

**FACILITY CONCESSION AGREEMENT**  
**SH 130 SEGMENTS 5 AND 6 FACILITY**

**Between**

**Texas Department of Transportation**

**and**

**SH 130 Concession Company, LLC**

Dated March 22, 2007

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## LIST OF EXHIBITS

- Exhibit 1**      **Abbreviations and Definitions**
- Exhibit 2**      **Developer's Schematic Plan of Facility and Proposal Commitments**
- Exhibit 3**      **Form of Lease**
- Exhibit 4**      **Toll Regulation**
- Exhibit 5**      **Facility Plan of Finance**
- Exhibit 6**      **Intentionally Omitted**
- Exhibit 7**      **Compensation Terms**
- Exhibit 8**      **Federal Requirements**
- Exhibit 9**      **Milestone Schedule**
- Exhibit 10**     **Facility Baseline Schedule**
- Exhibit 11**     **Hazardous Materials Risk Allocation Terms**
- Exhibit 12**     **Form of Direct Agreement**
- Exhibit 13**     **Handback Requirements Reserve Elements and Reserve Funding Mechanism**
- Exhibit 14**     **Terms for TxDOT Toll Collection and Enforcement Services**
- Exhibit 15**     **Developer's DBE Performance Plan**
- Exhibit 16**     **Developer's Job Training / Small Business Mentoring Plan**
- Exhibit 17**     **Competing Facilities Provisions**
- Exhibit 18**     **Required Capacity Improvements and Facility Extensions**
- Exhibit 19**     **Insurance Coverage Requirements**
- Exhibit 20**     **Noncompliance Points System, Persistent Developer Default and Measures of Liquidated Damages**
- Exhibit 21**     **Disputes Board Agreement**
- Exhibit 22**     **Terms for Termination Compensation**
- Exhibit 23**     **State Sales Tax Reimbursement Provisions**
- Exhibit 24**     **Initial Designation of Authorized Representatives**
- Exhibit 25**     **Form of Master Lockbox and Custodial Account Agreement and Joinder Agreement**

**FACILITY CONCESSION AGREEMENT**  
**STATE HIGHWAY 130 - SEGMENTS 5 AND 6**

This Facility Concession Agreement (the "**Agreement**") is entered into and effective as of March 22, 2007 by and between the Texas Department of Transportation, a public agency of the State of Texas ("**TxDOT**"), and SH 130 Concession Company, LLC, a Delaware limited liability company ("**Developer**").

**RECITALS**

A. The State of Texas desires to facilitate private sector investment and participation in the development of the State's transportation system via public-private partnership agreements, and has enacted HB 3588, effective September 1, 2003, and HB 2702, effective September 1, 2005 (together, the "**Act**"), to accomplish that purpose.

B. The Act, including Chapters 223 and 227 of the Code, grants TxDOT the authority to enter into agreements with private entities to develop, design, construct, finance, operate and maintain transportation facilities.

C. Pursuant to the provisions of the Act then in effect and the Texas Administrative Code (the "**Rules**"), on March 11, 2005, TxDOT and Cintra-Zachry, LP ("**Cintra-Zachry**"), entered into a comprehensive development agreement (the "**CDA**") that provides the framework for Cintra-Zachry to collaborate with TxDOT for the conceptual, preliminary and final planning, along with some or all of the development, design, construction, financing, operation and maintenance, of a combination of transportation facilities as further described in the CDA.

D. The CDA contemplates that TxDOT and Cintra-Zachry or an Affiliate thereof may enter into agreements for the development of one or more transportation facilities, including the State Highway 130 ("**SH 130**") Segments 5 and 6 facility (the "**Facility**").

E. On July 27, 2005, TxDOT and Cintra-Zachry entered into a Facility Implementation Plan Preparation Agreement authorizing the preparation of a Facility Implementation Plan for the Facility, as required by Section 7.2 of the CDA.

F. On June 29, 2006, TxDOT approved Cintra-Zachry's proposed Facility Implementation Plan for carrying out Facility Development Work under the CDA prior to closing of finance for the Facility.

G. This Agreement, the other FCA Documents, the Facility Right of Entry Agreement, the Intellectual Property Escrows, the Lease Escrow Agreement, and the Facility Trust and Security Documents collectively constitute a Facility Agreement entered into pursuant to the authority of the CDA and as such are collectively considered a comprehensive development agreement as contemplated under the Act, the Code and the Rules, and are entered into in accordance with the provisions of the CDA after all prerequisites under the CDA have been satisfied.

H. The Executive Director of TxDOT has been authorized to enter into this Agreement pursuant to the Act, the Rules and the Texas Transportation Commission Minute Order 110567.

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

## **ARTICLE 1. DEFINITIONS; FCA DOCUMENTS; ORDER OF PRECEDENCE**

### **1.1 Definitions**

Definitions for the terms used in this Agreement and the other FCA Documents are contained in Exhibit 1.

### **1.2 FCA Documents; Order of Precedence**

The term "FCA Documents" shall mean the documents listed in this Section 1.2. Each of the FCA 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 FCA Documents are intended to be complementary and to describe and provide for a complete agreement.

**1.2.1** Subject to Section 1.2.2, in the event of any conflict, ambiguity or inconsistency among the FCA Documents, the order of precedence shall be as follows:

1. Change Orders and Agreement and Lease amendments;
2. Book 1 (this Agreement, including all Exhibits and the executed originals of Exhibits that are contracts);
3. Book 3 amendments (Technical Documents) (see Sections 7.2.7 and 8.1.2.2);
4. Book 2 (Technical Requirements) amendments;
5. Book 2, including all exhibits and attachments thereto (Technical Requirements);
6. Book 3 (Technical Documents);
7. Developer's schematic plan of the Facility and Developer's Proposal commitments set forth in Exhibit 2 to this Agreement, provided that, to the extent specified in Exhibit 2, certain provisions therein shall supersede the specified provisions of the FCA Documents. Moreover, if Developer's schematic plan of the Facility set forth in Exhibit 2 or if the Proposal includes statements, offers, terms, concepts or designs that can reasonably be interpreted as offers to provide higher quality items than otherwise required by the other FCA Documents or to perform services or meet standards in addition to or better than those otherwise required, or otherwise contains terms or designs which are more advantageous to TxDOT than the requirements of the other FCA Documents, then Developer's obligations hereunder shall include compliance with all such statements, offers, terms, concepts and

designs, which shall have the priority of Agreement amendments and Technical Requirements amendments, as applicable.

**1.2.2** If the FCA Documents contain differing provisions on the same subject matter, the provisions that establish the higher quality, manner or method of performing the Work, establish better Good Industry Practice or use more stringent standards will prevail. Additional details in a lower priority FCA Document shall be given effect except to the extent they irreconcilably conflict with requirements, provisions and practices contained in the higher priority FCA Document.

### **1.3 Order of Precedence of Facility Management Plan**

In the event of any conflict, ambiguity or inconsistency between the Facility Management Plan and any of the FCA Documents, the latter shall take precedence and control.

### **1.4 Facility Trust and Security Documents**

**1.4.1** Except for the Master Lockbox and Custodial Account Agreement and Joinder Agreement, concurrently with the Effective Date Developer has entered into the Facility Trust Agreement and the other Facility Trust and Security Documents. TxDOT is, or will be, either a party thereto or an express, intended third party beneficiary of the Facility Trust Agreement and the other Facility Trust and Security Documents.

**1.4.2** If TxDOT is not a signatory thereto, then except with TxDOT's prior written approval in its sole discretion, Developer shall not during the Term (a) terminate or permit termination of the Facility Trust Agreement, (b) appoint or approve a substitute or replacement trustee thereunder, (c) agree to any amendment of any provisions of the Facility Trust Agreement, (d) in any material respect waive, or fail to enforce, any provision of the Facility Trust Agreement or (e) oppose or interfere with TxDOT's exercise of its third party beneficiary rights against the trustee thereunder.

**1.4.3** TxDOT and Developer covenant and agree to (i) perform all of their respective obligations under or in connection with the Facility Trust and Security Documents and (ii) maintain in place the custodial arrangements contemplated under the Facility Trust and Security Documents for the period of time specified in the Facility Trust and Security Documents.

### **1.5 Reference Information Documents**

**1.5.1** TxDOT has provided and disclosed to Developer the Reference Information Documents. The Reference Information Documents only provide information affecting the Facility and Work, and are not mandatory or binding on Developer. Developer is not entitled to rely on the Reference Information Documents as presenting a design, engineering, operating or maintenance solutions or other direction, means or methods for complying with the requirements of the FCA Documents, Governmental Approvals or Law.

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

**1.5.3** TxDOT does not represent or warrant that the information contained in the Reference Information Documents is complete or accurate or that such information is in conformity with the requirements of the FCA Documents, Governmental Approvals or Laws. Developer shall have no claim to a Relief Event, Extended Relief Event or Compensation Event on account of any incompleteness or inaccuracy in the Reference Information Documents.

## **ARTICLE 2. GRANT OF CONCESSION; TERM**

### **2.1 Grant of Concession**

**2.1.1** Pursuant to the provisions of the Act and Code and subject to the terms and conditions of the FCA Documents, TxDOT hereby grants to Developer the exclusive right, and Developer accepts the obligation, to finance, develop, design and construct the Facility described in Section 1 of the Technical Requirements, to perform Upgrades, and to enter into the Lease in the form attached as Exhibit 3 for the Facility and Facility Right of Way.

**2.1.2** From and after the Effective Date, Developer and its authorized Developer-Related Entities shall have the right to enter onto Facility Right of Way and other lands owned by TxDOT for purposes of carrying out its obligations under this Agreement, in accordance with that certain Facility Right of Entry Agreement dated as of the Effective Date between TxDOT and Developer.

**2.1.3** Concurrently with the Effective Date, TxDOT and Developer have executed two counterparts of the Lease and placed them in a neutral escrow for safekeeping pursuant to the Lease Escrow Agreement. Upon the Service Commencement Date, but not before then, and as a ministerial act, TxDOT and Developer shall date the Lease, attach all legal descriptions of the Facility, and TxDOT shall deliver to Developer, and Developer shall accept, the Lease, whereupon it shall take effect and the Facility Right of Entry Agreement shall automatically cease to have effect. Developer shall have the right and obligation, as lessee under the Lease, during the Operating Period to use, manage, operate, maintain, repair and toll the Facility, and to perform Renewal Work and Upgrades, pursuant to the terms of the Lease, this Agreement and the other Principal Facility Documents.

### **2.2 Term of Concession**

This Agreement shall take effect upon its execution and delivery (the "Effective Date"), and shall remain in effect until expiration or earlier termination of the Lease (the "Term"). The term of the Lease shall commence upon the Service Commencement Date and shall continue for a period of 50 years, less the period, if any, between (a) the Service Commencement Deadline set forth in the Milestone Schedule, as it may be extended due to Relief Events and (b) the actual later Service Commencement Date; and provided that the Lease shall be subject to earlier termination in accordance with the terms of this Agreement.

## **ARTICLE 3. TOLLS**

### **3.1 Authorization to Toll**

**3.1.1** Developer's right to toll the Facility shall consist of the exclusive right to (a) impose tolls upon the Users of the limited access lanes of the Facility at all times during the Term after Service Commencement, (b) establish, modify and adjust the rate of such tolls, all in accordance with and subject to the terms and conditions contained in this Agreement, including

those set forth in this Article 3 and in Exhibit 4, and (c) subject to Section 3.1.5, enforce and collect tolls, Video Trip Toll Premiums, and Incidental Charges from the Users of the limited access lanes of the Facility. Developer has no authority or right to impose any toll, fee, charge or other amount for use of the frontage roads.

**3.1.2** Developer has no authority or right to impose any fee, charge or other amount for use of the Facility other than the tolls specifically authorized by this Article 3. Developer may charge, debit and collect tolls only for actual vehicular use of the limited access lanes of the Facility. Developer may implement toll collection systems that charge, debit and collect tolls only at or through the electronic tolling facilities physically located on the Facility Right of Way, except that the foregoing does not preclude use of global positioning system technology or other remote sensing technology to charge, debit and collect tolls for actual vehicular use of the limited access lanes of the Facility.

**3.1.3** Except as provided otherwise in Sections 3.5 and 3.6, and except for toll violations not reasonably collectible, Developer shall require payment of tolls for use of the limited access lanes of the Facility.

**3.1.4** Except as provided otherwise in Section 19.11, nothing in this Agreement shall obligate or be construed as obligating TxDOT to continue or cease tolls after the end of the Term.

**3.1.5** Without limiting or diminishing Developer's ownership of all Toll Revenues or Developer's rights under the Facility Trust and Security Documents or Exhibit 14, Developer's rights under Section 3.1.1(c) shall be deemed, and hereby are, suspended and waived whenever TxDOT is entitled to perform toll handling, collection and enforcement services pursuant to Section 8.7.1 and Exhibit 14 to this Agreement. Refer to Section 8.7.2 for circumstances in which Developer is entitled to take over such functions.

## **3.2 Toll Rates; Customer Account Balances**

Developer's authority to charge and collect tolls is limited by, and conditioned on, among other provisions of this Agreement, the following:

**3.2.1** The toll rates in any year shall not exceed the maximum rates for each User Classification for such year determined according to the toll rate policy, schedule and methodology set forth in Exhibit 4 to this Agreement;

**3.2.2** The toll rates shall be the same for all Persons and vehicles in the same User Classification, provided that Developer may adopt and implement discount programs for different classes or groups of persons using the Facility under like conditions, provided that Developer does not discriminate against any of the categories of persons identified in Section 10.8; and

**3.2.3** Developer is prohibited from implementing any toll rate or change in toll rate or User Classification until (a) it delivers 90 days' prior written notice thereof to TxDOT as provided in Section 3.3.1, (b) it gives public notice thereof in the manner and for the minimum period(s) provided in Section 3.3.2 and (c) the requisite time periods have passed.

### **3.3 Notice of Toll Rates and Change in Toll Rates**

**3.3.1** Not later than 90 days before the Service Commencement Date, Developer shall prepare and submit to TxDOT for review and comment Developer's initial toll rate schedule, organized by each User Classification and each fee, charge, penalty, security deposit or other amount described in Section 3.1.2. Not later than 90 days before Developer intends to initiate any change in toll rates for one or more User Classifications (a "Pending Toll Change"), Developer shall submit to TxDOT written notice thereof for review and comment, including Developer's revised toll rate schedule.

**3.3.2** Developer shall use commercially reasonable efforts to provide advance notice to the public of (a) Developer's complete toll rate schedule and (b) any Pending Toll Change. Such efforts shall include publishing the toll rate schedule and notices of Pending Toll Change on advance toll information signs in accordance with Section 21.5 of the Technical Requirements. In addition, Developer shall maintain a website on the Internet and posting thereon for general public (i.e. non-passcode) viewing at all times from and after a date at least 30 days prior to initiation of (i) its then-current toll rate schedule and (ii) each Pending Toll Change. Developer shall make known to the public, and shall maintain a telephone number to enable any member of the public to request, a printed toll rate schedule, temporary discounts and Pending Toll Changes. Developer may modify the means of communication with the public consistent with developments in common practice for means of communication. Developer shall make available to any member of the public on Developer's website and upon request at Developer's offices, during reasonable business hours, or by facsimile copy without charge, or by mailing a copy if the written request is accompanied by a self-addressed stamped envelope, a schedule of its then-current toll rates.

**3.3.3** Notwithstanding Sections 3.3.1 and 3.3.2, if Developer desires to establish or cancel a temporary discount with respect to any toll, it shall give written notice of the establishment or cancellation to TxDOT at least five days prior to implementation thereof.

### **3.4 Changes in User Classifications**

**3.4.1** Developer may not change, add to or delete any of the User Classifications set forth in Exhibit 4 without TxDOT's express prior written consent pursuant to this Section 3.4.

**3.4.2** If Developer desires to change, add to or delete any of the User Classifications, Developer shall apply to TxDOT for permission to implement such change, addition or deletion at least 120 days prior to the proposed effective date of such change. Such application shall set forth:

**3.4.2.1** Each proposed change, addition or deletion;

**3.4.2.2** The date each change, addition or deletion shall become effective;

**3.4.2.3** The length of time each change, addition or deletion shall be in effect;

**3.4.2.4** The reason Developer requests each change, addition or deletion;

**3.4.2.5** The effect each change, addition or deletion is likely to have upon Users and traffic patterns;

**3.4.2.6** A proposed schedule of toll rates reflecting each change, addition or deletion;

**3.4.2.7** A thorough report and analysis of the effect each change, addition or deletion is anticipated to have on Developer's internal rate of return (determined using the Financial Model Formulas), including the effects on the Base Case Financial Model Update (or, if there has been no Update, on the Base Case Financial Model) and on the assumptions and data therein; and

**3.4.2.8** Such other information and data as TxDOT may reasonably request.

**3.4.3** Developer's application shall be deemed granted without conditions unless within 120 days after receipt of a completed application TxDOT advises Developer that it has granted Developer's application with conditions or denied Developer's application. TxDOT may deny an application or impose conditions in its sole and absolute discretion, including conditioning approval on adjustment of compensation for TxDOT under this Agreement. Without limiting TxDOT's discretion, the following matters will be grounds for rejection: the proposals set forth in the application are not reasonable under the circumstances; the supporting documentation is erroneous, incomplete, inconsistent, inaccurate or deficient, or is insufficient to support the proposal; or the assumptions of projections set forth in the application are unrealistic. TxDOT's decision shall not be subject to dispute resolution. If Developer resubmits an application after rejection or imposition of conditions, the above procedures shall apply to the resubmitted application.

**3.4.4** If Developer's application is deemed granted without conditions or is granted subject to conditions acceptable to Developer, then:

**3.4.4.1** Developer may implement such change in User Classification on the effective date set forth in the application, subject to such conditions, if any, imposed by TxDOT, and subject to first giving notice to the public of the change, addition or deletion in the same manner as a Pending Toll Change; and

**3.4.4.2** The Parties shall promptly amend (a) Exhibit 4 to this Agreement to incorporate the change, addition or deletion and (b) this Agreement as necessary in accordance with the accepted conditions.

### **3.5 Exempt Vehicles**

**3.5.1** The following categories of vehicles shall be exempt from payment of tolls: marked police vehicles or marked fire department vehicles; ambulances; marked military and civil defense vehicles; official vehicles operated by members, officers and employees of TxDOT acting in the discharge of their official duties; and any other vehicles classified as exempt in Exhibit 4.

**3.5.2** Developer shall not levy or impose a toll, and shall not permit or suffer a toll to be levied or imposed, for or in connection with use of the Facility by an exempt vehicle.

**3.5.3** Upon two Business Days' prior written notice from Developer, TxDOT shall provide Developer access during normal business hours to TxDOT's toll collection and enforcement records for the Facility to enable Developer to audit the accuracy of TxDOT's



records and waiver of tolls for exempt vehicle trips. In addition, TxDOT shall issue transponders to TxDOT official vehicles in order to track and record exempt trips by such vehicles on the Facility.

### **3.6 Emergency Suspension of Tolls**

**3.6.1** In the event the Facility is designated for immediate use as an emergency mass evacuation route, TxDOT shall have the right to order immediate suspension of tolling in the direction of evacuation. TxDOT shall have no liability to Developer for the loss of Toll Revenues or the increase in costs and expenses attributable to such order, provided that during any period for which tolling has been suspended, TxDOT:

**3.6.1.1** Concurrently suspends tolling on all other TxDOT-operated tolled facilities that are located within the area designated for evacuation or facilitation of evacuation;

**3.6.1.2** Concurrently orders suspension of tolling on all other tolled facilities operated by others within such area and over which TxDOT has the authority to order such suspension; and

**3.6.1.3** Lifts such order concurrently with the lifting of such order for all other designated tolled facilities or, if there are no such other facilities, as soon as the need for emergency mass evacuation ceases.

**3.6.2** TxDOT shall have no liability to Developer for the loss of Toll Revenues or the increase in costs and expenses attributable to any order to suspend tolling to facilitate emergency mass evacuation issued pursuant to applicable Law by any federal or other State agency or instrumentality.

### **3.7 Toll Revenues**

**3.7.1** At all times during the Term, Developer shall have the exclusive right, title, entitlement and interest in and to the Toll Revenues (including payments from TxDOT in respect of User trips on the Facility to the extent set forth in Exhibit 14 to this Agreement), subject to the terms and conditions of the FCA Documents (including TxDOT's rights to compensation in accordance with this Agreement) and the security interests therein under the Security Documents.

**3.7.2** Developer shall not use Toll Revenues to make any Distribution or to pay non-competitive fees and charges of Affiliates unless and until Developer first pays (a) all current and delinquent amounts due to TxDOT under this Agreement or the Lease, including any compensation due under Article 5, (b) all current and delinquent material undisputed costs necessary for the proper operation and maintenance of the Facility (including premiums for insurance, bonds and other performance security, and including Safety Compliance work and Handback Requirements work), (c) current and delinquent debt service, and other current and delinquent amounts, due under any Funding Agreement or Security Document, (d) all currently required or delinquent deposits to the Handback Requirements Reserve, (e) all Taxes currently due and payable or delinquent, and (f) all current and delinquent costs and expenses of Renewal Work. If Developer makes any Distribution or makes any payment to an Affiliate in violation of this provision, the same shall be deemed to be held in trust by the recipient for the benefit of TxDOT and the Collateral Agent under the senior Security Documents, and shall be payable to TxDOT or the Collateral Agent on demand. If TxDOT collects any such amounts

held in trust, it shall make them available for any of the purposes set forth above and, at the request of the Collateral Agent, deliver them to the Collateral Agent net of any amounts under clause (a) above.

**3.7.3** Developer shall have no right to use Toll Revenues to pay any debt, obligation or liability unrelated to this Agreement, the Lease, the Facility, the Work or Developer's services under this Agreement. The foregoing does not apply to or affect Developer's right to make Distributions in accordance with Developer's governing instruments and subject to the limitations in Section 3.7.2.

**3.7.4** Developer acknowledges and agrees that it shall not be entitled to receive any compensation, return on investment or other profit for providing the services contemplated by this Agreement and the Lease other than those resulting from cost savings, Toll Revenues, Compensation Amounts and Termination Compensation in accordance with the provisions of this Agreement, and in the circumstances contemplated under Section 8.7.2, Video Trip Toll Premiums and Incidental Charges and earnings thereon. The Parties acknowledge that this Agreement and the Lease were negotiated in good faith and at arms' length, contain commercially reasonable provisions and allow Developer no more than a reasonable rate of return and compensation commensurate with risk.

**3.7.5** Toll Revenues, Video Trip Toll Premiums, and Incidental Charges collected by Developer or TxDOT under this Agreement or any of the Facility Trust and Security Documents shall be deposited in the appropriate Facility Trust Account established for the purposes of holding Toll Revenues, Video Trip Toll Premiums, and Incidental Charges in accordance with the terms of the Facility Trust Agreement and the other Facility Trust and Security Documents.

## **ARTICLE 4. FINANCING; REFINANCING; TXDOT DEBT PURCHASE RIGHTS**

### **4.1 Developer Right and Responsibility to Finance**

**4.1.1** Developer may grant security interests in or assign the entire Developer's Interest (but not less than the entire Developer's Interest) to Lenders for purposes of securing the Facility Debt, subject to the terms and conditions contained in this Agreement and the Lease. Developer is strictly prohibited from pledging or encumbering the Developer's Interest, or any portion thereof, to secure any indebtedness that is issued by any Person other than Developer, any special purpose entity that owns Developer but no other assets and has powers limited to the Facility and Work, or any special purpose subsidiary wholly owned by such entity.

**4.1.2** Developer is solely responsible for obtaining and repaying all financing, at its own cost and risk and without recourse to TxDOT, necessary for the acquisition, design, permitting, development, construction, equipping, operation, maintenance, modification, reconstruction, rehabilitation, restoration, renewal and replacement of the Facility, and for the Utility Adjustment Work, .

**4.1.3** If Developer entered into the Initial Funding Agreements and Initial Security Documents on the Effective Date, then Developer warrants and represents that it has delivered to TxDOT true, correct and complete copies of the Initial Funding Agreements and Initial Security Documents and that as of the Effective Date there exists no breach or default thereunder or events which with notice or the passage of time, or both, would constitute a breach or default thereunder.

**4.1.4** If Developer has not entered into the Initial Funding Agreements and Initial Security Documents on the Effective Date, then the following provisions shall apply:

**4.1.4.1** Unless Developer or TxDOT elects to terminate this Agreement pursuant to Section 19.5, Developer shall be unconditionally obligated to enter into the same and complete closing for all the Initial Facility Debt (including any sub-debt), in a total amount, which when combined with all unconditional equity commitments acceptable to the Collateral Agent, is not less than the total capital funding set forth in Exhibit 5 to this Agreement (Facility Plan of Finance), by not later than the Facility Financing Deadline, without any right to extension on account of any Relief Event or Extended Relief Event (notwithstanding any other provision of this Agreement to the contrary), except that such deadline may be extended as follows:

(a) By the period of delay in Developer's ability to achieve closing directly caused by TxDOT-Caused Delay, TxDOT Change or Discriminatory Action; and

(b) At the option of Developer for an additional period of 180 Days from and after the Facility Financing Deadline, which option may be exercised only by delivering to TxDOT not later than expiration of the original deadline (as it may be extended under clause (a) above) written notice of election to extend and the original replacement letter(s) of credit set forth in Section 17.4.1.2, and the Financial Model in Developer's Proposal shall remain firm during any such extension. Such option shall automatically expire if not exercised in the manner specified by such deadline.

**4.1.4.2** Developer shall deliver written notice to TxDOT of the close of such financing on the date of closing, and shall deliver to the Intellectual Property Escrow for access and review by TxDOT true and complete copies of those Initial Funding Agreements and Initial Security Documents that contain the material commercial terms relating to the Initial Facility Debt within five Business Days after the date of closing, and true and complete copies of the Initial Funding Agreements, Initial Security Documents and ancillary supporting documents (e.g., UCC filing statements) within 30 days after the date of closing; and

**4.1.4.3** If for any reason TxDOT has not received such written notice by such deadline, or if for any reason Developer has not deposited true and complete copies of those Initial Funding Agreements and Initial Security Documents that contain the material commercial terms relating to the Initial Facility Debt in the Intellectual Property Escrow within five Business Days after the date of closing, then TxDOT shall have the liquidated damage and termination remedies set forth in Sections 17.4.1 and 19.3.2, after delivering written notice of such default to Developer and Developer's failure to cure the same within five Business Days after the delivery of such notice.

**4.1.5** Developer exclusively bears the risk of any changes in the interest rate, payment provisions or the other terms of its financing.

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

## **4.2 No TxDOT Liability**

**4.2.1** TxDOT shall have no obligation to pay debt service on any debt issued or incurred by Developer. TxDOT shall have no obligation to join in, execute or guarantee any note or other evidence of indebtedness of Developer, any other Funding Agreement or any Security Document.

**4.2.2** None of the State, TxDOT, the Texas Transportation Commission 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 Facility Debt, any other obligations issued or incurred by Developer in connection with this Agreement, the Lease or the Facility, 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 TxDOT of its express obligations to Lenders set forth in Article 20, no Lender is entitled to seek any damages or other amounts from TxDOT, whether for Facility Debt or any other amount. TxDOT's review of any Funding Agreements or Security Documents or other Facility financing documents is not a guarantee or endorsement of the Facility Debt, any other obligations issued or incurred by Developer in connection with this Agreement, the Lease or the Facility, or any traffic and revenue study, and is not a representation, warranty or other assurance as to the ability of Developer to perform its obligations with respect to the Facility Debt or any other obligations issued or incurred by Developer in connection with this Agreement, the Lease or the Facility, or as to the adequacy of the Toll Revenues to provide for payment of the Facility Debt or any other obligations issued or incurred by Developer in connection with this Agreement, the Lease or the Facility. For the avoidance of doubt, the foregoing does not affect TxDOT's liability to Developer under Article 19 and Exhibit 22 for Termination Compensation that is measured in whole or in part by outstanding Facility Debt.

**4.2.3** TxDOT shall not have any obligation to any Lender pursuant to this Agreement, except for the express obligations to Lenders set forth in Article 20 or in any other instrument or agreement signed by TxDOT in favor of such Lender or Collateral Agent, provided that the Collateral Agent has notified TxDOT of the existence of its Security Documents. The foregoing does not preclude Lender enforcement of this Agreement against TxDOT where the Lender has succeeded to the rights, title and interests of Developer under the FCA Documents, whether by way of assignment or subrogation.

## **4.3 Mandatory Terms of Facility Debt, Funding Agreements and Security Documents**

Facility Debt, Funding Agreements and Security Documents, including the Initial Facility Debt, Initial Funding Agreements and Initial Security Documents and any amendments or supplements thereto, shall comply with the following terms and conditions:

**4.3.1** The Security Document may only secure Facility Debt the proceeds of which are obligated to be used exclusively for the purposes of (a) acquiring, designing, permitting, building, constructing, improving, equipping, modifying, operating, maintaining, reconstructing, restoring, rehabilitating, renewing or replacing the Facility, or performing Utility Adjustment Work, (b) paying interest during construction, (c) paying reasonable development fees to Developer-Related Entities, (d) paying fees to any Lender of the Facility Debt, (e) paying costs and fees in connection with the closing of any permitted Facility Debt, (f) making Distributions, but only from the proceeds of Refinancings permitted under this Agreement and (g) refinancing any Facility Debt under clauses (a) through (f) above;

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

**4.3.3** Facility Debt under a Funding Agreement and secured by a Security Document must be issued and held only by Institutional Lenders who qualify as such at the date the Security Document is executed and delivered (or, if later, at the date any such Institutional Lender becomes a party to the Security Document), except that (a) qualified investors other than Institutional Lenders may acquire and hold interests in Facility Debt in connection with the securitization of Facility Debt through a public offering, but only if an Institutional Lender acts as Collateral Agent for such Facility Debt, and (b) Facility Debt secured by Subordinated Security Documents is not subject to this provision;

**4.3.4** No Security Document shall encumber less than the entire Developer's Interest, provided that the foregoing does not preclude subordinate Security Documents or equipment lease financing;

**4.3.5** 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 TxDOT in the Facility or the Facility Right of Way or TxDOT's rights or interests under the FCA Documents;

**4.3.6** Each note, bond or other negotiable or non-negotiable instrument evidencing Facility Debt or any other obligations issued or incurred by Developer in connection with this Agreement, the Lease or the Facility must include or refer to a document controlling the foregoing that includes a conspicuous recital on its face to the effect that payment of the principal thereof and interest thereon is a valid claim only as against Developer and the security pledged by Developer therefor, is not an obligation, moral or otherwise, of the State, TxDOT, the Texas Transportation Commission, any other agency, instrumentality or political subdivision of the State, or any elected official, board member, director, officer, employee, agent or representative of any of them, and neither the full faith and credit nor the taxing power of the State, TxDOT, the Texas Transportation Commission or any other agency, instrumentality or political subdivision of the State is pledged to the payment of the principal thereof and interest thereon;

**4.3.7** Any number of permitted Funding Agreements and Security 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 4;

**4.3.8** Each Funding Agreement and Security Document shall require that if Developer is in default thereunder and the Collateral Agent gives notice of such default to Developer, then the Collateral Agent shall also give concurrent notice of such default to TxDOT. Each Funding Agreement and Security Document shall require that the Collateral Agent deliver to TxDOT, 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;

**4.3.9** No Funding Agreement or Security Document that may be in effect during any part of the period that the Handback Requirements apply shall grant to the Lender any right to apply funds in the Handback Requirements Reserve or to apply proceeds from any Handback Requirements Letter of Credit to the repayment of Facility Debt, to any other obligation owing the Lender or to any other use except the uses set forth in Section 8.11.3, and any provision purporting to grant such right shall be null and void, provided, however, that (a) any Lender or Substituted Entity shall, following foreclosure or transfer in lieu of foreclosure, automatically succeed to all rights, claims and interests of Developer in and to the Handback Requirements Reserve, and (b) an exception may be made for excess funds described in Section 8.11.4.2;

**4.3.10** Each Funding Agreement and Security Document that may be in effect during any part of the period that the Handback Requirements apply shall expressly permit, without condition or qualification, Developer to (a) use and apply funds in the Handback Requirements Reserve and (b) issue additional Facility Debt, secured by the Developer's Interest, for the added limited purposes of funding work pursuant to Handback Requirements and Safety Compliance as set forth in Section 12.4 and (c) otherwise comply with its obligations in the FCA Documents regarding Renewal Work, the Renewal Work Schedule, the Handback Requirements and the Handback Requirements Reserve. Subject to the foregoing, any protocols, procedures, limitations and conditions concerning draws from the Handback Requirements Reserve set forth in any Funding Agreement or Security Document shall be consistent with the permitted uses of the Handback Requirements Reserve, and shall not constrain Developer's access thereto for such permitted uses, even during the pendency of a default under the Funding Agreement or Security Document. For the avoidance of doubt, (i) the Lenders then holding Facility Debt may reasonably limit additional Facility Debt if other funds are then readily available to Developer for the purpose of funding the work; (ii) no Lender then holding Facility Debt is required hereby to grant *pari passu* lien or payment status to any such additional Facility Debt; and (iii) the Lenders then holding Facility Debt may impose reasonable, customary requirements as to performance and supervision of the work;

**4.3.11** Each Funding Agreement and Security Document shall expressly state that the Lender shall not name or join TxDOT, the Texas Transportation Commission, any other agency, instrumentality or political subdivision of the State, or any elected official, board member, director, officer, employee, agent or representative of any of them in any legal proceeding seeking collection of the Facility Debt or other obligations secured thereby or the foreclosure or other enforcement of the Funding Agreement or Security Document, unless and except to the extent that (a) joinder of TxDOT as a necessary party is required by applicable Law in order to confer jurisdiction on the court over the dispute with Developer or to enforce Lender remedies against Developer and (b) the complaint against TxDOT states no claim or cause of action for a lien or security interest on, or to foreclose against, TxDOT's right, title and interest in and to the Facility and Facility Right of Way, or for any liability of TxDOT on the indebtedness;

**4.3.12** Each Funding Agreement and Security Document shall expressly state that the Lender shall not seek any damages or other amounts from TxDOT, the Texas Transportation Commission, any other agency, instrumentality or political subdivision of the State, or any elected official, board member, director, officer, employee, agent or representative of any of them, whether for Facility Debt or any other amount, except (a) damages from TxDOT for a violation by TxDOT of its express obligations to Lenders set forth in Article 20 and (b) amounts due from TxDOT under this Agreement where the Lender has succeeded to the rights, title and interests of Developer under the FCA Documents, whether by way of assignment or subrogation;

**4.3.13** No Funding Agreement or Security Document shall prohibit, limit, restrict, impede, require Lender approval of or otherwise impose conditions on any contributions of additional equity to Developer or use of equity contributions to pay and perform Developer's responsibilities, obligations and liabilities under the FCA Documents; and

**4.3.14** Each Funding Agreement and Security Document shall expressly state that the Collateral Agent shall respond to any request from TxDOT or Developer for consent to a modification or amendment of this Agreement within a reasonable period of time.

#### **4.4 Refinancing**

##### **4.4.1 Right of Refinancing**

Developer from time to time may consummate Refinancings under the Funding Agreements on terms and conditions acceptable to Developer and in compliance with Section 4.3 and this Section 4.4. TxDOT shall have no obligations or liabilities in connection with any Refinancing except to deliver estoppel certificates pursuant to Section 20.9.

##### **4.4.2 Notice of Refinancing**

Developer shall deliver to the Intellectual Property Escrow for access and review by TxDOT drafts of those proposed Funding Agreements and Security Documents that will contain the material commercial terms in connection with any Refinancing not later than 14 Days prior to the proposed date for closing the Refinancing, and copies of all signed Funding Agreements and Security Documents in connection with the Refinancing not later than 30 Days after close of the Refinancing.

