evaluated the constraints affecting design and construction of the Project, including the Project Right of Way as defined in the Right of Way Plans as well as the conditions of the NEPA/CEQA Approval, and has reasonable grounds for believing and does believe that the Project can be designed and built within such constraints.

17.1.6 Without limiting its rights and remedies expressly granted hereunder, Developer has, in accordance with Best Management Practice, examined the Site and surrounding locations, performed appropriate field studies and investigations of the Site, investigated and reviewed the subsurface data attached, the Hazardous Materials information, the Utility information and other available public and private records, and undertaken other activities sufficient to familiarize itself with surface conditions and subsurface conditions, including the presence of Utilities, Hazardous Materials, contaminated groundwater, archaeological, paleontological and cultural resources, and endangered and threatened species, affecting the Site or surrounding locations; and as a result of such review, inspection, examination and other activities Developer is familiar with and, subject to the provisions of this Agreement, accepts the physical requirements of the Work.

17.1.7 Developer has familiarized itself with the requirements of any and all applicable Laws, including those Laws applicable to the use of federal-aid funds, and the conditions of any required Governmental Approvals prior to entering into this Agreement.

17.1.8 Except as specifically permitted in this Agreement, Developer shall be responsible for complying with the foregoing at its sole cost and without any increase in compensation or extension of any deadlines in the Project Schedule on account of such compliance, regardless of whether such compliance would require additional time for performance or additional labor, equipment and/or materials not expressly provided for in the Contract Documents. Developer has no reason to believe that any Governmental Approval required to be obtained by Developer will not be granted in due course and, thereafter, remain in effect so as to enable the Work to proceed in accordance with the Contract Documents.

17.1.9 All Work furnished by Developer will be performed by or under the supervision of Persons who hold all necessary, valid licenses to practice in the State, by personnel who are skilled, experienced and competent in their respective trades or professions, who are professionally qualified to perform the Work in accordance with the Contract Documents and who shall assume professional responsibility for the accuracy and completeness of the Design Documents, Construction Documents and other documents prepared or checked by them.

17.1.10 Developer is a [XXXXXXXXXXXXXXXXXX] duly organized and validly existing under the laws of [XXXXXXXXXXXXXXXXXX], 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 deliver this Agreement, the Lease and the Principal Developer Documents to which Developer is a party and to perform each and all of the obligations of Developer provided for herein and therein. Developer is duly qualified to do business, and is in good standing, in the

State, and will remain in good standing throughout the Term and for as long thereafter as any obligations remain outstanding under the Contract Documents.

17.1.11 The execution, delivery and performance of this Agreement, the Lease and the Principal Developer Documents to which Developer is (or will be) a party have been (or will be) duly authorized by all necessary corporate action of Developer; each person executing this Agreement and such Principal Developer Documents on Developer's behalf has been (or at the time of execution will be) duly authorized to execute and deliver each such document on Developer's behalf; and this Agreement, the Lease and such Principal Developer Documents have been (or will be) duly executed and delivered by Developer.

17.1.12 Neither the execution and delivery by Developer of this Agreement, the Lease and the Principal Developer Documents to which Developer is (or will be) a party, nor the consummation of the transactions contemplated hereby or thereby, is (or at the time of execution will be) in conflict with or has resulted or will result in a default under or a violation of the governing instruments of Developer or any other agreements or instruments to which it is a party or by which it is bound.

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

17.1.14 There is no action, suit, proceeding, investigation or litigation pending and served on Developer which challenges Developer's authority to execute, deliver or perform, or the validity or enforceability of, this Agreement, the Lease and the Principal Developer Documents to which Developer is a party, or which challenges the authority of Developer's representative executing this Agreement, the Lease or such Principal Developer Documents; and Developer has disclosed to the Department any pending and un-served or threatened action, suit, proceeding, investigation or litigation with respect to such matters of which Developer is aware.

17.1.15 To the extent the Lead Contractor, the Lead Engineering Firm and/or the Lead Operations and Maintenance Firm is not Developer, Developer represents and warrants, as of the effective date of the relevant Key Contract, as follows: (a) each of the Lead Contractor, the Lead Engineering Firm and the Lead Operations and Maintenance Firm is duly organized, validly existing and in good standing under the laws of the state of its organization; (b) the capital stock of each of them (including options, warrants and other rights to acquire capital stock) is owned by the Persons who Developer has set forth in a written certification delivered to the Department prior to the Effective Date; (c) each of them has the power and authority to do all acts and things and execute and deliver all other documents as are required to be done, observed or performed by it in connection with its engagement by Developer; (d) each of them has all necessary expertise, qualifications, experience, competence, skills and know-how to perform the Design Work, Construction Work and the O&M Work, as applicable, of the Project in accordance with the Contract Documents; and (e) each of them is not in breach of any applicable Law that would have a material adverse effect on the Design Work, Construction Work and O&M Work, as applicable, of the Project.

17.1.16 Except as provided in Section 11.6, Developer has no authority or right to

impose any fee, toll, charge or other amount for the use of the Project.

17.2 Department Representations and Warranties

The Department hereby represents and warrants to Developer as follows:

17.2.1 The Department is a public agency, duly formed and validly existing under the laws of the State, and has full status, power, right and authority to execute, deliver and perform this Agreement, the Lease, the Direct Agreement, and the other Contract Documents to which the Department is a party and to perform each and all of the obligations of the Department provided for herein and therein.

17.2.2 This Agreement, the Lease the Direct Agreement, and the other Contract Documents to which the Department is a party have each been duly authorized by the Department, and each constitutes a legal, valid and binding obligation of the Department enforceable against the Department in accordance with its terms.

17.2.3 Each person executing this Agreement, the Lease, the Direct Agreement and the other Contract Documents to which the Department is a party has been (or at the time of execution will be) duly authorized to execute and deliver each such document on behalf of the Department; and this Agreement, the Lease, the Direct Agreement and the other Contract Documents to which the Department is a party have been (or will be) duly executed and delivered by the Department.

17.2.4 Neither the execution and delivery by the Department of this Agreement, the Lease, the Direct Agreement and the other Contract Documents to which the Department is a party nor the consummation of the transactions contemplated hereby or thereby, is (or at the time of execution will be) in conflict with or will result in a default under or violation of the Department's organizational documents or any other agreements or instruments to which it is a party or by which it is bound.

17.2.5 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, the Lease, the Direct Agreement or the other Contract Documents to which the Department is a party, or which challenges the authority of the Department official executing this Agreement, the Lease, the Direct Agreement, or the other Contract Documents to which the Department is a party; and the Department has disclosed to Developer any pending and un-served or threatened action, suit, proceeding, investigation or litigation with respect to such matters of which the Department is aware.

17.2.6 In executing this Agreement, the Department is in full compliance, and shall remain in compliance, with the PPP Law, as the PPP Law may be amended and with any successor thereto. As of the Effective Date, the Project is included in the Department's long-range transportation plan for the applicable metropolitan planning organization, all annual payments, subject to appropriation, payable under this Agreement have been included in the proposed State Transportation Improvement Program Fund Estimate submitted to the California Transportation Commission for adoption.

The Department agrees to prioritize annual payments relating to public-private partnerships, including those related to the Project, ahead of new capacity projects in the development and updating of the Department's State Transportation Improvement Program

Fund Estimate submitted to the California Transportation Commission for adoption. The Department shall, so long as this Agreement is in effect and any portion of the TIFIA Loan is outstanding, provide an annual report to Developer and USDOT regarding: (i) whether the then-current year's payments due under this Agreement have been duly appropriated; and (ii) the inclusion of subsequent year's payments due under this Agreement in the Department's State Transportation Improvement Program Fund Estimate submitted to the California Transportation Commission for adoption.

So long as the TIFIA Loan is outstanding, USDOT shall be a third-party beneficiary of this Section 17.2.6.

17.3 Survival of Representations and Warranties

The representations and warranties of Developer and the Department contained herein shall survive expiration or earlier termination of this Agreement.

ARTICLE 18 DEFAULT; SUSPENSION OF WORK

18.1 Default by Developer; Cure Periods

18.1.1 Developer Default

Developer shall be in breach of this Agreement upon the occurrence of any one or more of the following events or conditions (each a "**Developer Default**"):

18.1.1.1 Developer fails to satisfy the applicable conditions to commencement of the Design Work as set forth in Sections 4.6 within [30] days of the Effective Date;

18.1.1.2 Developer fails to begin the applicable portion of the Design Work within [10] days following the Department's issuance of NTP 1;

18.1.1.3 Developer discontinues the prosecution of the Work for a period of [30] days, or fails to resume discontinued Work as required by the Contract Documents within [30] days after the Department notifies Developer to do so;

18.1.1.4 Developer fails to perform the Work with sufficient workmen and equipment or with sufficient materials to ensure prompt completion of the Work;

18.1.1.5 Developer fails to perform the Work or any portion thereof in accordance with the Contract Documents, including conforming to applicable requirements of the Technical Volumes; provided that a failure by Developer to perform any obligation for which Noncompliance Points are assigned under the then current Appendix 5 will not constitute a Developer Default under this Section 18.1.1.5;

18.1.1.6 Developer fails to comply with applicable Governmental Approvals and Laws, including the Federal Requirements;

18.1.1.7 Developer fails to make an undisputed payment to the Department under this Agreement when due, or fails to deposit funds to any reserve or account in the amount and within the time period required by this Agreement;

18.1.1.8 There occurs any use of the Project or a material portion thereof in violation of or not otherwise contemplated by this Agreement, the Technical Volumes, Governmental Approvals or Laws (except violations of Law by Users);

18.1.1.9 Developer fails to obtain, provide and maintain any insurance, bonds, guarantees, letters of credit or other performance security as and when required under this Agreement for the benefit of relevant parties, or fails to comply with any requirement of this Agreement pertaining to the amount, qualifications, terms or coverage of the same;

18.1.1.10 Developer makes or attempts to make an assignment or transfer of all or any portion of this Agreement, the Lease, the Project or Developer's equity or economic interest therein in violation of Article 23 or there occurs an Equity Transfer or Change of Control in violation of Section 13.1;

18.1.1.11 Any representation or warranty made by Developer or any Guarantor in the Contract Documents, any guaranty or any certificate, schedule, report, instrument or other document delivered to the Department pursuant to the Contract Documents is false in any material respect or materially misleading or inaccurate in any material respect when made or omits material information when made;

18.1.1.12 Developer fails to timely observe or perform or cause to be observed or performed any other material covenant, agreement, obligation, term or condition required to be observed or performed by Developer under the Contract Documents; provided that (a) such actions shall not be considered a Developer Default if they are the direct result of the Department's breach of its obligation to make payments to Developer and (b) a failure by Developer to perform any obligation for which Noncompliance Points are assigned under the then current Appendix 5 will not constitute a Developer Default under this Section 18.1.1.12;

18.1.1.13 Developer commences a voluntary case seeking liquidation, reorganization or other relief with respect to itself or its debts under any U.S. or foreign bankruptcy, insolvency or other similar Law now or hereafter in effect, seeks the appointment of a trustee, receiver, liquidator, custodian or other similar official of it or any substantial part of its assets; becomes insolvent, or generally does not pay its debts as they become due or admits in writing its inability to pay its debts (other than: (i) debts are otherwise paid by an Equity Member; (ii) Project Debt that is otherwise paid by a financial guarantor that is a Lender to the holders thereof under its financial guaranty; or (iii) debt otherwise owing to a financial guarantor); makes an assignment for the benefit of creditors; or takes any action to authorize any of the foregoing; or any of the foregoing acts or events shall occur with respect to (a) any Equity Member with a material financial obligation owing to Developer for Committed Investment, or (b) any Guarantor of material Developer obligations owed to the Department under the Contract Documents, provided such actions shall not be considered a Developer Default if they are the sole and direct result of the Department's breach of its obligation to make payments to Developer;

18.1.1.14 An involuntary case is commenced against Developer seeking liquidation, reorganization, dissolution, winding up, a composition or arrangement with creditors, a readjustment of debts or other relief with respect to Developer or Developer's debts under any U.S. or foreign bankruptcy, insolvency or other similar

Law now or hereafter in effect; seeking the appointment of a trustee, receiver, liquidator, custodian or other similar official of Developer or any substantial part of Developer's assets; seeking the issuance of a writ of attachment, execution, or similar process; or seeking like relief, and such involuntary case shall not be contested by Developer in good faith or shall remain undismissed and unstayed for a period of [60] days; or any such involuntary case, or any of the foregoing acts or events, shall occur with respect to (a) any Equity Member with a material financial obligation owing to Developer for Committed Investment, or (b) any Guarantor of material Developer obligations owed to the Department under the Contract Documents; provided such actions shall not be considered a Developer Default if they are the sole and direct result of the Department's breach of its obligation to make payments to Developer;

18.1.1.15 Developer fails to comply with the Department's written suspension of Work order issued in accordance with Section 18.2.7 within the time reasonably allowed in such order;

18.1.1.16 Developer fails to: (a) commence the Construction Work by the Construction Commencement Deadline; or (b) achieve Substantial Completion by the Long Stop Date;

18.1.1.17 A Persistent Developer Noncompliance exists; or

18.1.1.18 There occurs any closure of the Project or any portion thereof, or any lane closure, except as expressly permitted otherwise or expressly excused under this Agreement, the Technical Provisions and the Department-approved Traffic Management Plan.

18.1.2 Initial Notice and Cure Periods

The Department shall provide written notice to Developer of the occurrence of a Developer Default. Upon receipt of the Department's notice (if required), Developer shall have the following cure periods:

18.1.2.1 For a Developer Default under Sections 18.1.1.1 through 18.1.1.3, Sections 18.1.1.6 through 18.1.1.10, and Section 18.1.1.18 a period of [30] days after Developer receives written notice from the Department of Developer Default; provided that as to a Developer Default under Section 18.1.1.8, such cure period shall not preclude or delay the Department's immediate exercise, without notice or demand, of its remedy set forth in Section 18.2.2.

18.1.2.2 For a Developer Default under Sections 18.1.1.4, 18.1.1.5, 18.1.1.11 and 18.1.1.12, a period of [30] days after Developer receives written notice from the Department of Developer Default; provided that if Developer Default is of such a nature that the cure cannot with diligence be completed within such time period and Developer has commenced meaningful steps to cure immediately after receiving the default notice, Developer shall have such additional period of time, up to a maximum cure period of [120] days, as is reasonably necessary to diligently effect cure.

18.1.2.3 For a Developer Default under Section 18.1.1.13 and Section 18.1.1.14, a period of [20] days and [60] days, respectively, after Developer receives written notice from the Department of Developer Default; provided that if the Developer

Default relates to an Equity Member or a Guarantor, Developer shall have an additional period of [30] days to effect cure of such default by providing a substitute Equity Member or Guarantor reasonably acceptable to the Department or by providing a letter of credit or other form of security reasonably acceptable to the Department in the amount of, as the case may be, (a) the Equity Member's financial obligation for Committed Investment to or for the benefit of Developer, or (b) the Guarantor's specified sum or specified maximum liability under its guaranty, or if none is specified, the reasonably estimated maximum liability of the Guarantor. Notwithstanding the foregoing, if such default relates to an Equity Member who holds a Controlling Interest in Developer, Developer shall cure such default only by providing a letter of credit or other form of security reasonably acceptable to the Department in the amount of such Equity Member's financial obligation for Committed Investment to or for the benefit of Developer.

18.1.2.4 For a Developer Default under Sections 18.1.1.15 through 18.1.1.17, there is no cure period.

18.2 Department Remedies for Developer Default

18.2.1 Termination

In the event of any Developer Default that is or becomes a Default Termination Event set forth in Section 19.3.1, the Department may terminate this Agreement and thereupon enter and take possession and control of the Project under Section 19.5, which termination shall, among other things, automatically terminate all of Developer's rights under Article 2 of this Agreement and under the Lease, whereupon Developer shall take all action required to be taken by Developer under Section 19.5.

18.2.2 Immediate Department Entry and Cure of Wrongful Use

Without notice and without awaiting lapse of the period to cure, in the event of any Developer Default under Section 18.1.1.8 (use of the Project in violation of the Contract Documents) or Section 18.1.1.18 (closure of the Project or lane closure in violation of the Contract Documents), the Department may enter and take control of the Project to restore the permitted uses and reopen and continue operations for the benefit of Developer and the public, until such time as Developer or the Lenders cure such breach, or the Department terminates this Agreement. Developer shall pay to the Department on demand the Department's Recoverable Costs in connection with such action. So long as the Department undertakes such action in good faith, even if under a mistaken belief in the occurrence of such a Developer Default, such action shall not be deemed unlawful or a breach of this Agreement, shall not expose the Department to any liability to Developer and shall not entitle Developer to any other remedy, except for the Department's gross negligence, recklessness, willful misconduct or bad faith, it being acknowledged that the Department has a high priority, paramount public interest in providing and maintaining the authorized uses of the Project and continuous public access to the Project. Immediately following cure of such Developer Default, as determined by the Department, acting reasonably, the Department shall relinquish control and possession of the Project back to Developer.

18.2.3 Remedies for Failure to Meet Safety Standards or Perform Safety Compliance

18.2.3.1 If at any time Developer, or its Surety under payment and performance bonds, fails to meet any Safety Standard or timely perform Safety Compliance or the Department and Developer cannot reach an agreement regarding the interpretation or application of a Safety Standard or the valid issuance of a Safety Compliance Order within a period of time acceptable to the Department, acting reasonably, the Department shall have the absolute right and entitlement to undertake or direct Developer to undertake any work required to ensure implementation of and compliance with Safety Standards as interpreted or applied by the Department or with the Safety Compliance Order.

18.2.3.2 To the extent that any work done pursuant to Section 18.2.3.1 is undertaken by the Department and is reasonably necessary to comply with Safety Standards or perform validly issued Safety Compliance Orders, Developer shall pay to the Department on demand the Department's Recoverable Costs in connection with such work, and the Department (whether it undertakes the work or has directed Developer to undertake the work) shall have no obligation or liability to compensate Developer for any Losses it suffers or incurs as a result thereof, except as a result of the Department's gross negligence, recklessness, willful misconduct or bad faith.

18.2.3.3 To the extent that any work done pursuant to Section 18.2.3.1 is undertaken by the Department and is not reasonably necessary to comply with Safety Standards or perform validly issued Safety Compliance Orders, the Department shall compensate Developer only for Losses it suffers or incurs as a direct result thereof.

18.2.3.4 Notwithstanding anything to the contrary contained in this Agreement, if, in the good faith judgment of the Department, Developer has failed to meet any Safety Standards or perform Safety Compliance and the failure results in an Emergency or danger to persons or property, and if Developer is not then diligently taking all necessary steps to cure or deal with such Emergency or danger, the Department may (but is not obligated to), without notice and without awaiting lapse of the period to cure any breach, and in addition and without prejudice to its other remedies, (a) immediately take such action as may be reasonably necessary to rectify the Emergency or danger, in which event Developer shall pay to the Department on demand the cost of such action, including the Department's Recoverable Costs, or (b) suspend the Work and/or close or cause to be closed any and all portions of the Project affected by the Emergency or danger. So long as the Department undertakes such action in good faith, even if under a mistaken belief in the occurrence of such failure or existence of an Emergency or danger as a result thereof, such action shall not be deemed unlawful or a breach, shall not expose the Department to any liability to Developer, except if the Department's action constitutes gross negligence, recklessness, willful misconduct or bad faith, and shall not entitle Developer to any other remedy, it being acknowledged that the Department has a high priority, paramount public interest in protecting public and worker safety at the Project and adjacent and connecting areas. The Department's good faith determination of the existence of such a failure, Emergency or danger shall be deemed conclusive in the absence of clear and convincing evidence to the contrary. Immediately following

rectification of such Emergency or danger, as determined by the Department, acting reasonably, the Department shall allow the Work to continue or such portions of the Project to reopen, as the case may be.

18.2.4 Department Step-in Rights

Upon the occurrence of a Developer Default and expiration, without full and complete cure, of the cure period, if any, available to Developer, without waiving or releasing Developer from any obligations, but subject to the prior rights of the Lenders under this Agreement and the Direct Agreement, the Department shall have the right, but not the obligation, to pay and perform all or any portion of Developer's obligations and the Work that relates to Developer Default, on and subject to the following terms and conditions.

18.2.4.1 The Department may, to the extent necessary to cure the Developer Default:

1. Perform or attempt to perform, or caused to be performed, such Work;
2. Employ security guards and other safeguards to protect the Project;
3. Spend such sums as the Department deems necessary and reasonable to employ and pay such architects, engineers, consultants and contractors and obtain materials and equipment as may be required for the purpose of completing the Work;
4. Draw on and use proceeds from the Payment Security and Performance Security and any other available security to pay such sums;
5. Execute all applications, certificates and other documents as may be required for completing the Work;
6. Make decisions respecting, assume control over and continue Work as the Department determines appropriate;
7. Modify or terminate any contractual arrangements, without liability for termination fees, costs or other charges;
8. Meet with, coordinate with, direct and instruct Contractors, process invoices and applications for payment from Contractors, pay Contractors, and resolve claims of Contractors, and for this purpose Developer irrevocably appoints the Department as its attorney-in-fact with full power and authority to act for and bind Developer in its place and stead;
9. Take any and all other actions which it may in its sole discretion consider necessary to complete the Work; and
10. Prosecute and defend any action or proceeding incident to the Work.

18.2.4.2 Developer shall reimburse the Department, on written demand, the Department's Recoverable Costs in connection with the performance of any act or Work authorized by this Section 18.2.4.

18.2.4.3 For the purpose of carrying out the Department's step-in rights under this Section 18.2.4, the Department shall have the right to take exclusive possession of the Project and the Project ROW and to suspend or revoke Developer's right to enter the same, and the Department is also hereby granted a perpetual, non-rescindable right of entry for the Department and its authorized representatives, contractors, subcontractors, vendors and employees to enter onto any other construction, lay down, staging, borrow and similar areas, exercisable at any time or times without notice. Neither the Department nor any of its authorized representatives, contractors, subcontractors, vendor and employees shall be liable to Developer in any manner for any inconvenience or disturbance arising out of any such exclusion of Developer from the Project or the Project Right of Way or its entry onto any construction lay down, staging, borrow and similar areas in order to perform under this Section 18.2.4, unless caused by the gross negligence, recklessness, willful misconduct or bad faith of such Person. If any Person exercises any right to pay or perform under this Section 18.2.4, it nevertheless shall have no liability to Developer for the sufficiency or adequacy of any such payment or performance, or for the manner or quality of design, construction, operation or maintenance, unless caused by the gross negligence, recklessness, willful misconduct or bad faith of such Person.

18.2.4.4 The Department's rights under this Section 18.2.4 are subject to the right of any Surety under payment and performance bonds to assume performance and completion of all bonded Work.

18.2.4.5 The Department's rights under this Section 18.2.4 are subject to the exercise of the rights by the Collateral Agent under the senior Security Documents, provided that the Collateral Agent complies with its obligations under the Direct Agreement.

18.2.4.6 Without waiving any of its rights and remedies under this Agreement, once the Department has exercised its rights under this Section 18.2.4, the Department will comply with the applicable provisions of the Direct Agreement after the Department has completed performance of the obligations or the work that was the responsibility of Developer to perform.

18.2.5 Damages; Offset

18.2.5.1 Subject to Section 18.2.11, the Department shall be entitled to recover any and all damages available under Law on account of the occurrence of the Developer Default, including loss of any compensation due the Department under this Agreement proximately caused by the Developer Default, together with interest thereon from and after the date any amount becomes due to the Department until paid at the Late Payment Rate. Developer shall be liable for any damages that accrue after the occurrence of the Developer Default, regardless of whether the Developer Default is subsequently cured, which shall be due and owing after the expiration of all cure periods available to Developer and Lenders under the Contract Documents.

18.2.5.2 In the case of a termination for Developer Default, the Department may deduct and offset any damages owing to it under the Contract Documents from and against any amounts the Department may owe to Developer. If the amount of damages owing the Department is not liquidated or known with certainty at the time a payment is due from the Department to Developer with respect to such termination for

a Developer Default, the Department may deduct and offset the amount it reasonably estimates will be due, subject to the Department's obligation to adjust such deduction or offset when the amount of damages owing the Department is liquidated or becomes known with certainty.

18.2.6 Persistent Developer Noncompliance

18.2.6.1 Developer recognizes and acknowledges that a pattern or practice of continuing, repeated or numerous instances of Noncompliance, whether such instances of Noncompliance are cured or not, will undermine the confidence and trust essential to the success of the public-private arrangement under this Agreement and will have a material, cumulative adverse impact on the value of this Agreement to the Department. Developer acknowledges and agrees that measures for determining the existence of such a pattern or practice described in the definition of Persistent Developer Noncompliance and this Section 18.2.6 are a fair and appropriate objective basis to conclude that such a pattern or practice will continue.

18.2.6.2 A Persistent Developer Noncompliance under clause (a) of the definition thereof, regarding accumulated Noncompliance Points, shall be deemed to exist if:

1. The cumulative number of Noncompliance Points assessed during any consecutive [365]-day period (including any period prior to the Substantial Completion Date) equals or exceeds [100]; or
2. The cumulative number of Noncompliance Points assessed during any consecutive [1095]-day period (including any period prior to the Substantial Completion Date) equals or exceeds [200].

18.2.6.3 A Persistent Developer Noncompliance under clause (b) of the definition thereof shall be deemed to exist if:

1. The cumulative number of instances of Noncompliance, cured or uncured, during any consecutive [365]-day period equals or exceeds [100]; or
2. The cumulative number of instances of Noncompliance, cured or uncured, during any consecutive [1095]-day period equals or exceeds [250].

18.2.7 Suspension of Work

18.2.7.1 Subject to the rights of the Lenders as provided in this Agreement and the Direct Agreement, the Department shall have the right and authority to suspend, in whole or in part, the Work by written order to Developer for Developer's failure to cure and correct, within the applicable cure period available to Developer (if any), the following:

1. Failure to perform the Work in compliance with the Contract Documents;
2. Failure to comply with any Law or Governmental Approval (including failure to handle, preserve and protect archaeological, paleontological or historic resources, or failure to handle Hazardous Materials, in accordance with

applicable Laws and Governmental Approvals);

3. The existence of conditions unsafe for workers, other Project personnel or the general public, including failures to comply with Safety Standards or perform Safety Compliance as set forth in Section 18.2.3;
4. Failure to provide proof of required insurance coverage as set forth in Section 16.1.2.4 and renew the Payment Security, Performance Security, and O&M Security required under Section 16.2; and
5. Failure to carry out and comply with orders given by the Department.

The Department shall have no liability to Developer, and Developer shall have no right to Extra Work Costs, Delay Costs, time extensions or other relief for the duration of any suspension under this Section 18.2.7.1.

18.2.7.2 The Department shall have the right and authority to suspend, in whole or in part, the Work for reasons other than set forth in Section 18.2.7.1. If the Department orders suspension of Work under this Section 18.2.7.2 that is not the result of the negligence, willful misconduct, or breach of applicable Law or contract by Developer or any Developer-Related Entity, Developer shall be entitled to submit a Claim for Extra Work Costs, Delay Costs, time extensions or other relief as permitted under the Contract Documents.