##### **4.4.3 Refinancing Limitations, Requirements and Conditions**

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

**4.4.3.1** No Refinancing is permitted prior to the Service Commencement Date, except to the extent (a) TxDOT reasonably agrees that it is necessary, together with additional equity contributions to Developer, to fund unexpected capital cost overruns in excess of contingency reserves available under the Initial Funding Agreements or (b) Developer first demonstrates that the Refinancing will produce Refinancing Gain in which TxDOT will share, as set forth in Part C of Exhibit 7, and TxDOT reasonably agrees to the Refinancing; and

**4.4.3.2** If TxDOT renders any assistance or performs any requested activity in connection with a Refinancing apart from delivering an estoppel certificate, then Developer shall reimburse TxDOT all TxDOT's Recoverable Costs and other fees, costs and expenses TxDOT incurs in connection with rendering any such assistance or performing any such activity. If TxDOT delivers to Developer a written invoice therefor prior to the scheduled date of closing, then such costs shall be reimbursed by Developer at closing. If TxDOT does not deliver a written invoice prior to closing, then it may deliver such invoice within 30 days after closing and Developer shall reimburse TxDOT for such costs within 10 days after TxDOT delivers the invoice to Developer. If for any reason the Refinancing does not close, Developer shall reimburse such TxDOT's Recoverable Costs and such other fees, costs and expenses within ten days after TxDOT delivers to Developer a written invoice therefor.

## ARTICLE 5. COMPENSATION; FINANCIAL MODEL UPDATES

### 5.1 TxDOT Compensation

#### 5.1.1 Concession Payment

The Concession Payment shall be in the amount, and payable upon the terms, set forth in Part A of Exhibit 7. Developer agrees to (i) the Concession Payment and (ii) Developer's cost to acquire the Facility Right of Way on behalf of TxDOT under Section 7.4 of this Agreement and Section 7 of the Technical Requirements as compensation to TxDOT in exchange for TxDOT's grant to Developer of the right to impose and collect tolls pursuant to this Agreement and no part of these preceding items (i) and (ii) are rent to TxDOT payable with respect to use and operation of the Facility pursuant to the Lease.

#### 5.1.2 Revenue Sharing

TxDOT's rights to share in Toll Revenues for the Facility are set forth in Part B of Exhibit 7. Developer agrees to pay TxDOT such share of Toll Revenues as compensation to TxDOT in exchange for TxDOT's grant to Developer of rights to impose and receive tolls pursuant to this Agreement and as rent for the use and operation of the Facility pursuant to the Lease.

#### 5.1.3 Refinancing Gain

TxDOT's rights to share in Refinancing Gain are set forth in Part C of Exhibit 7. Developer agrees to pay TxDOT such share of Refinancing Gain as compensation to TxDOT in exchange for TxDOT's grant to Developer of rights to impose and receive tolls pursuant to this Agreement and as rent for the use and operation of the Facility pursuant to the Lease.

#### 5.1.4 Offset Rights

Developer may deduct and offset any Claim amount owing to it, provided such Claim amount has been liquidated through Dispute Resolution Procedures or otherwise, from and against any amounts Developer may owe to TxDOT. If the Claim amount is not liquidated, Developer may elect to exercise its rights pursuant to the Facility Trust Agreement and direct the transfer of TxDOT Revenue Share amounts from the Toll Revenue Account to the Developer Claims Account up to the amount of the disputed portion of the Claim, in accordance with the provisions of the Facility Trust Agreement. Upon liquidation, the disputed portion of the Claim may be satisfied first from the amounts held in the Developer Claims Account, and then through Developer's offset right with respect to liquidated Claim amounts.

### 5.2 Reserved

### 5.3 Financial Model Updates

5.3.1 Developer shall run new projections and calculations under the Financial Model Formulas to establish a Base Case Financial Model Update:

5.3.1.1 Whenever there occurs a Compensation Event; and

5.3.1.2 Whenever the FCA Documents are amended and the Parties agree that the amendment has a material effect on future costs or Toll Revenues.



**5.3.2** Base Case Financial Model Updates pursuant to Section 5.3.1.2 require the mutual written approval of the Parties. Where the Base Case Financial Model Update is pursuant to Section 5.3.1.1, TxDOT shall have the right to challenge, according to the Dispute Resolution Procedures, the validity, accuracy or reasonableness of any Base Case Financial Model Update or the related updated and revised assumptions and data. TxDOT shall have 60 Days after receiving written notice from Developer that the Update has been deposited in the Intellectual Property Escrow to commence action under the Dispute Resolution Procedures. In the event of a challenge, the immediately preceding Base Case Financial Model Update that has not been challenged (or, if there has been no unchallenged Update, the Base Case Financial Model) shall remain in effect pending the outcome of the challenge or until a new Base Case Financial Model Update is issued and unchallenged.

**5.3.3** In no event shall the Financial Model Formulas be changed except with the prior written approval of both Parties, each in its sole discretion.

## **ARTICLE 6. FACILITY PLANNING AND APPROVALS; REVIEW AND OVERSIGHT; PUBLIC INFORMATION**

### **6.1 Preliminary Planning and Engineering Activities; Site Conditions**

**6.1.1** Developer shall perform or cause to be performed all engineering activities appropriate for development, design and construction of the Facility or the Utility Adjustments included in the Design Work and/or the Construction Work in accordance with the FCA Documents and, to the extent not addressed therein, Good Industry Practice, including but not limited to (a) technical studies and analyses; (b) geotechnical investigations; (c) right-of-way mapping, surveying and appraisals; (d) Utility subsurface investigations and mapping; (e) Hazardous Materials investigations; and (f) design and construction surveys.

**6.1.2** TxDOT makes no warranties or representations as to any surveys, data, reports or other information provided by TxDOT or other Persons concerning surface conditions and subsurface conditions, including the presence of Utilities, Hazardous Materials, contaminated groundwater, archeological, paleontological and cultural resources, and endangered and threatened species, affecting the Site or surrounding locations. Developer acknowledges that such information is for Developer's reference only and has not been verified.

**6.1.3** Except to the extent that Developer is entitled to relief under this Agreement for Relief Events and Extended Relief Events or is entitled to compensation under Exhibit 11, and except as otherwise set forth in Section 7.9, as between TxDOT and Developer, Developer shall bear the risk of all conditions occurring on, under or about the Site, including (a) physical conditions of an unusual nature, differing materially from those ordinarily encountered in the area, (b) changes in surface topography, (c) variations in subsurface moisture content, (d) Utility facilities, (e) the presence or discovery of Hazardous Materials, including contaminated groundwater, (f) the discovery at, near or on the Facility Right of Way of any archeological, paleontological or cultural resources, and (g) the discovery at, near or on the Facility Right of Way of any species listed as threatened or endangered under federal or State endangered species laws.

### **6.2 Governmental Approvals**

**6.2.1** Developer shall obtain all Governmental Approvals required in connection with the Facility or the Work with the exception of the NEPA Approval, the Section 404 Permit and

Section 401 certification, which approvals have been obtained by TxDOT and copies of which have been provided to Developer prior to the Effective Date. Developer also shall obtain all other Governmental Approvals of the Facility Right of Way that are required under the agreements shown in Section 6.2.4. Developer shall deliver to TxDOT true and complete copies of all such Governmental Approvals.

**6.2.2** Prior to submitting to a Governmental Entity any application for a Governmental Approval, any proposed Governmental Approval, or any proposed revision, modification, amendment, supplement, renewal, extension or waiver of a Governmental Approval or provision thereof, Developer shall submit the same, together with any supporting environmental studies and analyses, to TxDOT (a) for approval or (b) for review and comment, in the specific instances indicated in Table 4.1 – Environmental Approval Status of the Technical Requirements.

**6.2.3** In the event Developer desires to include any Additional Properties outside the Facility Right of Way for which NEPA Approval has been obtained, as between TxDOT and Developer, Developer shall be fully responsible for all necessary actions, and shall bear all risk of delay and all risk of increased cost, resulting from or arising out of any associated change in the Facility location and design, including (a) conducting all necessary environmental studies and preparing all necessary environmental documents in compliance with applicable Environmental Laws, (b) obtaining and complying with all necessary new Governmental Approvals, and all necessary re-evaluations, revisions, modifications, amendments, supplements, renewals and extensions of the NEPA Approval, Section 404 Permit and Section 401 certification, and other existing Governmental Approvals, and (c) bearing all risk and cost of litigation. TxDOT and FHWA will independently evaluate all environmental studies and documents and fulfill the other responsibilities assigned to them by 23 CFR Part 771.

**6.2.4** If Developer pursues Additional Properties outside the Facility Right of Way, or any other modification of or Deviation from any Governmental Approvals, including the NEPA Approval, Developer shall comply with, and obtain any consent or waiver required pursuant to, then-existing agreements between TxDOT and other Governmental Entities. These agreements include the following:

**6.2.4.1** Memorandum of Understanding between TxDOT and the Texas Historical Commission;

**6.2.4.2** Memorandum of Agreement between TxDOT and Texas Parks and Wildlife Department for Finalization of 1998 MOU, Concerning Habitat Descriptions and Mitigation;

**6.2.4.3** Memorandum of Agreement Between the Texas Department of Transportation and the Texas Natural Resource Conservation Commission (applicable to its successor agency the Texas Commission on Environmental Quality);

**6.2.4.4** First Amended Programmatic Agreement among the Federal Highway Administration, Texas State Historic Preservation Officer, Advisory Council on Historic Preservation and the Texas Department of Transportation; and

**6.2.4.5** Memorandum of Agreement between the Texas Department of Transportation and the Texas Parks and Wildlife Department Regarding Mitigation Banking.

**6.2.4.6** Program Level Agreement for Biological Evaluations and for the Development of Further Endangered Species Act Programmatic Agreement among the Texas Department of Transportation, FHWA and U.S. Fish and Wildlife Service.

Upon Developer's request, TxDOT will cooperate with Developer in updating the foregoing list and providing Developer with copies of the applicable agreements between TxDOT and other Governmental Entities.

**6.2.5** At Developer's request, TxDOT shall reasonably assist and cooperate with Developer in obtaining Governmental Approvals and revisions, modifications, amendments, supplements, renewals, reevaluations and extensions of existing Governmental Approvals. TxDOT and Developer shall work jointly to establish a scope of work and budget for TxDOT's Recoverable Costs related to the assistance and cooperation TxDOT will provide. Subject to any agreed scope of work and budget, Developer shall fully reimburse TxDOT for all costs and expenses, including TxDOT's Recoverable Costs, it incurs in providing such cooperation and assistance, including those incurred to conduct further or supplemental environmental studies. Without limiting the foregoing, subject to any agreed scope of work and budget, Developer shall fully reimburse TxDOT for all costs and expenses, including TxDOT's Recoverable Costs, it incurs in carrying out the TxDOT actions, and for any other reimbursable costs and expenses, set forth in Table 4.1 – Environmental Approval Status of the Technical Requirements.

**6.2.6** Developer shall comply with all conditions imposed by and undertake all actions required by and all actions necessary to maintain in full force and effect all Governmental Approvals, including performance of all environmental mitigation measures required by the FCA Documents or Governmental Approvals, except to the extent that responsibility for performance of such measures is expressly assigned to TxDOT in the FCA Documents.

**6.2.7** In the event that any Governmental Approvals required to be obtained by Developer must formally be issued in TxDOT's name, Developer shall undertake all efforts to obtain such approvals subject to TxDOT's reasonable cooperation with Developer, at Developer's expense, in accordance with Section 6.2.5, including execution and delivery of appropriate applications and other documentation in form approved by TxDOT. Refer to Table 4.1 – Environmental Approval Status of the Technical Requirements, for more specific provisions on applications in TxDOT's name for Environmental Approvals.

**6.2.8** In the event that TxDOT or FHWA must act as the lead agency and directly coordinate with a Governmental Entity, Developer shall provide all necessary support to facilitate the approval, mitigation or compliance process. Such support shall include conducting necessary field investigations, surveys, and preparation of any required reports, documents and applications.

**6.2.9** Developer shall be responsible for compliance with all applicable Laws in relation to Project Specific Locations and for obtaining any environmental clearance or other Governmental Approval required in connection with Project Specific Locations.

## **6.3 Submittal, Review and Approval Terms and Procedures**

### **6.3.1 General**

**6.3.1.1** Wherever in the FCA Documents Developer is obligated to make a Submittal to TxDOT, Developer shall also concurrently submit a duplicate thereof to the Independent Engineer. Wherever in the FCA Documents Developer is obligated to make a Submittal to the Independent Engineer, Developer shall also concurrently submit a duplicate thereof to TxDOT. The foregoing provision shall not apply wherever a provision of the FCA Documents expressly states that no duplicate or copy is required to be submitted to one or the other of TxDOT or the Independent Engineer.

**6.3.1.2** This Section 6.3 sets forth uniform terms and procedures that shall govern all Submittals to TxDOT pursuant to the FCA Documents or Facility Management Plan and component plans thereunder. In the event of any irreconcilable conflict between the provisions of this Section 6.3 and any other provisions of the FCA Documents or Facility Management Plan and component plans thereunder concerning submission, review and approval procedures, this Section 6.3 shall exclusively govern and control, except to the extent that the conflicting provision expressly states that it supersedes this Section 6.3.

### **6.3.2 Time Periods**

**6.3.2.1** Whenever TxDOT is entitled to review and comment on, or to affirmatively approve, a Submittal, TxDOT shall have a period of 14 days to act after the date it receives an accurate and complete Submittal, together with a completed Transmittal Form as provided in Section 2 of the Technical Requirements and all necessary information and documentation concerning the subject matter, except as otherwise provided below.

**6.3.2.2** The time periods for the Independent Engineer to review and comment on a Submittal shall be as set forth in the Independent Engineer Agreement, and except as specifically provided otherwise in the Independent Engineer Agreement, shall be several days shorter than the time periods available to TxDOT, to enable TxDOT to take into consideration the comments and recommendations of the Independent Engineer before TxDOT delivers its own responses.

**6.3.2.3** If any provision of the FCA Documents expressly provides a longer or shorter period for TxDOT or the Independent Engineer to act, such period shall control over the foregoing time period.

**6.3.2.4** If at any given time TxDOT or the Independent Engineer is in receipt of more than (a) ten concurrent Submittals in the aggregate (or other number of aggregate concurrent Submittals mutually agreed in writing by TxDOT and Developer) that are subject to TxDOT's review and comment or approval or (b) the maximum number of concurrent Submittals of any particular type set forth in any other provision of the FCA Documents, TxDOT may extend the applicable period for it and the Independent Engineer to act to that period in which TxDOT and the Independent Engineer can reasonably accommodate the Submittals under the circumstances, or such other period of extension set forth in any other provision of the FCA Documents, and no such extension shall constitute a TxDOT-Caused Delay, TxDOT Change, Relief Event, Compensation Event or other basis for any Claim. However, if at any time the Independent Engineer is in receipt of some Submittals subject to the decision factor in (a) and some Submittals subject to the decision factor in (b), then the maximum number of

Submittals determined pursuant to the decision factor in (b) shall determine whether TxDOT may extend the applicable period. Submittals are deemed to be concurrent to the extent the review time periods available to TxDOT under this Section 6.3.2 regarding such Submittals overlap. Refer to Sections 6.5.1, 7.2.4 and 7.3.1 of the Technical Requirements for maximum concurrent Utility Adjustment Submittals, Submittals of Acquisition Packages and Submittals of Facility ROW maps, and extensions of time in the case of Acquisition Packages and Facility ROW maps in excess of the maximum; extensions of time in the case of Utility Adjustment Submittals are addressed in accordance with this Section 6.3.2.5.

**6.3.2.5** All time periods for TxDOT or the Independent Engineer to act shall be extended by the period of any delay caused by any Relief Event set forth in clauses (a), (b), (c), (e), (f), (g), (n) and (o) of the definition of Relief Event (for this purpose modified where applicable to refer to Developer acts rather than TxDOT).

**6.3.2.6** During any time that there exists an uncured Persistent Developer Default for which TxDOT has given notice to Developer, the applicable period for TxDOT and the Independent Engineer to act on any Submittals received during such time that do not relate to curing such Persistent Developer Default shall automatically be extended by 14 Days.

**6.3.2.7** TxDOT shall endeavor to reasonably accommodate a written request from Developer for expedited action on a specific Submittal, within the practical limitations on availability of TxDOT and Independent Engineer personnel appropriate for acting on the types of Submittal in question; provided Developer sets forth in its request specific, abnormal circumstances demonstrating the need for expedited action. This provision shall not apply, however, during any time described in Section 6.3.2.5 or 6.3.2.6.

### **6.3.3 TxDOT Discretionary Approvals**

If the Submittal is one where the FCA Documents indicate approval or consent or acceptance is required from TxDOT in its sole discretion, absolute discretion, unfettered discretion or good faith discretion, then TxDOT's lack of approval, determination, decision or other action within the applicable time period under Section 6.3.2 shall be deemed disapproval. If approval is subject to the sole, absolute or unfettered discretion of TxDOT, then its decision shall be final, binding and not subject to the Dispute Resolution Procedures, and such decision shall not constitute a TxDOT-Caused Delay, TxDOT Change, Relief Event, Compensation Event or other basis for any Claim. If the approval is subject to the good faith discretion of TxDOT, then its decision shall be binding unless it is finally determined under the Dispute Resolution Procedures by clear and convincing evidence that such decision was arbitrary or capricious. For avoidance of doubt, if the decision is determined to be arbitrary and capricious and causes delay, it will constitute and be treated as a TxDOT-Caused Delay.

### **6.3.4 Other TxDOT Approvals**

**6.3.4.1** Whenever the FCA Documents indicate that a Submittal or other matter is subject to TxDOT's approval or consent and no particular standard therefor is stated, then the standard shall be reasonableness.

**6.3.4.2** If the Submittal is one where the FCA Documents indicate TxDOT's reasonable approval is required, or the reasonableness standard applies to TxDOT's right of approval or consent, and TxDOT delivers no approval, consent, determination, decision or other action within the applicable time period under Section 6.3.2, then Developer may

deliver to TxDOT a written notice stating the date within which TxDOT was to have decided or acted and that if TxDOT does not decide or act within five Business Days after receipt of the notice, delay thereafter may constitute TxDOT-Caused Delay for which Developer may be entitled to issue a Relief Event Notice and Compensation Event Notice under Sections 13.1 and 14.3.

### **6.3.5 TxDOT Review and Comment**

Whenever the FCA Documents indicate that a Submittal or other matter is subject to TxDOT's review, comment; review and comment, disapproval or similar action not entailing a prior approval and TxDOT delivers no comments, exceptions, objections, rejections or disapprovals within the applicable time period under Section 6.3.2, then Developer may proceed thereafter at its election and risk, without prejudice to TxDOT's rights to later object or disapprove in accordance with Section 6.3.7.1. No such failure or delay by TxDOT in delivering comments, exceptions, objections, rejections or disapprovals within the applicable time period under Section 6.3.2 shall constitute a TxDOT-Caused Delay, TxDOT Change, Relief Event, Compensation Event or other basis for any Claim. When used in the FCA Documents, the phrase "completion of the review and comment process" or similar terminology means either (a) TxDOT has reviewed, provided comments, exceptions, objections, rejections or disapprovals, and all the same have been resolved, or (b) the applicable time period has passed without TxDOT providing any comments, exceptions, objections, rejections or disapprovals.

### **6.3.6 Submittals Not Subject to Prior Review, Comment or Approval**

Whenever the FCA Documents indicate that Developer is to deliver a Submittal to TxDOT but express no requirement for TxDOT review, comment, disapproval, prior approval or other TxDOT action, then Developer is under no obligation to provide TxDOT any period of time to review the Submittal or obtain approval of it before proceeding with further Work, and TxDOT 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 in accordance with Section 6.3.7.1. No failure or delay by TxDOT in delivering comments, exceptions, objections, rejections or disapprovals with respect to the Submittal shall constitute a TxDOT-Caused Delay, TxDOT Change, Relief Event, Compensation Event or other basis for any Claim.

### **6.3.7 Resolution of TxDOT Comments and Objections**

**6.3.7.1** If the Submittal is one not governed by Section 6.3.3, TxDOT's exception, objection, rejection or disapproval shall be deemed reasonable, valid and binding if and only if based on any of the following grounds:

(a) The Submittal or subject provision thereof fails to comply with any applicable covenant, condition, requirement, term or provision of the FCA Documents or Facility Management Plan and component plans thereunder;

(b) The Submittal or subject provision thereof is not to a standard equal to or better than the requirements of Good Industry Practice;

(c) Developer has not provided all content or information required in respect of the Submittal or subject provisions thereof, provided that TxDOT assumes no duty, obligation or liability regarding completeness or correctness of any Submittal, including a Submittal that is to be delivered to another Governmental Entity as a proposed Governmental

Approval, or in order to obtain, modify, amend, supplement, renew, extend, waive or carry out a Governmental Approval;

(d) 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; or

(e) In the case of a Submittal that is to be delivered to another Governmental Entity as a proposed Governmental Approval, or in order to obtain, modify, amend, supplement, renew, extend, waive or carry out a Governmental Approval, it proposes commitments, requirements, actions, terms or conditions that are not usual and customary arrangements that TxDOT offers or accepts for addressing similar circumstances affecting its own projects.

**6.3.7.2** Developer shall respond to all of TxDOT's and the Independent Engineer's comments and objections to a Submittal and make modifications to the Submittal as necessary to fully reflect and resolve all such comments and objections, in accordance with the review processes set forth in this Section 6.3. However, if the Submittal is not governed by Section 6.3.3, the foregoing shall in no way be deemed to obligate Developer to incorporate any comments or resolve objections that are not on any of the grounds set forth in Section 6.3.7.1 and would result in a delay to a critical path on the Facility Schedule, in an increase in Developer's costs or a decrease in Toll Revenues, except pursuant to a TxDOT Change. If, however, Developer does not accommodate or otherwise resolve any comment or objection, Developer shall deliver to TxDOT within a reasonable time period, not to exceed 30 days after receipt of TxDOT's and the Independent Engineer's comments or objections, a written explanation why modifications based on such comment or objection are not required. The explanation shall include the facts, analyses and reasons that support the conclusion.

**6.3.7.3** The foregoing shall in no way be deemed to obligate Developer to incorporate any comments or resolve objections that Developer believes would render the Submittal erroneous, defective, deficient or less than Good Industry Practice in any respect, except pursuant to a TxDOT Change.

**6.3.7.4** Thereafter, the Parties shall attempt in good faith to resolve the dispute. If they are unable to resolve the dispute, it shall be resolved according to the Dispute Resolution Procedure except (a) as provided otherwise in Section 6.3.3, and (b) if TxDOT elects to issue a Directive Letter pursuant to Section 14.3 with respect to the disputed matter, Developer shall proceed in accordance with TxDOT's directive while retaining any Claim as to the disputed matter.

**6.3.7.5** If Developer fails to notify TxDOT within such time period, TxDOT may deliver to the Developer a written notice stating the date by which the Developer was to have addressed TxDOT's and the Independent Engineer's comments and that if the Developer does not address those comments within five Business Days after receipt of this notice, then that failure shall constitute Developer's agreement to make all changes necessary to accommodate and resolve the comment or objection and full acceptance of all responsibility for such changes without right to a TxDOT-Caused Delay, Change Order, Relief Event, Compensation Event or other Claim, including any Claim that TxDOT assumes design or other liability.

### **6.3.8 Limitations on Developer's Right to Rely**

**6.3.8.1** No review, comment on, objection, rejection, approval, disapproval, acceptance, certification (including certificates of Substantial Completion and Final Acceptance), concurrence monitoring, testing, inspection, spot checking, auditing or other oversight by or on behalf of TxDOT or the Independent Engineer, and no lack thereof by TxDOT or the Independent Engineer, shall constitute acceptance of materials or Work or waiver of any legal or equitable right under the FCA Documents, at law, or in equity. TxDOT shall be entitled to remedies for unapproved Deviations and Nonconforming Work and to identify additional Work which must be done to bring the Work and Facility into compliance with requirements of the FCA Documents, regardless of whether previous review, comment on, objection, rejection, approval, disapproval, acceptance, certification, concurrence, monitoring, testing, inspection, spot checking, auditing or other oversight were conducted or given by TxDOT or the Independent Engineer. Regardless of any such activity or failure to conduct any such activity by TxDOT or the Independent Engineer, Developer at all times shall have an independent duty and obligation to fulfill the requirements of the FCA Documents. Developer agrees and acknowledges that any such activity or failure to conduct any such activity by TxDOT or the Independent Engineer:

- (a) Is solely for the benefit and protection of TxDOT;
- (b) Does not relieve Developer of its responsibility for the selection and the competent performance of all Developer-Related Entities;
- (c) Does not create or impose upon TxDOT any duty or obligation toward Developer to cause it to fulfill the requirements of the FCA Documents;
- (d) Shall not be deemed or construed as any kind of warranty, express or implied, by TxDOT;
- (e) May not be relied upon by Developer or used as evidence in determining whether Developer has fulfilled the requirements of the FCA Documents; and
- (f) May not be asserted by Developer against TxDOT as a defense, legal or equitable, to, or as a waiver of or relief from, Developer's obligation to fulfill the requirements of the FCA Documents.

**6.3.8.2** Developer shall not be relieved or entitled to reduction of its obligations to perform the Work in accordance with the FCA Documents, or any of its other liabilities and obligations, including its indemnity obligations, as the result of any such activity or failure to conduct any such activity by TxDOT or the Independent Engineer. Such activity by TxDOT or the Independent Engineer shall not relieve Developer from liability for, and responsibility to cure and correct, any unapproved Deviations, Nonconforming Work or Developer Defaults.

**6.3.8.3** To the maximum extent permitted by law, Developer hereby releases and discharges TxDOT and the Independent Engineer from any and all duty and obligation to cause Developer's Work or the Facility to satisfy the standards and requirements of the FCA Documents. The Independent Engineer is an intended third party beneficiary of this provision.



**6.3.8.4** Notwithstanding the provisions of Sections 6.3.8.1, 6.3.8.2 and 6.3.8.3:

(a) Developer shall be entitled to rely on written approvals and acceptances from TxDOT (i) for the limited purpose of establishing that the approval or acceptance occurred or (ii) that are within its sole, absolute or unfettered discretion, but only to the extent that Developer is prejudiced by a subsequent decision of TxDOT to rescind such approval or acceptance;

(b) Developer shall be entitled to rely on specific written Deviations TxDOT approves under Section 7.2.3 or 8.1.2.10;

(c) Developer shall be entitled to rely on the certificates of Substantial Completion and Final Acceptance from TxDOT for the limited purpose of establishing that Substantial Completion and Final Acceptance, as applicable, have occurred, and the respective dates thereof;

(d) TxDOT is not relieved from any liability arising out of a knowing and intentional material misrepresentation under any written statement TxDOT delivers to Developer; and

(e) TxDOT is not relieved from performance of its express responsibilities under the FCA Documents in accordance with all standards applicable thereto.

**6.4 Community Outreach and Public Information**

Developer shall provide ongoing information to the public concerning the development, construction, operation, tolling and maintenance of the Facility, in accordance with the Public Information and Communications Plan prepared by Developer pursuant to Section 3 of the Technical Requirements.

**ARTICLE 7. DESIGN, ACQUISITION AND CONSTRUCTION**

**7.1 General Obligations of Developer**

Developer, in addition to performing all other requirements of the FCA Documents, shall:

**7.1.1** 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 FCA Documents expressly specify will be undertaken by TxDOT or other Persons) to construct the Facility and maintain it during construction, so as to achieve Substantial Completion, Service Commencement and Final Acceptance by the applicable Milestone Schedule Deadlines;

**7.1.2** At all times provide a Facility Manager approved by TxDOT who (a) will have full responsibility for the prosecution of the Design Work and Construction Work, (b) will act as agent and be a single point of contact in all matters on behalf of Developer, (c) will be present (or its approved designee will be present) at the Site at all times that Design Work or Construction Work is performed, and (d) will be available to respond to the Independent Engineer, TxDOT or its Authorized Representatives;

**7.1.3** Comply with, and require that all Contractors comply with, all requirements of all applicable Laws, including Environmental Laws, the Americans with Disabilities Act of 1990 (42 U.S.C. § 12101 et seq.), as amended;

**7.1.4** Cooperate with TxDOT, the Independent Engineer, and Governmental Entities with jurisdiction in all matters relating to the Design Work and Construction Work, including their review, inspection and oversight of the design and construction of the Facility and the Utility Adjustments; and

**7.1.5** Mitigate delay to design and construction of the Facility and mitigate damages due to delay in all circumstances, to the extent possible, including by re-sequencing, reallocating, or redeploying Developer's and its Contractors' forces to other work, as appropriate, except that Developer is not obligated to consume Float.

## **7.2 Performance, Design and Construction Standards**

**7.2.1** Developer shall furnish all aspects of the Design Work and all Design Documents, including design required in connection with the operation and maintenance, Renewal Work or Upgrades, and shall construct the Facility and/or Utility Adjustments included in the Construction Work as designed, free from material defects, and in accordance with (a) Good Industry Practice, (b) the requirements, terms and conditions set forth in the FCA Documents (including the Technical Requirements and Technical Documents), (c) the Milestone Schedule and Facility Schedule, (d) all Laws, (e) the requirements, terms and conditions set forth in all Governmental Approvals, (f) the approved Facility Management Plan and all component plans prepared or to be prepared thereunder, (g) the Construction Documents and (h) all other applicable safety, environmental and other requirements, taking into account the Facility Right of Way limits and other constraints affecting the Facility.

**7.2.2** The Facility design and construction shall be subject to certification pursuant to the procedure contained in the approved Quality Management Plan.

**7.2.3** Developer may apply for TxDOT approval of Deviations from applicable Technical Requirements or Technical Documents regarding design or construction. All applications shall be in writing. Where Developer requests a Deviation as part of the submittal of a component plan of the Facility Management Plan, Developer shall specifically identify and label the Deviation. TxDOT shall consider in its sole discretion, but have no obligation to approve, any such application, and Developer shall bear the burden of persuading TxDOT that the Deviation sought constitutes sound and safe engineering consistent with Good Industry Practice and achieves or substantially achieves TxDOT's applicable Safety Standards and criteria. No Deviation shall exist or be effective unless and until stated in writing signed by TxDOT's Authorized Representative. TxDOT's affirmative written approval of a component plan of the Facility Management Plan shall constitute approval of the Deviations expressly identified and labeled as Deviations therein, unless TxDOT takes exception to any such Deviation. TxDOT's lack of issuance of a written Deviation within 14 Days after Developer applies therefor in writing shall be deemed a disapproval of such application. TxDOT's denial or disapproval of a requested Deviation shall be final and not subject to the Dispute Resolution Procedures. TxDOT may elect to process the application as a Change Request under Section 14.2 rather than as an application for a Deviation.

**7.2.4** Reserved.

**7.2.5** Developer shall use reasonable care to identify any provisions of the Technical Requirements or Technical Documents that are erroneous, create a potentially unsafe condition, or are or become inconsistent with Good Industry Practice. Whenever Developer knows or has reason to know that a provision of the Technical Requirements or Technical Documents is erroneous, creates a potentially unsafe condition or is or becomes inconsistent with Good Industry Practice, Developer shall have the duty to notify TxDOT and the Independent Engineer 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 Good Industry Practice. Any changes made shall be subject to the provisions of Section 7.2.7 and, if applicable, Section 8.1.2. If Developer commences or continues any Design Work or Construction Work affected by the change after the need for the change was discovered or suspected, or should have been discovered or suspected through the exercise of reasonable care, Developer shall bear any additional costs associated with redoing the Work already performed.

**7.2.6** References in the Technical Requirements or Technical Documents to manuals or other publications governing the Design Work or Construction Work prior to the Service Commencement Date shall mean the most recent editions in effect as of the Effective Date, unless expressly provided otherwise (e.g. Section 7.3.5.2, par. 3 of the Technical Requirements). Any changes to the Technical Requirements and Technical Documents, including Safety Standards, respecting Design Work or Construction Work prior to the Service Commencement Date shall be subject to the Change Order process for a TxDOT Change in accordance with Article 14. Safety Compliance changes shall be in accordance with Section 12.4.

**7.2.7** The Parties anticipate that from time to time after the Setting Date TxDOT will adopt, through revisions to existing manuals and publications or new manuals and publications, changed, added or replacement standards, criteria, requirements, conditions, procedures, specifications and other provisions, including Safety Standards, relating to Design Work and Construction Work of general application to Comparable Limited Access State Highways that are or become tolled or the subject of concession or public-private partnership agreements. TxDOT shall have the right to add such changed, added or replacement standards, criteria, requirements, conditions, procedures, specifications and other provisions, including Safety Standards, to Book 3 by notice to Developer, whereupon they shall constitute amendments, and become part, of the Technical Documents. To the extent such changed, added or replacement Technical Documents or Safety Standards encompass matters that are addressed in the Technical Requirements as of the Setting Date, they shall, upon inclusion in Book 3, replace and supersede inconsistent provisions of the Technical Requirements. TxDOT will identify the superseded provisions in its notice to Developer. Notwithstanding the foregoing, in the absence of a TxDOT Change and except as provided otherwise in Section 7.2.8 with respect to a Change in Law and Section 7.5.3 with respect to Adjustment Standards, if TxDOT adopts the changed, added or replacement standards, criteria, requirements, conditions, procedures, specifications and other provisions, including changed, added or replacement Safety Standards, prior to the Service Commencement Date, Developer shall not be obligated to (but may) incorporate the same into its design and construction of the Facility prior to the Service Commencement Date.

**7.2.8** New or revised statutes or regulations (excluding TxDOT rules and regulations) adopted after the Setting Date that change, add to or replace applicable standards, criteria, requirements, conditions, procedures, specifications and other provisions, including

Safety Standards, related to the Design Work and Construction Work, as well as revisions to Technical Requirements and Technical Documents to conform to such new or revised statutes or regulations, shall be treated as Changes in Law rather than a TxDOT revision of Technical Requirements and Technical Documents; however, the foregoing shall not apply to new or revised statutes or regulations that also cause or constitute changes in Adjustment Standards.

**7.2.9** Refer to Section 12.4 for the timing by which Developer must implement Safety Compliance prior to Service Commencement.

### **7.3 Design Implementation and Submittals**

**7.3.1** Developer, through the appropriately qualified and licensed design professionals identified in Developer's Facility Management Plan in accordance with Section 2.2 of the Technical Requirements, shall prepare designs, plans and specifications in accordance with the FCA Documents. Developer shall cause the engineer of record for the Facility to sign and seal all Final Design Documents.

**7.3.2** Developer shall deliver to TxDOT and the Independent Engineer accurate and complete duplicates of all interim, revised and final Design Documents (including Final Design Documents), Plans and Construction Documents as and when Developer completes preparation thereof, in form as provided in Section 2.4 of the Technical Requirements.

### **7.4 Facility Right of Way Acquisition**

**7.4.1** Developer shall undertake and complete the acquisition of Facility Right of Way in accordance with Section 7 of the Technical Requirements, the approved Right of Way Acquisition Plan and all applicable Laws relating to such acquisition, including without limitation the Uniform Act.