18.2.7.3 For any suspension order issued under this Section 18.2.7, the Department will provide Developer the reason for such suspension, and Developer shall comply with such suspension order in accordance with [Section ___ of Division ___].

18.2.8 Warning Notices

18.2.8.1 Without prejudice to any other right or remedy available to the Department, the Department may deliver a written notice (a “**Warning Notice**”) to Developer, with a copy to the Collateral Agent, stating explicitly that it is a “Warning Notice” and stating in reasonable detail the matter or matters giving rise to the notice and, if applicable, amounts due from Developer, and reminding Developer of the implications of such notice, whenever there occurs a Developer Default.

18.2.8.2 Subject to the Lender’s right to cure under the Direct Agreement, the Department may issue a Warning Notice at the same time it delivers a notice of Developer Default. If the Department issues a Warning Notice for any Developer Default after it issues a notice of such Developer Default, then the remaining cure period available to Developer, if any, for such Developer Default before the Department may terminate this Agreement on account of such Developer Default shall be extended by the time period between the date the notice of such Developer Default was issued and the date the Warning Notice is issued. However, this shall not affect the time when the Department may exercise any other remedy respecting such Developer Default.

18.2.8.3 Along with the Warning Notice and without prejudice to any other right or remedy available to the Department, the Department may request that Developer prepare and submit within the applicable cure period a remedial plan

that shall set forth a schedule and specific actions to be taken by Developer to cure the Developer Default and reduce the likelihood of such defaults occurring in the future. Such actions may include improvements to Developer's quality management practices, plans and procedures, revising and restating management plans, changes in organizational and management structure, increased monitoring and inspections, changes in Key Personnel and other important personnel, and replacement of Contractors.

18.2.9 Other Rights and Remedies

18.2.9.1 In accordance with [Section ___ of Division ___], Developer shall be subject to suspension or revocation of its Certificate of Qualification for failure to timely perform and complete the Work by a Completion Deadline.

18.2.9.2 In the instance of a Developer Default, the Department expressly reserves any and all existing rights to pursue administrative or other remedies as to any entity's or Person's respective continuing or future fitness, eligibility, qualification, certification or responsibility status for participation in future Department contracts.

18.2.10 Cumulative, Non-Exclusive Remedies

Subject to Section 18.2.11, and except as specifically provided otherwise in this Agreement, each right and remedy of the Department hereunder shall be cumulative and shall be in addition to every other right or remedy provided herein or now or hereafter existing under Law, and the exercise or beginning of the exercise by the Department of any one or more of any of such rights or remedies shall not preclude the simultaneous or later exercise by the Department of any or all other such rights or remedies.

18.2.11 Limitation on Developer's Liability for Certain Damages

18.2.11.1 Notwithstanding any other provision of the Contract Documents and except as set forth in Section 18.2.11.2, in no event shall Developer be liable to the Department for punitive damages or indirect, incidental or consequential damages, whether arising out of breach of this Agreement or the Lease by Developer, tort (including negligence) or any other theory of liability, and the Department releases Developer from any such liability.

18.2.11.2 The foregoing limitation on Developer's liability shall not apply to or limit the Department's right of recovery respecting the following:

1. Losses (including defense costs) to the extent (a) covered by the proceeds of insurance required to be carried pursuant to Section 16.1, (b) covered by the proceeds of insurance actually carried by or insuring Developer under policies solely with respect to the Project and the Work, regardless of whether required to be carried pursuant to Section 16.1, or (c) Developer is deemed to have self-insured the Loss pursuant to Section 16.1.4.3;
2. Losses arising out of fraud, criminal conduct, intentional misconduct, recklessness, gross negligence or bad faith on the part of any Developer-Related Entity;

3. Losses arising out of Releases of Hazardous Materials by any Developer-Related Entity;
4. Amounts Developer may owe or be obligated to reimburse the Department under the express provisions of the Contract Documents, including the Department's Recoverable Costs; and
5. Interest, late charges, fees, transaction fees and charges, penalties and similar charges that the Contract Documents expressly state are due from Developer to the Department.

18.3 Default by the Department; Cure Periods

18.3.1 Department Default

The Department shall be in breach of this Agreement upon the occurrence of any one or more of the following events or conditions (each a "**Department Default**"):

18.3.1.1 The Department fails to make any payment due Developer under this Agreement when due; provided that such payment is not subject to a Dispute;

18.3.1.2 Any representation or warranty made by the Department under Section 17.2 of this Agreement is false or materially misleading or inaccurate when made in any material respect or omits material information when made; or

18.3.1.3 The Department or any other Governmental Entity confiscates, sequesters, condemns or appropriates the Project or any material part thereof, or Developer's Interest or any material part thereof, excluding a Termination for Convenience or any other exercise of a right of termination set forth in this Agreement.

18.3.2 Cure Periods

The Department shall have the following cure periods with respect to the following Department Defaults:

18.3.2.1 For a Department Default under Sections 18.3.1.1, a period of [60] days after Developer delivers to the Department written notice of the Department Default.

18.3.2.2 For a Department Default under Sections 18.3.1.2 or 18.3.1.3, a period of [30] days after Developer delivers to the Department written notice of the Department Default; provided that if the Department Default is of such a nature that the cure cannot with diligence be completed within such time period and the Department has commenced meaningful steps to cure immediately after receiving the default notice, the Department shall have such additional period of time, up to a maximum cure period of [180] days, as is reasonably necessary to diligently effect cure.

18.4 Developer Remedies for Department Default

18.4.1 Termination

Subject to Section 18.4.3, Developer will have the right to terminate this Agreement and recover termination damages as more particularly set forth in, and subject to the terms and conditions of, Section 19.4.

18.4.2 Damages and Other Remedies

18.4.2.1 Subject to Section 18.4.3, Developer shall have and may exercise the following remedies upon the occurrence of a Department Default and expiration, without cure, of the applicable cure period:

1. If Developer does not terminate this Agreement, Developer may submit a Claim for Extra Work Costs, Delay Costs, time extensions and other compensation permitted under Article 9; and
2. Developer may exercise any other rights and remedies available under this Agreement or available at Law.

18.4.2.2 Subject to Section 18.4.3 and except as specifically provided otherwise in this Agreement, each right and remedy of Developer shall be cumulative and shall be in addition to every other right or remedy provided by this Agreement or now or hereafter existing under Law, and the exercise or beginning of the exercise by Developer of any one or more of any of such rights or remedies shall not preclude the simultaneous or later exercise by Developer of any or all other such rights or remedies.

18.4.3 Limitations on Remedies

18.4.3.1 Notwithstanding any other provision of the Contract Documents and except as provided in Section 18.4.3.2, in no event shall the Department be liable to Developer for punitive damages or indirect or incidental consequential damages, whether arising out of a breach of this Agreement or the Lease by the Department, tort (including negligence) or any other theory of liability, and Developer releases the Department from any such liability.

18.4.3.2 The foregoing limitation on the Department's liability for damages shall not apply to or limit Developer's right of recovery respecting the following:

1. Losses (including defense costs) to the extent covered by the proceeds of insurance or for which the Department has self-insured;
2. Losses arising out of fraud, criminal conduct, intentional misconduct, recklessness or bad faith on the part of the Department;
3. Losses arising out of Department Releases of Hazardous Materials;
4. Amounts the Department may owe or be obligated to reimburse to Developer under the express provisions of the Contract Documents; or

5. Interest, late charges, fees, transaction fees and charges, penalties and similar charges that the Contract Documents expressly state are due from the Department to Developer.

18.4.3.3 The measure of compensation available to Developer as set forth in this Agreement for an event of termination shall constitute the sole and exclusive monetary relief and damages available to Developer arising out of or relating to such event; and Developer irrevocably waives and releases any right to any other or additional damages or compensation. No award of compensation or damages shall be duplicative.

ARTICLE 19. TERMINATION

19.1 Termination for Convenience

19.1.1 The Department may terminate this Agreement and the Lease in whole if the Secretary determines that a termination is in the Department's best interest (a "**Termination for Convenience**"). The Secretary will deliver to Developer a written Notice of Termination for Convenience specifying the election to terminate and its effective date. Termination of this Agreement and the Lease shall not relieve Developer or any Guarantor or Surety of its obligation for any claims arising from the Work performed prior to such termination.

19.1.2 In the event of a Termination for Convenience, the Department shall pay compensation to Developer (or to the Collateral Agent as provided in the Direct Agreement) in an amount equal to either (i) the Backward Looking Termination for Convenience Amount, or (ii) the Forward Looking Termination for Convenience Amount, as selected by Developer in Appendix 2-J. Any Dispute arising out of the determination of such compensation shall be resolved according to the Dispute Resolution Procedures.

19.1.3 The Backward Looking Termination for Convenience Amount shall be calculated as follows (calculated at the Early Termination Date and without double-counting):

1. The Project Debt Termination Amount; plus
2. An amount which, upon the date of payment by the Department, is added to all Distributions described in clause (a) of the definition thereof actually paid to Equity Members or their Affiliates on or before the date of payment by the Department, gives an internal rate of return on Committed Investment described in clause (a) of the definition thereof (taking into account the timing of such Distributions and Committed Investment), equal to the Equity IRR; plus
3. Redundancy Payments for employees of Developer that have been or will be reasonably incurred by Developer as a direct result of termination of this Agreement; plus
4. Subject to Section 18.4.3, any Losses that have been incurred and will be incurred by Developer as a direct result of termination of this Agreement arising out of the termination of contracts with Contractors, including reasonable and documented out-of-pocket costs to demobilize, but only to

the extent that (a) such Losses are incurred in connection with the Project and in respect of the provision of services or the completion of work required to be provided by Developer, (b) such Losses are incurred under arrangements and/or agreements that are consistent with terms that have been entered into in the ordinary course of business and on reasonable commercial terms, and (c) Developer and the relevant Contractors have each used reasonable efforts to mitigate the Losses;

minus

5. All amounts standing to the credit of any bank account held by or on behalf of Developer as of the Early Termination Date if and to the extent such amounts are available to pay the items set forth in subsections (1) through (4) above.

19.1.4 The Forward Looking Termination for Convenience Amount shall be calculated as follows (calculated at the Early Termination Date and without double-counting):

1. The Project Debt Termination Amount; plus
2. The amount of all Distributions described in clause (a) of the definition thereof to Equity Members or their Affiliates anticipated in the Financial Model to be paid between the Early Termination Date until the date of expiration of the Term, each amount discounted back at the Equity IRR from the date on which it is shown to be payable in the Financial Model to the Early Termination Date; plus
3. Redundancy Payments for employees of Developer that have been or will be reasonably incurred by Developer as a direct result of termination of this Agreement; plus
4. Subject to Section 18.4.3, any Losses that have been incurred and will be incurred by Developer as a direct result of termination of this Agreement arising out of the termination of contracts with Contractors, including reasonable and documented out-of-pocket costs to demobilize, but only to the extent that (a) such Losses are incurred in connection with the Project and in respect of the provision of services or the completion of work required to be provided by Developer, (b) such Losses are incurred under arrangements and/or agreements that are consistent with terms that have been entered into in the ordinary course of business and on reasonable commercial terms, and (c) Developer and the relevant Contractors have each used its reasonable efforts to mitigate the Losses;

minus

5. All amounts standing to the credit of any bank account held by or on behalf of Developer as of the Early Termination Date if and to the extent such amounts are available to pay the items set forth in subsections (1) through (4) above.

19.2 Termination for Extended Relief Events

19.2.1 Notice of Conditional Election to Terminate

Either Party may deliver to the other Party written notice of its conditional election to terminate this Agreement and the Lease based on Relief Events (other than a Department Default, which is governed by Section 19.4.1) under the following circumstances:

19.2.1.1 One or more of the following have occurred:

1. A Relief Event has occurred during the Construction Period and the resulting Relief Event Delays exceed **[270]** days in the aggregate;
2. A Relief Event has occurred during the Operating Period and the period of time during which the Department is required to make payments as provided in Section 9.2.4 has expired; or
3. (a) A Relief Event has occurred, (b) the Department is not required to make a payment under Sections 9.2.2 or 9.2.4, as applicable, (c) the abovementioned notice is delivered after the Substantial Completion Date; (d) as a direct result of the Relief Event all or substantially all of the Segments have become and remain inoperable for a period of **[270]** days or more, and (e) such suspension of operations is not attributable to another concurrent delay;

and

19.2.1.2 Developer could not have mitigated or cured such result through the exercise of diligent efforts; and

19.2.1.3 Such result is continuing at the time of delivery of the written notice; and

19.2.1.4 The written notice sets forth in reasonable detail the Relief Event, a description of the direct result and its duration, and the notifying Party's intent to terminate this Agreement.

19.2.1.5 Notwithstanding the foregoing, if following the occurrence of any Relief Event that results in damage or partial destruction of the Project:

1. The conditions listed in Sections 19.2.1.1 through 19.2.1.4 are satisfied;
2. Insurance proceeds are available to fund work required to remedy the effects of the Relief Event; and
3. The Parties agree to a restoration plan in respect of such work required to remedy the effect of the Relief Event; then

the Parties agree that neither of them shall have the right to elect to terminate this Agreement or the Lease pursuant to this Section 19.2.1.