**7.4.2** Developer shall perform all right of way engineering, mapping, surveying, appraisal, appraisal review, administration, negotiation, acquisition, environmental assessment, testing and remediation, environmental permitting, if any, (except for the NEPA Approval), procurement of title insurance, clearing of title, closing of acquisitions, relocation assistance, clearance/demolition of improvements, and related services in connection with the acquisition of real property interests necessary for construction and/or operation of the Facility, including land required for permanent or temporary works outside of the Facility Right of Way, and for temporary work space, lay down areas, material storage areas and earthwork borrow sites or any other convenience of Developer, as described in more detail in Section 7 of the Technical Requirements. Prior to the time Developer has necessary access to a particular parcel, the environmental assessment, testing and remediation and environmental permitting for such parcel may be limited to such environmental assessment as is necessary for reasonable investigation of such parcel in connection with the acquisition of such parcel.

**7.4.3** Developer shall pay all costs and expenses associated with acquisition of real property interests necessary for construction and/or operation of the Facility, including (a) the cost of acquisition services and document preparation, (b) the cost of condemnation proceedings required by the Office of the Attorney General, from special commissioner's hearings through jury trials and appeals, including attorneys' and expert witness fees, and all fees and expenses for exhibits, transcripts, photos and other documents and materials production, (c) the purchase prices, court awards or judgments, and special commissioner's awards for all parcels required for the Facility or the Work, whether within or outside of the

Facility Right of Way, (d) the cost of permanent or temporary acquisition of leases, easement and other interests in real property, including for drainage, temporary work space, lay down areas, material storage areas, earthwork borrow sites, and any other convenience of Developer, (e) the cost of permitting, (f) closing costs associated with parcel purchases, in accordance with the Uniform Act and TxDOT policies, and (g) relocation assistance payments and costs, in accordance with the Uniform Act. If TxDOT incurs any such costs and expenses on Developer's behalf, including TxDOT's Recoverable Costs and costs for the State Attorney General counsel in connection with any condemnation actions, TxDOT may submit any invoices for such costs and expenses to Developer, in which case Developer shall pay the invoices prior to delinquency. If TxDOT pays any such costs and expenses on Developer's behalf, Developer shall reimburse TxDOT within ten Days of TxDOT's submittal to Developer of an invoice for such TxDOT costs and expenses.

**7.4.4** TxDOT, in accordance with the Right of Way Acquisition Plan, shall make available to Developer the land or land rights owned or controlled by TxDOT that are necessary for construction of the Facility and/or Utility Adjustments (subject to the Utility Accommodation Rules and other requirements of Section 6 of the Technical Requirements). TxDOT shall provide to Developer the benefit of any provisions in recorded utility or other easements affecting the Facility which require the easement holders to relocate at their expense, subject, however, to any provisions of applicable Law affecting the easement holder's payment obligations for Utility Adjustments.

**7.4.5** TxDOT shall (a) provide review and approval or disapproval of Acquisition Packages, and (b) undertake eminent domain proceedings, if necessary, in accordance with the procedures and time frames established in Section 7 of the Technical Requirements and the approved Right of Way Acquisition Plan. Except as otherwise authorized by Law for temporary areas that are necessary for construction of the Facility, TxDOT shall not be obligated to exercise its power of eminent domain in connection with Developer's acquisition of any such temporary right or interest, and TxDOT shall have no obligations or responsibilities with respect to the acquisition, maintenance or disposition of such temporary rights or interests.

**7.4.6** Developer's designated Right of Way Acquisition Manager, referred to herein as the ROW AM, shall be entitled to undertake the right-of-way acquisition services described in Sections 7.4.1, 7.4.2 and 7.4.3 of the Technical Requirements on behalf of TxDOT as its agent for such limited purpose, subject to the conditions and limitations of this Section 7.4.6.

**7.4.6.1** In performing such activities, the ROW AM shall at all times follow the standard of care and conduct and be subject to the laws and regulations applicable to a licensed real estate broker in the State, and shall at all times conform with applicable Law (including, to the extent applicable, the Uniform Act) in all communications and interactions with the owners or occupants of the Facility Right of Way or any other real property in which Developer seeks to obtain any right or interest.

**7.4.6.2** Developer shall not be entitled to a Change Order or Claim as a result of the actions or omissions of the ROW AM in connection with the ROW AM's activities in carrying out the limited agency provided herein.

**7.4.7** If at any time Developer or, to the best of Developer's knowledge, any Developer-Related Entity directly or indirectly (a) acquires or has previously acquired an interest in real property likely to be parcels of the Facility ROW or the remainders of any such parcels, (b) loans or has previously loaned money to any interest holder in any real property likely to be

a Facility ROW parcel and accepts as security for such loan the parcel, or the remainder of any such ROW parcel that is not a whole acquisition, or (c) purchases or has previously purchased from any existing mortgagee the mortgage instrument that secures an existing loan against real property likely to be a Facility ROW parcel, or the remainder of any such parcel, Developer shall promptly disclose the same to TxDOT. In the case of acquisitions, loans or mortgage purchases that occurred prior to the Effective Date, such disclosure shall be made within ten days after the Effective Date. In the event that Developer or any Developer-Related Entity acquires a real property interest, whether title or mortgage, in parcels of the Facility ROW, the real property interest acquired or a release of mortgage, as the case may be, shall be conveyed to the State without the necessity of eminent domain. Developer shall not acquire or permit the acquisition by any Developer-Related Entity of any real property interest in a Facility ROW parcel, whether in fee title or mortgage, for the purpose of avoiding compliance with applicable Laws regarding Facility ROW acquisition or with the practices, guidelines, procedures and methods described in Section 7.2.1 of the Technical Requirements.

**7.4.8** Developer and TxDOT acknowledge that Developer has incorporated the value of saleable improvements not retained by the property owner into the Facility ROW costs shown in the Financial Model and that Developer, subject to the property owner's waiver of the right to retain, shall concurrently with conveyance of the real property interest to TxDOT, and without the necessity of further documentation executed by TxDOT, obtain the rights to such saleable improvements. Developer shall not be entitled to a credit for any improvements retained by a property owner. To the extent required, TxDOT shall execute a transfer of title of such saleable improvements within the acquired Facility ROW to Developer as soon as legally permissible and in accordance with applicable Laws. Upon conveyance of the real property interest to TxDOT, Developer shall comply with all applicable Laws with respect to relocation assistance and demolition.

## **7.5 Utility Adjustments**

### **7.5.1 Developer's Responsibility**

Developer is responsible for causing, in accordance with the Facility Schedule, all Utility Adjustments necessary to accommodate construction, operation, maintenance and/or use of the Facility, both in its initial configuration and in its Ultimate Configuration. Accordingly, when used in the FCA Documents with respect to Utilities, the phrase "accommodation of the ... Facility" or similar terminology refers to accommodation of the Facility in both its initial configuration and in its Ultimate Configuration. All Utility Adjustment Work performed by Developer shall comply with the FCA Documents. Developer shall coordinate, monitor, and otherwise undertake the necessary efforts to cause Utility Owners performing Utility Adjustment Work to perform such work timely, in coordination with the Work, and in compliance with the standards of design and construction and other applicable requirements specified in the FCA Documents. However, regardless of the arrangements made with the Utility Owners and except as otherwise provided in Article 13, Developer shall continue to be the responsible party to TxDOT for timely performance of all Utility Adjustment Work so that upon completion of the Work, all Utilities located within or in the vicinity of the Facility Right of Way are compatible with the Facility.

### **7.5.2 Utility Agreements**

**7.5.2.1** As described in Section 6 of the Technical Requirements, Developer is responsible for preparing and entering into Utility Agreements with the Utility Owners, and TxDOT agrees to cooperate as reasonably requested by Developer in pursuing

Utility Agreements, including attendance at negotiation sessions and review of Utility Agreements. TxDOT is not providing any assurances to Developer that the Utility Owners will accept, without modification, the standard Utility Agreement forms specified in Section 6.1.4 of the Technical Requirements; Developer is solely responsible for the terms and conditions of all MUAAs and UAAAs into which it enters (subject to the requirements of the Contract Documents, including Section 6.1.4 of the Technical Requirements). TxDOT will not be a party to the Utility Agreements; however, Developer shall cause the Utility Agreements to designate TxDOT as an intended third-party beneficiary thereof. Developer shall not enter into any agreement with a Utility Owner that purports to bind TxDOT in any way, unless TxDOT has executed such agreement as a party thereto (TxDOT's signature indicating approval or review of an agreement between Developer and a Utility Owner, or its status as a third-party beneficiary, shall not satisfy this requirement).

**7.5.2.2** If a conflict occurs between the terms of an agreement between Developer and a Utility Owner and those of the FCA Documents, the terms that establish the higher quality, manner or method of performing Utility Adjustment Work, establish better Good Industry Practice or use more stringent standards shall prevail between Developer and TxDOT; if the foregoing criteria are not relevant to the terms at issue, then the FCA Documents shall prevail, unless expressly provided otherwise in the FCA Documents.

**7.5.2.3** Developer shall comply with and timely perform all obligations imposed on Developer by any Utility Agreement.

### **7.5.3 Requirements**

Each Utility Adjustment (whether performed by Developer or by the Utility Owner) shall comply with the Adjustment Standards in effect as of the Effective Date, together with any subsequent amendments and additions to those standards that (a) are necessary to conform to applicable Law, or (b) are adopted by the Utility Owner and affect the Utility Adjustment pursuant to the applicable Utility Agreement(s). Developer is solely responsible for negotiating any terms and conditions of its Utility Agreements that might limit Utility Owner amendments and additions to its Adjustment Standards after the Effective Date. In addition, all Utility Adjustment Work shall comply with all applicable Laws, the applicable Utility Agreement(s), and all other requirements specified in Section 6 of the Technical Requirements.

### **7.5.4 Utility Adjustment Costs**

**7.5.4.1** Subject to Section 7.5.4.2, Developer is responsible for all costs of the Utility Adjustment Work, including costs of acquiring Replacement Utility Property Interests and costs with respect to relinquishment or acquisition of Existing Utility Property Interests, and excluding costs attributable to Betterment and any other costs for which the Utility Owner is responsible under applicable Law. Developer shall fulfill this responsibility either by performing the Utility Adjustment Work itself at its own cost (except that any assistance provided by any Developer-Related Entity to the Utility Owner in acquiring Replacement Utility Property Interests shall be provided outside of the Work, in compliance with Section 6.2.4.2 of the Technical Requirements), or by reimbursing the Utility Owner for its Utility Adjustment Work (however, Developer has no obligation to reimburse Utility Adjustment costs for any Service Line Adjustment for which the affected property owner has been compensated pursuant to Section 7.4). Developer is solely responsible for collecting directly from the Utility Owner any reimbursement due to Developer for Betterment costs or other costs for which the Utility Owner is responsible under applicable Law.

**7.5.4.2** For each Utility Adjustment, the eligibility of Utility Owner costs (both indirect and direct) for reimbursement by Developer, as well as the determination of any Betterment or other costs due to Developer, shall be established in accordance with applicable Law and the applicable Utility Agreement(s), all of which shall incorporate by reference 23 CFR Part 645 Subpart A.

**7.5.4.3** Developer shall compensate the Utility Owner for the fair market value of each Existing Utility Property Interest relinquished pursuant to Section 6.2.4.3 of the Technical Requirements, to the extent TxDOT would be required to do so by applicable Law and provided that TxDOT has not objected to the Utility Owner's claim. Developer is advised that in some cases reimbursement of the Utility Owner's acquisition costs for a Replacement Utility Property Interest will satisfy this requirement. Developer shall pay any compensation due to the Utility Owner and all costs and expenses associated therewith (including any incurred by TxDOT on Developer's behalf for eminent domain proceedings or otherwise) in accordance with Section 7.4. Developer shall carry out the same duties for acquisition of an Existing Utility Property Interest, as are assigned to Developer in Section 7.4 and Section 7 of the Technical Requirements for the acquisition of any other necessary real property interests.

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

**7.5.4.5** If any local Governmental Entity is participating in any portion of Utility Adjustment costs, Developer shall coordinate with TxDOT and such local Governmental Authority regarding accounting for and approval of those costs.

**7.5.4.6** Developer shall maintain a complete set of records for the costs of each Utility Adjustment (whether incurred by Developer or by the Utility Owner), in a format compatible with the estimate attached to the applicable Utility Agreement 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. Developer also shall indicate in these records the source of funds used for each Utility Adjustment. All records with respect to Utility Adjustment Work shall comply with the record keeping and audit requirements of the FCA Documents.

## **7.5.5 FHWA Requirements**

Unless TxDOT advises Developer otherwise, the following provisions apply:

**7.5.5.1** The Facility will be subject to 23 CFR Part 645 Subpart A (including its requirements as to plans, specifications, estimates, charges, tracking of costs, credits, billings, records retention, and audit) and FHWA's associated policies. Developer shall comply (and shall require the Utility Owners to comply) with 23 CFR Part 645 Subpart A as necessary for any Utility Adjustment costs to be eligible for FHWA reimbursement (or for any other federal financing or funding). Developer acknowledges, however, that without regard to whether such compliance is required, (a) it is not anticipated that Developer will be eligible for FHWA reimbursement of any Utility Adjustment outlays, and (b) Developer will not have any



share in any reimbursement from FHWA or other federal financing or funding that TxDOT may receive on account of Utility Adjustments.

**7.5.5.2** Developer shall prepare and deliver to TxDOT in accordance with the FMP, a list of all Utilities identified by Developer pursuant to Section 6 of the Technical Requirements (an "Alternate Procedure List") in appropriate format for submittal to FHWA, together with all other documentation required by FHWA for compliance with the FHWA Alternate Procedure. If applicable, TxDOT will submit the Alternate Procedure List and other documentation to FHWA.

**7.5.5.3** Promptly upon determining that any Utility Owner not referenced on the Alternate Procedure List is impacted by the Facility, Developer shall submit to TxDOT all documentation required by FHWA to add these Utilities to the Alternate Procedure List. If applicable, TxDOT will transmit the additional documentation to FHWA for approval.

**7.5.5.4** Promptly upon receiving FHWA's approval of the initial or any amended Alternate Procedure List, TxDOT will forward the approved list to Developer.

#### **7.5.6 Utility Enhancements**

Developer shall be responsible for addressing any requests by Utility Owners that Developer design and/or construct a Betterment or Utility Owner Project (collectively, "Utility Enhancement"). Any Betterment performed as part of a Utility Adjustment, whether by Developer or by the Utility Owner, shall be subject to the same standards and requirements as if it were a necessary Utility Adjustment, and shall be addressed in the appropriate Utility Agreement. Developer shall perform any work on a Utility Owner Project only by separate contract outside of the Work, and such work shall be subject to Section 7.5.8. Under no circumstances shall Developer proceed with any Utility Enhancement that is incompatible with the Facility or is not in compliance with applicable Law, the Governmental Approvals or the FCA Documents, including the Milestone Schedule Deadlines. Under no circumstances will Developer be entitled to any compensation or time extension hereunder as the result of any Utility Enhancement, whether performed by Developer or by the Utility Owner.

#### **7.5.7 Failure of Utility Owners to Cooperate**

**7.5.7.1** Developer shall use diligent efforts to obtain the cooperation of each Utility Owner as necessary for the Facility. Developer shall notify TxDOT immediately if (a) Developer is unable (or anticipates that it will be unable), after diligent efforts, to reach agreement with a Utility Owner on a necessary Utility Agreement within a reasonable time, (b) Developer reasonably believes for any other reason that any Utility Owner would not undertake or permit a Utility Adjustment in a manner consistent with the timely completion of the Facility, (c) Developer becomes aware that any Utility Owner is not cooperating in a timely manner to provide agreed-upon work or approvals, or (d) any other dispute arises between Developer and a Utility Owner with respect to the Facility, despite Developer's diligent efforts to obtain such Utility Owner's cooperation or otherwise resolve such dispute. Such notice may include a request that TxDOT assist in resolving the dispute or in otherwise obtaining the Utility Owner's timely cooperation. Developer shall provide TxDOT with such information as TxDOT requests regarding the Utility Owner's failure to cooperate and the effect of any resulting delay on the Facility Schedule. After delivering to TxDOT any notice or request for assistance, Developer shall continue to use diligent efforts to pursue the Utility Owner's cooperation.

**7.5.7.2** If Developer requests TxDOT's assistance pursuant to Section 7.5.7.1, Developer shall provide evidence reasonably satisfactory to TxDOT that (a) the subject Utility Adjustment is necessary, (b) the time for completion of the Utility Adjustment in the Facility Schedule was, in its inception, a reasonable amount of time for completion of such work, (c) Developer has made diligent efforts to obtain the Utility Owner's cooperation, and (d) the Utility Owner is not cooperating (the foregoing items (a) through (d) are referred to herein as the "conditions to assistance"). Following TxDOT's receipt of satisfactory evidence, TxDOT shall take such reasonable steps as may be requested by Developer to obtain the cooperation of the Utility Owner or resolve the dispute; however, TxDOT shall have no obligation to prosecute eminent domain or other legal proceedings, or to exercise any other remedy available to it under applicable Law or existing contract, unless TxDOT elects to do so in its sole discretion. If TxDOT holds contractual rights that might be used to enforce the Utility Owner's obligation to cooperate and TxDOT elects in its sole discretion not to exercise those rights, then TxDOT shall assign those rights to Developer upon Developer's request; however, such assignment shall be without any representation or warranty as to either the assignability or the enforceability of such rights. Developer shall reimburse TxDOT for TxDOT's Recoverable Costs in connection with providing any assistance to Developer pursuant to this Section 7.5.7. Any assistance TxDOT provides shall not relieve Developer of its sole responsibility for satisfactory compliance with its obligations and timely completion of all Utility Adjustment Work, except as otherwise expressly set forth herein.

**7.5.7.3** If TxDOT objects in writing to a request for assistance pursuant to Section 7.5.7.1, based on Developer's failure to satisfy the conditions to assistance for that request, Developer shall take such action as Developer deems advisable during the next 30 days to obtain the Utility Owner's cooperation and shall then have the right to submit another request for assistance on the same subject matter. This process shall be followed until Developer succeeds in obtaining the Utility Owner's cooperation or in otherwise resolving the dispute or until TxDOT determines, based on evidence presented by Developer, that the conditions to assistance have been satisfied. Developer shall have the right to submit the question of the reasonableness of TxDOT's determination for resolution according to the Dispute Resolution Procedures.

**7.5.7.4** In certain cases where a Utility Owner is not cooperating with Developer or TxDOT, TxDOT may, in its sole discretion and where applicable Law authorizes TxDOT to take unilateral action, issue a Directive Letter directing Developer to proceed with a Utility Adjustment without an agreement or other written consent by the Utility Owner. If TxDOT directs Developer to perform work pursuant to this Section 7.5.7.4, then Developer, without cost to TxDOT, shall proceed with such work as if Developer has entered into a Utility Agreement providing for Developer to perform such work, and shall perform such work in accordance with the requirements of the FCA Documents otherwise applicable to Developer's performance of Utility Adjustment Work.

## **7.5.8 Applications for Utility Permits**

**7.5.8.1** It is anticipated that during the design and construction phases of the Work, from time to time Utility Owners will apply for utility permits to install new Utilities that would cross or longitudinally occupy the Facility Right of Way, or to modify, upgrade, relocate or expand existing Utilities within the Facility Right of Way for reasons other than accommodation of the Facility. The provisions of Sections 7.5.8.2 through 7.5.8.4 shall apply to all such permit applications, except as otherwise provided in Section 7.5.8.5. Except as otherwise provided in Section 7.5.8.4(b) or in Section 11.2, no accommodation of new Utilities or of modifications,

upgrades, relocations or expansions of existing Utilities pursuant hereto shall entitle Developer to compensation, extension of time or other Claim against TxDOT.

**7.5.8.2** For all such utility permit applications pending as of or submitted after the Effective Date, Developer shall furnish the most recent Facility design information and/or as-built plans, as applicable, to the applicants, and shall assist each applicant with information regarding the location of other proposed and existing Utilities. Developer shall keep records of its costs related to new Utilities separate from other costs.

**7.5.8.3** Developer shall assist TxDOT in deciding whether to approve a permit described in Section 7.5.8.2. Within a time period that will enable TxDOT to timely respond to the application, Developer shall analyze each application and provide to TxDOT a recommendation (together with supporting analysis) as to whether the permit should be approved, denied, or approved subject to conditions. As part of the recommendation process, Developer shall furnish to TxDOT Utility No-Conflict Sign-Off Forms, signed by both Developer's Utility Design Coordinator (UDC) and Developer's Utility Manager, using the standard forms included in Book 2. Developer shall limit the grounds for its recommendation to the grounds (as TxDOT communicates to Developer from time to time) on which TxDOT is legally entitled to approve or deny the application or to impose conditions on its approval.

**7.5.8.4** If Developer and TxDOT disagree on the response to a permit application described in Section 7.5.8.2, such disagreement shall be resolved according to the Dispute Resolution Procedures; provided that if Developer recommends against issuance of the permit and TxDOT determines issuance is appropriate or required, then:

(a) TxDOT's determination shall control unless it is arbitrary and capricious;

(b) TxDOT may elect to issue the utility permit in advance of resolution of the Dispute, but if it is finally determined that issuance of the permit was arbitrary and capricious, its issuance shall be deemed a TxDOT Change (and therefore a potential Relief Event and Compensation Event); and

(c) If TxDOT elects to delay issuance of a utility permit pending final resolution of the Dispute, Developer's indemnities under Sections 16.5.1.2 and 16.5.1.4 shall be deemed to apply with respect to any applicant claim of wrongful delay or denial.

**7.5.8.5** Where TxDOT is pursuing a Business Opportunity involving a Utility in the Facility Right of Way, (a) TxDOT shall have the right to issue utility permits in its sole discretion, (b) any decision by TxDOT to issue utility permits shall be final, binding and not subject to the Dispute Resolution Procedures, (c) Sections 7.5.8.2 through 7.5.8.4 shall not apply, and (d) instead, Section 11.2 shall apply.

## **7.5.9 Payment Bonds; Letters of Credit; Insurance**

**7.5.9.1** Upon request from a Utility Owner entitled to reimbursement of Utility Adjustment costs, Developer shall provide security for such reimbursement by way of a payment bond or a letter of credit, in such amount and on such terms as are negotiated in good faith between Developer and the Utility Owner.

**7.5.9.2** Developer may satisfy a Utility Owner's requirement that Developer provide liability insurance by naming such Utility Owner as an additional insured on the insurance provided by Developer or any Contractor pursuant to Article 16.

## **7.6 Conditions to Commencement of Construction**

### **7.6.1 Construction Work Generally**

Except to the extent expressly permitted in writing by TxDOT, Developer shall not commence or permit or suffer commencement of construction of the Facility or applicable portion thereof until TxDOT issues Notice to Proceed for the work and all of the following conditions have been satisfied:

**7.6.1.1** All Governmental Approvals necessary to begin the initial Construction Work in the applicable portion of the Facility have been obtained, and Developer has furnished to TxDOT fully executed copies of such Governmental Approvals;

**7.6.1.2** Fee simple title or other property rights acceptable to TxDOT in its sole discretion for the Facility Right of Way necessary for commencement of construction of the applicable portion of the Facility included in the Construction Work have been conveyed to and recorded in favor of TxDOT, TxDOT has obtained possession thereof through eminent domain, or all necessary parties have validly executed and delivered a possession and use agreement therefor on terms acceptable to TxDOT;

**7.6.1.3** Developer has satisfied for the applicable portion of the Facility all applicable pre-construction requirements contained in the NEPA Approval and other Governmental Approvals;

**7.6.1.4** Each Payment and Performance Bond, with TxDOT named as a dual obligee, required under Section 16.2 has been obtained and is in full force and effect, and Developer has delivered to TxDOT certified and conformed copies of the originals of each such bond, with the original of each such bond delivered to Developer or the Collateral Agent for the senior Facility Debt;

**7.6.1.5** The guarantees in favor of TxDOT, if any, required under Section 16.4 have been obtained and delivered to TxDOT;

**7.6.1.6** Insurance Policies required under Section 16.1 have been obtained and are in full force and effect, and Developer has delivered to TxDOT written binding verifications of coverage from the relevant issuers of such Insurance Policies;

**7.6.1.7** Developer has caused to be developed and delivered to TxDOT and TxDOT has approved the relevant component parts, plans and documentation of the Facility Management Plan in accordance with Section 9.1 of this Agreement and Section 2 of the Technical Requirements;

**7.6.1.8** Developer has delivered to TxDOT and the Independent Engineer all Submittals relating to the Construction Work required by the Facility Management Plan or FCA Documents, in the form and content required by the Facility Management Plan or FCA Documents;

**7.6.1.9** All representations and warranties of Developer set forth in Section 15.1 are in all material respects true and correct;

**7.6.1.10** Developer has adopted written policies establishing ethical standards of conduct for all Developer-Related Entities, including Developer's supervisory and management personnel in dealing with (a) TxDOT and the Independent Engineer and (b) employment relations, in accordance with Section 10.7.1; and

**7.6.1.11** There exists no uncured Developer Default for which Developer has received written notice from TxDOT.

## **7.6.2 Utility Adjustments**

Developer shall not commence or permit or suffer commencement of construction of a Utility Adjustment included in the Construction Work until TxDOT issues Notice to Proceed for the work, all of the conditions set forth in Section 7.6.1 that are applicable to the Utility Adjustment (reading such provisions as if they referred to the Utility Adjustment) have been satisfied, and the following additional requirements have been satisfied:

**7.6.2.1** If applicable, the Alternate Procedure List has been approved by FHWA, and either the affected Utility or the Utility Owner is on the approved Alternate Procedure List, as supplemented;

**7.6.2.2** The Utility Adjustment is covered by an executed Utility Agreement (except as otherwise provided in Section 7.5.7.4); and

**7.6.2.3** The review and comment process has been completed and any required approvals have been obtained for the Utility Assembly covering the Utility Adjustment.

## **7.7 Schedule, Milestone Schedule Deadlines and Notices to Proceed**

**7.7.1** As a material consideration for entering into this Agreement, Developer hereby commits, and TxDOT is relying upon Developer's commitment, to design and develop the Facility in accordance with the milestones and time periods set forth in this Agreement, Section 2.3 of the Technical Requirements, and the Milestone Schedule attached as Exhibit 9 to this Agreement, subject only to delays caused by Relief Events specifically provided hereunder. Except where this Agreement expressly provides for extension of time due to a Relief Event, the time limitations set forth in the Milestone Schedule for Developer's performance of its covenants, conditions and obligations are of the essence, and Developer waives any right at law or in equity to tender or complete performance beyond the applicable time period, or to require TxDOT to accept such performance.

**7.7.2** Authorization allowing Developer to proceed with Work hereunder shall be provided through one or more Notices to Proceed issued by TxDOT. Pending the NEPA Finality Date and Custodial Arrangement Date, TxDOT will not issue a full Notice to Proceed. However, the Parties expect that TxDOT will, but TxDOT is not obligated to, issue limited Notices to Proceed for specific scopes of Work, including acquisition of Facility ROW. After the NEPA Finality Date and Custodial Arrangement Date, TxDOT may only issue a full Notice to Proceed. Prior to issuing a limited Notice to Proceed, TxDOT may request from Developer a proposed budget and pricing for a proposed specific scope of Work. Developer shall provide the same as expeditiously as reasonable possible, and in any event within 30 days, after receiving any such

request. If TxDOT issues a limited Notice to Proceed, Developer shall be authorized thereby to commence and perform the scope of Work thereunder subject to the budget and pricing limits and terms TxDOT approves therefor. Developer shall not, however, be obligated to commence or perform any Work authorized by a limited Notice to Proceed, or by full Notice to Proceed, prior to occurrence of the NEPA Finality Date and Custodial Arrangement Date. TxDOT also may, at any time prior to the NEPA Finality Date and Custodial Arrangement Date, order suspensions of Work previously authorized under Notices to Proceed. Notwithstanding any contrary provision of this Agreement, no election by TxDOT to delay issuing full Notice to Proceed until after the NEPA Finality Date and Custodial Arrangement Date, by TxDOT to issue or not issue limited Notices to Proceed prior to the NEPA Finality Date and Custodial Arrangement Date, by TxDOT to order suspensions of Work prior to the NEPA Finality Date and Custodial Arrangement Date, or by Developer to not commence and perform Work authorized by Notices to Proceed prior to the NEPA Finality Date and Custodial Arrangement Date, shall entitle Developer to a Compensation Event or to otherwise adjust or update the Base Case Financial Model or other financial terms of this Agreement. After occurrence of the NEPA Finality Date and Custodial Arrangement Date, TxDOT delay in issuing full Notice to Proceed by more than 60 days beyond the latter of such dates will constitute a Compensation Event, as set forth in the definitions of TxDOT-Caused Delay and Compensation Event.

**7.7.3** Developer is responsible for commencement and completion of the Design Work and Construction Work and achieving Service Commencement in accordance with the Milestone Schedule.

**7.7.4** Developer shall achieve Substantial Completion, Service Commencement and Final Acceptance in accordance with the procedures, requirements and conditions set forth in Section 7.8, and by the deadlines set forth in Exhibit 9.

**7.7.5** Developer hereby represents and warrants that the Facility Baseline Schedule attached to this Agreement as Exhibit 10 meets the requirements set forth in Section 2.3.1 of the Technical Requirements and is consistent with the Milestone Schedule. The Parties shall use the Facility Baseline Schedule for planning and monitoring the progress of the Work. The Facility Baseline Schedule includes the originally scheduled target for Service Commencement for the entire Facility.

**7.7.6** All Float contained in the Facility Schedule, as shown in the initial Facility Baseline Schedule or as generated thereafter, shall be considered a Developer resource and shall not be available to TxDOT in mitigation of delay caused by Relief Events. All Float shall be shown as such in the Facility Schedule on each affected schedule path. Identification of (or failure to identify) Float on the Facility Schedule shall be examined by TxDOT in determining whether to approve the Facility Schedule. Once identified, Developer shall monitor, account for and maintain Float in accordance with critical path methodology.

## **7.8 Substantial Completion, Punch List, Service Commencement, Final Acceptance and Early Openings**

### **7.8.1 Substantial Completion**

**7.8.1.1** TxDOT will issue a written certificate of Substantial Completion at such time as Substantial Completion occurs for the entire Facility. In determining whether Substantial Completion has occurred, TxDOT may consider and require satisfaction of the following criteria with respect to the entire Facility:

- (a) Whether all major safety features, including but not limited to shoulders, guard rails, striping and delineations, are installed and functional;
- (b) Whether required illumination is installed and functional;
- (c) Whether required signs and signals are installed and functional;
- (d) Whether the need for temporary traffic controls or for lane closures at any time has ceased (except for any then required for routine maintenance, and except for temporary lane closures during hours of low traffic volume in accordance with and as permitted by the Construction Traffic Management Plan or Operating Traffic Management Plan solely in order to complete Punch List items);
- (e) Whether all lanes of traffic (including ramps, interchanges, overpasses, underpasses, other crossings and frontage roads) set forth in the Design Documents are in their final configuration and available for public use; and
- (f) Whether all tolling systems for the Facility are completed, have passed all demonstration and performance testing and are ready for normal operation.

**7.8.1.2** The status of the landscaping and aesthetic features included in the Design Documents shall be disregarded in determining whether Substantial Completion has occurred, except to the extent that its later completion will affect public safety or satisfaction of the criterion in Section 7.8.1.1(e).

**7.8.1.3** Developer shall provide TxDOT and the Independent Engineer with not less than 20 Days' prior written notification of the date Developer determines it will achieve Substantial Completion. During such 20-day period, or such longer period as Developer may request after giving the notice required hereunder, Developer, TxDOT and the Independent Engineer shall meet and confer and exchange information on a regular cooperative basis with the goal being TxDOT's and the Independent Engineer's orderly, timely inspection and review of the Facility and the Final Design Documents and Construction Documents, and TxDOT's issuance of a written certificate of Substantial Completion.

**7.8.1.4** During the period specified above in Section 7.8.1.3, the Independent Engineer shall conduct an inspection of the Facility and its components, a review of the Final Design Documents and Construction Documents and such other investigation as may be necessary to evaluate whether Substantial Completion is achieved. The Independent Engineer shall deliver a written report of findings and recommendations to TxDOT and Developer following such inspection, review and investigation and in any case within five Days after the end of the specified period preceding the date the Developer anticipates it will achieve Substantial Completion. TxDOT may, but is not obligated to, jointly with the Independent Engineer or independently conduct such inspection, review and investigation within such specified period.

**7.8.1.5** Developer shall provide TxDOT and the Independent Engineer a second written notification when Developer determines it has achieved Substantial Completion. Within five Days after expiration of the period specified in Section 7.8.1.3, TxDOT's and the Independent Engineer's receipt of the second notification and TxDOT's receipt of the Independent Engineer's report of findings and recommendations, TxDOT shall either (a) issue the written certificate of Substantial Completion or (b) notify Developer in writing setting forth, as

applicable, why the Facility has not reached Substantial Completion. If TxDOT and Developer cannot agree as to the date of Substantial Completion, such Dispute shall be resolved according to the Dispute Resolution Procedures.

## **7.8.2 Punch List**

**7.8.2.1** The Facility Management Plan shall establish procedures and schedules for preparing a Punch List and completing Punch List work. Such procedures and schedules shall conform to the following provisions.

**7.8.2.2** The schedule for preparation of the Punch List either shall be consistent and coordinated with the inspections regarding Substantial Completion, or shall follow such inspections.

**7.8.2.3** Developer shall prepare and maintain the Punch List. Developer shall deliver to TxDOT and the Independent Engineer not less than five days' prior written notice stating the date when Developer will commence Punch List field inspections and Punch List preparation. The Independent Engineer and TxDOT may, but are not obligated to, participate in the development of the Punch List. Each participant shall have the right to add items to the Punch List and none shall remove any item added by any other without such other's express permission, except that TxDOT shall have the right to remove any item added by the Independent Engineer. If Developer objects to the addition of an item by TxDOT or the Independent Engineer, the item shall be noted as included under protest, and if the Parties thereafter are unable to reconcile the protest, the Dispute shall be resolved according to the Dispute Resolution Procedures. Developer shall deliver to TxDOT and the Independent Engineer a true and complete copy of the Punch List, and each modification thereto, as soon as it is prepared.

**7.8.2.4** Developer shall immediately commence work on the Punch List items it does not protest and diligently prosecute such work to completion, consistent with the FCA Documents, within the time period to be set forth in the Facility Management Plan and in any case by the Final Acceptance Deadline.

## **7.8.3 Conditions to Service Commencement**

**7.8.3.1** Except as provided in Section 7.8.5, Developer shall not initiate, permit or suffer Service Commencement until TxDOT issues a written certificate that all of the following conditions have been satisfied for the entire Facility. TxDOT will issue such a written certificate immediately upon satisfaction of all the following conditions for the entire Facility:

(a) TxDOT has issued the certificate of Substantial Completion, or the Disputes Board has determined that TxDOT should have issued such certificate (regardless of whether TxDOT subsequently contests such determination);

(b) Developer has completed all demonstration testing of the ETCS in accordance with the Facility Management Plan, and demonstration of interoperability with the CSC Host as provided in the Technical Documents, has delivered to TxDOT and the Independent Engineer all reports, data and documentation relating to such demonstration testing, and such testing demonstrates that the ETCS meets the minimum threshold performance standards and requirements set forth in the Facility Management Plan, and the minimum interoperability performance standards set forth in the Technical Documents, for



commencing normal, live use and operation (TxDOT and Developer recognize that such threshold performance standards and requirements will be at lower levels than the performance standards and requirements set forth in the Performance and Measurement Table because of normal need for ramp-up and optimization of performance at the beginning of regular operations);

(c) Developer demonstrates to TxDOT's reasonable satisfaction that Developer has completed training of operations and maintenance personnel in accordance with the Hazardous Materials Management Plan and Section 4.2.4 of the Technical Requirements, which demonstration shall include delivery to TxDOT of a written certificate, in form acceptable to TxDOT, executed by Developer that it and its Contractors are fully staffed with such trained personnel and are ready, willing and able to operate and maintain the Facility in accordance with the terms and conditions of the FCA Documents and Facility Management Plan pertaining to the Operating Period;

(d) All component parts, plans and documentation of the Facility Management Plan required to be prepared, submitted and approved prior to Service Commencement have been so prepared, submitted and approved, including all operations and maintenance plans, procedures, rules, schedules and manuals for the Facility, and including manuals and procedures respecting safety, security, Emergency response and Incident response, as identified in the Facility Management Plan;

(e) All Submittals required by the Facility Management Plan or FCA Documents to be submitted to and approved by TxDOT or the Independent Engineer prior to Service Commencement have been submitted to and approved by TxDOT and the Independent Engineer, in the form and content required by the Facility Management Plan or FCA Documents;

(f) Developer has received, and paid all associated fees for, all applicable Governmental Approvals and other third party approvals required for use and operation of the Facility, and there exists no uncured material violation of the terms and conditions of any such Governmental Approval or other third party approvals;

(g) Developer, TxDOT and the Independent Engineer have completed preparation of the Punch List;

(h) All insurance policies required during the Operating Period under this Agreement have been obtained and Developer has delivered to TxDOT verification thereof as required under Section 16.1.4.4;

(i) Any guaranty of payment or performance during the Operating Period required pursuant to Section 16.4 has been delivered to TxDOT;

(j) Developer has made all deposits to the Intellectual Property Escrow required at or prior to Substantial Completion pursuant to Section 22.5;

(k) Developer has paid in full all liquidated damages that are owing to TxDOT pursuant to this Agreement and are not in Dispute, and has not interfered with or attempted to hinder or interfere with the deposit of funds into the TxDOT Claims Account in accordance with the Facility Trust Agreement with respect to the liquidated damages that may then be the subject of an unresolved Dispute; and

(l) There exists no uncured Developer Default that is the subject of a Warning Notice (except any Developer Default for which Service Commencement will effect its cure).

**7.8.3.2** Developer shall provide TxDOT and the Independent Engineer with written notification when Developer determines that all of the foregoing conditions have been satisfied. During the 20-Day period following receipt of such notification, Developer, TxDOT and the Independent Engineer shall meet and confer and exchange information on a regular cooperative basis with the goal being TxDOT's and the Independent Engineer's orderly, timely inspection and review of the Facility and the data and documentation submitted by Developer, and TxDOT's issuance of a written certificate authorizing Service Commencement.

**7.8.3.3** During such 20-Day period, the Independent Engineer shall conduct an inspection of the Facility and such other review of reports, data and documentation as may be necessary to evaluate whether all of the conditions to Service Commencement have been satisfied. The Independent Engineer shall deliver a written report of findings and recommendations to TxDOT and Developer following such inspection and review and in any case within five Days after the end of such 20-Day period. TxDOT may, but is not obligated to, jointly with the Independent Engineer or independently conduct such inspection and review within such 20-Day period.

**7.8.3.4** Within five Days after expiration of such 20-Day period and TxDOT's receipt of the Independent Engineer's report of findings and recommendations, TxDOT shall either (a) issue a certificate authorizing Service Commencement or (b) notify Developer in writing setting forth, as applicable, why the conditions to Service Commencement have not been satisfied. If TxDOT and Developer cannot agree as to the date of Service Commencement, such Dispute shall be resolved according to the Dispute Resolution Procedures.

#### **7.8.4 Final Acceptance**

**7.8.4.1** Promptly after achieving Substantial Completion, Developer shall perform all remaining Construction Work, including completion of all Punch List items for the Facility and all landscaping. Developer shall prepare and adhere to a timetable for completing the landscaping and aesthetic features for the Facility, taking into account weather conditions necessary for successful planting and growth, which timetable shall in any event provide for landscaping and aesthetic features to be completed by the Final Acceptance Deadline.

**7.8.4.2** TxDOT will issue a written certificate of Final Acceptance at such time as all of the following have occurred for the entire Facility:

- (a) All requirements for Substantial Completion have been satisfied;
- (b) All Punch List items have been completed and delivered to the reasonable satisfaction of TxDOT;
- (c) All aesthetic and landscaping features have been completed in accordance with Section 15 of the Technical Requirements, Attachment 10 to the Technical Requirements and the plans and designs prepared in accordance therewith;

(d) TxDOT has received a complete set of the Record Drawings and Documentation for the entire Facility in form and content required by Section 2.4.4 of the Technical Requirements;

(e) All Utility Adjustment Work and other work that Developer is obligated to perform for or on behalf of third parties has been accepted by such third parties, and Developer has paid for all work by third parties that Developer is obligated to pay for, other than disputed amounts;

(f) If any Governmental Entity with jurisdiction requires any form of certification of design, engineering or construction with respect to the Facility or any portion thereof, including any certifications from the engineer of record and architect of record for the Facility, Developer has caused such certificates to be delivered and has concurrently issued identical certificates to TxDOT;

(g) Developer has made all deposits to the Intellectual Property Escrow required at or prior to Final Acceptance pursuant to Section 22.5;

(h) Developer has paid in full all liquidated damages that are owing to TxDOT pursuant to this Agreement and are not in Dispute, and has provided to TxDOT reasonable security for the full amount of liquidated damages that may then be the subject of an unresolved Dispute; and

(i) There exist no uncured Developer Defaults that are the subject of a Warning Notice, or with the giving of notice or passage of time, or both, could become the subject of a Warning Notice, (except any Developer Default for which Final Acceptance will effect its cure).

**7.8.4.3** Developer shall provide TxDOT and the Independent Engineer with written notification when Developer determines it has achieved Final Acceptance. During the 15-day period following receipt of such notification, Developer, TxDOT and the Independent Engineer shall meet and confer and exchange information on a regular cooperative basis with the goal being TxDOT's and the Independent Engineer's orderly, timely inspection and review of the Facility and the Record Drawings and Documentation, and TxDOT's issuance of a written certificate of Final Acceptance.

**7.8.4.4** During such 15-Day period, the Independent Engineer shall conduct an inspection of the Punch List items, a review of the Record Drawings and Documentation and such other investigation as may be necessary to evaluate whether the conditions to Final Acceptance are satisfied. The Independent Engineer shall deliver a written report of findings and recommendations to TxDOT and Developer following such inspection, review and investigation and in any case by the end of such 15-Day period. TxDOT may, but is not obligated to, jointly with the Independent Engineer or independently conduct such inspection, review and investigation within such 15-Day period.

**7.8.4.5** Within five Days after expiration of such 15-Day period and TxDOT's receipt of the Independent Engineer's report of findings and recommendations, TxDOT shall either (a) issue a certificate of Final Acceptance or (b) notify Developer in writing setting forth, as applicable, why Final Acceptance has not been achieved. If TxDOT and Developer

cannot agree as to the date of Final Acceptance, such Dispute shall be resolved according to the Dispute Resolution Procedures.

#### **7.8.5 Early Openings and Operation**

Prior to Substantial Completion, with TxDOT's prior written approval, not to be unreasonably withheld, Developer shall have the right to open to traffic, operate and maintain non-tolled portions of the Facility where necessary or advisable for traffic circulation or providing safe transition conditions for Service Commencement. Such portions are expected to include frontage roads and overpasses, underpasses and other crossings within the Facility Right of Way that are part of other roadways or routes of travel. Upon TxDOT written approval of an early opening, any prior responsibility of TxDOT to manage or maintain the applicable portion of the Facility shall cease and Developer shall concurrently assume responsibility. No such early openings shall be relevant for determining whether Milestone Schedule Deadlines are satisfied.

### **7.9 Hazardous Materials Management**

**7.9.1** Without limiting TxDOT's role or responsibilities with respect to subject Hazardous Materials as set forth in Section 7.9.4, Developer shall manage, treat, handle, store, remediate, and remove all Hazardous Materials and Recognized Environmental Conditions, including contaminated groundwater, as necessary and in accordance with the Hazardous Materials Management Plan and all applicable provisions of the FCA Documents, to the extent required by and in accordance with all applicable Law and Governmental Approvals. If during the course of the Work, Developer encounters Hazardous Materials or a Recognized Environmental Condition in connection with the Facility, Facility Right of Way or Work, Developer shall (a) promptly notify TxDOT in writing and advise TxDOT of any obligation to notify State or federal agencies under applicable Law; and (b) take reasonable steps, including design modifications and/or construction techniques, to avoid excavation or dewatering in areas with Hazardous Materials or Recognized Environmental Conditions. Where excavation or dewatering of Hazardous Materials or Recognized Environmental Conditions is unavoidable or is required by applicable Law, Developer shall utilize appropriately trained Contractors or personnel in the performance of its obligations under Section 7.9. Wherever feasible, prudent and consistent with applicable Law, contaminated soil and groundwater shall not be disposed off-site.

**7.9.2** If within a reasonable time after discovery of Hazardous Materials or a Recognized Environmental Condition, taking into consideration the nature and extent of the contamination, the type and extent of remedial action required and the potential impact upon Developer's schedule for use of and operations on the Facility Right of Way, Developer has not undertaken remedial action required under Section 7.9.1, TxDOT may provide Developer with written notice that it will undertake the remedial action itself. TxDOT thereafter may undertake action to remediate in compliance with a remediation plan approved by applicable Governmental Entities and in compliance with applicable Laws. Without limiting TxDOT's role or responsibilities under Section 7.9.4, Developer shall reimburse to TxDOT on a current basis the reasonable costs, including TxDOT's Recoverable Costs, TxDOT incurs in carrying out such remediation plan, to the extent set forth in Section 2 of Exhibit 11 to this Agreement. Notwithstanding the foregoing, if either Party notifies the other that it desires to preserve claims against other potentially responsible parties, then the Party undertaking the remedial act shall do so consistently with either the National Contingency Plan or comparable State regulations and standards; and a reasonable period of time for Developer to perform the remedial work

shall include a sufficient period for Developer to comply with the National Contingency Plan or such comparable State regulations and standards.

**7.9.3** Except as set forth in Exhibit 11, Developer shall not be entitled to any compensation due to increased costs or delays associated with the discovery, handling, storage, removal, remediation, transport, treatment or disposal of Hazardous Materials, including contaminated groundwater, encountered in construction of the Facility or Utility Adjustments, but may be entitled to schedule relief under Article 13 to the extent such event constitutes a Relief Event and to other relief under Section 19.2 to the extent such event constitutes an Extended Relief Event.

**7.9.4** Management of certain Hazardous Materials is subject to the following provisions:

**7.9.4.1** As between Developer and TxDOT, TxDOT shall be considered the generator and arranger solely for Hazardous Materials that meet all the following criteria (for purposes of this Section 7.9.4, the "subject Hazardous Materials"): (a) the Hazardous Materials are on the Facility Right of Way as of the date TxDOT shall make available to Developer the affected parcel; (b) the Hazardous Materials are not located on any Project Specific Locations or Additional Properties, except Additional Properties required due to TxDOT Changes (including TxDOT Changes regarding the initial construction or Upgrades); and (c) the Hazardous Materials are not required to be removed and disposed of due to a Developer Release of Hazardous Materials. For purposes of determining whether Hazardous Materials were on the Facility Right of Way or on any Additional Properties required by TxDOT to be included in the Facility Right of Way as a result of TxDOT Changes, as of the date on which TxDOT shall make available to Developer the affected parcel, Developer shall have the burden of proof in any Dispute before the Dispute Board as to any Hazardous Materials not identified as being present thereon in any environmental or site investigation reports or similar documentation as of the date on which TxDOT shall make available to Developer the affected parcel in the Facility Right of Way, or the relevant Additional Property required due to a TxDOT Change. (In this Section 7.9.4.1, the words "make available" shall have the meaning set forth in the definition of TxDOT-Caused Delay.)

**7.9.4.2** Developer agrees that it will require Design-Build Contractor to enter into the Direct Agreement with TxDOT in substantially the form attached hereto as Exhibit 12 regarding the management of any subject Hazardous Materials, and to provide to TxDOT an opinion of counsel for Design-Build Contractor, in substantially the form attached to Exhibit 12. Developer acknowledges and agrees that the Direct Agreement will be an agreement entered into with TxDOT in connection with a comprehensive development agreement.

**7.9.4.3** Because TxDOT and Developer agree that TxDOT shall be the party that actually exercises control over how and where the subject Hazardous Materials are managed, TxDOT will review and approve the remediation plans for management of subject Hazardous Materials, such plans to be submitted by the Design-Build Contractor or, if applicable, any replacement Contractor. Developer is relieved of responsibility for the preparation, review and approval of such remediation plans only to the extent that the Design-Build Contractor is performing its obligations with respect to such remediation plans in accordance with the Direct Agreement, or a replacement Contractor is performing its obligations with respect thereto under a direct agreement with TxDOT substantially similar to the Direct Agreement. TxDOT agrees to enter into such a direct agreement with such replacement

Contractor. TxDOT will approve or disapprove any such remediation plan within 14 days after such plans have been reviewed and approved by TCEQ and then submitted to TxDOT.

**7.9.4.4** No action regarding the management of subject Hazardous Materials may be taken without the express prior written approval of TxDOT. As between Developer and TxDOT, TxDOT has exclusive decision-making authority regarding whether off-site transport of subject Hazardous Materials is acceptable and, if so, the choice of transporter and the determination of the destination facility to which they will be transported, and all other matters relating to the arrangement for their off-Site disposal. As between Developer and TxDOT, TxDOT also has exclusive decision-making authority regarding possible on-site management of subject Hazardous Materials. With regard to subject Hazardous Materials, TxDOT shall comply with the applicable standards for generators including those found at 40 CFR, Part 262, including the responsibility to sign manifests for the transport of hazardous wastes. The foregoing shall not preclude or limit any rights, remedies or defenses that TxDOT, Developer, the Design-Build Contractor, or any other Contractor may have against any Governmental Entity, third parties and/or prior owners, lessees, licensees and occupants of any parcel of land that becomes part of the Facility Right of Way.

**7.9.4.5** Notwithstanding any contrary provision of the FCA Documents, under no circumstances whatsoever shall any TxDOT-Caused Delay arising out of or relating to (a) its review and approval or disapproval of remediation plans for removal and off-Site disposal of subject Hazardous Materials or Hazardous Materials that any Person claims to be subject Hazardous Materials, (b) any other act or failure to act by TxDOT in its capacity as arranger and generator for off-Site disposal of subject Hazardous Materials, or (c) any Dispute over whether Hazardous Materials are subject Hazardous Materials constitute a Compensation Event or otherwise entitle Developer to any compensation from TxDOT or other remedy against TxDOT, other than extension of Milestone Schedule Deadlines to the extent any of the foregoing constitutes a Relief Event. Under no circumstances whatsoever shall any breach, failure to perform or delay by the Design-Build Contractor under its Direct Agreement with TxDOT, or, if applicable, by any replacement Contractor under a comparable direct agreement with TxDOT, constitute a TxDOT Default, Relief Event, Extended Relief Event or Compensation Event, or otherwise expose TxDOT to any obligation or liability to Developer.

**7.9.4.6** To the extent permitted by applicable Law, TxDOT shall indemnify, save, protect and defend Developer from third party claims, causes of action and Losses arising out of or related to generator or arranger liability for the subject Hazardous Materials for which TxDOT is considered the generator or arranger pursuant to this Section 7.9.4, specifically excluding generator or arranger liability for actual and threatened Developer Releases of Hazardous Materials.

## **7.10 Environmental Compliance**

**7.10.1** Throughout the course of the Design Work and Construction Work, Developer shall perform or cause to be performed all environmental mitigation measures required under the Environmental Approvals, including the NEPA Approval, the Section 404 Permit and similar Governmental Approvals for the Facility, or under the FCA Documents, and shall comply with all other conditions and requirements of the Environmental Approvals in accordance with Section 4 and Table 4-1 of the Technical Requirements.

**7.10.2** Developer's cumulative wetland impacts up to 15.5 acres will be mitigated as part of TxDOT's environmental process, without obligation on the part of Developer to acquire

mitigation property. If Developer's cumulative wetland impacts exceed 15.5 acres due to a TxDOT Change, TxDOT will bear the cost of acquiring the amount of additional property necessary for wetlands mitigation. However, if Developer's cumulative wetland impacts exceed 15.5 acres for any reason other than a TxDOT Change, then Developer shall bear all cost of acquiring and preparing the amount of additional property necessary for wetlands mitigation as required under the Section 404 Permit and will obtain any necessary modifications thereof. Nothing in this Section 7.10.2 is intended to relieve Developer of its obligations to comply with the mitigation requirements contained in the Section 404 Permit and described in detail in Section 4 of the Technical Requirements.

## **7.11 Oversight, Inspection and Testing; Meetings**

### **7.11.1 Oversight by Independent Engineer**

Oversight, inspection, testing and auditing respecting the Design Work and Construction Work shall be performed by the Independent Engineer in accordance with Section 9.3 and the Independent Engineer Agreement.

### **7.11.2 Oversight by TxDOT**

TxDOT's rights of oversight, inspection, testing and auditing respecting the Design Work and Construction Work are set forth in Sections 9.3 and 22.2.

### **7.11.3 Meetings**

**7.11.3.1** Developer shall conduct regular progress meetings with TxDOT at least once a month during the course of design and construction. At TxDOT's request, Developer will require the Design-Build Contractor to attend the progress meetings.

**7.11.3.2** In addition, TxDOT 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 Design Work, Construction Work or Facility.

**7.11.3.3** Developer shall schedule all meetings with TxDOT at a date, time and place reasonably convenient to both Parties and, except in the case of urgency, shall provide TxDOT with written notice and a meeting agenda at least three Business Days in advance of each meeting.

## **7.12 Construction Warranties**

**7.12.1** If and to the extent Developer obtains general or limited warranties from any Contractor in favor of Developer with respect to design, materials, workmanship, equipment, tools, supplies, software or services, Developer also shall cause such warranty to be expressly extended to TxDOT and any third parties for whom Work is being performed or equipment, tools, supplies or software is being supplied by such Contractor. TxDOT agrees to forebear from exercising remedies under any such warranty so long as Developer or a Lender is diligently pursuing remedies thereunder. To the extent that any Contractor warranty would be voided by reason of Developer's negligence in incorporating material or equipment into the Work, Developer shall be responsible for correcting such defect.

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

## **ARTICLE 8. OPERATIONS AND MAINTENANCE**

### **8.1 General**

#### **8.1.1 Developer Obligations**

At all times during the Operating Period, Developer shall carry out the O&M Work in accordance with (a) Good Industry Practice, as it evolves from time to time, (b) the requirements, terms and conditions set forth in the FCA Documents (including the Technical Requirements and Technical Documents), as the same may change from time to time, (c) all Laws, (d) the requirements, terms and conditions set forth in all Governmental Approvals, (e) the approved Facility Management Plan and all component parts, plans and documentation prepared or to be prepared thereunder, and (f) all other applicable safety, environmental and other requirements, taking into account the Facility Right of Way limits and other constraints affecting the Facility. Developer is responsible for keeping itself informed of current Good Industry Practice.

#### **8.1.2 Performance, Operation and Maintenance Standards**

**8.1.2.1** Developer, at its sole cost and expense unless expressly provided otherwise in this Agreement, shall comply with all Technical Requirements and Technical Documents, including Safety Standards, during the Operating Period.

**8.1.2.2** TxDOT shall have the right to adopt at any time, and Developer acknowledges it must comply with all, changes and additions to, and replacements of, Technical Documents and Safety Standards relating to the O&M Work, whether of general application or Discriminatory. Refer to Section 13.2 for Developer's rights to compensation regarding Discriminatory changes and additions to, and replacements of, such Technical Documents or Safety Standards. TxDOT shall provide Developer with prompt written notice of changes and additions to, and replacements of, such Technical Documents or Safety Standards. Without limiting the foregoing, the Parties anticipate that from time to time after the Setting Date TxDOT will adopt, through revisions to existing manuals and publications or new manuals and publications, changed, added or replacement standards, criteria, requirements, conditions, procedures, specifications and other provisions, including Safety Standards, relating to O&M Work of general application to Comparable Limited Access State Highways that are or become tolled or the subject of concession or public-private partnership agreements. TxDOT shall have the right to add such changed, added or replacement standards, criteria, requirements, conditions, procedures, specifications and other provisions, including Safety Standards, to Book 3 by notice to Developer, whereupon they shall constitute amendments, and become part, of the Technical Documents. To the extent such changed, added or replacement Technical Documents or Safety Standards encompass matters that are addressed in the Technical Requirements as of the Setting Date, they shall, upon inclusion in Book 3, replace and supersede inconsistent provisions of the Technical Requirements. TxDOT will identify the superseded provisions in its notice to Developer.



**8.1.2.3** If compliance with a non-Discriminatory changed, added or replacement Technical Document or Safety Standard relating to the O&M Work requires major repair, reconstruction, rehabilitation, restoration, renewal or replacement of any Element or other component of the Facility, Developer shall commence performance of the major repair, reconstruction, rehabilitation, restoration, renewal or replacement not later than the first to occur of (a) any deadline prescribed in the changed or added Technical Document or Safety Standard, (b) the date when Developer first performs or (if earlier) is first obligated to perform Renewal Work on such Element or other component and (c) the date TxDOT first applies the change, addition or replacement to other Comparable Limited Access State Highways that TxDOT manages or operates, as determined pursuant to Section 8.1.2.8. If, however, TxDOT adopts the changed, added or replacement Technical Document or Safety Standard prior to the Service Commencement Date, in the absence of a TxDOT Change clauses (a) and (c) above shall not apply in determining when Developer must implement the changed, added or replacement Technical Document or Safety Standard. Following commencement of any Work pursuant to this Section, Developer shall diligently prosecute the Work until completion, and in any event by any deadline for completion prescribed in the changed, added or replacement Technical Document or Safety Standard.

**8.1.2.4** If compliance with a non-Discriminatory changed, added or replacement Technical Document or Safety Standard relating to the O&M Work requires construction or installation of new improvements at, for or on the Facility, Developer shall complete construction and installation of the new improvements according to the implementation period recommended or prescribed by the changed, added or replacement Technical Document or Safety Standard. If the changed, added or replacement Technical Document or Safety Standard does not recommend or prescribe an implementation period, Developer shall submit to the Independent Engineer and TxDOT for TxDOT's approval, within 90 Days after adoption of the changed, added or replacement Technical Document or Safety Standard, a proposed schedule for completing the new improvements. The proposed schedule shall be reasonable and conform to Good Industry Practice, taking into account the scope, complexity and cost of the work required. Any Dispute regarding the proposed schedule shall be resolved according to the Dispute Resolution Procedures. Developer shall diligently prosecute the Work until completion in accordance with the approved schedule.

**8.1.2.5** Developer shall be obligated to implement a Discriminatory changed, added or replacement Technical Document or Safety Standard related to the O&M Work only after TxDOT issues a Change Order therefor pursuant to Article 14. If a Discriminatory changed, added or replacement Technical Document or Safety Standard relating to the O&M Work requires major repair, reconstruction, rehabilitation, restoration, renewal or replacement of any Element or other component of the Facility during the Operating Period, or requires construction or installation of new improvements, Developer shall perform the major repair, reconstruction, rehabilitation, restoration, renewal or replacement or the new improvement work according to the schedule therefor adopted in the Change Order for such work. If Discriminatory changed, added or replacement Technical Document or Safety Standard requires implementation not entailing such work, Developer shall implement it from and after the date TxDOT issues the Change Order.

**8.1.2.6** Refer to Section 12.4 for the timing by which Developer must implement Safety Compliance during the Operating Period.

**8.1.2.7** In the case of any other changed, added or replacement Technical Document or Safety Standard, Developer shall be obligated to comply from and after the date it

becomes effective and Developer is notified or otherwise obtains knowledge of the change or addition. For the avoidance of doubt, Developer shall comply with all changes or additions to such Technical Documents that are in effect and noticed or known to Developer on or prior to the date Developer commences maintenance, routine repair or routine replacement of damaged, worn or obsolete Facility components or materials.

**8.1.2.8** For purposes of Section 8.1.2.3(c), a change, addition or replacement shall be deemed to have been first applied by TxDOT if and when TxDOT commences implementing actions on any other Comparable Limited Access State Highway that TxDOT manages or operates. Developer shall not be entitled to delay commencement or completion of its work on grounds that TxDOT is delayed in commencing or completing implementing actions on Comparable Limited Access State Highways where:

(a) TxDOT is delayed due to the extensive system of Comparable Limited Access State Highways for which TxDOT is responsible; or

(b) The changed, added or replacement Technical Document or Safety Standard applies only upon the occurrence of a condition or circumstance that has not yet occurred in respect of a Comparable Limited Access State Highway that TxDOT manages or operates.

**8.1.2.9** New or revised statutes or regulations (excluding TxDOT rules and regulations) adopted after the Setting Date that change, add to or replace applicable standards, criteria, requirements, conditions, procedures, specifications and other provisions, including Safety Standards, relating to the O&M Work shall be treated as Changes in Law rather than a TxDOT change to Technical Requirements and Technical Documents.

**8.1.2.10** Developer may apply for TxDOT approval of Deviations from applicable Technical Requirements or Technical Documents regarding O&M Work. All applications shall be in writing. Where Developer requests a Deviation as part of the submittal of a component plan of the Facility Management Plan, Developer shall specifically identify and label the Deviation. TxDOT shall consider in its sole discretion, but have no obligation to approve, any such application, and Developer shall bear the burden of persuading TxDOT that the Deviation sought constitutes sound and safe practices consistent with Good Industry Practice and achieves or substantially achieves TxDOT's applicable Safety Standards and criteria. No Deviation shall exist or be effective unless and until stated in writing signed by TxDOT's Authorized Representative. TxDOT's affirmative written approval of a component plan of the Facility Management Plan shall constitute approval of the Deviations expressly identified and labeled as Deviations therein, unless TxDOT takes exception to any such Deviation. TxDOT's lack of issuance of a written Deviation within 14 Days after Developer applies therefor in writing shall be deemed a disapproval of such application. TxDOT's denial or disapproval of a requested Deviation shall be final and not subject to the Dispute Resolution Procedures. TxDOT may elect to process the application as a Change Request under Section 14.2 rather than as an application for a Deviation.

### **8.1.3 Hazardous Materials Management**

Without limiting TxDOT's role or responsibilities as set forth in Section 7.9, during the Operating Period, Developer shall manage, treat, handle, store, remediate and remove all Hazardous Materials and Recognized Environmental Conditions, including contaminated groundwater, in accordance with applicable Law, Governmental Approvals, the Hazardous

Materials Management Plan, and all applicable provisions of the FCA Documents. The provisions of Section 7.9 shall apply throughout the Operating Period.

#### **8.1.4 Environmental Compliance**

Throughout the Operating Period, Developer shall perform or cause to be performed all environmental mitigation measures required under the Environmental Approvals, including the NEPA Approval and similar Governmental Approvals for the Facility, or under the FCA Documents, and shall comply with all other conditions and requirements of the Environmental Approvals. Refer to Section 4 of the Technical Requirements for further provisions, requirements and obligations regarding environmental compliance.

#### **8.1.5 Utility Accommodation**

**8.1.5.1** It is anticipated that during the course of the Operating Period, from time to time Utility Owners will apply for additional utility permits to install new Utilities that would cross or longitudinally occupy the Facility Right of Way, or to modify, repair, upgrade, relocate or expand existing Utilities within the Facility Right of Way. In such circumstances, the provisions of Sections 7.5.8 shall apply, including the application of Section 11.2 to those circumstances where TxDOT is pursuing a Business Opportunity involving a Utility in the Facility Right of Way.

**8.1.5.2** Throughout the Operating Period, Developer shall monitor Utilities and Utility Owners within the Facility Right of Way for compliance with applicable utility permits, Utility Joint Use Acknowledgments/Agreements, easements, the Utility Accommodation Rules and other applicable Law, and shall use diligent efforts to obtain the cooperation of each Utility Owner having Utilities within the Facility Right of Way. If (a) Developer reasonably believes that any Utility Owner is not complying with the terms of a utility permit, Joint Use Acknowledgment/Agreement, easement, the Utility Accommodation Rules or other applicable Law affecting a Utility within the Facility Right of Way, or (b) any other dispute arises between Developer and a Utility Owner with respect to a Utility within the Facility Right of Way, despite Developer having exercised its diligent efforts to obtain the Utility Owner's cooperation, Developer shall promptly notify TxDOT, and TxDOT and Developer shall work together in the manner described in Section 7.5.7, including Developer's obligation to reimburse TxDOT for TxDOT's Recoverable Costs in connection with providing assistance to Developer, except that the "conditions to assistance" shall be that Developer shall provide evidence reasonably satisfactory to TxDOT that (i) Developer's position in the dispute is reasonable, (ii) Developer has made diligent efforts to obtain the Utility Owner's cooperation, and (iii) the Utility Owner is not cooperating.

#### **8.1.6 Frontage Roads Access**

TxDOT shall be solely responsible, at its expense, for handling requests and permitting for adjacent property access to frontage roads of the Facility. Nothing in the FCA Documents shall restrict TxDOT from granting access permits or determining the terms and conditions of such permits. Developer shall have no claim for a Relief Event, Extended Relief Event or Compensation Event by reason of TxDOT's grant of access permits, the terms and conditions thereof, or the actions of permit holders or their employees, agents, representatives and invitees. Developer at its expense shall cooperate and coordinate with permit holders to enable them to safely construct, repair and maintain access improvements allowed under their access permits.

## **8.2 O&M Contracts**

**8.2.1** If Developer elects not to self-perform any aspect of the operations and maintenance of the Facility, including but not limited to toll operations, it shall enter into an O&M Contract for such O&M Work. Each O&M Contract will be a Principal Facility Document.

**8.2.2** The O&M Contractor, if any, shall have the expertise, qualifications, experience, competence, skills and know-how to perform the O&M Work and related obligations of Developer in accordance with this Agreement.

## **8.3 Operations and Maintenance During Construction**

Developer shall be responsible for operations and maintenance services required prior to Service Commencement, except that TxDOT will retain maintenance and traffic management responsibility for the existing portions of US 183 within the Facility Right of Way until such time as Developer commences construction thereon. Regardless of which Party has maintenance responsibility, prior to Service Commencement the existing portions of US 183 shall be treated as Related Transportation Facilities under the FCA Documents.

## **8.4 Oversight, Inspection and Testing; Meetings**

### **8.4.1 By Independent Engineer**

Oversight, inspection, testing and auditing respecting the O&M Work shall be performed by the Independent Engineer in accordance with Section 9.3 and the Independent Engineer Agreement.

### **8.4.2 By TxDOT**

TxDOT's rights of oversight, inspection, testing and auditing with respect to the O&M Work are set forth in Sections 9.3 and 22.2.

### **8.4.3 General Inspections**

Developer shall carry out General Inspections in accordance with the Technical Requirements and the Facility Management Plan. Developer shall use the results of General Inspections to develop and update the Renewal Work Schedule, to maintain asset condition and service levels, and to develop programs of maintenance and Renewal Work to minimize the effect of O&M Work on Users.

### **8.4.4 Meetings**

**8.4.4.1** At TxDOT's request, Developer shall conduct regular quarterly meetings with TxDOT during the Operating Period. At TxDOT's request, Developer will require the O&M Contractor, if any, to attend the quarterly meetings.

**8.4.4.2** In addition, TxDOT 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 Facility.

**8.4.4.3** Developer shall schedule all meetings with TxDOT at a date, time and place reasonably convenient to both Parties and, except in the case of urgency, shall provide TxDOT with written notice and a meeting agenda at least three Business Days in advance of each meeting.

## **8.5 Renewal Work**

**8.5.1** The Performance and Measurement Table and related provisions of the Technical Requirements set forth performance measures and standards for the Elements of the Facility. 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 Requirements, including, when applicable, the Handback Requirements. Developer shall use the Renewal Work Schedule, as updated from time to time, as the principal guide for scheduling and performing Renewal Work.

**8.5.2** Not later than 90 Days after the end of each calendar year, Developer shall deliver to TxDOT and the Independent Engineer a written report of the Renewal Work performed in the immediately preceding calendar year. The report shall describe by location, Element as listed in the Renewal Work Schedule and other component the type of work performed, the dates of commencement and completion and the cost, as well as the total cost of all Renewal Work performed during the calendar year. During the period the Handback Requirements Reserve is in effect, the report also shall set forth the total draws from the Handback Requirements Reserve in the immediately preceding calendar year and the date, amount and use of each draw (including any use for Safety Compliance work).

## **8.6 Renewal Work Schedule**

**8.6.1** Not later than 90 Days before the beginning of the second full calendar year after the Service Commencement Date, Developer shall prepare and submit to the Independent Engineer and TxDOT for their review and comment a Renewal Work Schedule. Using the results of its Facility inspections under Sections 19.3 through 19.7 of the Technical Requirements, Developer shall set forth in the Renewal Work Schedule, by Element, (a) the estimated Useful Life, (b) the estimated Residual Life, (c) a brief description of the type of Renewal Work anticipated to be performed at the end of the Element's Residual Life, (d) a brief description of any Renewal Work anticipated to be performed before the end of the Element's Residual Life, including reasons why this work should be performed at the proposed time, (e) the estimated cost of such Renewal Work and (f) the total estimated cost of Renewal Work in each of the years Renewal Work is anticipated to be performed under the Renewal Work Schedule.

**8.6.2** Developer shall estimate the Useful Life of each Element within the Renewal Work Schedule based on (a) Developer's reasonable expectations respecting the manner of use, levels of traffic, and wear and tear and (b) the assumption that, when subject to routine maintenance of a type which is normally included as an annually recurring cost in highway maintenance and repair budgets, the Element will comply throughout its Useful Life with each applicable Performance Requirement. Developer shall estimate the Residual Life of each Element within the Renewal Work Schedule based on its Age and whether (i) the Element has performed in service in the manner and with the levels of traffic and wear and tear originally expected by Developer (ii) Developer has performed the type of routine maintenance of the Element which is normally included as an annually recurring cost in highway maintenance and

repair budgets, and (iii) the Element has complied throughout its Age with each applicable Performance Requirement.

**8.6.3** Not later than 90 Days before the beginning of each calendar year thereafter, Developer shall prepare and submit to the Independent Engineer and TxDOT for their review and comment either (a) a revised Renewal Work Schedule or (b) the then-existing Renewal Work Schedule accompanied by a statement that Developer intends to continue in effect the then-existing Renewal Work Schedule without revision (in either case, referred to as the "updated Renewal Work Schedule"). Developer shall make revisions as reasonably indicated by experience and then-existing conditions respecting the Facility, the factors described in Section 8.6.2, changes in estimated costs of Renewal Work, 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. During the period the Handback Requirements Reserve is in effect, the updated Renewal Work Schedule also shall set forth, by Element, Developer's planned draws from the Handback Requirements Reserve during the forthcoming calendar year.

**8.6.4** At TxDOT's or the Independent Engineer's request, Developer and its O&M Contractor(s), if any, shall promptly meet and confer with TxDOT or the Independent Engineer to review and discuss the original or updated Renewal Work Schedule.

**8.6.5** The Independent Engineer's duties shall include delivering to TxDOT and Developer, within 30 days after receipt of the original and each updated Renewal Work Schedule, comments, objections and recommendations with respect thereto. Within 30 Days after receiving such comments, objections and recommendations, TxDOT shall have the right to object to or disapprove the original or updated Renewal Work Schedule or any elements thereof. In addition to the grounds for disapproval set forth in Section 6.3.7.1, comments, objections and disapprovals by the Independent Engineer or TxDOT shall be based on whether the original or updated Renewal Work Schedule and underlying assumptions are reasonable, realistic and consistent with Good Industry Practice, Facility experience and condition, applicable Technical Requirements, Governmental Approvals and Laws.