19.2.2 Developer Options Upon Department Notice

If the Department gives written notice of conditional election to terminate, Developer shall have the option either to accept such notice or to continue this Agreement and the Lease in effect by delivering to the Department written notice of Developer's choice not later than [30] days after the Department delivers its notice. If Developer does not deliver such written notice within such [30]-day period, then it shall be conclusively deemed to have accepted the Department's election to terminate this Agreement and the Lease. If Developer delivers timely written notice choosing to continue this Agreement and the Lease in effect, then:

19.2.2.1 Except as provided in Article 9 and Article 10, the Department shall have no obligation to compensate Developer for any other costs of restoration and repair, for any loss of Availability Payments or for any other Extra Work Costs or Delay Costs arising out of the Relief Event;

19.2.2.2 If the Relief Event occurred prior to the Substantial Completion Date and resulted in a Delay, Developer shall be entitled to an extension of the applicable Completion Deadline in accordance with the Contract Documents; and

19.2.2.3 This Agreement and the Lease shall continue in full force and effect and the Department's election to terminate shall be deemed withdrawn.

19.2.3 Department Options Upon Developer Notice

If Developer gives written notice of conditional election to terminate, including an estimate (with supporting documentation) of the compensation that would be paid or reimbursed to Developer under Section 19.2.3.1, the Department shall have the option either: (a) to accept such notice, or (b) to continue this Agreement and the Lease in effect, provided that the Department in its reasonable discretion determines that the Project can be completed or re-opened, as applicable, on a commercially reasonable basis, in each case by delivering to Developer written notice of the Department's choice not later than [30] days after Developer delivers its notice. If the Department does not deliver such written notice within such [30]-day period, then it shall be conclusively deemed to have accepted Developer's election to terminate this Agreement and the Lease. If the Department delivers timely written notice choosing to continue this Agreement and the Lease in effect, then:

19.2.3.1 The Department shall be obligated to pay or reimburse Developer an amount equal to (without double-counting):

1. The Extra Work Costs to repair and restore any physical damage or destruction to the Project and Delay Costs, if any, directly caused by the Relief Event which are incurred after the date Developer delivers its written notice of conditional election to terminate; plus
2. Compensation calculated and paid in accordance with Section 9.2, modified as follows:
 - (a) If Developer delivers its written notice of conditional election to terminate prior to Substantial Completion, then: (i) the [270] day limitation in Section 9.2.2.4 shall not apply; and (ii) with respect to Relief Event Delays in excess of [270] days, then the amounts calculated under Sections

9.2.2.2.1(b)(i) and 9.2.2.2.1(b)(ii) shall be increased to include the prorated operation and maintenance expenses incurred on each such day, provided that Developer uses reasonable commercial efforts to mitigate such costs; or

- (b) If Developer delivers its written notice of conditional election to terminate after Substantial Completion due to a Closure of one or more Segments caused by a Relief Event under clause (a) or (l) of the definition thereof, then beginning on the [271st] day and continuing for as long as such Closure persists, an Hourly Unavailability Factor of [0.2] shall apply for purposes of calculating the Hourly Unavailability Adjustments for these Hours as described in Appendix 6, except that in no event shall such Hourly Unavailability Adjustments solely cause the prorated Availability Payments to fall below the lesser of: (i) the prorated amounts of debt service (except the repayment of principal scheduled to be funded by Milestone Payments which have been delayed by a Relief Event Delay) and operations and maintenance expenses scheduled to be paid as shown in the Financial Model for the time periods during which such Closure persists after the initial [270] days; or (ii) the actual prorated amounts of debt service (except the repayment of principal scheduled to be funded by Milestone Payments which have been delayed by a Relief Event Delay) and operations and maintenance expenses incurred (provided that Developer uses reasonable commercial efforts to mitigate such costs) during the time period during which such Closure persists after the initial [270] days. Notwithstanding the foregoing, in no event shall the calculations in this clause (b) of Section 19.2.3.1.2 exceed the prorated Availability Payment which would have been earned if such Closure had not persisted for more than [270] days;

minus

3. The sum of (a) the greatest of the proceeds of insurance (including casualty insurance and business interruption insurance) that is required to be carried pursuant to Section 16.1 and provides coverage to pay, reimburse or provide for any of the foregoing costs and losses or the proceeds of insurance (including casualty insurance and business interruption insurance) that is actually carried by or insuring Developer under policies solely with respect to the Project and the Work, regardless of whether required to be carried pursuant to Section 16.1, and that provides coverage to pay, reimburse or provide for any of the foregoing costs and losses, and (b) the foregoing costs and losses that Developer is deemed to have self-insured pursuant to Section 16.1.4.3.

19.2.3.2 Developer's remedies and other relief from performance obligations under Section 9.2 shall continue to apply to the Relief Event until the damages produced by such Relief Event are compensated as provided in this Agreement and the restoration works are completed; and

19.2.3.3 This Agreement and the Lease shall continue in full force and effect and Developer's election to terminate shall not take effect.

19.2.4 No Waiver

No election by Developer under Section 19.2.2 or by the Department under Section 19.2.3 to keep this Agreement and the Lease in effect shall prejudice or waive the Department's right to thereafter give a written notice of conditional election to terminate with respect to the same or any other Relief Event.

19.2.5 Concurrent Notices

If the Department and Developer deliver concurrent written notices of conditional election to terminate, Developer's notice shall prevail. Notices shall be deemed to be concurrent if each Party sends its written notice before actually receiving the written notice from the other Party. Knowledge of the other Party's written notice obtained prior to actual receipt of the notice shall have no effect on determining whether concurrent notice has occurred.

19.2.6 Termination Compensation for Extended Relief Events

If either Party accepts the other Party's conditional election to terminate, then this Agreement and the Lease shall be deemed terminated on an Early Termination Date that is [60] days after the date of acceptance of the conditional election to terminate; and Developer will be entitled to compensation calculated as follows (calculated at the Early Termination Date and without double-counting):

1. The Project Debt Termination Amount; plus
2. Amounts paid by the Equity Members or their Affiliates in the form of Committed Investment described in clause (a) of the definition thereof up until the Early Termination Date, less any amounts actually received by the Equity Members or their Affiliates from Developer as Distributions described in clause (a) of the definition thereof, provided if the amounts calculated pursuant to this subsection (2) are less than zero, then, for purposes of the calculation of the termination amount, they shall be deemed to be zero; plus
3. Redundancy Payments for employees of Developer that have been or will be reasonably incurred by Developer as a direct result of termination of this Agreement; plus
4. Subject to Section 18.4.3, any Losses that have been or will be incurred by Developer as a direct result of termination of this Agreement arising out of the termination of contracts with Contractors, including reasonable and documented out-of-pocket costs to demobilize, but only to the extent that (a) such Losses are incurred in connection with the Project and in respect of the provision of services or the completion of work required to be provided, (b) such Losses are incurred under arrangements and/or agreements that are consistent with terms that have been entered into in the ordinary course of business and on reasonable commercial terms and (c) Developer and the relevant Contractor have each used its reasonable efforts to mitigate the Losses;

minus

5. All amounts standing to the credit of any bank account held by or on behalf of Developer as of the Early Termination Date if and to the extent such amounts are available to pay items set forth in subsections (1) through (4) above.

Any Dispute arising out of the determination of such compensation shall be resolved according to the Dispute Resolution Procedures.

19.3 Termination for Developer Default

19.3.1 Developer Defaults Triggering Department Termination Rights

Developer agrees, acknowledges and stipulates that any of the Developer Defaults listed in this Section 19.3.1 would result in material and substantial harm to the Department's rights and interests under this Agreement and therefore constitute a material Developer Default justifying termination if not cured within the applicable cure period, if any. After expiration of the applicable cure period (if any) provided to Developer under this Agreement, the following Developer Defaults (each a "**Default Termination Event**") shall, subject to the provisions of the Direct Agreement, entitle the Department, at its sole election, to terminate this Agreement and the Lease, effective immediately upon delivery of written notice of termination to Developer and the Collateral Agent under the Security Documents as required by the Direct Agreement:

19.3.1.1 There occurs a Developer Default under Section 18.1.1.15.

19.3.1.2 There occurs a Developer Default under Section 18.1.1.16.

19.3.1.3 There occurs a Developer Default under Section 18.1.1.17.

19.3.1.4 There occurs a Developer Default under Section 18.1.1.13 or 18.1.1.14.

19.3.1.5 There occurs any other Developer Default for which the Department issues a Warning Notice under Section 18.2.8 and such Developer Default is not fully and completely cured within the applicable cure period, if any, set forth in Section 18.1.2 or available to Lenders under the Direct Agreement.

19.3.2 Compensation to Developer

If the Department issues a notice of termination of this Agreement and the Lease due to a Default Termination Event, Developer will be entitled to compensation in an amount equal to:

19.3.2.1 If this Agreement and the Lease are terminated by the Department pursuant to Section 19.3.1 (but excluding a termination due to a Default Termination Event under Section 19.3.1.5) before the Substantial Completion Date, the Department shall pay compensation to Developer in an amount calculated as follows (calculated at the Early Termination Date and without double-counting):

1. The lesser of (a) Project Adjusted Costs, or (b) the costs as shown in the Schedule of Values (as such Schedule of Values may be adjusted for Relief Events), corresponding to the percentage of such Work completed as of the Early Termination Date, excluding (i) interest and other financing costs, professional and advisory fees, and (ii) Developer overhead and

administrative expenses; plus

2. The lesser of (a) the actual costs incurred in performing the O&M Work, or (b) the O&M Work costs shown in the O&M Work budget for the Construction Period (as such O&M Work budget may be adjusted for Relief Events), corresponding to the percentage of the O&M Work completed as of the Early Termination Date, excluding from both items (a) and (b) the (i) interest and other financing costs, professional and advisory fees, and (ii) Developer overhead and administrative expenses;

minus the sum of subsections (3) and (4) below:

3. Subject to Section 18.2.11, the amount of any Losses recoverable by the Department under the Contract Documents resulting from the Developer Default, including the projected costs required to remedy any defective part of the Work, to rectify any breach by Developer and/or to bring the condition of the Project to the standard it would have been in if Developer had complied with its obligations to carry out and complete the Work in accordance with its obligations under the Contract Documents as of the Early Termination Date, as well as the costs of replacing Developer; and
4. Any amounts previously paid by the Department to Developer under the Agreement.

However, if the sum of subsections (1) and (2) above is less than [80% or less] of the Project Debt Termination Amount, Developer will be entitled to compensation of [80% or less] of the Project Debt Termination Amount minus the sum of subsections (3) and (4) above.

19.3.2.2 If this Agreement and the Lease are terminated by the Department pursuant to Section 19.3.1 (but excluding a termination due to a Default Termination Event under Section 19.3.1.5) on or after the Substantial Completion Date, the Department shall pay compensation to Developer in an amount calculated as follows (calculated at the Early Termination Date and without double-counting):

1. The amount which is the higher of:
 - (a) The amount equal to the difference of the Project Adjusted Costs less the value of the accrued amortization of those costs, provided that (i) accrued amortization will be determined by calculating, using a straight line amortization schedule, the total amount accrued through the Early Termination Date, and (ii) in no event shall such amount be greater than the amount of Project Adjusted Costs less accrued amortization on the Early Termination Date as shown in the Financial Model; and
 - (b) [80% or less] of the Project Debt Termination Amount;

minus the sum of subsections (2) and (3) below:

2. Subject to Section 18.2.11, the amount of any Losses recoverable by the Department under the Contract Documents resulting from the Developer

Default, including the projected costs required to remedy any defective part of the Work, to rectify any breach by Developer and/or to bring the condition of the Project to the standard it would have been in if Developer had complied with its obligations to carry out and complete the Work in accordance with its obligations under the Contract Documents as of the Early Termination Date, as well as the costs of replacing Developer; and

3. Any amounts previously paid (excluding Availability Payments and Milestone Payments) by the Department to Developer under the Agreement.

However, if the Early Termination Date occurs after the Final Acceptance Date, the compensation pursuant to this Section 19.3.2.2 shall be no less than an amount equal to the amount of Milestone Payments to be paid between the Early Termination Date and **[INSERT DATE]** (inclusive), each amount discounted back at the Milestone Payments Termination Discount Rate, from the date on which such amount should have been paid (had the Agreement and the Lease not been terminated) to the Early Termination Date.

19.3.2.3 If this Agreement and the Lease are terminated due to a Default Termination Event under Section 19.3.1.5, then the Department shall pay compensation to Developer in an amount calculated as follows (calculated at the Early Termination Date and without double counting): (a) the Project Debt Termination Amount, minus (b) all amounts standing to the credit of any bank account held by or on behalf of Developer as of the Early Termination Date if and to the extent such amounts are available to pay the Project Debt Termination Amount.

19.3.3 Any Dispute arising out of the determination of such compensation shall be resolved according to the Dispute Resolution Procedures.

19.3.4 If this Agreement and the Lease are terminated for grounds which are later determined not to justify a termination by the Department pursuant to Section 19.3.1, such termination shall be deemed to constitute a termination for convenience pursuant to Section 19.1.1, and Developer's remedy shall be as set forth in Section 19.1.2.

19.4 Termination for Department Default or Suspension of Work; Termination by Court Ruling; Termination Based on Benchmark Interest Rate and Credit Spread Changes

19.4.1 Termination for Department Default

In the event of a material Department Default under Section 18.3.1 or Section 18.3.3 that remains uncured following notice and expiration of the applicable cure period under Section 18.3.2, Developer shall have the right to terminate this Agreement and the Lease, effective immediately upon delivery of written notice of termination to the Department. In the event of such termination, the Department shall pay compensation to Developer in an amount equal to the amount described in Section 19.1.2. Any Dispute arising out of the determination of such compensation shall be resolved according to the Dispute Resolution Procedures.