**8.6.6** Within 30 Days after receiving written notice of comments, objections, recommendations and disapprovals from the Independent Engineer or TxDOT, Developer shall submit to TxDOT and the Independent Engineer 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 TxDOT shall endeavor in good faith to reach agreement as to the matters listed in the notice. If no agreement is reached as to any such matter within 30 Days after Developer delivers its notice, either Party may refer the Dispute to the Disputes Resolution Procedures for determination. The comments, objections, recommendations and disapprovals of the Independent Engineer shall receive substantial weight in resolving the Dispute.

**8.6.7** Until resolution of any portion of the original or updated Renewal Work Schedule that is in Dispute, the treatment of that portion in the immediately preceding Renewal Work Schedule shall remain in effect and govern.

## **8.7 Toll Handling, Collection and Enforcement**

**8.7.1** The rights and obligations of the Parties for operations related to toll collection, violation processing, revenue handling and accounting, and customer service and support for the Facility are set forth in Exhibit 14 to this Agreement.

**8.7.2** In the event TxDOT commits a material monetary default that is not cured within the applicable cure period and Developer becomes entitled to terminate this Agreement pursuant to Section 19.4 as a result thereof, Developer may elect, by written notice to TxDOT, to undertake the performance of services described in Exhibit 14, until the default is cured and as part of such election, Developer may require TxDOT to continue providing clearinghouse services pursuant to Exhibit 14 for all or a portion of such period. For so long as Developer performs such services, Developer shall solely bear all costs and risks associated with toll handling, collection and enforcement, including risk that Video Trip Toll Premiums are insufficient to defer costs and other risks associated with Video Trip enforcement and collection. In addition, for so long as Developer performs such services (a) Video Trip Toll Premiums shall conform to the maximum rates established under Exhibit 14, (b) to the extent permitted by applicable Law, Developer may fix, charge, enforce and collect with respect to Video Trips and electronic tolling accounts managed by Developer Incidental Charges that, except for toll violation penalties, do not exceed the amount reasonably necessary for Developer to recover its reasonable out-of-pocket and documented costs and expenses directly incurred for the items, services and work for which they are levied, such Incidental Charges being subject to TxDOT's reasonable approval if they deviate above the amounts TxDOT would be entitled to impose if TxDOT were providing the services described on Exhibit 14, and (c) all Video Trip Toll Premiums and Incidental Charges Developer collects shall constitute Toll Revenues. Promptly after receipt of such written notice, TxDOT shall diligently cooperate and assist with the transition of the toll collection and enforcement services to Developer; provided that TxDOT is under no obligation to transfer such functions until Developer's methodology for setting rates and rate adjustments, and Developer's initial rates, for its Incidental Charges are reasonably approved by TxDOT to the extent such approval by TxDOT is required under this Section 8.7.2. TxDOT shall reimburse Developer for any reasonable transition costs incurred by Developer in any such transition of the services described in Exhibit 14 between Developer and TxDOT pursuant to this Section 8.7.2 and such transition costs shall be payable by TxDOT within 30 days after receipt of a documented invoice therefor.

**8.7.3** The following provisions shall apply only during any portion of the Operating Period (an "applicable period") in which (a) Developer has the right to elect and has elected, by written notice to TxDOT, to undertake the performance of services described in Exhibit 14 in accordance with the provisions of this Section 8.7.2, (b) Section 228.055 of the Texas Transportation Code, as the same may be amended from time to time, or any statute of similar import ("Section 228.055"), is in effect, (c) Developer lacks statutory authority comparable to that available to TxDOT under Section 228.055, and (d) Developer has no agreement in effect for customer services and back office services for the Facility with a Governmental Entity (including TxDOT) that has statutory authority under or comparable to that under Section 228.055.

**8.7.3.1** TxDOT appoints Developer as TxDOT's agent during the applicable period for the sole and limited purpose of (a) delivering notices of nonpayment to Video Trip Users under Section 228.055, (b) imposing an administrative fee under Section 228.055, (c) using and approving automated enforcement technology under Section 228.058, (d) pursuing any misdemeanor offenses against Video Trip Users under Section 228.055, and (e) instructing all courts and public officials to deliver all tolls and Incidental Charges, including administrative fees, recovered under Section 228.055 with respect to Video Trip toll transactions to the trustee under the Facility Trust Agreement for deposit into the Toll Revenue Account. Such appointment shall be exclusive and irrevocable during the applicable period, provided that such appointment is deemed automatically suspended during any period that TxDOT exercises step-in rights under Section 17.3.4 involving TxDOT's performance of toll operations, and is deemed automatically revoked upon termination of this Agreement.

**8.7.3.2** At Developer's request, TxDOT shall cooperate with Developer in connection with (a) confirming in writing to courts and public officials Developer's authority as TxDOT's agent under Section 8.7.3.1, and (b) any proceedings Developer initiates under Section 228.055. At Developer's request, TxDOT will deliver instructions to such public officials and courts as reasonably necessary for them to deliver tolls and Incidental Charges, including administrative fees, recovered under Section 228.055 with respect to Video Trip toll transactions to the trustee under the Facility Trust Agreement for deposit into the Toll Revenue Account. Developer shall reimburse TxDOT for all costs, including TxDOT's Recoverable Costs, it incurs in connection with such cooperation.

**8.7.3.3** TxDOT will promptly deliver to Developer a copy of all notices, other communications and documentation from Video Trip Users that TxDOT receives in response to notices of violation Developer issues under Section 228.055; provided that TxDOT shall have no liability to Developer for compensation or other damages if it does not promptly deliver such notices, communications or documentation.

**8.7.3.4** If any court or public official remits to TxDOT any tolls or Incidental Charges collected via proceedings brought under Section 228.055, or if any Video Trip User in response to or settlement of a violation notice or any such proceeding remits to TxDOT any such tolls or Incidental Charges, then the amounts so remitted to TxDOT shall constitute Developer's property, shall be deemed received by TxDOT merely as a bailee or agent, and shall not constitute funds or property of TxDOT or the State; and TxDOT shall forthwith remit such payments to the trustee under the Facility Trust Agreement for deposit into the Toll Revenue Account.

**8.7.3.5** For the sole purpose of enabling processing and collection of transactions, so long as it is authorized under Section 730.007(a)(2)(J) of the Transportation Code, as the same may be amended from time to time, or any other statute of similar import, TxDOT will cause its Vehicle Titles and Registration Division to (a) provide Developer with electronic access to all vehicle registration records and information maintained by Vehicle Titles and Registration Division, and (b) provide Developer with the same access that TxDOT has to vehicle registration records and information for vehicles that are not registered in Texas. The foregoing rights of access shall survive until 90 days after the end of the applicable period (including any portion of such 90 days that runs after expiration or earlier termination of the Term) solely for the purpose of processing and collecting transactions occurring during the Term. As conditions to receiving access to such records and information, Developer shall (i) submit any request form and enter into any form agreement that the Vehicle Titles and Registration Division may require for obtaining access and (ii) pay all fees, costs and charges



that the Vehicle Titles and Registration Division customarily imposes from time to time for providing access. Developer acknowledges that all such records and information constitute Patron Confidential Information subject to Section 8.8.

**8.7.4** Commencing at Service Commencement and continuing throughout the Term, Developer shall provide, maintain and operate all Electronic Toll Collection Systems and services for the Facility in accordance with the requirements set forth in Section 21 of the Technical Requirements. Such Electronic Toll Collection System shall meet all applicable TxDOT statewide interoperability and compatibility standards, requirements and protocols, if any. Interoperability is required both as to functionality, enabling use of a single transponder across all highways, and customer account maintenance, management and reconciliation, enabling a customer to have a single account for tolled travel on all highways.

**8.7.5** If prior to commencement of toll operations on the Facility TxDOT has in place statewide interoperability and compatibility standards, requirements and protocols for electronic tolling, then Developer shall demonstrate or cause to be demonstrated interoperability of its Electronic Toll Collection System prior to commencement of the toll operations.

## **8.8 User Privacy**

**8.8.1** Developer shall provide an Electronic Toll Collection System and procedures designed to maintain the toll account and travel records of Users as confidential information and in compliance with applicable Laws on notice of privacy practices. In addition, unless otherwise approved in writing by TxDOT, Developer shall provide that users of electronic tolling services may be offered, as an option, anonymous accounts and/or other techniques that enhance motorists' privacy, consistent with applicable Laws. Developer shall not, however, be required to maintain account anonymity when providing information to TxDOT to process tolls for Video Trips or toll violations or attempting to resolve customer disputes regarding toll charges, or when the intrinsic nature of the technology requires establishment of customer identity (e.g. cellular telephones), provided Users requesting anonymity are clearly advised of the circumstances under which Developer is not required to maintain account anonymity.

**8.8.2** Developer acknowledges that the data generated by, or accumulated or collected in connection with, operation of Developer's Electronic Toll Collection System, including customer lists, customer identification numbers, customer contact information, customer account information and billing records and other customer specific information, including use and enforcement data, origin and destination information, system performance statistics, and real time traffic flow information may consist of or include information that identifies an individual who is a patron of the Facility and that is exempt from disclosure to the public or other unauthorized persons under applicable Law ("Patron Confidential Information"). Patron Confidential Information includes names, addresses, Social Security numbers, e-mail addresses, telephone numbers, financial profiles, credit card information, driver's license numbers, medical data, law enforcement records, agency source code or object code, agency security data, or other information that relates to any of these types of information.

**8.8.3** Developer shall comply with all applicable Laws, Technical Requirements and TxDOT statewide interoperability and compatibility standards, requirements and protocols limiting, restricting or pertaining to collection, use, confidentiality, privacy, handling, retention, reporting, disclosure or dissemination of Patron Confidential Information.

**8.8.4** Developer agrees to hold Patron Confidential Information in strictest confidence and not to make use of Patron Confidential Information for any purpose other than the performance of this Agreement, including toll violation processing and collection. Developer shall release Patron Confidential Information only to (a) TxDOT if requested, (b) the Independent Engineer if requested in connection with its auditing functions, (c) authorized employees or Contractors requiring such information for the purposes of carrying out this Agreement, (d) authorized collection agencies as necessary to assist their collection of toll violations, (e) the Texas Department of Public Safety as necessary to assist its enforcement of toll violation traffic infractions, and (f) any Lender or Substituted Entity that succeeds to Developer's Interest. Developer shall not release, divulge, publish, transfer, sell or disclose Patron Confidential Information, or otherwise make it known, to any other Person without TxDOT's express prior written consent in its sole discretion except as required by applicable Laws. Developer may provide such information and material only to employees of Developer-Related Entities who have signed a nondisclosure agreement, the terms of which have been previously approved by TxDOT in its good faith discretion. Developer agrees to implement physical, electronic and managerial safeguards to prevent unauthorized access to Patron Confidential Information and to implement destruction of records containing Patron Confidential Information in accordance with the records retention provisions of the Technical Requirements and Technical Documents.

**8.8.5** Immediately upon expiration or termination of this Agreement, Developer shall, at TxDOT's option, (a) certify to TxDOT that Developer has destroyed all Patron Confidential Information, (b) return all Patron Confidential Information to TxDOT or (c) take whatever other steps TxDOT reasonably requires of Developer to protect Patron Confidential Information.

**8.8.6** Developer shall describe in the Operations and Maintenance Quality Management Plan or operating manual or procedures prepared thereunder (a) the Patron Confidential Information received in the performance of this Agreement, (b) the purpose(s) for which the Patron Confidential Information is received, (c) who receives, maintains and uses the Patron Confidential Information and (d) the final disposition of the Patron Confidential Information.

**8.8.7** The rights of TxDOT and the Independent Engineer to audit and inspect under this Agreement shall include the right to monitor, audit and investigate Developer's books and records and Developer's systems, practices and procedures concerning Patron Confidential Information.

**8.8.8** Developer shall disclose in writing to each User for whom Developer holds Patron Confidential Information Developer's policies regarding privacy of Patron Confidential Information, consistent with this Section 8.7. Developer shall deliver such written disclosure within 30 days after any User first opens an account for automatic payment of tolls, and thereafter at least annually so long as such an account remains open. Developer shall comply with the provisions of any applicable Law prescribing disclosure of Developer's privacy policies, including provisions on the content of disclosures and when disclosure must be given, as deemed compliance with the disclosure requirements of this Section 8.8.8. The content of the form of disclosure, and any changes thereto that Developer may make from time to time, shall be subject to TxDOT's prior written approval. While TxDOT performs toll collection services pursuant to Exhibit 14, at either Party's request both Parties shall issue a joint written disclosure of their privacy policies.

## **8.9 Policing, Security and Incident Response**

### **8.9.1 Police Services**

**8.9.1.1** Developer, without expense to TxDOT, shall permit the Texas Department of Public Safety and any other public law enforcement agency with jurisdiction to provide traffic patrol, traffic law enforcement and the other police and public safety services in accordance with applicable Laws and agreements with State and local agencies, including permitting at least the type and level of service that the Texas Department of Public Safety provides on Comparable Limited Access State Highways owned and operated by TxDOT. In addition, Developer, without expense to TxDOT, shall engage, on mutually acceptable reasonable terms and conditions, either the Texas Department of Public Safety or another qualified public law enforcement agency with jurisdiction to provide enhanced levels of traffic patrol, traffic law enforcement services, special traffic operations services, accident assistance and investigation, and other enhanced police and Emergency services for special events, construction or maintenance activities, predicted peak traffic periods, or as otherwise needed on the Facility.

**8.9.1.2** Developer shall not engage, or otherwise permit the engagement of, private security services to provide traffic patrol or traffic law enforcement services on the Facility. Notwithstanding the foregoing, Developer may engage private security firms or employ passive security devices or technology to protect, collect, accumulate, transfer and deposit Toll Revenues or to identify toll violators; provided, however, that services to physically apprehend toll violators may be performed only by the Texas Department of Public Safety unless otherwise approved in writing by TxDOT in its sole discretion. In providing such policing services through a private security firm, Developer shall comply and cause the firm to comply with applicable Laws, including the regulations of the Texas Department of Public Safety. The foregoing does not in any way limit Developer's enforcement of private rights and civil remedies respecting toll violations.

**8.9.1.3** At Developer's request and expense, TxDOT shall assist Developer in securing the agreement of the Texas Department of Public Safety to perform enhanced services. Such assistance may include accompanying Developer to meetings with the Texas Department of Public Safety, requesting the involvement of the director of TxDOT and taking any other reasonable action within its powers.

**8.9.1.4** Nothing in this Section 8.9.1 shall be construed as meaning that TxDOT shall in any way be responsible for funding policing services.

**8.9.1.5** Developer acknowledges that the Texas Department of Public Safety is empowered to enforce all applicable Laws and to enter the Facility 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 the Texas Department of Public Safety or any other Governmental Entity, and all such police powers are hereby expressly reserved.

**8.9.1.6** TxDOT shall not have any liability or obligation to Developer resulting from, arising out of or relating to the failure of the Texas Department of Public Safety or any other public law enforcement agency to provide services, or its negligence or misconduct in providing services.

## **8.9.2 Security and Incident Response**

**8.9.2.1** Developer is responsible for the safety and security of the Facility and the workers and public thereon during all construction activities and operations under control of any Developer-Related Entity.

**8.9.2.2** 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 all Governmental Entities providing security, first responder and other public emergency response services. Without limiting the foregoing, whenever the Homeland Security Advisory System (HSAS) or successor system is raised to "orange" or "red" or comparable level of threat or alert for any region in which the Facility is located or which the Facility serves, Developer, at its expense, shall assign management personnel with decision-making authority to be personally present at the relevant emergency operations center serving the region. Developer shall provide such service 24 hours a day, seven days a week, until such level or threat or alert is reduced below the "orange", "red" or comparable level, or until the lead agency at the operations center determines such staffing level is no longer necessary.

**8.9.2.3** Developer shall perform and comply with the provisions of the Technical Requirements concerning Incident response, safety and security.

**8.9.2.4** Developer shall implement all Incident response, safety and security procedures, protocols and requirements set forth in the Incident Management Plan and Emergency Plan (components of the Facility Management Plan).

## **8.10 Handback Requirements**

### **8.10.1 Handback Condition**

On the Termination Date Developer shall transfer the Facility, including all Upgrades, to TxDOT, at no charge to TxDOT, in the condition and meeting all of the requirements for Residual Life at Handback specified in the Handback Requirements.

### **8.10.2 Handback Inspections**

The Parties shall conduct inspections of the Facility at the times and according to the terms and procedures specified in the Handback Requirements, for the purposes of (a) determining and verifying the condition of all Elements and their Residual Lives, (b) adjusting, to the extent necessary based on inspection and analysis, Element Useful Lives, Ages, Residual Lives, estimated costs of Renewal Work and timing of Renewal Work, (c) revising and updating the Renewal Work Schedule to incorporate such adjustments, (d) determining the Renewal Work required to be performed and completed prior to reversion of the Facility to TxDOT, based on the requirements for Residual Life at Handback specified in the Handback Requirements, the foregoing adjustments and the foregoing changes to the Renewal Work Schedule, (e) verifying that such Renewal Work has been properly performed and completed in accordance with the Handback Requirements, and (f) adjusting Developer's funding of the Handback Requirements Reserve so that it is funded according to the schedule and amounts required under Exhibit 13 to this Agreement.

### **8.10.3 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 Facility to TxDOT, 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:

**8.10.3.1** Prior to the Termination Date, if transfer of the Facility is to occur at the natural expiration of the Term;

**8.10.3.2** As close as possible to the Early Termination Date, if this Agreement and the Lease are terminated prior to the natural expiration of the Term. If Developer, despite diligent efforts, is unable to complete such work prior to the Early Termination Date, TxDOT may grant Developer a right of entry to complete such work after the Early Termination Date, provided that Developer shall abide by all TxDOT's Safety Standards and standards for traffic management and control, and shall minimize interference with use and operation of the Facility.

### **8.11 Handback Requirements Reserve**

#### **8.11.1 Establishment**

**8.11.1.1** Beginning six full calendar years before the end of the Term, Developer shall establish and fund a reserve account (the "Handback Requirements Reserve") exclusively available for the uses set forth in Section 8.11.3. The Handback Requirements Reserve shall be established under the Facility Trust Agreement or other similar arrangements that, to the maximum extent practicable, preclude it from being an asset of Developer or TxDOT, so that it will be available to TxDOT or Lenders regardless of any bankruptcy event. Such other arrangements shall be subject to TxDOT's and Developer's prior written approval, each in its good faith discretion. If such arrangements are not pursuant to the Facility Trust, then such arrangements shall include the holding of the Handback Requirements Reserve in an account with a financial institution nominated by Developer and approved by TxDOT, which institution may include any Lender that is and continues to qualify as an Institutional Lender.

**8.11.1.2** Developer shall provide to TxDOT 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 TxDOT's rights and interests with respect to the Handback Requirements Reserve, including TxDOT's right to draw on the Handback Requirements Reserve as provided in Section 8.11.3. Developer shall deliver such notices to the depository institution and execute such documents as may be required to establish and perfect TxDOT's interest in the Handback Requirements Reserve under the Uniform Commercial Code as adopted in the State, including TxDOT's right to make direct draws against the Handback Requirements Reserve as provided in Section 8.11.3.

**8.11.1.3** In lieu of establishing the Handback Requirements Reserve, Developer may deliver to TxDOT Handback Requirements Letters of Credit, on the terms and conditions set forth in Section 8.11.5.

## **8.11.2 Funding**

**8.11.2.1** Developer shall make deposits to the Handback Requirements Reserve at the frequencies or intervals and in the amounts set forth in Exhibit 13 to this Agreement.

**8.11.2.2** Funds held in the Handback Requirements Reserve may be invested and reinvested only in Eligible Investments. Eligible Investments in the Handback Requirements Reserve must mature, or the principal of and accrued interest on such Eligible Investments must be available for withdrawal without penalty, not later than such times as shall be necessary to provide funds when needed for payment of draws to Developer, and in any event not later than the end of the Term. All interest earned or profits realized from the investment of funds in the Handback Requirements Reserve shall be retained therein.

## **8.11.3 Use**

**8.11.3.1** Developer will have the right to payments from the Handback Requirements Reserve for the following, and no other, purposes, provided the Handback Requirements Reserve is not at any time reduced below the amount of funds then required under Exhibit 13:

(a) Costs of Renewal Work for those Elements that have a number of years stated in the "Useful Life" column in Table 19.8.5.1- Residual Life Table of the Technical Requirements, to the extent such Renewal Work is to be performed prior to the end of the Term pursuant to Section 8.5;

(b) Costs of Renewal Work for those Elements that have a number of years stated in the "Residual Life at Handback" column in Table 19.8.5.1- Residual Life Table of the Technical Requirements, to the extent such Renewal Work is necessary in order to return the Element to TxDOT at the end of the Term with a Residual Life equal to or greater than such number of years; and

(c) Costs of Safety Compliance work.

**8.11.3.2** Not later than six years before the end of the Term, the Parties shall establish reasonable written protocols and procedures for requesting and funding draws from the Handback Requirements Reserve.

## **8.11.4 Disposition at End of Term**

**8.11.4.1** At the expiration or any earlier termination of the Term for any reason, including termination due to TxDOT Default, all funds in the Handback Requirements Reserve (except as provided in Section 8.11.4.2) shall automatically be and become the sole property of TxDOT, free and clear of all liens, pledges and encumbrances. Thereupon, Developer shall deliver such transfers, assignments and other documents, and take such other actions, as TxDOT or the depository institution for the Handback Requirements Reserve shall require to confirm transfer to TxDOT of the Handback Requirements Reserve and funds therein, free and clear of all liens, pledges and encumbrances.

**8.11.4.2** In the event the Handback Requirements Reserve at such time is different from the amount then required pursuant to Exhibit 13 to this Agreement, Developer

shall be obligated to pay any shortfall to TxDOT upon demand, or TxDOT shall authorize release to Developer of any excess, as the case may be. TxDOT at its election may offset any Termination Compensation owing to Developer by the amount of the Handback Requirements Reserve owing to TxDOT. For the avoidance of doubt, if at the expiration of the Term Developer has completed and paid in full all Renewal Work required on all Elements that have a number of years stated in the "Residual Life at Handback" column in Table 19.8.5.1- Residual Life Table of the Technical Requirements and funds in the Handback Requirements Reserve exceed the total amount required under Section 2(a) of Exhibit 13 and the 10% contingency thereon required under Section 2(c) of Exhibit 13, then TxDOT shall authorize release of such excess to Developer or, at Developer's direction, the Collateral Agent.

#### **8.11.5 Handback Requirements Letters of Credit**

**8.11.5.1** In lieu of establishing the Handback Requirements Reserve, Developer may deliver to TxDOT one or more letters of credit (each, a "Handback Requirements Letter of Credit"), on the terms and conditions set forth in this Section 8.11.5 and Section 16.3. If the Handback Requirements Reserve 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, on the terms and conditions set forth in this Section 8.11.5 and Section 16.3. Upon receipt of the required substitute Handback Requirements Letter of Credit, TxDOT shall authorize the release to Developer of amounts in the Handback Requirements Reserve equal to the face amount of the substitute Handback Requirements Letter of Credit, such released funds to be applied as set forth in Section 3.7.2. If the face amount of any Handback Requirements Letter of Credit will fall below the total amount required to be funded to the Handback Requirements Reserve prior to expiry of the Handback Requirements Letter of Credit, Developer shall be obligated to pay, when due, the shortfall into the Handback Requirements Reserve. Alternately, 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 during the period up to the expiry 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 are due.

**8.11.5.2** TxDOT shall have the right to draw on the Handback Requirements Letter of Credit as provided in Section 16.3.1.2. For avoidance of doubt, TxDOT shall have the right to draw if (a) Developer has failed to pay or perform as and when due (subject to extension by reason of Relief Events to the extent provided in Section 13.1) any obligation with respect to Renewal Work under the FCA Documents for which the Handback Requirements Letter of Credit is held or (b) Developer for any reason fails to deliver to TxDOT a new or replacement Handback Requirements Letter of Credit, on the same terms, or at least a one year extension of the expiration date of the existing Handback Requirements Letter of Credit, by not later than 45 Days before such expiration date, in which event TxDOT shall deposit the proceeds from drawing on the expiring Handback Requirements Letter of Credit into the Handback Requirements Reserve.

**8.11.5.3** In the event TxDOT draws on a Handback Requirements Letter of Credit, TxDOT shall have the right to use and apply the proceeds of such drawing as provided in Section 8.11.3.

**8.11.5.4** TxDOT shall have the right to draw on any Handback Requirements Letter of Credit upon expiration or earlier termination of the Term for any reason, including termination due to TxDOT Default, as necessary to obtain the Handback Requirements Reserve funds to which TxDOT is then entitled under Section 8.11.4.

## **ARTICLE 9. MANAGEMENT SYSTEMS AND OVERSIGHT**

### **9.1 Facility Management Plan**

**9.1.1** Developer is responsible for all quality assurance and quality control activities necessary to manage the development, design, construction, operation and maintenance of the Facility and to manage the Utility Adjustment Work. Developer shall undertake all aspects of quality assurance and quality control for the Facility and Work in accordance with the Facility Management Plan and Good Industry Practice.

**9.1.2** Developer shall develop the Facility Management Plan and its component parts, plans and other documentation in accordance with the requirements set forth in Section 2 of the Technical Requirements and Good Industry Practice. The Facility Management Plan shall include all the parts, Management Plans and other documentation identified in Attachment 1 to the Technical Requirements.

**9.1.3** Developer shall maintain in an electronic format readily accessible by TxDOT and in accordance with Section 2.5 of the Technical Requirements each component part, plan and other documentation of the Facility Management Plan and any proposed changes or additions to or revisions of any such component part, plan or other documentation. No component part, plan or other documentation of the Facility Management Plan, and no such changes, additions or revisions, shall be given effect until reasonably approved by TxDOT in accordance with the procedures described in Section 6.3 and Section 2.4.2 of the Technical Requirements. If Developer fails to propose any change required to comply with Good Industry Practice or to reflect a change in working practice implemented by Developer, TxDOT may propose such change and it shall be dealt with as though it had been proposed by Developer.

**9.1.4** Developer shall not commence or permit the commencement of any aspect of the design, construction, operation or maintenance before the relevant component parts, plans and other documentation of the Facility Management Plan applicable to such Work have been submitted to and approved by TxDOT in accordance with the procedures described in Section 6.3 and Section 2.4.2 of the Technical Requirements. The schedule according to which each component part, plan and other documentation of the Facility Management Plan shall be submitted is included in Section 2 and Attachment 1 of the Technical Requirements.

**9.1.5** If any part, plan or other documentation of the Facility Management Plan refers to, relies on or incorporates any manual, plan, procedure or like document then all such referenced or incorporated materials shall be submitted to TxDOT for reasonable approval at the time that the relevant part, plan or other documentation of the Facility Management Plan or change, addition or revision to the Facility Management Plan is submitted to TxDOT.

**9.1.6** Developer shall carry out internal audits of the Facility Management Plan at the times prescribed in the Facility Management Plan.

**9.1.7** Developer shall cause each of its Contractors at every level to comply with the applicable requirements of the approved Facility Management Plan.



**9.1.8** Developer shall at all times employ a Quality Manager who shall, irrespective of his other responsibilities, have defined authority for ensuring the establishment and maintenance of the Facility Management Plan and reporting to TxDOT and the Independent Engineer on the performance of the Facility Management Plan. The Quality Manager may be an employee of the Developer.

## **9.2 Traffic Management**

**9.2.1** Developer shall be responsible for the general management of traffic on the Facility. Developer shall manage traffic so as to preserve and protect safety of traffic on the Facility and Related Transportation Facilities and, to the maximum extent practicable, to avoid disruption, interruption or other adverse effects on traffic flow, throughput or level of service on the Facility and Related Transportation Facilities. Developer shall conduct traffic management in accordance with all applicable Technical Requirements, Technical Documents, Laws and Governmental Approvals, and in accordance with the Traffic Management Plans.

**9.2.2** Developer shall prepare and submit to TxDOT and the Independent Engineer for TxDOT's reasonable approval in its good faith discretion a Construction Traffic Management Plan for managing traffic during construction of the Facility and the Utility Adjustments, addressing orderly and safe movement and diversion of traffic on Related Transportation Facilities. Developer shall prepare the Construction Traffic Management Plan according to the schedule set forth in the Technical Requirements. The Construction Traffic Management Plan shall be consistent with the outline therefor approved by TxDOT on or prior to the Effective Date and comply with the Technical Requirements and Technical Documents concerning traffic management and traffic operations. Developer shall carry out all construction activities in accordance with the approved Construction Traffic Management Plan.

**9.2.3** Developer shall prepare and submit to TxDOT and the Independent Engineer for TxDOT approval an Operating Traffic Management Plan for managing traffic after the commencement of traffic operations on any portion of the Facility, addressing (a) orderly and safe movement of traffic on the Facility and (b) orderly and safe diversion of traffic on the Facility and Related Transportation Facilities necessary in connection with field maintenance and repair work or Renewal Work or in response to Incidents, Emergencies and lane closures. Developer shall prepare the Operating Traffic Management Plan according to the schedule set forth in the Technical Requirements. The Operating Traffic Management Plan shall comply with the Technical Requirements and Technical Documents concerning traffic management and traffic operations. Developer shall carry out all traffic management during the Operating Period in accordance with the approved Operating Traffic Management Plan.

**9.2.4** Developer shall implement the Traffic Management Plans to promote safe and efficient operation of the Facility and Related Transportation Facilities at all times during the course of any construction or operation of the Facility and during the Utility Adjustment Work.

**9.2.5** TxDOT shall have at all times, without obligation or liability to Developer, the right to:

**9.2.5.1** Issue directive orders to Developer regarding traffic management and control (with which Developer shall comply), or directly assume traffic management and control, of the Facility during any period the Facility is designated for immediate use as (a) an emergency mass evacuation route, including reversing the direction of traffic flow during such

period, or (b) the alternate route for diversion of traffic from another State Highway or frontage road temporarily closed to all lanes in one or both directions due to incident or emergency; and

**9.2.5.2** Provide on the Facility, via message signs or other means consistent with Good Industry Practice, non-Discriminatory traveler and driver information, and other public information (e.g. amber alerts), provided that the means to disseminate such information does not materially interfere with the functioning of the ETCS or create a safety hazard.

### **9.3 Oversight, Inspection and Testing**

#### **9.3.1 Oversight by Independent Engineer**

**9.3.1.1** From and after the Effective Date, the Independent Engineer shall have the right and responsibility to conduct the monitoring, reviewing, inspection, testing, reporting, auditing and other oversight functions set forth in the FCA Documents and the Independent Engineer Agreement. The Parties shall cause the Independent Engineer Agreement to include all the rights and responsibilities of the Independent Engineer set forth in the FCA Documents.

**9.3.1.2** The Independent Engineer's rights and responsibilities shall include throughout the Term the following:

(a) Monitoring and auditing Developer and its books and records to determine compliance with requirements of the FCA Documents and the approved Facility Management Plan, including (i) audit review of Design Documents, Plans, Construction Documents and other Submittals and (ii) audit review regarding Patron Confidential Information; as provided in Section 8.8.7;

(b) Conducting field monitoring and inspections as indicated in the FCA Documents and Independent Engineer Agreement, including in connection with TxDOT's certifications of Substantial Completion, Service Commencement and Final Acceptance;

(c) Conducting Owner Verification Tests ("OVT") to verify Developer's compliance with all testing frequencies and requirements, including performance and acceptance testing, set forth in the FCA Documents and the approved Facility Management Plan. The Independent Engineer's OVT effort during construction will focus on materials, components, systems and Elements where Nonconforming Work, Deviations, Defects or other non-compliance could affect safety, compliance with Governmental Approvals or the Residual Life at Handback. Notwithstanding any contrary provisions hereof, the Independent Engineer will perform OVT as the express agent of TxDOT, under TxDOT's exclusive direction and control, and TxDOT will pay for all costs of the Independent Engineer's OVT services;

(d) Providing simultaneously to Developer, TxDOT and the Collateral Agent progress reports, quality reports, regular audit reports, reports on Performance Requirements, Targets and Defects, other reports, and findings, opinions, evaluations, comments, objections and recommendations, all as more particularly set forth in the FCA Documents and the Independent Engineer Agreement;

(e) Reviewing and commenting on all Submittals for which TxDOT review and comment or approval is required under the FCA Documents, unless expressly

provided otherwise in the FCA Documents or Independent Engineer Agreement, or unless waived in writing by the Parties for a specific Submittal or type of Submittal;

(f) Reviewing, commenting on and giving recommendations, objections or disapprovals regarding the Renewal Work Schedule and revisions thereto, as provided in Section 8.6.5;

(g) Selecting Auditable Sections, accompanying Developer on physical inspections associated with Developer's Audit Inspections, conducting its own Audit Inspections, assessing and scoring Developer's O&M Records, and assessing and scoring the condition of Elements, as provided in Section 19.7 of the Technical Requirements;

(h) Attending and witnessing Developer's other tests and inspections;

(i) Auditing the books and records of Key Contractors to evaluate compliance with the requirements of the FCA Documents;

(j) Investigating, analysing and reporting on Safety Compliance and performance of Safety Compliance Orders;

(k) Making recommendations on Relief Event Determinations;

(l) Evaluating and reporting to TxDOT on Developer's estimates of cost impacts attributable to Compensation Events, Developer's projected impacts of proposed TxDOT Changes on the Facility Schedule and Milestone Schedule, and Change Requests,

(m) Recommending suspension of work if circumstances exist that would entitle TxDOT to order suspension of work under Section 17.3.8;

(n) Notifying TxDOT of any Developer breach or failure specified in Exhibit 20, recommending assessment of Noncompliance Points and reporting on Developer's cure or failure to cure, as provided in Section 18.2; and

(o) Serving as the sole person to whom TxDOT outsources any of its oversight responsibilities with respect to right of way acquisition; provided, however, that TxDOT may retain consultants to provide assistance to TxDOT in an advisory capacity (and not in a decision making capacity) with respect to right of way acquisition.

**9.3.1.3** Developer at all times shall coordinate and cooperate with the Independent Engineer to facilitate the full, efficient, effective and timely performance by the Independent Engineer of his or her monitoring, inspection, sampling, measuring, testing, reporting, auditing, and other oversight functions. Without limiting the foregoing, Developer shall afford the Independent Engineer safe access to the Facility and Developer's Facility offices, operations buildings and data respecting the Facility design, construction, operations and maintenance, and the Utility Adjustment Work, and shall deliver to the Independent Engineer upon request accurate and complete books, records, data and information regarding Work, the Facility and the Utility Adjustment Work, in the format required by the Technical Requirements.

**9.3.1.4** The Independent Engineer shall be required to report and give notices to TxDOT, Developer and Lenders in accordance with the terms of the Independent Engineer Agreement.

**9.3.1.5** Costs and expenses for the Independent Engineer shall be allocated equally between Developer and TxDOT, as set forth in the Independent Engineer Agreement.

**9.3.1.6** Wherever in the FCA Documents it is stated that the Independent Engineer shall or may perform an action, function or task, it means that the Parties to this Agreement agree that the Independent Engineer has been or will be given the right and obligation to perform the same under the Independent Engineer Agreement.