19.4.2 Termination for Suspension of Work

If the Department issues a suspension order under Section 18.2.7.2 that suspends the Work for a period of [270] days or more, Developer shall have the right to terminate this

Agreement and the Lease, effective immediately upon delivery of written notice of termination to the Department, provided that such suspension is not the result of the negligence, willful misconduct, or breach of applicable Law or contract by Developer or any Developer-Related Entity. In the event of such termination, Developer will be entitled to compensation equal to the amount described in Section 19.1.2. Any Dispute arising out of the determination of such compensation shall be resolved according to the Dispute Resolution Procedures.

19.4.3 Termination by Court Ruling

Termination by Court Ruling means, and becomes effective upon, (a) issuance of a final order by a court of competent jurisdiction to the effect that this Agreement is void, voidable, and/or unenforceable or impossible to perform in its entirety for reasons beyond the reasonable control of Developer, or (b) issuance of a final order by a court of competent jurisdiction upholding the binding effect on Developer of a Change in Law that causes impossibility of performance of a fundamental obligation by Developer or the Department under the Contract Documents or impossibility of exercising a fundamental right of Developer or the Department under the Contract Documents. The final court order shall be treated as the notice of termination of this Agreement and the Lease. In the event of such termination, Developer will be entitled to compensation in an amount equal to the amount described in Section 19.1.2. Any Dispute arising out of the determination of such compensation shall be resolved according to the Dispute Resolution Procedures.

19.5 Termination Procedures and Duties

Upon expiration of the Term or any earlier termination of this Agreement for any reason, the provisions of this Section 19.5 shall apply. Except as expressly provided otherwise in this Section 19.5, Developer shall timely comply with such provisions independently of, and without regard to, the timing for determining, adjusting, settling and paying any amounts due Developer or the Department on account of termination. If Developer fails to timely comply with the provisions of this Section 19.5, Department shall have the right thereupon to enter and take possession and control of the Project and Project Right of Way by summary proceeding available to landlords under applicable Law.

19.5.1 Transition Plan

19.5.1.1 Within [three] days after receipt of a notice of termination, Developer shall meet and confer with the Department for the purpose of developing an interim transition plan for the orderly transition of Work, demobilization and transfer of control of the Project and Project Right of Way to the Department. The Parties shall use diligent efforts to complete preparation of the interim transition plan within [15] days after the date Developer receives the notice of termination.

19.5.1.2 The Parties shall use diligent efforts to complete a final transition plan within [30] days after such date. The transition plan shall be in form and substance reasonably acceptable to the Department and shall include and be consistent with the other provisions and procedures set forth in this Section 19.5, all of which procedures Developer shall immediately follow, regardless of any delay in preparation or acceptance of the interim or final transition plan. The transition plan shall include an estimate of costs and expenses to be incurred by both Parties in connection with implementation of the transition plan.

19.5.2 Relinquishment and Possession of the Project

19.5.2.1 On the Termination Date, Developer shall: (a) execute, acknowledge and deliver to the Department a quitclaim deed, in form and substance acceptable to the Department, acting reasonably, quitclaiming all of Developer's right, title, interest and estate in and to the Project and Project Right of Way, (b) record a termination of the Memorandum of Lease if it was previously recorded, and (c) cancel the Lease Escrow Agreement and return all originals of the Lease and Memorandum of Lease to Department if the Lease Escrow Agreement is still in effect on the Termination Date.

19.5.2.2 On the Termination Date, or as soon thereafter as is possible as provided in the transition plan, Developer shall relinquish and surrender full control and possession of the Project and Project Right of Way to the Department or the Department's Authorized Representative, and shall cause all Persons claiming under or through Developer to do likewise, in at least the condition required by the Handback Requirements.

19.5.2.3 On the later of the Termination Date or the date Developer relinquishes full control and possession as provided in the transition plan, the Department shall assume responsibility, at its expense (subject to the right to recover damages under this Agreement), for the Project and the Project Right of Way.

19.5.3 Continuance or Termination of Key Contracts Prior to Work Completion

19.5.3.1 If as of the Termination Date Developer has not completed the Work, in whole or in part, the Department shall elect, by written notice to Developer, to continue in effect the relevant Key Contracts or to require their termination. If the Department elects to continue such Key Contracts, then Developer shall execute and deliver to the Department a written assignment, in form and substance acceptable to the Department, acting reasonably, of all Developer's right, title and interest in and to such Key Contracts, and the Department shall assume in writing Developer's obligations thereunder that arise from and after the Termination Date.

19.5.3.2 If the Department elects to require termination of the Key Contracts, then Developer shall:

1. Unless the Department has entered into a new concession agreement with a Lender or its Substituted Entity, take such steps as are necessary to terminate the relevant Key Contracts, including notifying each Key Contractor that its Key Contract is being terminated and that each of them is to immediately stop work and stop and cancel orders for materials, services or facilities unless otherwise authorized in writing by the Department;
2. Immediately demobilize and secure in a safe manner construction, staging, lay down and storage areas for the Project to the reasonable satisfaction of the Department, and remove all debris and waste materials (including Hazardous Materials and Undesirable Materials that are in the process of removal) except as otherwise approved by the Department in writing;
3. Take such other actions as are necessary or appropriate to mitigate further

cost;

4. Subject to the Department's reasonable prior written approval, settle all outstanding liabilities and all claims arising out of the Key Contracts;
5. As a condition to Developer receiving all payments required to be paid by the Department under Article 19 and pursuant to the requirements of the transition plan, cause each of the Key Contractors to execute and deliver to the Department a written assignment, in form and substance acceptable to the Department, acting reasonably, of all of their right, title and interest in and to all warranties, to the extent assignable, claims and causes of action held by each of them against subcontractors and other third parties in connection with the Project or the Work, to the extent the Project or the Work is adversely affected by any subcontractor or other third-party breach of warranty, contract or other legal obligation; and
6. As a condition to Developer receiving all payments required to be paid by the Department under Article 19 and pursuant to the requirements of the transition plan, carry out such other directions as the Department may give for termination of the Work in accordance with the transition plan.

19.5.4 Other Close-Out Activities

19.5.4.1 Within [30] days after notice of termination is delivered or no later than [30] days prior to the natural expiration of the Term (as applicable), Developer shall provide the Department with a true and complete list of all materials, goods, machinery, equipment, parts, supplies and other property in inventory or storage (whether held by Developer or any Person on behalf of or for the account of Developer) for use in or respecting the Work or the Project, or on order or previously completed but not yet delivered from Suppliers for use in or respecting the Work or the Project, and on or about the Termination Date shall transfer title and deliver to the Department or the Department's Authorized Representative, through bills of sale or other documents of title, as directed by the Department, all such materials, goods, machinery, equipment, parts, supplies and other property.

19.5.4.2 Developer shall take all action that may be necessary, or that the Department may direct, for the protection and preservation of the Project, the Work and such materials, goods, machinery, equipment, parts, supplies and other property.

19.5.4.3 On the Termination Date, Developer shall transfer to the Department the amount in the Handback Requirements Reserve Account due the Department in accordance with Section 5.10.3.3.

19.5.4.4 On or about the Termination Date, Developer shall execute and deliver to the Department the following, together with an executed bill of sale or other written instrument, in form and substance acceptable to the Department, acting reasonably, assigning and transferring to the Department the following:

1. All completed or partially completed drawings (including plans, elevations, sections, details and diagrams), specifications, designs, Design Documents,

As-Built Record Plans, surveys, and other documents and information pertaining to the Work;

2. All samples, borings, boring logs, subsurface data and similar data and information relating to the Project or Project Right of Way;
3. All books, records, reports, test reports, studies and other documents of a similar nature relating to the Work, the Project or the Project Right of Way;
4. All data and information relating to the use of the Project by the traveling public, including all studies, reports, projections, estimates and other market research or analysis relating to use of the Project by the traveling public; and
5. All other work product and Intellectual Property used or as specifically developed by Developer or any Affiliate relating to the Work, the Project or the Project Right of Way, except for Proprietary Intellectual Property of Developer or an Affiliate held in an Intellectual Property Escrow.

19.5.4.5 Within [90] days after the Termination Date, the Parties shall adjust and prorate costs of operation and maintenance of the Project, including utility service costs and deposits, as of the Termination Date. If the Parties do not have complete or accurate information by such date, they shall make the adjustment and proration using a good faith estimate, and thereafter promptly readjust when the complete and accurate information is obtained. The Parties acknowledge that certain adjustments or readjustments may depend on receipt of bills, invoices or other information from a third party, and that the third party may delay in providing such information. Any readjustment necessary only because of error in calculation and not due to lack of complete and accurate information shall be irrevocably waived, unless the Party seeking readjustment delivers written request for such readjustment to the other Party not later than [180] days following the Termination Date.

19.5.4.6 On or about the Termination Date, Developer shall execute and deliver to the Department a perpetual, non-exclusive license to use, in form and substance acceptable to the Department, acting reasonably, all of Developer's right, title and interest in and to any escrows or similar arrangements for the protection of Intellectual Property, source code or source code documentation of others (to the extent permitted by such third parties) used for or relating to the Project or the Work.

19.5.4.7 On or about the Termination Date, Developer shall execute and deliver to the Department a written assignment, in form and substance acceptable to the Department, acting reasonably, of all Developer's right, title and interest in and to all warranties, to the extent assignable, claims and causes of action held by Developer against third parties in connection with the Project or the Work which are not to be pursued by Developer as provided in the final transition plan.

19.5.4.8 Developer shall otherwise assist the Department in such manner as the Department may require to ensure the orderly transition of the Project, and shall, if appropriate and if requested by the Department, take all steps as may be necessary to enforce the provisions of the Key Contracts pertaining to the surrender of the Project.

19.6 No Separate Terminations of Agreement and Lease

If for any reason this Agreement is terminated before the Lease is delivered from escrow, then all right to obtain the Lease shall concurrently cease and terminate. Department and Developer further agree and expressly intend that after the Lease is granted neither this Agreement nor the Lease shall continue in full force and effect without the other. Accordingly, (a) any termination of this Agreement according to its terms shall also automatically constitute a termination of the Lease, even if the notice of termination fails to declare a termination of the Lease, and (b) any termination of the Lease shall also automatically constitute a termination of this Agreement, even if the notice of termination fails to declare a termination of this Agreement.

19.7 Effect of Termination

19.7.1 Cessation of Developer's Property Interest

Termination of this Agreement and the Lease and payment of compensation as required under any provision of this Article 19 shall automatically cause, as of the Termination Date, the cessation of any and all property interest of Developer, real and personal, tangible and intangible, in or with respect to the Project, the Project Right of Way, the Availability Payments and the Handback Requirements Reserve Account, which thereupon shall be and remain free and clear of any lien or encumbrance created, permitted or suffered by Developer or anyone claiming by, through or under Developer, including the liens, pledges, assignments, collateral assignments, security interests and encumbrances of any and all Financing Documents. In order to confirm the foregoing, at the Department's request, Developer shall promptly obtain and deliver to the Department reconveyances, releases and discharges of all Security Documents, executed by the Lenders in proper form for recording or filing (as appropriate), but no such reconveyances, releases and discharges shall be necessary to the effectiveness of the foregoing.

19.7.2 Contracts and Agreements

Regardless of the Department's prior actual or constructive knowledge thereof, no contract or agreement to which Developer is a party as of the Termination Date shall bind the Department, unless the Department elects to assume such contract or agreement in writing. Except in the case of the Department's express written assumption, no such contract or agreement shall entitle the contracting party to continue performance of work or services respecting the Project following Developer's relinquishment to the Department of possession and control of the Project, or to any claim, legal or equitable, against the Department.

19.8 Liability After Termination; Final Release

19.8.1 No termination of this Agreement or the Lease shall excuse either Party from any liability arising out of any default as provided in this Agreement or the Lease that occurred prior to termination.

19.8.2 Subject to Section 19.5.4.5, if this Agreement is terminated for any reason, then the Department's payment to Developer of the amounts required under this Agreement (if any) shall constitute full and final satisfaction of, and upon payment the Department shall be forever released and discharged from, any and all claims, causes of action, suits, demands and Losses, known or unknown, suspected or unsuspected, that Developer may have against the Department arising out of or relating to this Agreement or the Lease or termination thereof, or the Project. Upon

such payment, Developer shall execute and deliver to the Department all such releases and discharges as the Department may reasonably require to confirm the foregoing, but no such written release and discharge shall be necessary to give effect to the foregoing satisfaction and release.

19.9 Payment of Termination Compensation

19.9.1 Termination Compensation for termination pursuant to Section 19.1 or Section 19.4 shall be due and payable by the Department in immediately available funds within [60] days after (a) the Department or Developer, as the case may be, gives its written notice of its election to terminate; (b) the Collateral Agent provides the Department with a written statement as to the Project Debt Termination Amount (if applicable), with documentation reasonably required by the Department to support such statement; and (c) Developer provides the Department with a written statement as to the amounts payable pursuant to subsections (2) through (5) of Sections 19.1.3 or 19.1.4, as applicable, with documentation reasonably required by the Department to support such statement and a certification that such amounts are true and correct.

19.9.2 Compensation for termination pursuant to Section 19.2 shall be due and payable by the Department within [60] days after (a) either Party has accepted the other Party's election to terminate this Agreement, (b) the time period for the other Party to elect not to terminate this Agreement has expired and the party has not made the election; (c) the Collateral Agent provides the Department with a written statement as to the Project Debt Termination Amount, with documentation reasonably required by the Department to support such statement; and (d) Developer provides the Department with a written statement as to the amounts payable pursuant to subsections (2) through (5) of Section 19.2.6, with documentation reasonably required by the Department sufficient to support such statement and a certification that such amounts are true and correct.