**9.3.1.7** The Independent Engineer is engaged jointly by TxDOT and Developer to assist them with fair and objective oversight and administration of this Agreement and the Work. Nothing in this Agreement, the Technical Requirements or the Independent Engineer Agreement is intended or shall be construed as vesting in the Independent Engineer any powers or authority to:

- (a) Arbitrate or render binding decisions or judgments;
- (b) Approve or disapprove Submittals or Work (unless expressly provided otherwise in the FCA Documents or Independent Engineer Agreement for specific Submittals);
- (c) Conduct "over-the-shoulder" reviews of Design Documents or other Submittals;
- (d) Conduct formal prior reviews of Design Documents except to the extent necessary or advisable to comply with FHWA requirements or unless TxDOT chooses to have the Independent Engineer do so during any period there exists an uncured Persistent Developer Default for which TxDOT has given notice to Developer;
- (e) Direct design, construction, operations or maintenance of the Facility, or order suspensions of Work, except to give such direction or order or take such action as in its opinion is necessary to remove an immediate and present threat to the safety of life or property;
- (f) Act as an agent of TxDOT or Developer, except as provided in Section 9.3.1.2(c); or
- (g) Undertake Developer's primary responsibility for quality assurance and quality control.

### **9.3.2 Oversight by TxDOT**

**9.3.2.1** TxDOT or TxDOT acting through its Authorized Representative shall have the right at all times to monitor, inspect, sample, measure, attend, observe or conduct tests and investigations, and conduct any other oversight respecting any part or aspect of the Facility or the Work, to the extent necessary or advisable (a) to comply with FHWA requirements, (b) to verify on an audit basis Developer's compliance with the FCA Documents

and Facility Management Plan and (c) to verify the Independent Engineer's proper performance of its responsibilities and obligations. TxDOT shall conduct such activity in accordance with Developer's safety procedures and manuals, and in a manner that does not unreasonably interfere with normal construction activity or normal operation and maintenance of the Facility.

**9.3.2.2** Refer to Section 22.2 for TxDOT's rights to audit Developer and its Contractors. Developer acknowledges and agrees that TxDOT will have the right to audit, monitor and inspect the Independent Engineer and its compliance with Good Industry Practice and its responsibilities and obligations under the Independent Engineer Agreement.

**9.3.2.3** TxDOT will not conduct formal prior reviews of Design Documents except to the extent necessary or advisable to comply with FHWA requirements or unless TxDOT chooses to do so during any period there exists an uncured Persistent Developer Default for which TxDOT has given notice to Developer.

### **9.3.3 Rights of Cooperation and Access; Increased Oversight**

**9.3.3.1** Developer at all times shall coordinate and cooperate, and require its Contractors to coordinate and cooperate, with the Independent Engineer to facilitate the full, efficient, effective and timely performance by the Independent Engineer of his or her monitoring, inspection, sampling, measuring, testing, reporting, auditing, and other oversight functions.

**9.3.3.2** Developer at all times shall coordinate and cooperate, and require its Contractors to coordinate and cooperate, with TxDOT and its Authorized Representative to facilitate TxDOT's oversight activities. Developer shall cause its representatives to be available at all reasonable times for consultation with TxDOT and the Independent Engineer.

**9.3.3.3** Without limiting the foregoing, Developer shall afford TxDOT, its Authorized Representative and the Independent Engineer (a) safe and unrestricted access to the Facility at all times, (b) safe access during normal business hours to Developer's Facility offices and operations buildings and (c) unrestricted access to data respecting the Facility design, construction, operations and maintenance, and the Utility Adjustment Work. Without limiting the foregoing, Developer shall deliver to TxDOT and the Independent Engineer upon request accurate and complete books, records, data and information regarding Work, the Facility and the Utility Adjustment Work, in the format required by the Technical Requirements.

**9.3.3.4** TxDOT and the Independent Engineer shall have the right to increase the type and level of their oversight during any period there exists an uncured Persistent Developer Default for which TxDOT has given notice to Developer.

### **9.3.4 Testing and Test Results**

Each of the Independent Engineer and TxDOT shall have the right to attend and witness any tests and verifications to be conducted pursuant to the Technical Requirements and applicable Management Plans, including accuracy, availability and performance tests of the Electronic Toll Collection System. Developer shall provide to the Independent Engineer and TxDOT all test results and reports (which may be provided in electronic format in accordance with the Technical Requirements) within ten days after Developer receives them.

## ARTICLE 10. CONTRACTING AND LABOR PRACTICES

### 10.1 Disclosure of Contracts and Contractors

10.1.1 Developer shall provide TxDOT and the Independent Engineer with a list of all Contracts, the Contractors thereunder, guarantees of Key Contracts and the guarantors thereunder with each monthly report required under this Agreement or the Technical Requirements. Developer shall allow TxDOT and the Independent Engineer ready access to all Contracts and records regarding Contracts, including amendments and supplements to Key Contracts and guarantees thereof; provided, however, that Developer may provide access thereto by depositing unredacted copies in the Intellectual Property Escrow as provided in Section 22.5.

10.1.2 Within five days after Developer enters into a definitive agreement with any Contractor, Developer shall notify TxDOT in writing of the name, address, phone number and authorized representative of such Contractor.

### 10.2 Responsibility for Work, Contractors and Employees

10.2.1 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.

10.2.2 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 TxDOT for the actions, omissions, negligence, willful misconduct, or breach of applicable Law or contract by Contractors.

10.2.3 Each Contract shall include terms and conditions sufficient to ensure compliance by the Contractor with the requirements of the FCA Documents, and shall include those terms that are specifically required by the FCA Documents to be included therein including, to the extent applicable, those set forth in Exhibit 8.

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

10.2.5 Developer shall supervise and be fully responsible for the actions, omissions, 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.

### 10.3 Key Contracts; Contractor Qualifications

#### 10.3.1 Use of and Change in Key Contractors

Developer shall retain, employ and utilize the firms and organizations specifically listed in the Facility Management Plan 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 TxDOT's prior written approval, which will not be unreasonably withheld. For Key Contractors not known as of the Effective Date, Developer's selection thereof shall be subject to TxDOT's prior written approval, such approval not to be unreasonably withheld.

### **10.3.2 Key Contract Provisions**

Each Key Contract shall:

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

**10.3.2.2** Expressly require the Key Contractor to participate in meetings between Developer and TxDOT 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 shall limit the authority of TxDOT or the Independent Engineer 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;

**10.3.2.3** Include an agreement by the Key Contractor to participate in any dispute resolution proceeding pursuant to Section 17.8, if such participation is requested by either TxDOT or Developer;

**10.3.2.4** Without cost to Developer or TxDOT, and subject to the rights of the Collateral Agent as described in Article 20, expressly permit assignment to TxDOT or its successor, assign or designee of all Developer's rights under the Key Contract, contingent only upon delivery of written request from TxDOT following termination or expiration of this Agreement, allowing TxDOT or its successor, assign or designee 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;

**10.3.2.5** Expressly state that any acceptance of assignment of the Key Contract to TxDOT or its successor, assign or designee 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 assumption (but without restriction on Developer's rights to suspend work or demobilize due to Developer's breach);

**10.3.2.6** Expressly include a covenant to recognize and attorn to TxDOT upon receipt of written notice from TxDOT that it has exercised step-in rights under this Agreement, without necessity for consent or approval from Developer or to determine whether TxDOT validly exercised its step-in rights, and Developer's covenant to waive and release any claim or cause of action against the Key Contractor arising out of or relating to its recognition and attornment in reliance on any such written notice;

**10.3.2.7** 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 with respect to the Work by each of Developer, TxDOT and the Independent Engineer 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 TxDOT or the Independent Engineer under this Agreement;

**10.3.2.8** Include the right of Developer to terminate the Key Contract in whole or in part upon any Termination for Convenience of this Agreement and the Lease or any termination of this Agreement and the Lease due to Force Majeure Event or TxDOT default, in each case without liability of Developer or TxDOT for the Key Contractor's lost profits or business opportunity; and

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

### **10.3.3 Additional Requirement for Design-Build Contract.**

**10.3.3.1** The Design-Build Contract also shall expressly require the personal services of and not be assignable by the Design-Build Contractor without Developer's and TxDOT's prior written consent each in its sole discretion, provided that this provision shall not prohibit the subcontracting of portions of the Work. The provision included pursuant to Section 10.3.2.9 shall apply to such express provisions on personal services and non-assignment.

**10.3.3.2** Developer's execution of the Design-Build Contract with an entity other than the entities included in the definition of the Design-Build Contractor as set forth in Exhibit 1 to this Agreement shall be subject to TxDOT's prior written consent in its sole discretion.

## **10.4 Key Personnel**

**10.4.1** Developer shall retain, employ and utilize the individuals specifically listed in the Facility Management Plan to fill the corresponding Key Personnel positions listed therein. Developer shall not change or substitute any such individuals except due to retirement, death, disability, incapacity, or voluntary or involuntary termination of employment, or as otherwise approved by TxDOT as provided in Section 10.4.2.

**10.4.2** Developer shall notify TxDOT in writing of any proposed replacement for any Key Personnel position. TxDOT 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. TxDOT will not unreasonably withhold its approval of individuals with substantially equivalent capabilities in the relevant areas.

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



**10.4.4** Developer shall provide TxDOT and the Independent Engineer phone and pager numbers and email addresses for all Key Personnel. TxDOT and the Independent Engineer require the ability to contact Key Personnel 24 hours per Day, seven Days per week.

## **10.5 Contracts with Affiliates**

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

**10.5.1.1** Developer shall execute a written Contract with the Affiliate;

**10.5.1.2** The Contract shall comply with all applicable provisions of this Article 10, and be consistent with Good Industry Practice;

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

**10.5.1.4** 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

**10.5.1.5** No Affiliate, other than the Design-Build Contractor, shall be engaged by Developer to perform any Work or services which any FCA Documents or the Facility Management Plan or any component part, plan or other documentation thereunder indicates are to be performed by an independent or unaffiliated party. No Affiliate shall be engaged by Developer to perform any Work or services which would be inconsistent with Good Industry Practice.

**10.5.2** Before entering into a written Contract (other than the Design-Build Contract) with an Affiliate after the Effective Date, or entering into any supplement or amendment thereto, Developer shall submit a true and complete copy of the proposed Contract to TxDOT for review and comment. TxDOT shall have 20 Days after receipt to deliver its comments to Developer. If the Contract with the Affiliate is a Key Contract, other than the Design-Build Contract, it shall be subject to TxDOT's approval which shall not be unreasonably withheld.

**10.5.3** Developer shall make no payments to Affiliates for work or services in advance of provision of such work or services other than reasonable mobilization payments or other payments consistent with arms' length, competitive transactions of similar scope. Prior to the NEPA Finality Date, any such advance payments will be included in Developer's proposed budget under Section 7.7.2 and subject to TxDOT approval in its sole discretion and disclosed to TxDOT pursuant to Section 10.5.2. After the NEPA Finality Date, no TxDOT approval will be required, but any such payments will be excluded from the calculation of any Termination Compensation (i) only to the extent the Work for which the advance payment was made has not been performed by the Termination Date and (ii) except in the case of a termination for Force Majeure or Extended Relief Event, to the extent that such advance payments are not for the reasonable costs of contract cancellation, including costs of demobilization. The advance payments will not be excluded from the calculation of the Termination Compensation to the extent that Senior Debt has been used to make the advance payments.

## **10.6 Labor Standards**

**10.6.1** In the performance of its obligations under the FCA Documents, Developer at all times shall comply, and require by contract that all Contractors and vendors comply, with all applicable federal and State labor, occupational safety and health standards, rules, regulations and federal and State orders.

**10.6.2** All individuals performing the Work shall have the skill and experience and any licenses or certifications required to perform the Work assigned to them.

**10.6.3** If any individual serving as one of the Key Personnel or Specified Personnel is not performing the Work in a proper, safe and skillful manner, then Developer shall, or shall cause such Contractor to, remove such individual and such individual shall not be re-employed on the Work. If, after notice and reasonable opportunity to cure, such individual is not removed or if Developer fails to ensure that skilled and experienced personnel are furnished for the proper performance of the Work, then TxDOT may suspend the affected portion of the Work by delivering to Developer written notice of such suspension. Such suspension shall in no way relieve Developer of any obligation contained in the FCA Documents or entitle Developer to any compensation, extension of time or other Claim against TxDOT.

## **10.7 Ethical Standards**

**10.7.1** 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) TxDOT and the Independent Engineer and (b) employment relations. Such policy shall be subject to review and comment by TxDOT prior to adoption. Such policy shall include standards of ethical conduct concerning the following:

**10.7.1.1** Restrictions on gifts and contributions to, and lobbying of, TxDOT, the Texas Transportation Commission, the Independent Engineer and any of their respective commissioners, directors, officers and employees;

**10.7.1.2** Protection of employees from unethical practices in selection, use, hiring, compensation or other terms and conditions of employment, or in firing, promotion and termination of employees;

**10.7.1.3** Protection of employees from retaliatory actions (including discharge, demotion, suspension, threat, harassment, pay reduction or other discrimination in the terms and conditions of employment) in response to reporting of illegal (including the making of a false claim), unethical or unsafe actions or failures to act by any Developer-Related Entity;

**10.7.1.4** 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 Facility or employees;

**10.7.1.5** 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 Facility, 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

**10.7.1.6** Restrictions on directors, members, officers, or employees of any Developer-Related Entity performing any of the Work if the performance of such services would be prohibited under TxDOT's published conflict of interest rules and policies applicable to TxDOT's comprehensive development agreement program, or would be prohibited under Section 572.054, Texas Government Code.

**10.7.2** 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. Developer shall establish reasonable systems and procedures to promote and monitor compliance with the policy.

## **10.8 Non-Discrimination; Equal Employment Opportunity**

**10.8.1** Developer shall not, and shall cause the Contractors to not, discriminate on the basis of race, color, national origin, sex, age, religion or handicap in the performance of the Work under the FCA Documents. Developer shall carry out, and shall cause the Contractors to carry out, applicable requirements of 49 CFR Part 26. Failure by Developer to carry out these requirements is a material breach of this Agreement, which may result in termination of this Agreement in accordance with Section 17.1.2.5 and Article 19 or such other remedy permitted hereunder as TxDOT deems appropriate.

**10.8.2** Developer shall include the immediately preceding paragraph in every Contract (including purchase orders and in every Contract of any Developer-Related Entity for Work), and shall require that they be included in all Contracts at lower tiers, so that such provisions will be binding upon each Contractor.

**10.8.3** Developer confirms for itself and all Contractors that Developer and each Contractor has an equal employment opportunity policy ensuring equal employment opportunity without regard to race, color, national origin, sex, age, religion or handicap; and that Developer and each Contractor maintains no employee facilities segregated on the basis of race, color, national origin, sex, age, religion or handicap. Developer shall comply with all applicable Equal Employment Opportunity and nondiscrimination provisions set forth in Exhibit 8 to this Agreement, and shall require its Contractors to comply with such provisions.

## **10.9 Disadvantaged Business Enterprise**

### **10.9.1 General**

**10.9.1.1** Developer shall comply with all applicable requirements set forth in TxDOT's Disadvantaged Business Enterprise (DBE) Program adopted pursuant to 49 CFR Part 26 and the Texas Administrative Code, and the provisions in Developer's approved DBE Performance Plan, set forth in Exhibit 15, including the Special Provisions attached thereto. The purpose of the DBE Program is to ensure that DBEs shall have an equal opportunity to participate in the performance of contracts financed in whole or in part with federal funds.

**10.9.1.2** Developer shall include provisions to effectuate the DBE Program in every Contract to which it is a party (including purchase orders and task orders for Work), and

shall require that they be included in all Contracts at lower tiers (including purchase orders and task orders for Work), so that such provisions will be binding upon each Contractor.

#### **10.9.2 DBE Participation Goals**

**10.9.2.1** The goal for DBE participation in the Work required under this Agreement for the design, construction, operation and maintenance of the Facility shall be 12.54%.

**10.9.2.2** Developer shall exercise good faith efforts to achieve the DBE participation goal for the Facility through implementation of Developer's approved DBE Performance Plan.

#### **10.10 Job Training and Small Business Mentoring Plan**

**10.10.1** Developer's Job Training and Small Business Mentoring Plan applicable to the Facility is set forth in Exhibit 16. The purpose of the Job Training and Small Business Mentoring Plan is to ensure that inexperienced and untrained workers have a reasonable opportunity to participate in the performance of the Work through apprenticeships, training and similar measures to maintain and grow a diverse, skilled work force. Developer shall perform and comply with all requirements set forth in of the Job Training and Small Business Mentoring Plan.

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

#### **10.11 Prevailing Wages**

**10.11.1** Developer shall pay or cause to be paid to all applicable workers employed by it or its Contractors to perform the Work not less than the prevailing rates of wages, as provided in the statutes and regulations applicable to public work contracts, including Chapter 2258 of the Texas Government Code. TxDOT, Developer and its Contractors shall comply with all Laws pertaining to prevailing wages. For the purpose of applying such Laws, the Facility shall be treated as a public work paid for in whole or in part with public funds (regardless of whether public funds are actually used to pay for the Facility).

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

**10.11.3** Any issue between Developer or a Contractor and any affected worker relating to any alleged violation of Section 2258.023 of the Texas Government Code that is not resolved before the 15<sup>th</sup> day after the date TxDOT makes its initial determination under Section 2258.052 of the Texas Government Code (as to whether good cause exists to believe that a violation

occurred) shall be submitted to binding arbitration in accordance with the Texas General Arbitration Act, Chapter 171 of the Civil Practice and Remedies Code.

**10.11.4** Developer shall comply and cause its Contractors to comply with all Laws regarding notice and posting of intent to pay prevailing wages, and any other notice or posting of prevailing wage requirements and prevailing wage rates.

## **10.12 Uniforms**

Any uniforms worn by personnel of Developer-Related Entities shall bear colors, lettering, badges or other identifiers to assure clear differentiation from uniforms worn by TxDOT employees.

# **ARTICLE 11. RELATED AND COMPETING FACILITIES**

## **11.1 Integration with Related Transportation Facilities**

**11.1.1** Developer shall locate, configure, design, operate and maintain the termini, interchanges, entrances and exits of the Facility so that the Facility will be compatible and integrated with the location, configuration, design, operation and maintenance of, and provide a smooth, safe transition of traffic to and from, Related Transportation Facilities, as set forth in Section 1 of the Technical Requirements. The design and Right of Way Acquisition Plan for the Facility shall include and provide for such compatibility, integration and transition. The design, construction, operation and maintenance of the Facility shall satisfy all provisions of the Technical Requirements and Facility Management Plan relating to compatibility, integration and transition with or at Related Transportation Facilities, including those concerning signage, signaling and communications with Users.

**11.1.2** Without limiting the foregoing, Developer shall cooperate and coordinate with TxDOT and any third party that owns, manages, operates or maintains a Related Transportation Facility with regard to the maintenance and repair programs and schedules for the Facility and Related Transportation Facility, in order to minimize disruption to the operation of the Facility and the Related Transportation Facilities.

**11.1.3** To assist Developer, TxDOT shall provide to Developer during normal working hours reasonable access to plans, surveys, drawings, as-built drawings, specifications, reports and other documents and information in the possession of TxDOT or its contractors and consultants pertaining to Related Transportation Facilities. Developer at its expense shall have the right to make copies of the same. Developer, at its expense, shall conduct such other inspections, investigations, document searches, surveys and other work as may be necessary to identify the Related Transportation Facilities and achieve such compatibility, integration and transition.

**11.1.4** TxDOT shall provide reasonable assistance to Developer, upon its request and at its expense, in obtaining cooperation and coordination from third parties that own, manage, operate or maintain Related Transportation Facilities and in enforcing rights, remedies and warranties that Developer may have against any such third parties. Such assistance may include TxDOT's participation in meetings and discussions. In no event shall TxDOT be required to bring any legal action or proceeding against any such third party.

**11.1.4.1** TxDOT shall have at all times, without obligation or liability to Developer, the right to conduct traffic management activities on TxDOT's Related Transportation Facilities and all other facilities of the State transportation network in the area of the Facility in accordance with its standard traffic management practices and procedures in effect from time to time.

## **11.2 Reserved Airspace and Business Opportunities**

**11.2.1** Developer's rights and interests in the Facility and Facility Right of Way are and shall remain specifically limited only to such real and personal property rights and interests that are necessary or required for developing, permitting, designing, financing, constructing, installing, equipping, operating, maintaining, repairing, reconstructing, rehabilitating, restoring, renewing or replacing the Facility and Developer's timely fulfillment of its obligations under the FCA Documents. 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 Facility Right of Way which are not necessary or required for such purposes.

**11.2.2** TxDOT 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 (a) the use, enjoyment and operation of the Facility and Facility Right of Way as provided in this Agreement and the Lease and (b) the collection, use and enjoyment of Toll Revenues as provided in this Agreement and the Lease ("Business Opportunities"). Unless expressly authorized by TxDOT in its sole discretion, Developer will not grant permission for any Person to use or occupy the Facility 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 (i) carrying out the Facility Plan of Finance, (ii) arranging and consummating Refinancings, (iii) creating and using brochures and other marketing material that include descriptions, presentations and images of the Facility or the Work for the purpose of promoting Developer's business of developing, financing and operating transportation projects.

**11.2.3** The Business Opportunities reserved to TxDOT include all the following:

**11.2.3.1** All rights to finance, design, construct, operate and maintain any passenger or freight rail facility or other mode of transportation in the Airspace, and to grant to others such rights, subject to the provisions of Section 11.3.2 and 11.2.4;

**11.2.3.2** 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 Facility 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 Facility. For avoidance of doubt, if Developer installs any such improvements, all use and capacity thereof not necessary for operation of the Facility is reserved to, and shall be the sole property of, TxDOT;

**11.2.3.3** All rights to use, sell and derive revenues from traffic data and other data generated from operation of the Facility or any Electronic Toll Collection System except use of such data as required solely for operation of the Facility and enforcement and collection of tolls;

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

**11.2.3.5** 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 Facility. For avoidance of doubt, if Developer installs any such systems or applications, all use and capacity thereof not necessary for operation of the Facility is reserved to, and shall be the sole property of, TxDOT;

**11.2.3.6** 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 TxDOT or the Facility, or that may be confused with those of TxDOT or the Facility;

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

**11.2.3.8** All rights to revenues and profits derived from the right or ability of electronic toll account customers to use their accounts or transponders to purchase services or goods other than payment of tolls; and

**11.2.3.9** Any other commercial or noncommercial development or use of the Airspace or electronic toll collection technology for other than operation of the Facility.

**11.2.4** If the development, use or operation of the Airspace by TxDOT or anyone claiming under or through TxDOT, or if the development or operation of a Business Opportunity in the Airspace, prevents Developer from performing its fundamental obligations under this Agreement or materially adversely affects Developer's rights, costs or Toll Revenues, such impacts will be treated as a Compensation Event under Section 13.2; provided that in the case of a passenger or freight rail facility or other mode of transportation in the Airspace that is not a Competing Facility, the compensation to Developer shall be limited to (a) the loss of Toll Revenues due to traffic disruption during, and directly caused by, construction activities and (b) the increase in Developer's costs directly caused by construction or operating activities, and shall not include loss of Toll Revenues (if any) caused by the operation of such facility or mode of transportation. Prior to deciding whether to pursue or implement a Business Opportunity, TxDOT may call on Developer to provide analysis of the impacts thereof on Developer's costs, schedule and revenues, as if it were a Request for Change Proposal, in which case the Parties shall follow the procedures under Sections 14.1.2 through 14.1.9.

**11.2.5** In the event a Developer Default concerns a breach of the provisions of this Section 11.2, in addition to any other remedies, TxDOT 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.

**11.2.6** For the avoidance of doubt, Developer is prohibited by Law and this Section 11.2 from placing or permitting any outdoor advertising within the boundaries of the Facility Right of Way.

### **11.3 Competing Facilities**

#### **11.3.1 TxDOT Rights**

**11.3.1.1** Except for the limited rights to compensation provided to Developer under Section 11.3.2, TxDOT will have the unfettered right in its sole discretion, at any time and without liability, to finance, develop, approve, construct, expand, improve, modify, upgrade, add capacity to, reconstruct, rehabilitate, restore, renew and replace any existing and new transportation or other facilities (including, without limitation, free roads, connecting roads, service roads, frontage roads, turnpikes, managed lanes, HOT/HOV lanes, light rail, freight rail, bus lanes, etc.) (collectively, "TxDOT Projects") both within the Airspace and outside the Facility Right of Way, and whether adjacent to, nearby or otherwise located as to affect the Facility, its operation and maintenance (including, without limitation, the costs and expenses thereof), its vehicular traffic and/or its revenues.

**11.3.1.2** TxDOT Projects include those facilities (a) owned or operated by TxDOT, including those owned or operated by a private entity pursuant to a contract with TxDOT; (b) owned or operated by a joint powers authority or similar entity to which TxDOT is a member, (c) owned or operated by a Governmental Entity pursuant to a contract with TxDOT, including, without limitation, regional mobility authorities, joint powers authorities, counties and municipalities, and (d) owned or operated by a Governmental Entity (including, without limitation, regional mobility authorities, joint powers authorities, counties and municipalities) with respect to which TxDOT has contributed funds, in-kind contributions or other financial or administrative support. The foregoing rights include the ability to institute, increase or decrease tolls on such facilities or modify, change or institute new or different operation and maintenance procedures.

**11.3.1.3** TxDOT will have the right, without liability, to make non-discretionary distributions of federal and other funds for any transportation projects, programs and planning, to analyze revenue impacts of potential Competing Facilities, and to exercise all its authority to advise and recommend on transportation planning, development and funding.

#### **11.3.2 Exclusive Covenants and Remedies Regarding Competing Facilities**

This Section sets forth Developer's sole and exclusive rights and remedies with respect to Competing Facilities, and supersedes any provisions of the FCA Documents to the contrary. Such rights and remedies are subject to Section 11.3.3.

**11.3.2.1** The Compensation Amount owing from TxDOT to Developer on account of the Competing Facility shall be equal to the loss of Toll Revenues, if any, attributable to the Competing Facility less the increase in Toll Revenues, if any, attributable to (a) other Competing Facilities, but only to the extent that the amount of any such reduction has not been previously recognized under Section 13.2.3.4, (b) any direct southern extension to SH 130 in operation at the time Developer first delivers its Claim for compensation to TxDOT or (c) any prior decrease in the maximum daytime posted speed limit for passenger vehicles on all or a substantial portion of I-35 where it runs generally parallel to the Facility below the maximum daytime posted speed limit on the Setting Date. For purposes of the foregoing clause (c),



temporary decreases, lasting 10 days or less, in the maximum daytime posted speed limit for construction, maintenance, expansion or diversions shall not be considered. The foregoing Compensation Amount shall be determined in the same manner, and subject to the same conditions and limitations, as for a Compensation Event under Section 13.2; as well as the procedures in this Section.

**11.3.2.2** TxDOT may, but is not obligated to, deliver to Developer a notice of potential Competing Facility at any time from and after the selection thereof as the preferred alternative under a NEPA decision or local project decision and prior to opening of the potential Competing Facility to traffic. TxDOT shall include in such notice (a) a reasonable description of the Competing Facility, including any right of way alignments, number of lanes, location and other pertinent features, (b) a statement whether the potential Competing Facility will be tolled, and if so the intended toll rate schedule by vehicle classification, and (c) any traffic and revenue studies and analyses available to TxDOT for the potential Competing Facility.

**11.3.2.3** Within 120 days after TxDOT delivers such notice to Developer, Developer shall deliver to TxDOT a written notice of Claim stating whether Developer believes the potential Competing Facility will have an adverse effect on the amount of Toll Revenues and, if so, a true and complete copy of a preliminary traffic and revenue study and analysis showing the projected effects and a reasonably detailed statement quantifying such effects. Such analysis and quantification shall include data on past Toll Revenues and projected future Toll Revenues with and without the potential Competing Facility. At Developer's request within such 120-day period, TxDOT shall grant reasonable extensions of time for Developer to deliver the written notice of Claim, so long as Developer is making good faith, diligent progress in completing its traffic and revenue analysis and Toll Revenue impact analysis, provided that in no event shall TxDOT be obligated to grant extensions aggregating more than 60 days.

**11.3.2.4** If for any reason Developer fails to deliver such written notice of Claim and related information within the foregoing time period (as it may be extended), Developer shall be deemed to have irrevocably and forever waived and released any Claim or right to compensation for any adverse effect on Toll Revenues attributable to the construction, operation and use of the subject potential Competing Facility or any Competing Facility that is not substantially different from the potential Competing Facility. For this purpose, a Competing Facility ultimately constructed and operated shall be considered substantially different from the subject potential Competing Facility if (a) the route is substantially different, (b) the number of lanes is different, (c) the number of HOV, HOT, truck or other special purpose or restricted use lanes is different or their length is substantially different, (d) the total length is substantially different, (e) highways, roads and facilities having interchange, entrance or exit ramp access to and from the Competing Facility are different, or the design capacity of an interchange, entrance or exit ramp is substantially different, (f) TxDOT stated in its written notice that the potential Competing Facility would be tolled and the actual Competing Facility is not tolled or is tolled at materially lower toll rates for the predominant classifications of vehicles than the rates described in TxDOT's notice, (g) the means for collecting tolls is substantially different (e.g. barrier only vs. barrier-free or open lane tolling) or (h) there are other differences similar in scale or effect to the foregoing differences.

**11.3.2.5** If Developer timely delivers its written notice of Claim and related information, then at TxDOT's request Developer shall engage in good faith, diligent negotiations with TxDOT to mutually determine and settle the Compensation Amount owing from TxDOT to Developer on account of the potential Competing Facility. As part of such negotiations, the Parties shall continue to refine and exchange, on an Open Book basis, plans, drawings,

configurations and other information on the potential Competing Facility, traffic and revenue data, information, analyses and studies, and financial modeling and quantifications of projected Toll Revenue loss, if any. At the request of either Party, the Parties shall engage a neutral facilitator to assist with the negotiations.

**11.3.2.6** If, despite such good faith, diligent negotiations (including exchange of information on an Open Book basis), the Parties are unable to agree upon the Compensation Amount within 90 days after commencement of such negotiations, then either Party may terminate the negotiations upon written notice to the other Party. If the Parties are successful in the negotiations, they shall execute and deliver written agreements and, if necessary, amendments to this Agreement, setting forth all the terms and conditions of settlement, which shall thereafter be final and binding and constitute a full settlement and release of any and all Claims, causes of action, suits, demands and Losses of Developer arising out of the Competing Facility or any similar Competing Facility, except any material changes in operation of a Competing Facility, to the extent not taken into account in any prior determination of Compensation Amount, and any Relief Events or Extended Relief Events related to a Competing Facility. Neither Party thereafter shall have the right to rescind or cancel the settlement for any reason, including differences between the amounts of actual future Toll Revenues and the amount that were previously projected.

**11.3.2.7** If any Competing Facility is opened for traffic operations and is not the subject of compensation settlement under Section 11.3.2.5 or upon opening is substantially different from the Competing Facility that is the subject of compensation settlement (as described in Section 11.3.2.4), then Developer shall be entitled to pursue its Claim for the Compensation Amount on and subject to the following terms and conditions:

(a) Developer shall have a period of up to four years following the opening for traffic operations of the Competing Facility to make a Claim for the Compensation Amount (which may include both past and future adverse effects on the amount of Toll Revenues). Developer shall make a Claim by delivering to TxDOT written notice of the Claim together with the same related information and materials as described in Section 11.3.2.3. The written notice shall state the claimed Compensation Amount and Developer's proposed Base Case Financial Model Update. If for any reason Developer fails to deliver such written notice of Claim and related information within the foregoing time period, Developer shall be deemed to have irrevocably and forever waived and released any Claim or other right to compensation for any adverse effect, past or future, on Toll Revenues attributable to the Competing Facility.

(b) If Developer timely delivers its written notice of Claim and related information, then at TxDOT's request Developer shall deliver to TxDOT, on an Open Book basis, any other information, studies, analyses and documentation used by or available to Developer in support of its Claim or otherwise relevant to the determination of the Compensation Amount (if any), and the Parties shall seek to settle the Claim in good faith. Any unresolved Dispute regarding whether Developer is entitled to any compensation and the amount thereof shall be resolved according to the Dispute Resolution Procedures.

(c) Developer shall bear the burden of proving its Claim.

**11.3.2.8** If any Competing Facility for which compensation is paid pursuant to Section 11.3.2.5 or 11.3.2.6 is modified physically or operationally after opening for traffic operations so that it is substantially different (as described in Section 11.3.2.4) from the original Competing Facility and as a result thereof Developer experiences a further adverse effect on

the amount of Toll Revenues, then Developer shall be entitled to further compensation for such impact, offset by any further gain in Toll Revenues, if any, attributable to other Competing Facilities, or modifications thereof, that are in operation at the time Developer first delivers its Claim for further compensation to TxDOT. The foregoing right to further compensation shall be subject to the same terms and conditions as set forth in Section 11.3.2.7, with the deadline for making Claim running from the date the changes in the original Competing Facility are substantially completed.

### **11.3.3 Waiver of Rights and Remedies Regarding Competing Facilities**

**11.3.3.1** Developer acknowledges that TxDOT has a paramount public interest and duty to develop and operate whatever TxDOT Projects it deems to be in the best interests of the State, and that the compensation to which Developer is entitled on account of Competing Facilities is a fair and adequate remedy. Accordingly, Developer shall not have, and irrevocably waives and relinquishes, any and all rights to institute, seek or obtain any injunctive relief or pursue any action, order or decree to restrain, preclude, prohibit or interfere with TxDOT's rights to plan, finance, develop, operate, maintain, toll or not toll, repair, improve, modify, upgrade, reconstruct, rehabilitate, restore, renew or replace Competing Facilities; provided, however, that the foregoing shall not preclude Developer from enforcing its rights to compensation under Section 11.3.2, or claiming any relief in respect to Relief Events or Extended Relief Events, if appropriate. The filing of any such action seeking to restrain preclude, prohibit or interfere with TxDOT's rights shall automatically entitle TxDOT to recover all costs and expenses, including attorneys' fees, of defending such action and any appeals.

## **ARTICLE 12. UPGRADES, TECHNOLOGY ENHANCEMENTS AND SAFETY COMPLIANCE**

### **12.1 Conditions Requiring Mandatory Upgrades and Technology Enhancements**

#### **12.1.1 Capacity Improvements**

**12.1.1.1** Developer shall be obligated to make Capacity Improvements to and for the Facility as and when provided in Exhibit 18 to this Agreement.

**12.1.1.2** Required Capacity Improvements will be based on the level of service criteria, requirements and provisions set forth in Exhibit 18. Any Capacity Improvements proposed by Developer shall be subject to review and comment by the Independent Engineer and TxDOT for the purpose of determining, in addition to the matters set forth in Section 6.3.7.1, that the proposed Capacity Improvements are reasonably likely to restore and maintain for a reasonable period of time the minimum required levels of service set forth in Exhibit 18. For the avoidance of doubt, occurrence of the first trigger event described in Section 4.1 of Exhibit 18 signifies a failure to meet the minimum required levels of service. Developer shall bear the burden of proving that its proposed Capacity Improvements will restore minimum required levels of service for a reasonable period of time. Developer shall bear all risk that proposed Capacity Improvements do not restore and maintain minimum required levels of service.

**12.1.1.3** Except as provided in Section 12.1.1.4 and Exhibit 18, and except for TxDOT's right of review and comment on proposed Capacity Improvements, all the provisions of the FCA Documents, including all Technical Requirements and Technical Documents, concerning permitting, Facility Right of Way acquisition, design, construction, insurance, Utility Adjustments, Service Commencement, operation, maintenance and Renewal Work for the Facility shall apply, *mutatis mutandi*, to Capacity Improvements; provided that the

Technical Requirements and Technical Documents in effect on the date Developer first submits to TxDOT and the Independent Engineer preliminary designs and drawings for the Capacity Improvements shall apply to the design and construction of the Capacity Improvements.