19.9.3 Compensation for termination pursuant to Section 19.3 shall be due and payable by the Department within [60] days after (a) the Department has given written notice of its election to terminate this Agreement, (b) Developer provides the Department with a written statement as to the amounts described in subsections (1) and (2) of Section 19.3.2.1 or subsection (1) of Section 19.3.2.2, as the case may be, with written documentation sufficient to support such statement and a certification that such amounts are true and correct.

19.9.4 If as of the date the Department tenders payment the Parties have not agreed upon the amount of Termination Compensation due, then:

1. The Department shall proceed to make payment to Developer of the undisputed portion of the Termination Compensation;
2. Within [30] days after receiving such payment Developer shall deliver to the Department written notice of the additional amount of Termination Compensation that Developer in good faith determines is still owing (the "disputed portion"); and
3. The Department shall pay the disputed portion of the Termination Compensation to Developer in immediately available funds within [30] days after the disputed portion is agreed to by the Parties or otherwise determined pursuant to Article 24, as the case may be, and shall pay interest thereon commencing [30] Days after the Early Termination Date until paid at the Late

Payment Rate.

19.10 Exclusive Termination Rights

This Article 19 contains the entire and exclusive provisions and rights of the Department and Developer regarding termination of this Agreement, and any and all other rights to terminate under Law are hereby waived to the maximum extent permitted by Law.

ARTICLE 20. RESERVED RIGHTS

20.1 General

Without prejudice to Developer's rights to additional compensation, time extensions and other relief permitted under the Contract Documents, Developer's rights and interests in the Project and Project Right of Way are and shall remain specifically limited only to such real and personal property rights and interests that are necessary and required for developing, permitting, designing, financing, constructing, installing, equipping, operating, maintaining, repairing, reconstructing, rehabilitating, restoring, renewing or replacing the Project. Developer's rights and interests specifically exclude any and all Airspace and any and all improvements and personal property above, on or below the surface of the Project Right of Way which are not necessary and required for such purposes.

20.2 Reserved Business Opportunities

20.2.1 The Department reserves to itself, and Developer hereby relinquishes, all 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 this Agreement and the Lease ("**Business Opportunities**"). Unless expressly authorized by the Department in its sole discretion, Developer will not grant permission for any Person to use or occupy the Project for any ancillary or collateral purpose, whether through a sublease or otherwise. The foregoing reservation in no way precludes Developer or its Affiliates and Contractors from (a) carrying out its financial plan reflected in its Financial Model, (b) arranging and consummating Refinancings, (c) creating and using brochures and other marketing material that include descriptions, presentations and images of the Project or the Work for the purpose of promoting Developer's business of developing, financing and operating transportation projects, or (d) competing on any request or solicitation for proposals or bids issued by the Department in connection with Business Opportunities.

20.2.2 The Business Opportunities reserved to the Department include all the following:

20.2.2.1 All rights to finance, design, construct, operate and maintain any transit, passenger or freight rail facility or other mode of transportation in the Airspace or Project Right of Way, and to grant to others such rights;

20.2.2.2 All rights to finance, design, construct, operate and maintain Project Enhancements in the Airspace or Project Right of Way, and to grant others such rights;

20.2.2.3 Unless Developer has exercised its right under Section 11.6 to collect tolls and user fees for the right to use the Project and satisfied all conditions precedent

under Section 11.6, all rights to toll, collect tolls and perform other tolling activities in the Airspace or Project Right of Way, and to grant to others such rights;

20.2.2.4 All rights to install, use, lease, grant indefeasible rights of use, sell and derive revenues from electrical and fiber optic conduit, cable, capacity and associated equipment or other telecommunications equipment and capacity, existing over, on, under or adjacent to any portion of the Project Right of Way, except for the capacity of any such improvement installed by Developer that is necessary for and devoted exclusively to the operation of the Project;

20.2.2.5 All rights to use, sell and derive revenues from traffic data and other data generated from the operation of the Project;

20.2.2.6 All ownership, possession and control of, and all rights to develop, use, operate, lease, sell and derive revenues from, the Airspace or Project Right of Way, including development and operation of service areas, rest areas and any other office, retail, commercial, industrial or mixed use real estate project within the Airspace or Project Right of Way;

20.2.2.7 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 arising out of the development, use, operation or maintenance of the Project;

20.2.2.8 All rights to install, use and derive information, services, capabilities and revenues from intelligent transportation systems and applications, except installation and use of any such systems and applications by Developer as required solely for operation of the Project. For avoidance of doubt, if Developer installs any such systems or applications, all use and capacity thereof not necessary for operation of the Project is reserved to, and shall be the sole property of, the Department;

20.2.2.9 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;

20.2.2.10 All rights and opportunities to grant to others sponsorship, advertising and naming rights with respect to the Project or any portion thereof, provided that in any sponsorship or naming rights transaction the Department shall cause to be granted to Developer a non-exclusive license to use the name in connection with Project operations;

20.2.2.11 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 arising out of development, use, operation or maintenance of the Project.; and

20.2.2.12 Any other commercial or noncommercial development or use of the Airspace or Project Right of Way for other than operation of the Project.

20.2.3 If the development, use or operation of the Airspace or Project Right of Way by

the Department or anyone claiming under or through the Department, or if the development or operation of a Business Opportunity in the Airspace or Project Right of Way, materially prevents Developer from performing its fundamental obligations under this Agreement or materially adversely affects its costs, Developer shall be entitled to submit a Claim for Extra Work Costs, Delay Costs, time extensions or other relief as permitted under the Contract Documents. Prior to deciding whether to pursue or implement a Business Opportunity, the Department may require Developer to provide analysis of the impacts thereof on Developer's costs and schedule.

20.2.4 Developer may propose Business Opportunities, including expected financial and other terms, for Department consideration. In the event Developer desires to utilize, develop or take advantage of any Business Opportunity, it may submit to the Department its ideas and proposals for development thereof. If and only if the Department, in its sole discretion, is interested in the proposed Business Opportunity, the Department and Developer shall thereafter negotiate cooperatively and in good faith to formulate a structure, terms and conditions and written agreement(s) for such Business Opportunity and its use and development, which may include a development agreement, concession or franchise agreement, license agreement, royalty agreement, joint venture, or other form of lawful joint enterprise or lawful joint participation concerning the Business Opportunity. Nothing herein, however, creates any legally binding obligation on the part of the Department or Developer to continue such negotiations or to enter into any structure or agreement for development or use of a Business Opportunity. Neither the submission to the Department of a proposed Business Opportunity or related ideas, concepts, financial models or other information, nor the Department's election not to engage in the proposed Business Opportunity with Developer, shall preclude the Department from thereafter pursuing such Business Opportunity or using, adapting and disclosing the ideas, concepts, financial models or other information presented, provided the Department pursues it through a competitive procurement process in which Developer is afforded a fair and non-discriminatory opportunity to compete.

20.2.5 In the event a Developer Default concerns a breach of the provisions of this Section 20.2, in addition to any other remedies, the Department shall be entitled to Developer's disgorgement of all profits from the prohibited activity, together with interest thereon at the maximum rate permitted by Law, and to sole title to and ownership of the prohibited assets and improvements and revenues derived therefrom.

20.2.6 For the avoidance of doubt, Developer is prohibited by Law and this Article 20 from placing or permitting any outdoor advertising within the boundaries of the Project Right of Way.

ARTICLE 21. RECORDS; INTELLECTUAL PROPERTY

21.1 Maintenance and Inspection of Records

21.1.1 Developer shall keep and maintain in **[INSERT LOCATION]** or other location approved by the Department in writing in its sole discretion all books, records and documents relating to the Project, Project Right of Way, or Work, including copies of all original documents delivered to the Department. Developer shall keep and maintain such books, records and documents in accordance with applicable provisions of the Contract Documents and in accordance with Best Management Practice. Developer shall notify the Department where such records and documents are kept.

21.1.2 Developer shall make all its books, records and documents available for inspection by the Department at Developer's offices in **[INSERT LOCATION]** or other location approved by the Department in writing in its sole discretion, at all times during normal business hours, without charge. Developer shall provide to the Department copies thereof as and when reasonably requested by the Department. The Department may conduct any such inspection upon 48 hours' prior written notice, or unannounced and without prior notice where there is good faith suspicion of fraud or criminal activity. The right of inspection includes the right to make extracts and take notes.

21.1.3 Developer shall retain records and documents for a minimum of five years after the date the record or document is generated; provided that if the Contract Documents specify any different time period for retention of particular records, such time period shall control. Notwithstanding the foregoing, all records which relate to Claims and Disputes being processed or actions brought under the Dispute Resolution Procedures shall be retained and made available until any later date that such Claims, Disputes and actions are finally resolved.

21.2 Audits

21.2.1 The Department shall have such rights to review and audit Developer, its Contractors and their respective books and records as the Department deems necessary for purposes of verifying compliance with the Contract Documents and applicable Law. Without limiting the foregoing, the Department shall have the right to audit Developer's Project Management Plan and compliance therewith, including the right to inspect Work and/or activities and to verify the accuracy and adequacy of the Project Management Plan and other relevant Contract Documents.

21.2.2 All Claims filed against the Department shall be subject to audit in accordance with, and Developer and its Contractors shall comply with the provisions in, [Section __ of Division __].

21.2.3 Full compliance by Developer with the provisions of this Section 21.2 is a contractual condition precedent to Developer's right to seek relief on a Claim under this Agreement.

21.2.4 Any rights of the federal government and any agency thereof, including FHWA, to review and audit Developer, its Contractors and their respective books and records are set forth in the Federal Requirements and applicable Law.

21.2.5 The Department's audit rights include the right to observe the business operations of Developer and its Contractors to confirm the accuracy of books and records.

21.2.6 Developer shall include in the Project Management Plan internal procedures to facilitate review and audit by the Department and, if applicable, FHWA.

21.2.7 Developer represents and warrants the completeness and accuracy of all information it or its agents provides in connection with Department audits, and shall cause all Contractors to warrant the completeness and accuracy of all information such Contractors provide in connection with Department audits.

21.2.8 Developer's internal and third-party quality and compliance auditing responsibilities shall be set forth in the Project Management Plan.

21.2.9 Nothing in the Contract Documents shall in any way limit the constitutional and statutory powers, duties and rights of elected State officials, including the independent rights of the State Auditor, in carrying out his or her legal authority.

21.3 Public Records Law

21.3.1 Developer shall comply with the Public Record Law and the guidelines established pursuant to California Government Code Section 6253.4 dealing with access to public records. Further, Developer acknowledges and agrees that, except as provided by applicable Law, all Submittals, records, documents, drawings, plans, specifications and other materials in the Department's possession, including materials submitted by Developer, are subject to the provisions of the Public Records Law. If Developer believes information or materials submitted to the Department constitute trade secrets, proprietary information or other information excepted from disclosure, Developer shall be solely responsible for specifically and conspicuously designating that information by placing "CONFIDENTIAL" in the center header of each such page affected, as it determines to be appropriate and placing the materials in a folder or binder clearly labeled with the citation to the specific Law that exempts the material from the Public Records Law. Any specific proprietary information, trade secrets or confidential commercial and financial information shall be clearly identified as such, and shall be accompanied by a concise statement of reasons supporting the claim including the specific Law that authorizes the confidentiality and the specific Law that exempts the material from the Public Records Law. Nothing contained in this provision shall modify or amend requirements and obligations imposed on the Department by the Public Records Law or other applicable Law, and the provisions of the Public Records Law or other Laws shall control in the event of a conflict between the procedures described above and the applicable Law. Developer is advised to contact legal counsel concerning such Law and its application to Developer.

21.3.2 If the Department receives a request for public disclosure of materials marked "CONFIDENTIAL," the Department will use reasonable efforts to notify Developer of the request and give Developer an opportunity to assert, in writing and at its sole expense, a claimed exception under the Public Records Law or other applicable Law within the time period specified in the notice issued by the Department and allowed under the Public Records Law. Under no circumstances, however, will the Department be responsible or liable to Developer or any other Person for the disclosure of any such labeled materials, whether the disclosure is required by Law, or court order, or occurs through inadvertence, mistake or negligence on the part of the Department or its officers, employees, contractors or consultants.

21.3.3 If any legal action is filed against the Department to enforce the provisions of the Public Records Law in relation to confidential information, the Department agrees to promptly notify Developer of such action, and the Department's sole involvement in such proceedings or litigation will be as the custodian retaining the material until otherwise ordered by a court or such other authority having jurisdiction with respect thereto, and Developer shall be fully responsible for otherwise prosecuting or defending any action concerning the materials at its sole cost and risk; provided, however, that the Department reserves the right, in its sole discretion, to intervene or participate in the litigation in such manner as it deems necessary or desirable. Developer shall pay and reimburse the Department within [30] days after receipt of written demand and reasonable supporting documentation for all costs and fees, including attorneys' fees and costs, the Department incurs in connection with any litigation, proceeding or request for disclosure.

21.4 Intellectual Property

21.4.1 Developer shall deliver copies of all Proprietary Intellectual Property owned by Developer which it uses in providing the Work to the Department. All Intellectual Property contained in the Work, including Proprietary Intellectual Property and Technology Enhancements, owned by Developer or its Affiliates or Contractors on the Effective Date or developed by Developer or its Affiliates or Contractors during the Term shall remain exclusively the property of Developer or its Affiliates or Contractors that supply the same, notwithstanding any delivery of copies thereof to the Department or any other provision contained in this Agreement.