**12.1.1.4** Before Developer enters into any design-build or other contract for the construction of Capacity Improvements, it shall submit to TxDOT and the Independent Engineer a proposed reasonable, logic-driven preliminary schedule for performing and completing the Capacity Improvements, including a deadline for Service Commencement, per diem liquidated damages to TxDOT for failure to achieve the deadline for Service Commencement, a Long Stop Date and proposed amounts of payment and performance bonds. Such schedule, the deadline for completion and Service Commencement, the liquidated damages, the Long Stop Date and the amounts of the payment and performance bonds shall be subject to review, analysis and recommendation by the Independent Engineer and to TxDOT's prior written approval; and any Dispute regarding the same shall be resolved according to the Dispute Resolution Procedures. The opinion of the Independent Engineer shall be given substantial weight in resolving any Dispute, except with respect to the appropriate measure of liquidated damages and amount of payment and performance bonds.

### **12.1.2 Facility Extensions**

**12.1.2.1** Developer shall be obligated to add a Facility Extension as and when provided in Exhibit 18 to this Agreement. Responsibility for the cost of Facility Extensions is set forth in Exhibit 18.

**12.1.2.2** Except to the extent otherwise provided in Exhibit 18, all the provisions of the FCA Documents concerning permitting, Facility Right of Way acquisition, design, construction, insurance, Utility Adjustments, Service Commencement, operation, maintenance and Renewal Work for the Facility shall apply, *mutatis mutandis*, to Facility Extensions; provided that the Technical Requirements and Technical Documents in effect on the date Developer first submits to TxDOT and the Independent Engineer preliminary designs and drawings for a Facility Extension shall apply to the design and construction of the Facility Extension.

**12.1.2.3** Before Developer enters into any design-build or other contract for the construction of a Facility Extension, it shall submit to TxDOT and the Independent Engineer a proposed reasonable, logic-driven preliminary schedule for performing and completing the Facility Extension, including a deadline for Service Commencement, per diem liquidated damages to TxDOT for failure to achieve the deadline for Service Commencement, a Long Stop Date and proposed amounts of payment and performance bonds. Such schedule, the deadline for Service Commencement, the liquidated damages, the Long Stop Date and the amounts of the payment and performance bonds shall be subject to review, analysis and recommendation by the Independent Engineer and to TxDOT's prior written approval; and any dispute regarding the same shall be resolved according to the Dispute Resolution Procedures. The opinion of the Independent Engineer shall be given substantial weight in resolving any Dispute, except with respect to the appropriate measure of liquidated damages and amount of payment and performance bonds.

### **12.1.3 Technology Enhancements**

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 maintain interoperability in accordance with Section 8.7.3 and other applicable provisions of the Technical Requirements.

## **12.2 Cost and Financing of Mandatory Upgrades**

Responsibility for the cost of and financing for mandatory Upgrades is set forth in Exhibit 18.

## **12.3 Discretionary Upgrades**

**12.3.1** Developer shall have the right to propose and undertake Capacity Improvements not required pursuant to Section 12.1.1 or 12.3.3. Any such proposed Capacity Improvement shall be subject to review and comment by TxDOT and the Independent Engineer. If, however, any proposed discretionary Capacity Improvement requires further environmental review under NEPA, it shall be subject to TxDOT's approval in its sole discretion, and Developer shall reimburse TxDOT for all costs, including TxDOT's Recoverable Costs, it incurs in connection with the NEPA process and any litigation arising therefrom. The provisions of Sections 12.1.1.3 and 12.1.1.4 shall apply to Developer's discretionary Capacity Improvements.

**12.3.2** Except for mandatory Facility Extensions and Facility Extensions pursuant to Section 12.3.3, Developer shall have no right to, and shall not, construct any Facility Extension without TxDOT's prior written approval in its sole discretion. Developer may initiate request for approval of a discretionary Facility Extension by submitting to TxDOT and the Independent Engineer a Change Request setting forth all the relevant particulars supporting the request, including sources and method of financing. Any approved discretionary Facility Extension shall comply with the Technical Requirements and Technical Documents in effect as of the date TxDOT issues its approval. If any proposed discretionary Facility Extension requires further environmental review under NEPA, Developer shall reimburse TxDOT for all costs, including TxDOT's Recoverable Costs, it incurs in connection with the NEPA process, including litigation costs. The provisions of Sections 12.1.2.2 and 12.1.2.3 shall apply to Developer's discretionary Facility Extensions.

**12.3.3** TxDOT may at any time issue a Directive Letter or Change Order for Developer to undertake Upgrades, subject to compensation in accordance with the Change provisions of this Agreement for non-mandatory Upgrades. Developer shall diligently carry out any such Directive Letter or Change Order in accordance with its terms and conditions and the FCA Documents, subject to the right to suspend Work under Section 17.6.2.2.

## **12.4 Safety Compliance**

### **12.4.1 Safety Compliance Orders**

**12.4.1.1** TxDOT shall use good faith efforts to inform Developer at the earliest practicable time of any circumstance or information relating to the Facility which in TxDOT's reasonable judgment is likely to result in a Safety Compliance Order. Except in the case of Emergency, TxDOT shall consult with Developer and the Independent Engineer prior to issuing a Safety Compliance Order concerning the risk to public or worker safety, alternative compliance measures, cost impacts, and the availability of Developer resources to fund the Safety Compliance work.

**12.4.1.2** The Independent Engineer's duties shall include monitoring and inspecting for the purpose of determining whether any circumstances exist that warrant issuance of a Safety Compliance Order, and giving reports and recommendations to TxDOT and Developer with respect thereto.

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

#### **12.4.2 Duty to Comply**

**12.4.2.1** Subject to Section 12.4.1, 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.

**12.4.2.2** Developer shall perform all work required to implement Safety Compliance at Developer's sole cost and expense. Without limiting the foregoing and for the avoidance of doubt, in no event shall Developer be entitled to (a) issue a Change Request or claim that a Compensation Event has occurred as a result of the existence of a Safety Compliance Order, (b) claim that a Force Majeure Event, Relief Event or Extended Relief Event has occurred or resulted from the existence of a Safety Compliance Order or (c) in the absence of any agreement to the contrary, claim that any Force Majeure Event, Relief Event or Extended Relief Event relieves Developer from compliance with any Safety Compliance Order.

### **ARTICLE 13. RELIEF EVENTS; COMPENSATION EVENTS**

#### **13.1 Relief Events**

##### **13.1.1 Relief Event Notice**

**13.1.1.1** If Developer's ability to perform its obligations under this Agreement is or, in Developer's reasonable opinion, is likely to be directly, materially and adversely delayed or impacted by a Relief Event, Developer shall submit a written Relief Event Notice to TxDOT. Developer shall submit such Relief Event Notice to TxDOT within 30 days following the date on which Developer first became aware (or should have been aware, using all reasonable due diligence) of the Relief Event.

**13.1.1.2** The Relief Event Notice shall include (a) a statement of the Relief Event upon which the claim of delay or inability to perform is based; (b) to the extent then known, a reasonable description of the circumstances from which the delay or inability to perform arises; and (c) an estimate of the delay in performance of any obligations under this Agreement attributable to the Relief Event. In the case of a single Relief Event being a continuing cause of delay, only one Relief Event Notice shall be necessary.

##### **13.1.2 Relief Request**

**13.1.2.1** Developer shall, within a further ten Business Days after the date of the Relief Event Notice, submit to TxDOT a Relief Request containing such further information as is then available to Developer relating to the Relief Event, and any delay in performance or failure to perform, including the following:

(a) Full details of the Relief Event, including its nature, the date of its occurrence and its duration;

(b) The effect of the Relief Event on Developer's ability to perform any of its obligations under this Agreement, including details of the relevant obligations, the precise effect on each such obligation, an impacted delay analysis indicating all affected activities on any Critical Path (with activity durations, predecessor and successor activities and resources, but determined as if no Float exists), and the likely duration of that effect; and

(c) An explanation of the measures that Developer proposes to undertake to mitigate the delay and other consequences of the Relief Event.

**13.1.2.2** If, following issuance of any Relief Request, Developer receives or becomes aware of any further information relating to the Relief Event and/or any delay in performance or failure to perform, it shall submit such further information to TxDOT as soon as possible. TxDOT may request from Developer any further information reasonably available to Developer that TxDOT may reasonably require, and Developer shall supply the same within a reasonable period after such request.

### **13.1.3 Waiver**

Developer's failure to deliver a Relief Event Notice or Relief Request within the applicable period shall not constitute a waiver of its rights under Section 13.1.1, except to the extent that TxDOT has been materially prejudiced by such failure. However, if for any reason Developer fails to deliver such written Relief Event Notice or Relief Request within four years after the expiration of the applicable time period, Developer shall be deemed to have irrevocably and forever waived and released any Claim or right to relief for any adverse effect attributable to such Relief Event.

### **13.1.4 Relief Event Determination**

**13.1.4.1** Subject to Developer's compliance with the notice and information requirements in Sections 13.1 and 13.2, TxDOT, acting reasonably and with consideration given to recommendations made by the Independent Engineer, shall issue a Relief Event Determination, specifying (a) the relevant obligations for which relief is given and (b) the period of time Facility Schedule or Milestone Schedule deadlines will be extended based on the number of days of delay affecting a Critical Path that is directly attributable to the Relief Event and that cannot be avoided through reasonable mitigation measures. Developer shall be relieved from the performance of obligations to the extent specified in the Relief Event Determination, and Noncompliance Points shall not be assessed against Developer as a result of inability to perform its obligations due solely and directly to, and during, the Relief Event period.

**13.1.4.2** Developer shall not be excused from compliance with applicable Laws, Technical Requirements or Technical Documents due to the occurrence of a Relief Event, except temporary inability to comply as a direct result of a Relief Event.

**13.1.4.3** Any disagreement as to the terms of the Relief Event Determination or TxDOT's failure to issue a Relief Event Determination shall be resolved according to the Dispute Resolution Procedures.

## **13.2 Compensation Events; Determination of Compensation Amount**

**13.2.1** Except as otherwise provided in this Agreement, Developer shall submit a written Compensation Event Notice to TxDOT within 60 days following the date on which Developer first became aware (or should have been aware, using all reasonable due diligence) of the occurrence of such Compensation Event. The Compensation Event Notice shall identify the Compensation Event and its date of occurrence in reasonable detail, describe Developer's current projection of the anticipated adverse and beneficial effects of the Compensation Event, and include written analysis and calculation of Developer's current estimate of the increase or decrease in costs and Developer's current estimate of the loss of or increase in Toll Revenues, to the extent applicable to the Compensation Event. Developer's failure to deliver a Compensation Event Notice within the required time period shall not constitute a waiver of its rights under this Section 13.2.1, except to the extent that TxDOT has been materially prejudiced by such failure. However, if for any reason Developer fails to deliver such written Compensation Event Notice within four years after the expiration of the applicable time period, Developer shall be deemed to have irrevocably and forever waived and released any Claim or right to compensation for any adverse effect on Toll Revenues or Developer's costs attributable to such Compensation Event.

**13.2.2** After receiving Developer's Compensation Event Notice, TxDOT shall be entitled to obtain (a) from the Independent Engineer a comprehensive report as to Developer's estimate of the cost impacts attributable to the Compensation Event and (b) from a traffic and revenue consultant reasonably approved by TxDOT a traffic and revenue study, prepared in accordance with Good Industry Practice, analyzing and calculating the estimated impact on Toll Revenues attributable to the Compensation Event. TxDOT shall, within 90 days after receiving Developer's Compensation Event Notice, provide to Developer a true and complete copy of the traffic and revenue study and the report prepared by the Independent Engineer. If TxDOT does not provide Developer copies of such study and report within such 90-day period, Developer shall have the right to assert a Claim against TxDOT for the relevant Compensation Amount (if any) and have such Claim determined according to the Dispute Resolution Procedures.

**13.2.3** Within 60 Days after Developer submits its Compensation Event Notice and TxDOT and Developer receive the report and study from the Independent Engineer and traffic and revenue consultant, Developer and TxDOT shall commence good faith negotiations to determine the Compensation Amount, if any, to which Developer is entitled. If Developer stands ready to commence good faith negotiations to determine the Compensation Amount within the foregoing time period but for any reason TxDOT does not commence to engage therein within the foregoing time period, Developer shall have the right to assert a Claim against TxDOT for the relevant Compensation Amount (if any) and have such Claim determined according to the Dispute Resolution Procedures. The Compensation Amount shall be determined by applying the following provisions.

### **13.2.3.1** Cost impacts shall:

(a) Exclude (i) third-party entertainment costs, lobbying and political activity costs, costs of alcoholic beverages, costs for first class travel in excess of prevailing economy travel costs, and costs of club memberships, in each case to the extent that such costs would not be reimbursed to an employee of TxDOT in the regular course of business, and (ii) unallowable costs under the following provisions of the federal Contract Cost Principles, 48 C.F.R. 31.205: 31.205-8 (contributions or donations), 31.205-13 (employee morale, health, welfare, food service, and dormitory costs and credits), 31.205-14 (entertainment costs),



31.205-15 (fines, penalties, and mischarging costs), 31.205-27 (organization costs), 31.205-34 (recruitment costs), 31.205-35 (relocation costs), 31.205-43 (trade, business, technical and professional activity costs), 31.205-44 (training and education costs), and 31.205-47 (costs related to legal and other proceedings);

(b) Exclude amounts paid or to be paid to Affiliates in excess of the pricing Developer could reasonably obtain in an arms' length, competitive transaction with an unaffiliated Contractor;

(c) Exclude those costs incurred in asserting, pursuing or enforcing any Claim or Dispute;

(d) Take into account any savings in costs resulting from the Compensation Event; and

(e) Be subject to Developer's obligation to mitigate cost increases and augment cost decreases in accordance with Section 13.3.

**13.2.3.2** Toll Revenue impacts shall:

(a) Except in the case of a Competing Facility, take into account any increase in Toll Revenue attributable to the Compensation Event;

(b) In the case of a Competing Facility, be determined as set forth in Section 11.3.2.1; and

(c) Be subject to Developer's obligation to mitigate loss of Toll Revenues in accordance with Section 13.3.

**13.2.3.3** For the purpose of any discounting, the Parties shall use the same present value methodology as incorporated into the Base Case Financial Model Update (or, if there has been no Update, into the Base Case Financial Model).

**13.2.3.4** If the Compensation Event is the posting of a maximum daytime speed limit for passenger vehicles on all or a substantial portion of I-35 where it runs generally parallel to the Facility greater than the maximum daytime posted speed limit on the Setting Date, then the Compensation Amount shall equal, and be limited to, the loss of Toll Revenues, if any, attributable thereto; less the increase in Toll Revenues, if any, attributable to Competing Facilities or any direct southern extension to SH 130 in operation at the time Developer first delivers its Claim for compensation to TxDOT; but only to the extent that the amount of any such reduction has not been previously recognized under Section 11.3.2.1, and notwithstanding any contrary provision of Section 13.2.6 TxDOT shall have the right, at its election, to pay such loss via periodic payments no less frequently than annually on the amount attributable to such period, in order to mitigate compensation in the event TxDOT subsequently reduces the maximum speed limit.

**13.2.3.5** If the Compensation Event is direction by TxDOT, to reduce the maximum daytime posted speed limit for passenger vehicles on all or a substantial portion of the Facility to less than 79 mph, but not less than 70 mph, after TxDOT authorized an increase in such speed limit to 80 mph or 85 mph, then the Compensation Amount shall equal, and be limited to, the proportionate refund of additional Concession Payments, if applicable, or

adjustment of revenue sharing, if applicable, set forth in Part A, Section 5 and Part B, Section 2.2 of Exhibit 7 to this Agreement; provided that such reduction is directed by TxDOT within one year after receipt by TxDOT of the increased Concession Payment authorized hereunder.

**13.2.4** Developer shall conduct all discussions and negotiations to determine any Compensation Amount, and shall share with TxDOT all data, documents and information pertaining thereto, on an Open Book Basis.

**13.2.5** If TxDOT and Developer are unable to agree on the Compensation Amount within 30 days after commencing good faith negotiations, or if Developer asserts a Claim against TxDOT for the Compensation Amount pursuant to Section 13.2.2 or 13.2.3, TxDOT shall prepare a good faith estimate of the Compensation Amount, and shall pay the full undisputed portion of the Compensation Amount to Developer within 30 days or in accordance with any other arrangement mutually agreed upon within such 30-day period pursuant to Section 13.2.6. Any Dispute regarding the occurrence of a Compensation Event or determination of the Compensation Amount shall be resolved according to the Dispute Resolution Procedures. The dispute resolution body(ies) shall apply the provisions of Section 13.2.3 in determining the Compensation Amount.

**13.2.6** Within 30 days following a determination of the Compensation Amount by mutual agreement or the Dispute Resolution Procedures, TxDOT shall pay such Compensation Amount through (a) a lump sum payment of the Compensation Amount; or (b) alternate terms reasonably acceptable to Developer, which may, if acceptable to Developer, include quarterly or other periodic payments of the Compensation Amount over the remaining Term or adjustment to the revenue sharing formula set forth in Part B of Exhibit 7 so as to make up all or any portion of the Compensation Amount. If TxDOT makes quarterly or other periodic payments, at any later time it may choose to complete compensation through a lump sum payment of the present value of the remaining Compensation Amount.

**13.2.7** Without limiting Developer's rights with respect to non-monetary relief for Relief Events and Extended Relief Events, the Compensation Amount shall represent the sole right to compensation and damages for the adverse financial effects of a Compensation Event. As a condition precedent to TxDOT's obligation to pay any portion of the Compensation Amount, Developer shall execute a full, unconditional, irrevocable release, in form reasonably acceptable to TxDOT, of any Claims, Losses or other rights to compensation or other monetary relief associated with such Compensation Event, so long as TxDOT timely pays the Compensation Amount, except for its rights to non-monetary relief for Relief Events and Extended Relief Events and the right to terminate this Agreement in accordance with Section 19.4 and to receive any applicable Termination Compensation.

### **13.3 Mitigation**

Developer shall take all steps reasonably necessary to mitigate the consequences of any Relief Event, Extended Relief Event or Compensation Event, including all steps that would generally be taken in accordance with Good Industry Practice, except that Developer is not obligated to consume Float.

## **ARTICLE 14. TXDOT CHANGES; DEVELOPER CHANGES; DIRECTIVE LETTERS**

This Article 14 sets forth the requirements for obtaining all Change Orders under this Agreement. Developer hereby acknowledges and agrees that the assumptions contained in the

Base Case Financial Model provide for full compensation for performance of all of the Work, subject only to those exceptions specified in this Article 14. Developer unconditionally and irrevocably waives the right to any claim for any monetary compensation or other relief in addition to that specifically provided under the terms of this Agreement, except in accordance with this Article 14. The foregoing waiver encompasses all theories of liability, whether in contract, tort (including negligence), equity, quantum meruit or otherwise, and encompasses all theories to extinguish contractual obligations, including impracticability, mutual mistake and frustration of purpose. Nothing in the Technical Requirements shall have the intent or effect or shall be construed to create any right of Developer to any Change Order or other Claim for additional monetary compensation or other relief, any provision in the Technical Requirements to the contrary notwithstanding.

## **14.1 TxDOT Changes**

This Section 14.1 concerns (a) Change Orders unilaterally issued by TxDOT and (b) Change Orders issued by TxDOT following a Request for Change Proposal.

### **14.1.1 TxDOT Right to Issue Change Order**

TxDOT may, at any time and from time to time, without notice to any Lender or Surety, authorize and/or require changes in the Work within the general scope of this Agreement pursuant to a Change Order or in terms and conditions of the Technical Requirements or Technical Documents (including changes in the standards applicable to the Work). Developer shall have no obligation to perform any work outside the general scope of this Agreement, except on terms mutually acceptable to TxDOT and Developer.

### **14.1.2 Request for Change Proposal**

**14.1.2.1** If TxDOT desires to initiate a TxDOT Change or to evaluate whether to initiate such a change, then TxDOT may, at its discretion, issue a Request for Change Proposal. The Request for Change Proposal shall set forth the nature, extent and details of the proposed TxDOT Change.

**14.1.2.2** Within five Business Days after Developer's receipt of a Request for Change Proposal, or such longer period as may be mutually agreed to by TxDOT and Developer, TxDOT and Developer shall consult to define the proposed scope of the change. Within five days after the initial consultation, or such longer period as may be mutually agreed to by TxDOT and Developer, TxDOT and Developer shall consult concerning the estimated financial and schedule impacts.

**14.1.3** Within 60 Days following TxDOT's delivery to Developer of the Request for Change Proposal, Developer shall provide TxDOT with a written response as to whether, in Developer's opinion, the TxDOT Change constitutes a Relief Event or Compensation Event, and if so, a detailed assessment of the cost, Toll Revenue and schedule impact of the proposed TxDOT Change, including the following:

**14.1.3.1** Developer's detailed estimate of the impacts on costs and Toll Revenues of carrying out the proposed TxDOT Change;

**14.1.3.2** If the Change Notice is issued prior to Final Acceptance, the effect of the proposed TxDOT Change on the Facility Schedule and Milestone Schedule, including

achievement of the Milestone Schedule Deadlines, taking into consideration Developer's duty to mitigate any delay to the extent reasonably practicable;

**14.1.3.3** The effect (if any) of the proposed TxDOT Change upon traffic flow and traffic volume on the Facility during the Operating Period; and

**14.1.3.4** Any other relevant information related to carrying out the proposed TxDOT Change.

**14.1.4** TxDOT shall be entitled to obtain (a) from the Independent Engineer a comprehensive report as to the proposed TxDOT Change, including the Independent Engineer's comments concerning Developer's estimate of the cost impacts and projected impact on the Facility Schedule and Milestone Schedule, and (b) from a traffic and revenue consultant reasonably approved by TxDOT a traffic and revenue study, prepared in accordance with Good Industry Practice, analyzing and calculating the estimated impacts on Toll Revenues.

**14.1.5** Following TxDOT's receipt of the Independent Engineer's report on the proposed TxDOT Change and the traffic and revenue consultant's study on the estimated impacts on Toll Revenues, TxDOT and Developer, giving due consideration to such report and study, shall exercise good faith efforts to negotiate a mutually acceptable Change Order, including adjustment of the Facility Schedule and Milestone Schedule Deadlines, any Compensation Amount to which Developer is entitled, and the timing and method for payment of any Compensation Amount, in accordance with Section 13.2.

**14.1.6** If TxDOT and Developer are unable to reach agreement on a Change Order, TxDOT may, in its sole discretion, deliver to Developer a Directive Letter pursuant to Section 14.3.1 directing Developer to proceed with the performance of the Work in question notwithstanding such disagreement. Upon receipt of such Directive Letter, pending final resolution according to the Dispute Resolution Procedures of the relevant Change Order, (a) Developer shall implement and perform the Work in question as directed by TxDOT and (b) TxDOT will make interim payment(s) to Developer on a monthly basis for the reasonable documented costs of the Work in question, subject to subsequent adjustment through the Dispute Resolution Procedures.

**14.1.7** TxDOT shall be responsible for payment of the Compensation Amount agreed upon or determined through the Dispute Resolution Procedures, through one of the payment mechanisms set forth in Section 13.2, and the Facility Schedule and Milestone Schedule shall be adjusted as agreed upon or determined through the Dispute Resolution Procedures, and in accordance with Section 13.1, to reflect the effects of the Change Order.

**14.1.8** If TxDOT elects to apply to Developer during the period before Service Commencement changes in the Technical Documents or Safety Standards and such changes have a material adverse impact on the Milestone Schedule or Developer's costs or Toll Revenues, such changes shall be considered TxDOT Changes and handled pursuant to the Change Order procedures in this Section 14.1. Changes to the Technical Documents or Safety Standards during the Operating Period (other than Discriminatory Actions) shall be implemented by Developer at its sole cost and expense.

## **14.2 Developer Changes**

**14.2.1** Developer may request TxDOT to approve modifications to the Technical Requirements or Technical Documents by submittal of a written Change Request using a form approved by TxDOT. The Change Request shall set forth Developer's detailed estimate of impacts on costs, Toll Revenues and schedule attributable to the requested change.

**14.2.2** TxDOT, in its sole and unfettered discretion (and, if it so elects, after receiving a comprehensive report from the Independent Engineer regarding the proposed Change Request), may accept or reject any Change Request proposed by Developer. TxDOT may condition its approval on modification of TxDOT's compensation under this Agreement in order to share equally in the estimated net cost and revenue benefit, if any, attributable to the proposed change. If TxDOT accepts such change and Developer accepts TxDOT's terms and conditions, TxDOT and Developer shall execute a Change Order and Developer shall implement such change in accordance with the Change Order and all applicable Technical Requirements, Technical Documents, the Facility Management Plan, Good Industry Practice, and all applicable Laws.

**14.2.3** Developer shall be solely responsible for payment of any increased costs, for any revenue losses and for any Facility Schedule delays or other impacts resulting from a Change Request accepted by TxDOT.

**14.2.4** Developer may implement and permit a Utility Owner to implement, without a Change Request or Change Order, changes to a Utility Adjustment design that do not vary from the Technical Requirements or Technical Documents, but such changes are subject either to TxDOT's approval as part of a Utility Assembly as provided in Section 6.3.4 of the Technical Requirements, or, if the changes are Utility Adjustment Field Modifications, to TxDOT's review and comment as provided in Section 6.4.6 of the Technical Requirements.

**14.2.5** No Change Request shall be required to implement any change to the Work that is not a Deviation and is not specifically regulated or addressed by the FCA Documents or applicable Law.

**14.2.6** Certain minor changes may be approved in writing by TxDOT as Deviations, as described in Sections 7.2.3 and 8.1.2.10, and in such event shall not require a Change Order. Any other change in the requirements of the FCA Documents shall require a Change Order.

## **14.3 Directive Letters**

**14.3.1** TxDOT may at any time issue a Directive Letter to Developer regarding any matter for which a Change Order can be issued or in the event of any Dispute regarding the scope of the Work. The Directive Letter will state that it is issued under this Section 14.3, will describe the Work in question and will state the basis for determining additional compensation, if any. Subject to Section 14.1.6, Developer shall proceed immediately as directed in the letter, pending the execution of a formal Change Order (or, if the letter states that the Work is within Developer's original scope of Work, Developer shall proceed with the Work as directed but shall have the right pursuant to Section 14.2 to request that TxDOT issue a Change Order with respect thereto).

**14.3.2** The fact that a Directive Letter was issued by TxDOT shall not be considered evidence that in fact a TxDOT Change occurred. The determination whether a TxDOT Change in fact occurred shall be based on an analysis of the original requirements of the FCA Documents and a determination as to whether the Directive Letter in fact constituted a change in those requirements.

## **ARTICLE 15. REPRESENTATIONS AND WARRANTIES**

### **15.1 Developer Representations and Warranties**

Developer hereby represents and warrants to TxDOT as follows:

**15.1.1** The Financial Model Formulas (a) were prepared by or on behalf of Developer in good faith, (b) are the same financial formulas that Developer utilized and is utilizing in the Base Case Financial Model, in making its decision to enter into this Agreement and in making disclosures to Lenders under the Initial Funding Agreements, and (c) as of the Effective Date are mathematically correct and are suitable for making reasonable projections. For avoidance of doubt, this Section 15.1.1 does not apply to assumptions used in the Base Case Financial Model, which are addressed in Section 15.1.2.

**15.1.2** The Base Case Financial Model (a) was prepared by or on behalf of Developer in good faith, (b) was audited and verified through a preliminary audit by an independent recognized model auditor prior to the Effective Date, which audit will be updated after the closing for the Initial Facility Debt, (c) fully discloses 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 represents the projections that Developer believes in good faith are the most realistic and reasonable for the Facility; 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.

**15.1.3** During all periods necessary for the performance of the Work, Developer and its design Contractor(s) will maintain all required authority, license status, professional ability, skills and capacity to perform the Work.

**15.1.4** Developer has evaluated the constraints affecting design and construction of the Facility, including the Facility Right of Way limits as well as the conditions of the NEPA Approval, and, subject to Developer's rights with respect to a Relief Event, has reasonable grounds for believing and does believe that the Facility can be designed and built within such constraints.

**15.1.5** Except for the Inaccessible Parcels, Developer has, in accordance with Good Industry Practice, examined the Site and surrounding locations, performed appropriate field studies and geotechnical investigations of the Site, investigated and reviewed 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, archeological, 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 Developer's rights to seek relief under Article 13 and Exhibit 11 to this Agreement, Developer accepts the physical requirements of the Work.

**15.1.6** Developer has familiarized itself with the requirements of any and all applicable Laws and the conditions of any required Governmental Approvals prior to entering into this Agreement. Except as specifically permitted under Sections 13 and 14, Developer shall be responsible for complying with the foregoing at its sole cost and without any increase in compensation or extension of any Milestone Schedule Deadline 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 FCA 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 FCA Documents.

**15.1.7** 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 FCA 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.

**15.1.8** Developer is a limited liability company duly organized and validly existing under the laws of the State of Delaware, 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 Facility 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 FCA Documents.

**15.1.9** The execution, delivery and performance of this Agreement, the Lease and the Principal Facility 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, the Lease and such Principal Facility Documents on behalf of Developer has been (or at the time of execution will be) duly authorized to execute and deliver each such document on behalf of Developer; and this Agreement, the Lease and such Principal Facility Documents have been (or will be) duly executed and delivered by Developer.

**15.1.10** Neither the execution and delivery by Developer of this Agreement, the Lease and the Principal Facility 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.

**15.1.11** Each of this Agreement, the Lease and the Principal Facility 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 in accordance with its terms, subject only to applicable bankruptcy, insolvency and similar laws affecting the enforceability of the rights of creditors generally and general principles of equity.

**15.1.12** 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 Facility Documents to which Developer is a party, or which challenges the authority of the Developer official executing this Agreement, the Lease or such Principal Facility Documents; and Developer has disclosed to TxDOT any pending and un-served or threatened action, suit, proceeding, investigation or litigation with respect to such matters of which Developer is aware.

## **15.2 TxDOT Representations and Warranties**

TxDOT hereby represents and warrants to Developer as follows:

**15.2.1** TxDOT has full power, right and authority to execute, deliver and perform this Agreement, the Lease and the Principal Facility Documents to which TxDOT is a party and to perform each and all of the obligations of TxDOT provided for herein and therein.

**15.2.2** Each person executing this Agreement, the Lease and such Principal Facility Documents on behalf of TxDOT has been (or at the time of execution will be) duly authorized to execute and deliver each such document on behalf of TxDOT; and this Agreement, the Lease and such Principal Facility Documents have been (or will be) duly executed and delivered by TxDOT.

**15.2.3** Neither the execution and delivery by TxDOT of this Agreement, the Lease and the Principal Facility Documents to which TxDOT is (or will be) a party nor the consummation of the transactions contemplated hereby or thereby, will at the time of execution result in a default under or violation of any other agreements or instruments to which it is a party or by which it is bound.

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

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

## **15.3 Survival of Representations and Warranties**

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

## **15.4 Special Warranty Dispute**

Notwithstanding any other provision of this Agreement, and except as provided below, any Claim or Dispute among the Parties that TxDOT has breached any of the warranties set



forth in Section 15.2 on the basis that the execution and delivery of this Agreement, the Lease or the Principal Facility Documents to which TxDOT is (or will be) a party or 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 violation of any applicable Law or Governmental Approval (each such Dispute or Claim, a "Special Warranty Dispute") (i) is not eligible for resolution pursuant to the Dispute Resolution Procedures and (ii) shall not form the basis for a Compensation Event. Except as provided in Section F.3 or Section F.4 of Exhibit 22, the only remedies for a Special Warranty Dispute are those set forth in Sections 19.12 and 24.14 and Exhibit 22. The Parties agree that notwithstanding the foregoing, if either TxDOT or Developer fails or refuses to perform any of its respective obligations under this Agreement, the Lease or the Principal Facility Documents to which TxDOT or Developer is (or will be) a part, on the basis or alleged basis or asserts a defense to any Claim or Dispute on the basis or alleged basis that the execution and delivery of this Agreement, the Lease or any of the Principal Facility Documents to which TxDOT or Developer is (or will be) a party or 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 violation of any applicable Law or Governmental Approval, such matter and any resulting Claim or Dispute (i) shall be resolved by the Dispute Resolution Procedures and (ii) shall not be an Ineligible Matter.

**15.4.1** If a court determines that this Agreement is void because of an inaccurate warranty or for any other reason, that decision shall constitute a Termination by Court Ruling as described in Section 19.12.

**15.4.2** If a Termination by Court Ruling occurs, Developer will be entitled to compensation to the extent, and only to the extent, provided in Exhibit 22 to this Agreement.

## **ARTICLE 16. INSURANCE; PERFORMANCE SECURITY; INDEMNITY**

### **16.1 Insurance**

#### **16.1.1 Insurance Policies and Coverage**

At minimum Developer shall procure and keep the Insurance Policies in effect, or cause them to be procured and kept in effect, and in each case satisfy the requirements therefor set forth in this Section 16.1 and Exhibit 19. Developer shall also procure or cause to be procured and kept in effect the Contractors' insurance coverages as required in Section 16.1.2.5 and Section 9 of Exhibit 19.

#### **16.1.2 General Insurance Requirements**

##### **16.1.2.1 Qualified Insurers**

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

(a) Licensed or, in the case of Lloyd's of London, authorized to do business in the State and has a current policyholder's management and financial size category rating of not less than "A VII" according to A.M. Best's Insurance Reports Key Rating Guide; or

(b) Otherwise approved in writing by TxDOT, such approval not to be unreasonably withheld, conditioned or delayed.

#### **16.1.2.2 Effect of Insurance Policies**

(a) TxDOT shall have no obligation to pay for premiums, deductibles or self-insured retentions under the Insurance Policies.

(b) Except for the Parties' waivers set forth in Section 16.1.2.8, nothing in this Section 16.1 or Exhibit 19 alters TxDOT's legal obligations and/or contractual liability to Developer as set forth elsewhere under the DRP Governed Agreements or Developer's legal obligations and/or contractual liability to TxDOT or the other Indemnified Parties as set forth elsewhere under the DRP Governed Agreements. Therefore:

(i) With respect to any loss that exceeds the amount of insurance proceeds paid under the Insurance Policies, TxDOT shall have no liability for same except to the extent arising under any other provisions of the DRP Governed Agreements; and

(ii) If in any instance Developer has not obtained and kept in force the Insurance Policies or fails to assert, diligently prosecute and collect payment of proceeds on claims thereunder, Developer shall have liability for the underlying claim or loss to the extent of its liability, if any, arising under any other provision of the DRP Governed Agreement (as if the Insurance Policies had not been required hereunder).

(c) It shall not be a Developer Default where Developer is unable to collect proceeds for an insurance claim made under any of the Insurance Policies due to the bankruptcy or insolvency of any insurer which at the time the insurance policy was written was an insurer that was qualified under Section 16.1.2.1.

#### **16.1.2.3 Primary Coverage**

Each of the Insurance Policies shall provide that the coverage thereunder is primary and noncontributory coverage with respect to all named or additional insureds thereon; provided, however, that any insurance and/or self-insurance (a) in addition to the types of coverage and/or (b) in amounts greater than the amounts specified in this Section 16.1 and Exhibit 19 that is maintained by Developer, any Contractor or any of the Indemnified Parties shall be excess of the coverage specified for the Insurance Policies and shall not contribute with the primary coverage under the Insurance Policies.