21.4.2 The Department shall have and is hereby granted a nonexclusive, transferable, irrevocable, fully paid up right and license to use, reproduce, modify, adapt and disclose, and sublicense others to use, reproduce, modify, adapt and disclose, the Proprietary Intellectual Property owned by Developer or its Affiliates or Contractors which is directly related to the Work, including with respect to Technology Enhancements, solely in connection with the Project; provided that the Department shall have the right to exercise such license only at the following times:

21.4.2.1 From and after the expiration or earlier termination of the Term for any reason whatsoever, in which case the Department may exercise such license only in connection with the Project;

21.4.2.2 During any time that the Department is exercising its step-in rights pursuant to Section 18.2.4, in which case the Department may exercise such license only in connection with the Project; and

21.4.2.3 During any time that Developer has been replaced, in which case the Department may exercise such license only in connection with the Project.

21.4.3 The Department shall have no right to sell any Proprietary Intellectual Property of Developer or to use, reproduce, modify, adapt and disclose, or allow any party to use, reproduce, modify, adapt and disclose, any such Proprietary Intellectual Property for any other purpose other than as set forth in Section 21.4.2.

21.4.4 The right to transfer the license is limited to any Governmental Entity that succeeds to the power and authority of the Department generally or with respect to the Project.

21.4.5 Subject to Section 21.3, the Department shall:

21.4.5.1 Not disclose any Proprietary Intellectual Property of Developer to any Person other than authorized transferees and sublicensees who agree to be bound by any confidentiality obligations of the Department relating thereto;

21.4.5.2 Enter into a confidentiality agreement reasonably requested by Developer with respect to the licensed Proprietary Intellectual Property; and

21.4.5.3 Include, or where applicable require such other State or regional Governmental Entity to include, in the contract with the sublicensee its covenant to employ sound business practices no less diligent than those used for its own confidential information, and no less diligent than required by commercially reasonable

standards of confidentiality, to protect all Proprietary Intellectual Property of Developer and other materials provided under the sublicense against disclosure to third parties not in receipt of a sublicense, and to use the sublicense only for the permitted purposes.

21.4.6 Notwithstanding any contrary provision of this Agreement, in no event shall the Department or any of its directors, officers, employees, consultants or agents be liable to Developer, any Affiliate or any Contractor for any damages, including loss of profit, arising out of breach of the duty of confidentiality set forth in Section 21.4.5 if such breach is not the result of gross negligence or intentional misconduct. Developer hereby irrevocably waives all claims to any such damages.

21.4.7 Developer shall continue to have a full and complete right to use any and all duplicates or other originals of its Proprietary Intellectual Property in any manner it chooses.

21.4.8 With respect to any Proprietary Intellectual Property, including with respect to Technology Enhancements, owned by a Person other than Developer, including any Affiliate, Developer shall use reasonable efforts to obtain from such owner, concurrently with execution of any contract, subcontract or purchase order with such owner or with the first use or adaptation of the Proprietary Intellectual Property in connection with the Project, both for Developer and the Department, nonexclusive, transferable, irrevocable, royalty-free licenses to use, reproduce, modify, adapt and disclose such Proprietary Intellectual Property solely in connection with the Project of at least identical scope, purpose, duration and applicability as the license granted under Section 21.4.2. The limitations on sale, transfer, sublicensing and disclosure by the Department set forth in Section 21.4.3 through Section 21.4.5 shall also apply to the Department's licenses in relation to such Proprietary Intellectual Property. Developer shall also use reasonable efforts to obtain from such owner consent to have the relevant Proprietary Intellectual Property deposited into an Intellectual Property Escrow pursuant to the provisions of Section 21.5. In addition to the foregoing, Developer shall comply with its obligations in Appendix 16.

21.4.9 All Background Intellectual Property shall be owned by Developer or its Affiliates or Contractors, as applicable. The Department shall have and is hereby granted a non-exclusive license to use the Background Intellectual Property owned by Developer or its Affiliates or Contractors which is solely related directly to the Work, including with respect to Technology Enhancements, but only in connection with the Project and such license shall only be provided during the Term.

21.5 Intellectual Property Escrows

21.5.1 The Department and Developer acknowledge that Developer and/or Contractors that supply software, software source code or other Proprietary Intellectual Property may not wish to deliver the Proprietary Intellectual Property as specifically required by Section 21.4.1 directly to the Department, as public disclosure could deprive Developer and/or Contractors of commercial value. Developer further acknowledges that the Department nevertheless must be ensured access to such Proprietary Intellectual Property at any time, and must be assured that the Proprietary Intellectual Property to be delivered to the Department pursuant to Section 21.4.1 is released and delivered to the Department in either of the following circumstances:

21.5.1.1 In the case of such Proprietary Intellectual Property owned by Developer or any Affiliate, (a) this Agreement is terminated for Developer Default, (b) a

voluntary or involuntary bankruptcy or insolvency of Developer occurs, (c) Developer is dissolved or liquidated or (d) Developer fails or ceases to provide services as necessary to permit continued use of the Proprietary Intellectual Property to be delivered to the Department pursuant to Section 21.4.1 pursuant to the license or any sublicense thereof.

21.5.1.2 In the case of Proprietary Intellectual Property owned by a Contractor (other than a Contractor that is an Affiliate), this Agreement is terminated for any reason (including Department Default) and either (a) voluntary or involuntary bankruptcy of the Contractor occurs or (b) the Contractor is dissolved or liquidated or otherwise ceases to engage in the ordinary course of the business of manufacturing, supplying, maintaining and servicing the software, product, part or other item containing the Proprietary Intellectual Property to be delivered to the Department pursuant to Section 21.4.1 that is the subject of a license under Section 21.4.

21.5.2 In lieu of delivering the Proprietary Intellectual Property directly to the Department as required in Section 21.4.1, Developer may, from time to time, elect to deposit it with a neutral depository. In such event, the Department and Developer shall: (a) mutually select one or more escrow companies or other neutral depositories (each an "**Escrow Agent**") engaged in the business of receiving and maintaining escrows of software source code or other Intellectual Property; (b) establish one or more escrows (each an "**Intellectual Property Escrow**") with the Escrow Agent on terms and conditions reasonably acceptable to the Department and Developer for the deposit, retention, upkeep and release of source code and/or other Proprietary Intellectual Property to be delivered to the Department pursuant to Section 21.4.1 and related documentation; (c) determine a date for Developer's deposit of the Proprietary Intellectual Property to be delivered to the Department pursuant to Section 21.4.1 into the Intellectual Property Escrow; and (d) determine a process for releasing from escrow the Proprietary Intellectual Property to be delivered to the Department pursuant to Section 21.4.1. Related documentation shall include all relevant commentary, explanations and instructions to compile source code, and all modifications, additions or substitutions made to such source code and related documentation. Intellectual Property Escrows also may include Affiliates and Contractors as parties and may include deposit of their Proprietary Intellectual Property. The Department shall not be responsible for the fees and costs of the Escrow Agent.

21.5.3 The Intellectual Property Escrows shall survive expiration or earlier termination of this Agreement regardless of the reason.

ARTICLE 22. FEDERAL REQUIREMENTS

22.1 Compliance with Federal Requirements

Developer shall comply and require its Contractors to comply with applicable Federal Requirements, including compliance with federal Law pertaining to the use of federal-aid funds.

22.2 Cooperation with FHWA

Developer shall cooperate with FHWA in the reasonable exercise of FHWA's duties and responsibilities in connection with the Project.

ARTICLE 23. ASSIGNMENT AND TRANSFER

23.1 Restrictions on Assignment, Subletting and Other Transfers

23.1.1 Developer shall not voluntarily or involuntarily sell, assign, convey, transfer, pledge, mortgage or otherwise encumber Developer's Interest or any portion thereof without the Department's prior written approval, except:

23.1.1.1 To Lenders for security as permitted by this Agreement, provided Developer retains responsibility for the performance of Developer's obligations under the Contract Documents;

23.1.1.2 To any Lender affiliate that is a Substituted Entity in accordance with Section 12.5.2 or to any other Substituted Entity approved by the Department; provided that such Substituted Entity assumes in writing full responsibility for performance of the obligations of Developer under this Agreement, the Lease, the other Contract Documents, and the Principal Developer Documents arising from and after the date of assignment; or

23.1.1.3 To any entity in which the organizations signing this Agreement for Developer, or the shareholder(s), general partner(s) or member(s) that exercise management control over such organizations, hold and exercise effective management control and hold at least the applicable percent of equity interest set forth in Sections 13.1.

23.1.2 Developer shall not sublease or grant any other special occupancy or use of the Project to any other Person without the Department's prior written approval in its sole discretion.

23.1.3 Any sale, assignment, conveyance, transfer, pledge, mortgage, encumbrance, sublease or grant of other special occupancy or use in violation of this provision shall be null and void *ab initio* and the Department, at its option, may declare any such attempted action to be a Developer Default.

23.2 Assignment by the Department

The Department may assign all or any portion of its rights, title and interests in and to the Contract Documents, Payment Security and Performance Security(s), guarantees, letters of credit and other security for payment or performance: (a) without Developer's consent, to any other Person that succeeds to the governmental powers and authority of the Department; (b) without Developer's consent, to any bond trustee solely as security on condition that the Department shall remain fully liable for its obligations hereunder despite such assignment for security; and (c) to others with the prior written consent of Developer provided, however, that for any assignment under this Section 23.2, the Department's assignee shall have a credit rating equal to or better than the Department's rating at the time of the assignment as measured by a nationally recognized rating agency. Any sale, assignment, conveyance, transfer, pledge, mortgage, encumbrance or grant of other special occupancy or use in violation of this provision shall be null and void *ab initio*.

23.3 Notice and Assumption

Assignments and transfers of Developer's Interest or the Department's interest permitted under this Article 23 or otherwise approved in writing by the Department or Developer, as

applicable, shall be effective only upon receipt by the non-assigning Party of written notice of the assignment or transfer and a written instrument executed by the transferee, in form and substance reasonably acceptable to the non-assigning Party, in which the transferee, without condition or reservation, assumes all of Developer's or the Department's (as the case may be) obligations, duties and liabilities under this Agreement, the Lease and the other Contract Documents then in effect and agrees to perform and observe all provisions thereof applicable to Developer or the Department. Each transferee of Developer's rights and obligations under this Agreement, including any Person who acquires Developer's Interest pursuant to foreclosure, transfer in lieu of foreclosure or similar proceeding, shall take Developer's Interest subject to, and shall be bound by, the Project Management Plan, the Quality Plan, the Key Contracts, the Utility Agreements, the Governmental Approvals, and all agreements between the transferor and Governmental Entities with jurisdiction over the Project or the Work, except to the extent otherwise approved by the Department in writing in its good faith discretion. Except with respect to assignments and transfers in lieu of foreclosure or similar proceeding, the transferor and transferee shall give the Department written notice of the assignment not less than [30] days prior to the effective date thereof.

23.4 Change of Organization or Name

23.4.1 Developer shall not change the legal form of its organization without the prior written approval of the Department, which consent may be granted or withheld in the Department's sole discretion.

23.4.2 If either Party changes its name, such Party agrees to promptly furnish the other Party with written notice of change of name and appropriate supporting documentation.

ARTICLE 24. DISPUTE RESOLUTION PROCEDURES

24.1 General

The Parties agree to use reasonable efforts to resolve any Disputes under this Article 24 as quickly as possible, taking into consideration the time required to prepare detailed documentation.

24.2 Disputes Review Board

24.2.1 Except as provided under Section 24.4, the following Disputes shall be submitted to the Disputes Review Board in accordance with this Section 24.2: (a) Disputes arising up to and relating to Final Acceptance, and (b) Disputes relating to latent defects arising after Final Acceptance related to Work performed prior to Final Acceptance. Appendix 9-B establishes the authority and administrative procedures related to the submission of such Disputes to the Disputes Review Board. The Parties may agree to omit any of the steps or shorten the time periods in this Section 24.2 in order to hasten resolution.

1. If Developer objects to any Department decision, action or order, Developer may file a written protest with the Department, stating clearly and in detail the basis for the objection, within [15] days after the relevant decision, action or order.
2. The Department will consider the written protest and make its decision on

the basis of the relevant Contract Document, together with the facts and circumstances involved in the Dispute. The Department's decision will be furnished in writing to Developer within [15] days after receipt of the written protest.

3. Developer will have [7] days from the date it receives the Department's written decision to submit a written rebuttal to the Department's decision.
4. The Department will review Developer's rebuttal and issue a final written decision to Developer within [10] days after receipt of the rebuttal.
5. The Department's written decision in response to Developer's rebuttal is final and conclusive on the subject, unless Developer reserves the Dispute by filing a written appeal with the Department within [10] days of receiving the final decision. If Developer files such an appeal with the Department, either the Department or Developer may refer the matter to the Disputes Review Board.
6. Upon receipt by the Disputes Review Board of the Dispute from either Party, the Disputes Review Board will decide when to conduct the hearing, provided that the Disputes Review Board shall hold the hearing within [20] days of receipt, unless the Parties mutually agree to a longer time period.
7. Either Party may furnish written evidence or documentation to the Disputes Review Board regarding the Dispute. If either Party furnishes such information to the Disputes Review Board, it will furnish copies of such information to the other Party a minimum of [10] days prior to the date the Disputes Review Board sets to convene the hearing for the Dispute. If the Disputes Review Board requests any additional documentation or evidence prior to, during, or after the hearing, the relevant Party will provide the requested information to the Disputes Review Board and to the other Party, in accordance with the deadlines set by the Disputes Review Board.
8. Developer and the Department will each be afforded an opportunity to be heard by the Disputes Review Board and to offer evidence. Neither the Department nor Developer may present information at the hearing that was not previously distributed to both the Disputes Review Board and the other Party.
9. The Disputes Review Board's recommendations for resolution of the Dispute will be given in writing to both the Department and Developer within [15] days of completion of the hearings. In cases of extreme complexity, both Parties may agree to allow additional time for the Disputes Review Board to formulate its recommendations.
10. Within [15] days of receiving the Disputes Review Board's recommendations, both the Department and Developer will respond to the other and to the Disputes Review Board in writing, signifying either acceptance or rejection of the Disputes Review Board's

recommendations. The failure of either Party to respond within the [15] day period will be deemed an acceptance of the Disputes Review Board's recommendations by that Party. The recommendations of the Disputes Review Board shall be binding only to the extent the Parties accept such recommendations, either expressly or to the extent deemed accepted by virtue of that Party's failure to respond within such [15] day period.

11. Should the Dispute remain unresolved, either Party may seek reconsideration of the decision by the Disputes Review Board only when there is new evidence to present.

24.2.2 While both the Department and Developer should place great weight on the Disputes Review Board's recommendation, it is not binding. Notwithstanding the foregoing, any Disputes Review Board recommendation regarding Disputes over Department decisions regarding Substantial Completion and Final Acceptance shall be provisionally binding pending the results of litigation filed by the Party disputing the Disputes Review Board's recommendation.

24.2.3 If the Disputes Review Board's recommendations do not resolve the Dispute, all records and written recommendations of the Disputes Review Board will be admissible as evidence in any subsequent proceedings.

24.3 Regional Disputes Review Board

Except as provided under Section 24.4, Disputes arising after Final Acceptance (excluding Disputes relating to latent defects arising after Final Acceptance related to Work performed prior to Final Acceptance) shall be submitted to the Regional Disputes Review Board in accordance with the procedures set forth in Appendix 9-C.

24.4 Statewide Disputes Review Board for Value Added Specifications

Disputes related to the performance of the "value added" specification requirements set forth in [Section __ of Division __] shall be submitted to the Statewide Disputes Review Board for Valued Added Specifications in accordance with the procedures established by the Department.

24.5 Right to Litigate Dispute, Suits By and Against the Department, Limitations of Actions, and Forum

24.5.1 The Department and Developer agree that the submission of any unresolved Dispute to the Disputes Review Board, Regional Disputes Review Board, or Statewide Disputes Review Board for Value Added Specifications (as applicable) under this Article 24 is a condition precedent to the Department or Developer having the right to proceed to litigation of such unresolved Dispute.

24.5.2 Suits by and against the Department arising out of the D&C Work or the O&M Work during the Construction Period shall be commenced no later than [820] days after the Department's issuance of notice of Substantial Completion pursuant to Section 4.9.2 (if such notice is given), or in the event that this Agreement is terminated prior to the Department's issuance of such notice of Substantial Completion, then no later than [820] days after the Early Termination Date. Suits by and against the Department arising out of any O&M Work

performed after the Department's issuance of notice of Substantial Completion pursuant to Section 4.9.2 shall be commenced no later than [820] days following the expiration of the Calendar Year in which the cause of action accrued as to such O&M Work.

24.6 Continuance of Work During Dispute

During the course of any Dispute Resolution Procedures, Developer shall continue performing the Work, including any Work that is the subject of the Dispute, as directed by the Department and in accordance with the Contract Documents.

ARTICLE 25. MISCELLANEOUS

25.1 Amendments

The Contract Documents may be amended only by a written instrument duly executed by the Parties or their respective successors or assigns.

25.2 Waiver

25.2.1 No waiver of any term, covenant or condition of this Agreement or the other Contract Documents shall be valid unless in writing and signed by the obligee Party.

25.2.2 The exercise by a Party of any right or remedy provided under this Agreement or the other Contract Documents shall not waive or preclude any other or further exercise thereof or the exercise of any other right or remedy. No waiver by any Party of any right or remedy under this Agreement or the other Contract Documents shall be deemed to be a waiver of any other or subsequent right or remedy under this Agreement or the other Contract Documents. The consent by one Party to any act by the other Party requiring such consent shall not be deemed to render unnecessary the obtaining of consent to any subsequent act for which consent is required, regardless of whether similar to the act for which consent is given.

25.2.3 Except as provided otherwise in the Contract Documents, no act, delay or omission done, suffered or permitted by one Party or its agents shall be deemed to waive, exhaust or impair any right, remedy or power of such Party hereunder, or to relieve the other Party from the full performance of its obligations under this Agreement or the other Contract Documents.

25.2.4 Either Party's waiver of any breach or to enforce any of the terms, covenants, conditions or other provisions of the Contract Documents at any time shall not in any way limit or waive that Party's right thereafter to enforce or compel strict compliance with every term, covenant, condition or other provision, any course of dealing or custom of the trade notwithstanding. Furthermore, if the Parties make and implement any interpretation of the Contract Documents without documenting such interpretation by an instrument in writing signed by both Parties, such interpretation and implementation thereof will not be binding in the event of any future Disputes.

25.3 Independent Contractor

25.3.1 Developer is an independent contractor, and nothing contained in the Contract Documents shall be construed as constituting any relationship with the Department other than

that of Project developer and independent contractor, and that of landlord and tenant under the Lease.

25.3.2 Nothing in the Contract Documents is intended or shall be construed to create any partnership, joint venture or similar relationship between the Department and Developer; and in no event shall either Party take a position in any tax return or other writing of any kind that a partnership, joint venture or similar relationship exists. While the term “public-private partnership” may be used on occasion to refer to contractual relationships of the type hereby created, the Parties do not thereby express any intention to form or hold themselves out as a *de jure* or *de facto* partnership, joint venture or similar relationship, to share net profits or net losses, or to give the Department control or joint control over Developer’s financial decisions or discretionary actions concerning the Project and Work.

25.3.3 In no event shall the relationship between the Department and Developer be construed as creating any relationship whatsoever between the Department and Developer’s employees. Neither Developer nor any of its employees is or shall be deemed to be an employee of the Department. Except as otherwise specified in the Contract Documents, Developer has sole authority and responsibility to employ, discharge and otherwise control its employees and has complete and sole responsibility as a principal for its agents, for all Contractors and for all other Persons that Developer or any Contractor hires to perform or assist in performing the Work.

25.4 Successors and Assigns

The Contract Documents shall be binding upon and inure to the benefit of the Department and Developer and their permitted successors, assigns and legal representatives.

25.5 Designation of Representatives; Cooperation with Representatives

25.5.1 The Department and Developer shall each designate an individual or individuals who shall be authorized to make decisions and bind the Parties on matters relating to the Contract Documents (“**Authorized Representative**”). Appendix 10 to this Agreement provides the initial Authorized Representative designations. Such designations may be changed by a subsequent writing delivered to the other Party in accordance with Section 25.9.

25.6 Survival

Developer’s representations and warranties, the Dispute Resolution Procedures contained in Article 24, the indemnifications and releases contained in Section 16.4, the rights to compensation contained in Article 19 and any other obligations to pay amounts hereunder, and all other provisions which by their inherent character should survive expiration or earlier termination of this Agreement and/or completion of the Work under this Agreement, shall survive the expiration or earlier termination of this Agreement and/or the completion of the Work under this Agreement. The Department’s obligation to pay compensation to Developer upon the early termination of this Agreement as provided in Article 19 and any other payment obligations of the Department arising prior to expiration or early termination of this Agreement shall survive the expiration or earlier termination of this Agreement.

25.7 Limitation on Third-Party Beneficiaries

It is not intended by any of the provisions of the Contract Documents to create any third-

party beneficiary hereunder or to authorize anyone not a Party hereto to maintain a suit for personal injury or property damage pursuant to the terms or provisions hereof, except to the extent that specific provisions (such as the warranty and indemnity provisions, and the provisions for the protection of certain Lenders under Article 12 and the Direct Agreement) identify third parties and state that they are entitled to benefits hereunder. Except as otherwise provided in this Section 25.7, the duties, obligations and responsibilities of the Parties to the Contract Documents with respect to third parties shall remain as imposed by Law. The Contract Documents shall not be construed to create a contractual relationship of any kind between the Department and a Contractor or any Person other than Developer.

25.8 Governing Law

The Contract Documents shall be governed by and construed in accordance with the laws of the State of California.

25.9 Notices and Communications

25.9.1 Notices under the Contract Documents shall be in writing and: (a) delivered personally; (b) sent by certified mail, return receipt requested; (c) sent by a recognized overnight mail or courier service, with delivery receipt requested; or (d) sent by facsimile or email communication followed by a hard copy and with receipt confirmed by telephone, to the following addresses (or to such other address as may from time to time be specified in writing by such Person):

1. All notices, correspondence and other communications to Developer shall be delivered to the following address or as otherwise directed by Developer's Authorized Representative:

Attn:

Telephone:

Facsimile:

E-mail:

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

[addresses]

2. All notices, correspondence and other communications to the Department shall be marked as regarding the Project and shall be delivered to the following address or as otherwise directed by the Department's Authorized Representative:

Attn:

Telephone:

Facsimile:

E-mail:

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

Attn:

Telephone:

Facsimile:

E-mail:

25.9.2 Notices shall be deemed received when actually received in the office of the addressee (or by the addressee if personally delivered) or when delivery is refused, as shown on the receipt of the U. S. Postal Service, private carrier or other Person making the delivery. Notwithstanding the foregoing, notices sent by facsimile after 4:00 p.m., Pacific Standard or Daylight Time (as applicable), and all other notices received after 5:00 p.m., Pacific Standard or Daylight Time (as applicable), shall be deemed received on the first business day following delivery (that is, in order for a fax to be deemed received on the same day, at least the first page of the fax must have been received before 4:00 p.m., Pacific Standard or Daylight Time (as applicable)). Any technical or other communications pertaining to the Work shall be conducted by Developer's Authorized Representative and technical representatives designated by the Department.

25.10 Miscellaneous Mandatory Financial Terms

25.10.1 The Department agrees to pay Developer for the herein described services at a compensation as detailed in this Agreement.

25.10.2 Payment shall be made only after receipt and approval of goods and services unless advance payments are authorized by the Department's Chief Financial Officer under **[INSERT APPROPRIATE STATUTORY / REGULATORY REFERENCE (IF ANY)]**.

25.10.3 If this Agreement involves units of deliverables, then such units must be received and accepted by the Contract Manager prior to payments.

25.10.4 Bills for fees or other compensation for services or expenses shall be submitted in sufficient detail for a proper preaudit and postaudit thereof.

25.10.5 Records of costs incurred under the terms in this Agreement shall be

maintained and made available upon request to the Department at all times during the period of this Agreement and for five years after final payment is made. Copies of these documents and records shall be furnished to the Department upon request. Records of costs incurred include Developer's general accounting records and the Project records, together with supporting documents and records, of Developer and its Contractors considered necessary by the Department for a proper audit of costs.

25.11 Integration of Contract Documents

The Department and Developer agree and expressly intend that, subject to Section 25.12, this Agreement and other Contract Documents constitute a single, non-severable, integrated agreement whose terms are interdependent and non-divisible.

25.12 Severability

If any clause, provision, section or part of the Contract Documents is ruled invalid by a court having proper jurisdiction, then the Parties shall: (a) promptly meet and negotiate a substitute for such clause, provision, section or part, which shall, to the greatest extent legally permissible, effect the original intent of the Parties, including an equitable adjustment to the Financial Model Update (or, if there has been no update, the Financial Model) and the Department's compensation to account for any change in the Work resulting from such invalidated portion; and (b) if necessary or desirable, apply to the court or other decision maker (as applicable) which declared such invalidity for an interpretation of the invalidated portion to guide the negotiations. The invalidity or unenforceability of any such clause, provision, section or part shall not affect the validity or enforceability of the balance of the Contract Documents, which shall be construed and enforced as if the Contract Documents did not contain such invalid or unenforceable clause, provision, section or part.

25.13 Headings

The captions of the articles, sections and subsections of this Agreement are for convenience only and shall not be deemed part of this Agreement or considered in construing this Agreement.

25.14 Construction and Interpretation of Agreement

25.14.1 The language in all parts of this Agreement shall in all cases be construed simply, as a whole and in accordance with its fair meaning and not strictly for or against any Party. The Parties hereto acknowledge and agree that this Agreement 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 shall not be interpreted or construed against the Party preparing it, and instead other rules of interpretation and construction shall be utilized.

25.14.2 Any references to any covenant, condition, obligation and/or undertaking "herein," "hereunder" or "pursuant hereto" (or language of like import) mean, refer to and include the covenants, conditions, obligations and undertakings existing pursuant to this instrument and any riders, exhibits, addenda, attachments or other documents affixed to or expressly

incorporated by reference in this instrument. All terms defined in this instrument shall be deemed to have the same meanings in all riders, exhibits, addenda, attachments or other documents affixed to or expressly incorporated by reference in this instrument unless the context thereof clearly requires the contrary. Unless expressly provided otherwise, all references to Articles and Sections refer to the Articles and Sections set forth in this Agreement. Unless otherwise stated in this Agreement or the other Contract Documents, words which have well-known technical or construction industry meanings are used in this Agreement or the other Contract Documents in accordance with such recognized meaning. 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. Wherever the word "including," "includes" or "include" is used in the Contract Documents, it shall be deemed to be followed by the words "without limitation".

25.14.3 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.

25.15 Entire Agreement

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

25.16 Counterparts

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

IN WITNESS WHEREOF, the Parties, intending to be legally bound, have executed this Agreement as of the date first written above.

[XXXXXXXXXXXXXXXXXXXXXXXXXX]

**CALIFORNIA DEPARTMENT OF
TRANSPORTATION**

By: _____

By: _____

Name: _____

Name: _____

Title: _____

Title: _____

FOR DEPARTMENT USE ONLY

APPROVED AS TO FORM:

[XXXXXXXXXXXXXXXXXXXXXXXXXX]