#### **16.1.2.4 Verification of Coverage; TxDOT Right to Suspend**

(a) Each time Developer is required to procure any of the Insurance Policies, or cause any of them to be procured, and thereafter (to the extent renewal documentation has been executed by insurers) Developer shall deliver, or cause to be delivered to TxDOT a certificate, binder or cover note (or other evidence of coverage reasonably acceptable to TxDOT) for the respective policy. Developer shall reasonably endeavor to deliver the foregoing proof of insurance to TxDOT not less than 10 Business Days prior to the date that each of the Insurance Policies is initially required to be procured hereunder, and in no event later than the date each such policy is initially required to be procured hereunder. After the initial procurement of each such policy, Developer shall reasonably endeavor to deliver the

foregoing proof of insurance to TxDOT not less than 10 Business Days prior to the expiration date of each of the Insurance Policies. and not later than the expiration date of each such policy. Each certificate, binder or cover note (or other evidence of coverage) reasonably acceptable to TxDOT) must state the identity of all carriers, named insureds and additional insureds; state the type and limits of coverage and the policy term; and be signed by an authorized representative of the insurance company shown on the insurance certificate (or other evidence of coverage) or its agent or broker. In addition, (i) either in the insurance certificate, binder, or cover note, or in a separate communication by Developer's insurance company, agent or broker to TxDOT, Developer shall cause to be furnished to TxDOT evidence as to the amount of the deductibles under the builder's risk, property and business interruption policies described in Exhibit 19 and (ii) Developer shall furnish, or cause to be furnished, to TxDOT a copy of the termination provisions contained in the Insurance Policies.

(b) If Developer has not provided TxDOT with the foregoing proof of coverage for any of the Insurance Policies required to be procured hereunder within five days after Developer's receipt of notice from TxDOT of a Developer Default under Section 17.1.1.9 and demand for the foregoing proof of coverage, (i) TxDOT may, in addition to any other available remedy, without obligation and without further inquiry as to whether insurance under such policy is actually in force, obtain a replacement insurance policy meeting the requirements for such policy, and Developer shall reimburse TxDOT for the cost thereof upon demand and (ii) in addition, TxDOT shall have the right, after giving notice of suspension to Developer in accordance with Section 24.12.2, without obligation or liability and without limitation to any other available remedy, to suspend all or any portion of Work and to close the Facility during any time period (until TxDOT obtains a replacement insurance policy, if it elects to do so) that Developer has failed to provide insurance certificates of insurance, binders or cover notes (or other evidence of coverage reasonably acceptable to TxDOT) for the Insurance Policies then required to be in force.

#### **16.1.2.5 Contractor Insurance Requirements**

Developer's obligations in regard to Contractors insurance are contained in Section 9 of Exhibit 19. If any Contractor fails to procure and keep in effect the insurance required of it under Section 9 of Exhibit 19 and TxDOT asserts the same as a Developer Default hereunder, Developer may, within the applicable cure period, cure such Developer Default by (a) causing such Contractor to obtain the requisite insurance, (b) procuring the requisite insurance for such Contractor or (c) terminating the Contractor (and removing its personnel from the Site. If requested by TxDOT in writing, Developer shall promptly provide, or cause to be provided, to TxDOT certificates of insurance evidencing the insurance coverage required of each Contractor.

#### **16.1.2.6 Facility-Specific Insurance**

All Insurance Policies required hereunder shall be purchased specifically and exclusively for the Facility with coverage limits devoted solely to the Facility.

#### **16.1.2.7 Terms and Conditions**

All Insurance Policies that Developer is required to procure or cause to be procured hereunder shall comply with the provisions of clause (c) below and, as to the Insurance Policies that are required to insure Persons in addition to Developer, such Insurance Policies shall comply with the provisions of clauses (a), (b) and (d) below:

(a) Any failure on the part of a named insured to comply with reporting provisions or other conditions of the Insurance Policies, any breach of warranty, any action or inaction of a named insured or others shall not affect coverage provided to the other named insureds or additional insureds (and their respective members, directors, officers, employees, agents and Facility consultants);

(b) 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;

(c) Each policy shall provide that coverage cannot be canceled, voided, suspended, lapsed, modified or reduced in coverage or in limits except after 30 days' (or for cancellation due to non-payment of premium, ten days') prior written notice has been given to TxDOT. Developer will reasonably endeavor to cause each policy to specify that such prior written notices be issued by registered or certified mail, return receipt requested. No such policy shall include any limitation of liability of the insurer for failure to provide such notice; and

(d) Each of the Insurance Policies that insures Persons in addition to Developer shall be written so that no acts or omissions of an insured shall vitiate coverage of the other insureds.

#### **16.1.2.8 Waivers.**

TxDOT, for itself and the other Indemnified Parties, hereby waives all rights against the Developer-Related Entities for any claims or losses to the extent covered by the proceeds paid under the Insurance Policies. Developer hereby waives all rights against the Indemnified Parties for any claims or losses to the extent covered by the proceeds paid under the Insurance Policies (or to the extent that would have been covered by proceeds paid under the Insurance Policies where Developer failed to obtain requisite Insurance Policies covering the Indemnified Parties or to obtain payment or proceeds thereunder). Each of the Insurance Policies, including Developer's workers' compensation/employer's liability policy if permitted by Law, shall include a waiver of any right of subrogation against the Indemnified Parties.

#### **16.1.2.9 Support of Indemnification Obligations**

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

#### **16.1.2.10 Adjustments in Coverage**

(a) At least once every five years after the Service Commencement Date, TxDOT and Developer shall review the per occurrence and aggregate limits or combined single limits for the insurance policies that have stated dollar amounts set forth in Exhibit 19 for per occurrence, aggregate or combined single limits.

(b) Any Dispute regarding insurance changes shall be resolved in accordance with the procedures established under Section 17.8 of this Agreement.

#### **16.1.2.11 Inadequacy or Unavailability of Required Coverages**

(a) TxDOT makes no representation that the limits of liability specified for any of the Insurance Policies to be carried pursuant to this Agreement are adequate to protect Developer against its undertakings under this Agreement, to TxDOT, or any third party. Developer makes no representation that the limits of liability specified for any of the Insurance Policies to be carried pursuant to this Agreement are adequate to protect TxDOT or any other of the Indemnified Parties from liability to any Developer-Related Entity or any third party.

(b) If Developer has used diligent efforts in the global insurance and reinsurance markets to procure, or cause to be procured, the Insurance Policies that are required hereunder and if, despite such diligent efforts and through no fault of Developer or the Key Contractors, coverage under any of the Insurance Policies (or any of the required terms of such policies, including policy limits) become unavailable on commercially reasonable terms, TxDOT will consider granting to Developer an interim written variance from such requirements under which Developer shall procure and maintain alternative insurance packages and programs that provide risk coverage as comparable to that which would have been provided under the Insurance Policies as is commercially reasonable under then-existing insurance market conditions, such grant of variance not to be unreasonably withheld, conditioned or delayed. Any reference to Insurance Policies shall include a reference to any interim written variance therefrom granted to Developer hereunder. To establish that the Insurance Policies (or any of the required terms of such policies, including policy limits) are not available on commercially reasonable terms, Developer shall bear the burden of proving either that (i) the same is completely unavailable in the global insurance and reinsurance markets or (ii) the premiums for the same have so materially increased over those previously paid for the same coverage that no reasonable and prudent risk manager for a Person seeking to insure comparable risks would conclude that such increased premiums are justified by the risk protection afforded.

#### **16.1.2.12 Contesting Denial of Coverage**

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

### **16.1.3 Prosecution of Claims**

**16.1.3.1** Developer shall (a) report timely to the applicable insurer under any of the Insurance Policies all matters which may give rise to an insurance claim against any such policies and (b) promptly and diligently process and pursue all such insurance claims in accordance with the claims procedures specified in the applicable policy, whether for defense or indemnity or both. Developer shall endeavor to enforce, through lawful and diligent means, all legal rights against the insurer(s) under the applicable Insurance Policies and applicable Laws in order to collect payment of proceeds upon insurance claims made against such Insurance Policies, including pursuing necessary litigation and enforcement of judgments, but Developer does not represent, warrant or covenant to TxDOT that such endeavors will be successful.

**16.1.3.2** TxDOT agrees, for itself and on behalf of the Indemnified Parties, to (a) report timely to Developer any and all matters which may give rise to an insurance claim by TxDOT or other Indemnified Parties against any of the Insurance Policies; (b) provide copies to Developer of all claims notification letters; (c) tender to each insurer TxDOT's or other Indemnified Parties' defense of its or their claim(s) under any applicable policy; and (d) cooperate with Developer as necessary for Developer to fulfill its duties.

**16.1.3.3** If, in any instance, Developer has not promptly performed its obligation to report to applicable insurers and process any potential insurance claim tendered by TxDOT against any applicable Insurance Policies, then TxDOT may, but is not obligated to report the claim directly to the insurer and thereafter pursue such claim against any such applicable Insurance Policies.

#### **16.1.4 Umbrella and Excess Policies**

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

### **16.2 Payment and Performance Bonds**

Developer shall obtain a Payment and Performance Bond from the Design-Build Contractor in the aggregate amount of \$250,000,000 and in a form reasonably satisfactory to TxDOT. TxDOT shall be named as a dual obligee under such Payment and Performance Bond. Developer shall not commence or permit or suffer commencement of any Design Work (other than Facility Right of Way acquisition) or Construction Work until Developer obtains such Payment and Performance Bond from the Design-Build Contractor and delivers a certified copy thereof, with the dual obligee rider, to TxDOT. TxDOT shall forebear from exercising remedies under such Payment and Performance Bond so long as (a) Developer or the Collateral Agent commences the good faith, diligent exercise of remedies thereunder within 30 days after TxDOT delivers written notice to Developer and the Collateral Agent of its intent to make a claim thereunder, and (b) thereafter continues such good faith, diligent exercise of remedies until the default is cured.

### **16.3 Letters of Credit**

#### **16.3.1 General Provisions**

Wherever in the FCA Documents Developer has the option or obligation to deliver to TxDOT a letter of credit, the following provisions shall apply:

##### **16.3.1.1** The letter of credit shall:

- (a) Be a standby letter of credit;
- (b) Be issued by a financial institution with a credit rating of "A" or better according to Standard & Poors and with an office in the United States at which the letter of credit can be presented for payment by facsimile or by electronic means;
- (c) Be in form approved by TxDOT in its sole discretion;

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

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

(f) Allow for multiple draws; and

(g) Name TxDOT payee.

**16.3.1.2** TxDOT shall have the right to draw on the letter of credit, after not less than two Business Days' prior written notice to Developer for draws under clause (a) below and without prior notice to Developer for draws under clause (b) below, unless otherwise expressly provided in the FCA Documents with respect to the letter of credit, and use and apply the proceeds as provided in the FCA Documents for such letter of credit, if (a) Developer has failed to pay or perform when due the duty, obligation or liability under the FCA Documents for which the letter of credit is held or (b) Developer for any reason fails to deliver to TxDOT a new or replacement letter of credit, on the same terms, or at least a one year extension of the expiration date of the existing letter of credit, by not later than 45 days before such expiration date, unless the applicable terms of the FCA 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 TxDOT 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 or Developer.

**16.3.1.3** TxDOT shall use and apply draws on letters of credit toward satisfying the relevant obligation of Developer. If TxDOT receives proceeds of a draw in excess of the relevant obligation, TxDOT shall promptly refund the excess to Developer after all relevant obligations are satisfied in full.

**16.3.1.4** 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 declaring a TxDOT Default and pursuing remedies therefor or 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.

**16.3.1.5** 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 TxDOT's presentment of sight drafts and drawing against letters of credit or replacements thereof.

**16.3.1.6** In the event TxDOT makes a permitted assignment of its rights and interests under this Agreement, 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.

### **16.3.2 Special Letter of Credit Provisions**

Any terms and conditions applicable to a particular to a 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.

### **16.4 Guarantees**

**16.4.1** In the event Developer, any Affiliate or any Lender receives from any Person a guaranty of payment or performance of any obligation(s) of a Key Contractor, Developer shall cause such Person to (a) expressly include TxDOT as a guaranteed party under such guaranty, with the same protections and rights of notice, enforcement and collection as are available to any other guaranteed party, and (b) deliver to TxDOT a duplicate original of such guaranty. Such guaranty shall provide that the rights and protections of TxDOT shall not be reduced, waived, released or adversely affected by the acts or omissions of any other guaranteed party, other than through the rendering of payment and performance to another guaranteed party.

**16.4.2** TxDOT agrees to forebear from exercising remedies under any such guaranty so long as Developer or a Lender is diligently pursuing remedies thereunder.

### **16.5 Indemnity by Developer**

**16.5.1** Subject to Section 16.5.3, Developer shall release, defend, indemnify, protect and hold harmless the Indemnified Parties from and against any and all claims, 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, arising out of, relating to or resulting from:

**16.5.1.1** The breach or alleged breach of this Agreement by any Developer-Related Entity;

**16.5.1.2** 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) in accordance with the requirements of this Agreement;

**16.5.1.3** Any alleged patent 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 or inventions 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 TxDOT or another Indemnified Party pursuant to the FCA Documents; provided that this indemnity shall not apply to any infringement resulting from TxDOT's failure to comply with specific written instructions regarding use provided to TxDOT by Developer;

**16.5.1.4** The actual or alleged act, error or misconduct of any Developer-Related Entity acting within the scope of its authority and duties associated with performance of the Work;

**16.5.1.5** 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;

**16.5.1.6** Any and all liens filed in connection with the Work, including all expenses and attorneys', accountants' and expert witness fees and costs incurred in discharging any lien, and any other liability to Contractors for failure to pay sums due for their work or services, provided that TxDOT is not in default in payments owing (if any) to Developer with respect to such Work;

**16.5.1.7** Any actual or threatened Developer Release of Hazardous Materials;

**16.5.1.8** The claim or assertion by any other developer or contractor of inconvenience, disruption, delay or loss caused by interference by any Developer-Related Entity acting within the scope of its authority and duties hindering the progress or completion of work being performed by the other contractor or developer, or failure of any Developer-Related Entity to cooperate reasonably with other developers and contractors in accordance therewith;

**16.5.1.9** Any dispute between Developer and a Utility Owner, or any Developer-Related Entity's performance of, or failure to perform, acting within the scope of its authority and duties, the obligations under any Master Utility Agreement;

**16.5.1.10** (a) Any Developer-Related Entity's breach of or failure to perform an obligation that TxDOT owes to a third person, including Governmental Entities, under Law or under any agreement between TxDOT and a third person, where TxDOT has delegated performance of the obligation to Developer under the FCA Documents or (b) the wrongful acts or omissions of any Developer-Related Entity which render TxDOT unable to perform or abide by an obligation that TxDOT owes to a third person, including Governmental Entities, under any agreement between TxDOT and a third person, where the agreement is previously disclosed or known to Developer, and in each case above, where the Developer-Related Entity is acting within the scope of its authority and duties;

**16.5.1.11** 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 FCA Documents; or

**16.5.1.12** 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 Good Industry Practice, requirements of the FCA Documents, Facility Management 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 by any Developer-Related Entity.

**16.5.2** Subject to Section 16.5.3, Developer shall release, protect, defend, indemnify and hold harmless the Indemnified Parties from and against any and all third party claims, causes of action, suits, judgments, investigations, legal or administrative proceedings, demands and losses arising out of, relating to or resulting from errors, inconsistencies or other defects in the design or construction of the Facility and/or of Utility Adjustments included in the Design Work or Construction Work.

**16.5.3** Subject to the releases and disclaimers herein, including all the provisions set forth in Section 6.3.8, Developer's indemnity obligation shall not extend to any Loss to the extent caused or contributed to by:

**16.5.3.1** The negligence, recklessness, willful misconduct, bad faith or fraud of any Indemnified Party,

**16.5.3.2** TxDOT's material breach of any of its obligations under the FCA Documents

**16.5.3.3** Any Compensation Event;

**16.5.3.4** Any Indemnified Party's violation of any Laws or Governmental Approvals; or

**16.5.3.5** Any Relief Event or Extended Relief Event to the extent caused by any Indemnified Party.

**16.5.4** 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 16.5 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.

**16.5.5** For purposes of this Section 16.5, "third party" means any person or entity other than an Indemnified Party and Developer, except that a "third party" includes any Indemnified Party's employee, agent or contractor who asserts a claim against an Indemnified Party which is within the scope of the indemnities and which is not covered by the Indemnified Party's worker's compensation program.

**16.5.6** The following procedures shall apply to any indemnification under Section 16.5.1 or Section 16.5.2 above:

**16.5.6.1** Any Indemnified Party seeking indemnification under Section 16.5.1 or Section 16.5.2 shall notify Developer in writing thereof promptly upon, and not later than 15 days after, (a) discovering any matter for which it may be entitled to Developer's indemnification under Section 16.5.1 or Section 16.5.2 above (each such matter being referred to herein as a "**Covered Liability**"), or of any facts which may reasonably be expected to give rise to a claim for a Covered Liability, or (b) the date of receipt of notice of any action, lawsuit, proceeding, investigation, or other claim against such Indemnified Party which may be or give rise to a claim of a Covered Liability. Such notice shall assert the Indemnified Party's claim for indemnity hereunder and describe the Covered Liability and any claim or potential claim for such Covered Liability for which indemnity is sought, the amount thereof (if known and quantifiable), and the basis thereof (a "**Notice of Claim**"). Failure by an Indemnified Party to give timely notice as provided herein shall not relieve Developer of its obligations under Section 16.5.1 or Section 16.5.2 to the extent that Developer is not materially prejudiced or damaged in its ability to defend against such matter and to make a timely response thereto, including, without limitation, any responsive motion or answer to a complaint, petition, notice or other legal, equitable, or administrative process relating to the liability, action or claim.

**16.5.6.2** With respect to any third party action, lawsuit, proceeding, investigation or other claim which is the subject of a Notice of Claim, Developer shall, within 15 days after receipt of the Indemnified Party's Notice of Claim, assume the defense of such action, lawsuit, proceeding, investigation or other claim at Developer's expense.

(a) Developer's obligation to defend such action expressly includes, in addition to any other defenses available to Developer, the right to assert on behalf of the Indemnified Party any and all defenses that the Indemnified Party could assert if defending itself, including defenses of sovereign or official immunity from liability and suit to the extent such defenses are available to the Indemnified Party.

(b) The Indemnified Party shall be entitled, subject to Section 16.5.6.3, (i) to participate in the defense of such claim and to employ counsel of its choice for such purpose (the fees and expenses of such separate counsel to be borne by Indemnified Party) and (ii) if participating in the defense of such claim, to assert against any third party any and all cross claims and counterclaims the Indemnified Party may have.

(c) Developer may settle a claim of Covered Liability either (i) by written settlement agreement providing for Developer's payment of a stipulated monetary settlement in exchange for the claimant's irrevocable, unconditional release of the Indemnified Party from any and all liability, together with dismissal with prejudice of any petition filed in court by the claimant, with prior written notice of such written settlement agreement being furnished by Developer to the Indemnified Party, or (ii) as agreed in writing by the claimant and Developer, with the Indemnified Party's joinder therein or its prior written consent thereto (which consent shall not be unreasonably withheld, conditioned or delayed).

(d) If within 15 days after Developer receives a Notice of Claim it reasonably appears to the Indemnified Party that Developer has not taken affirmative action to assume the defense of the Covered Liability described in the Notice of Claim, the Indemnified Party may undertake the defense of such claim with counsel selected by it and may make any compromise or settlement thereof or otherwise protect against the same and be entitled to all amounts paid as a result of such third party claim, demand, suit or action or any compromise or settlement thereof, provided, however, that the Indemnified Party first provides written notice to Developer of its intent to undertake such defense and Developer fails to take affirmative action reasonably evidencing its assumption of the Indemnified Party's defense within 15 days after receipt of the Indemnified Party's notice under this Section 16.4.6.2(d).

**16.5.6.3** The obligations of Developer shall not extend to any Losses, damage, costs or expense of whatever kind and nature (including all related costs and expenses) to the extent the same results from the taking by the Indemnified Party of any action (unless required by Law) after the assertion of any claim which gave rise to Covered Liability which prejudices the successful defense of the action or claim, without, in any such case, the prior written consent of Developer (such consent not to be required in a case where Developer has failed to assume the defense of the Indemnified Party after notice and opportunity to cure under Section 16.5.6.2(d)). The Indemnified Party agrees to afford Developer and its counsel the opportunity to be present at, and to participate in, conferences with all Persons, including Governmental Entities, asserting any Covered Liability and conferences with representatives of or counsel for such Person.

**16.5.6.4** So long as Developer is defending in good faith Covered Liability, the Indemnified Party shall at all times cooperate in all reasonable ways with, make relevant

files and records available for inspection by, and make its employees available or otherwise render reasonable assistance to, Developer (with all reasonable out-of-pocket costs to be borne by Developer).

## **ARTICLE 17. DEFAULT; REMEDIES; DISPUTE RESOLUTION**

### **17.1 Default by Developer; Cure Periods**

#### **17.1.1 Developer Default**

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

**17.1.1.1** Developer (a) fails to begin Work within 60 days following the latest of (i) NEPA Finality Date, (ii) Custodial Arrangement Date, or (iii) issuance of the full Notice to Proceed, or (b) fails to satisfy all conditions to commencement of the Construction Work, and commence the Construction Work with diligence and continuity, by the Construction Work Commencement Deadline, as the same may be extended pursuant to this Agreement;

**17.1.1.2** An Abandonment;

**17.1.1.3** Developer fails to achieve Service Commencement by the Service Commencement Deadline, as the same may be extended pursuant to this Agreement;

**17.1.1.4** Any failure comparable to a failure described in Section 17.1.1.1 through 17.1.1.3 or in Section 17.1.1.11 occurs with respect to any Upgrade that Developer is obligated to perform under this Agreement;

**17.1.1.5** Developer fails to make any payment due TxDOT under the FCA Documents when due, or fails to deposit funds to any reserve or account in the amount and within the time period required by this Agreement;

**17.1.1.6** There occurs any use of the Facility or Airspace or any portion thereof in violation of this Agreement, the Technical Requirements, Technical Documents, Governmental Approvals or Laws (except violations of Law by Persons other than Developer-Related Entities);

**17.1.1.7** There occurs any closure of the Facility in violation of this Agreement, the Technical Requirements and the approved Operating Traffic Management Plan and such closure impedes access to or from the Facility or the flow of traffic;

**17.1.1.8** Any representation or warranty in the FCA Documents made by Developer or any Guarantor contemplated under Section 17.4.1.3, or any certificate, schedule, report, instrument or other document delivered to TxDOT pursuant to the FCA Documents, is false or materially misleading or inaccurate when made or omits material information when made;

**17.1.1.9** 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 or the Lease for the benefit of relevant parties, or fails to comply with any requirement of this Agreement pertaining to the amount, terms or coverage of the same;

**17.1.1.10** Developer makes or attempts to make an assignment or transfer of all or any portion of this Agreement, the Lease, the Facility or Developer's equity or economic interest therein, or there occurs a Change of Control, in violation of Article 21;

**17.1.1.11** Developer materially 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 FCA Documents, including material failure to perform the Design Work, Construction Work, O&M Work or any material portion thereof in accordance with the FCA Documents;

**17.1.1.12** There occurs any Persistent Developer Default, TxDOT delivers to Developer written notice of the Persistent Developer Default, and either (a) Developer fails to deliver to TxDOT, within 45 days after such notice is delivered, a remedial plan meeting the requirements for approval set forth in Section 17.3.6 or (b) Developer fails to fully and faithfully implement any action required in the approved remedial plan strictly according to the schedule therefore contained in the approved remedial plan;

**17.1.1.13** 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; admits in writing its inability to pay its debts; 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 any member of Developer with a material financial obligation owing to Developer for equity or shareholder loan contributions, or any member for whom transfer of ownership would constitute a Change of Control, or the Design-Build Contractor or Operator during the term of their respective Contracts with Developer or any Guarantor contemplated under Section 17.4.1.3; or

**17.1.1.14** 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 90 days; or any such involuntary case, or any of the foregoing acts or events, shall occur with respect to any member of Developer with a material financial obligation owing to Developer for equity or shareholder loan contributions, or any member for whom transfer of ownership would constitute a Change of Control, or the Design-Build Contractor or Operator during the term of their respective Contracts with Developer, or any Guarantor contemplated under Section 17.4.1.3.

## **17.1.2 Cure Periods**

Subject to Section 17.2.2, for Developer Defaults that are breaches or failures listed in Attachment 1 to Exhibit 20 to this Agreement, the cure periods set forth therein shall exclusively govern. For all other Developer Defaults, subject to Section 17.2.2, Developer shall have the following cure periods with respect to the following Developer Defaults:

**17.1.2.1** Respecting a Developer Default under Section 17.1.1.12(a), a period of five days after TxDOT delivers to Developer written notice of the Developer Default;

**17.1.2.2** Respecting a Developer Default under Section 17.1.10 a period of 15 days after TxDOT delivers to Developer written notice of the Developer Default;

**17.1.2.3** Respecting a Developer Default under Section 17.1.1.1, 17.1.1.2, 17.1.1.5, 17.1.1.9 or 17.1.1.12(b), a period of 30 days after TxDOT delivers to Developer written notice of the Developer Default; provided that TxDOT shall have the right, but not the obligation, to effect cure, at Developer's expense, if a Developer Default under Section 17.1.1.9 continues beyond five days after such notice is delivered;

**17.1.2.4** Respecting a Developer Default under Section 17.1.1.7, a period of 15 days after TxDOT delivers to Developer written notice of the Developer Default; provided that (a) such cure period shall not preclude or delay TxDOT's immediate exercise, without notice or demand, of its remedy set forth in Section 17.3.2 and (b) if the 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;

**17.1.2.5** Respecting a Developer Default under Section 17.1.1.4, 17.1.1.6, 17.1.1.8 or 17.1.1.11, a period of 30 days after TxDOT delivers to Developer written notice of the Developer Default; provided that (a) as to Section 17.1.1.6, such cure period shall not preclude or delay TxDOT's immediate exercise, without notice or demand, of its remedy set forth in Section 17.3.2, (b) as to Section 17.1.18, cure will be regarded as complete when the adverse effects of the breach are cured, (b) as to any breach of a representation or warranty by a Guarantor contemplated under Section 17.4.1 such breach may be cured by Developer's replacement at such Guarantor with another Guarantor that TxDOT approves and that delivers the same form of guaranty or by Developer providing a letter of credit in place of such guaranty in accordance with the requirements of Section 17.4.1.2 and 17.4.1.3, and (c) if the 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;

**17.1.2.6** Respecting a Developer Default under Section 17.1.1.3, the period up to the Long Stop Date, as the same may be extended pursuant to this Agreement, regardless of when TxDOT delivers written notice of the Developer Default;

**17.1.2.7** Respecting a Developer Default under Section 17.1.1.13 or 17.1.1.14, no cure period, and there shall be no right to notice of a Developer Default under Section 17.1.1.13 or 17.1.1.14; provided that (i) if the debtor in the bankruptcy event is the Design-Build Contractor or Operator, Developer shall have a period of one year after commencement of the voluntary or involuntary bankruptcy case, or 30 days after the order approving the debtor's reorganization, whichever is earlier, to effect cure respecting a Developer Default under Section 17.1.1.13 or Section 17.1.1.14, by replacing the Design-Build Contractor or Operator, as applicable, in accordance with Section 10.3.1; (ii) if the debtor in the bankruptcy event is a Guarantor contemplated under Section 17.4.1.3, Developer shall have 10 days from the date of filing of the bankruptcy case to effect cure by providing a replacement letter of credit in place of such guaranty in accordance with the requirements of Section 17.4.1.2 and 17.4.1.3;

and (iii) if the debtor in bankruptcy is a member of Developer, Developer shall have 10 days from the date of filing of the bankruptcy case to effect cure of such default by providing a letter of credit or payment to TxDOT or the Collateral Agent for the benefit of the Facility, in the amount of the member's financial obligation in relation to such equity or shareholder loan contribution, owing to Developer; and

**17.1.2.8** Respecting a Developer Default under Section 17.1.1.4, the cure period shall be the same as the cure period for a comparable Developer Default under Section 17.1.1.1, 17.1.1.2, 17.1.1.3 or 17.1.1.11, as applicable.

### **17.1.3 Certain Curative Actions; Status Report**

**17.1.3.1** If the Developer Default consists of imposing toll rates in excess of that permitted under this Agreement such Developer Default shall be curable only by (a) reinstating the toll rates in effect immediately prior to the impermissible raise in toll rates, unless waived by TxDOT, and (b) disgorging to TxDOT any and all increases in Toll Revenues that would not have been realized in the absence of such Developer Default.

**17.1.3.2** If the Developer Default consists of failure to give TxDOT a required prior notice and opportunity to complete an applicable review and comment or approval procedure under Section 6.3 before action is taken by Developer, such Developer Default shall be curable only by (a) reversing or suspending the action until the notice and review and comment or approval procedures are followed and completed, unless Developer finished the action before receiving the notice of Developer Default or unless waived by TxDOT, and (b) disgorging to TxDOT any and all increases in Toll Revenues that would not have been realized in the absence of such Developer Default.

**17.1.3.3** If the Developer Default consists of any Developer activity or failure to act which constitutes a change from Developer's activities immediately prior to the Developer Default, such Developer Default shall be curable only by (a) reinstating the activity as it was being performed immediately prior to the Developer Default and (b) disgorging to TxDOT any and all increases in Toll Revenues that would not have been realized in the absence of such Developer Default.

**17.1.3.4** For any Developer Default for which a Warning Notice has been delivered by TxDOT to Developer, Developer may request from TxDOT a status report as to Developer's progress in effecting a cure, by delivering to TxDOT a written request accompanied by Developer's own report as to its progress in effecting a cure. TxDOT shall provide its response within five (5) Business Days after receipt of Developer's written request and report. The response shall be provided solely for purposes of informing Developer as to TxDOT's view of the progress in effecting a cure for the Developer Default, and in no ways limits TxDOT's right to terminate the Agreement in accordance with Section 19.3 should the cure not be effected within the relevant period. Any response provided by TxDOT hereunder shall not form the basis for any Dispute or Claim, but may constitute evidence to either substantiate or refute a Dispute or Claim asserted on an independent basis.

## **17.2 Warning Notices**

### **17.2.1 Warning Notice Events**

Without prejudice to any other right or remedy available to TxDOT, TxDOT may deliver a written notice (a "Warning Notice") to Developer, with a copy to the Collateral Agent for the senior and first tier subordinate Security Documents, 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 any of the following:

**17.2.1.1** Any Developer Default under Section 17.1.1.1, 17.1.1.2, 17.1.1.4 (but only if it concerns a mandatory Capacity Improvement and is of the same type and nature as a Developer Default under Section 17.1.1.1, 17.1.1.2 or 17.1.1.11), 17.1.1.5 (but only for material failure to pay or deposit), 17.1.1.6 (but only if material), 17.1.1.7 (but only if it affects a material portion of the Facility), 17.1.1.10, 17.1.1.11 or 17.1.1.12;

**17.2.1.2** Delay in achieving Service Commencement that extends beyond the Service Commencement Deadline, as the same may be extended pursuant to this Agreement, by more than 90 days; or

**17.2.1.3** Any other material Developer Default.

### **17.2.2 Effect of Warning Notice on Developer Cure Period**

**17.2.2.1** Any notice of a Developer Default issued under Section 17.1 may, if it concerns a matter under Section 17.2.1, also be issued as a Warning Notice. In such case, the cure period available to Developer, if any, shall be as set forth in Section 17.1.2.

**17.2.2.2** If TxDOT issues a Warning Notice for any Developer Default after it issues a notice of such Developer Default under Section 17.2.1, then the cure period available to Developer, if any, for such Developer Default before TxDOT may terminate this Agreement and the Lease 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. No later issuance of a Warning Notice shall extend the time when TxDOT may exercise any other remedy respecting such Developer Default.

### **17.2.3 Other Effects of Warning Notice**

**17.2.3.1** The issuance of a Warning Notice shall entitle TxDOT and the Independent Engineer to increase the level of oversight.

**17.2.3.2** The issuance of a Warning Notice may trigger a Default Termination Event as provided in Section 19.3.

## **17.3 TxDOT Remedies for Developer Default**

### **17.3.1 Termination**

In the event of any Developer Default that is or becomes a Default Termination Event set forth in Section 19.3.1, TxDOT may terminate this Agreement and the Lease and thereupon



enter and take possession and control of the Facility by summary proceeding available to landlords under applicable Law, which termination shall, among other things, automatically terminate all of Developer's rights under Articles 2 and 3, whereupon Developer shall take all action required to be taken by Developer under Section 19.6.

### **17.3.2 Immediate TXDOT Entry and Cure of Wrongful Closure**

Without notice and without awaiting lapse of the period to cure, in the event of any Developer Default under Section 17.1.1.7 (closure of the Facility or lane closure in violation of the FCA Documents), TxDOT may enter and take control of the Facility solely to the extent reasonably necessary to reopen and continue operations for the benefit of Developer and the public, until such time as such breach is cured, or TxDOT terminates this Agreement and the Lease. Developer shall pay to TxDOT on demand TxDOT's Recoverable Costs in connection with such action. So long as TxDOT 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 TxDOT to any liability to Developer and shall not entitle Developer to any other remedy, it being acknowledged that TxDOT has a high priority, paramount public interest in providing and maintaining continuous public access to the Facility. Immediately following rectification of such Developer Default, as determined by TxDOT, acting reasonably, TxDOT shall relinquish control and possession of the Facility back to Developer.

### **17.3.3 Remedies for Failure to Meet Safety Standards or Perform Safety Compliance**

**17.3.3.1** Subject to Section 17.3.3.4, if at any time Developer fails to meet any Safety Standard or timely perform Safety Compliance or TxDOT 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 TxDOT, acting reasonably, TxDOT 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 TxDOT or with the Safety Compliance Order.

**17.3.3.2** To the extent that any work done pursuant to Section 17.3.3.1 is undertaken by TxDOT and is reasonably necessary to comply with Safety Standards or perform validly issued Safety Compliance Orders, Developer shall pay to TxDOT on demand TxDOT's Recoverable Costs in connection with such work, and TxDOT (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.

**17.3.3.3** To the extent that any work done pursuant to Section 17.3.3.1 is undertaken by TxDOT and is not reasonably necessary to comply with Safety Standards or perform validly issued Safety Compliance Orders, TxDOT shall compensate Developer only for Losses it suffers or incurs as a direct result thereof.

**17.3.3.4** To the extent that any Safety Compliance Order work pursuant to Section 17.3.3.1 is undertaken by Developer under written protest and it is finally determined that the Safety Compliance work was not necessary, the unnecessary work under the Safety Compliance Order shall be treated as a TxDOT Change.

**17.3.3.5** Notwithstanding anything to the contrary contained in this Agreement, if in the good faith judgment of TxDOT 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 rectify or deal with such Emergency or danger, TxDOT may, without notice and without awaiting lapse of the period to cure any breach, and in addition and without prejudice to its other remedies, (but is not obligated to) (a) immediately take such action as may be reasonably necessary to rectify the Emergency or danger, in which event Developer shall pay to TxDOT on demand (i) the cost of such action, including TxDOT's Recoverable Costs, or (b) suspend Construction Work and/or close or cause to be closed any and all portions of the Facility affected by the Emergency or danger. So long as TxDOT 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 of this Agreement, shall not expose TxDOT to any liability to Developer and shall not entitle Developer to any other remedy, it being acknowledged that TxDOT has a high priority, paramount public interest in protecting public and worker safety at the Facility and adjacent and connecting areas. TxDOT'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 TxDOT, acting reasonably, TxDOT shall allow the Construction Work to continue or such portions of the Facility to reopen, as the case may be.

#### **17.3.4 TxDOT 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 necessity for a Warning Notice, and without waiving or releasing Developer from any obligations, TxDOT shall have the right, but not the obligation, for so long as such Developer Default remains uncured by TxDOT or Developer, to pay and perform all or any portion of the Work and obligations that are the subject of such Developer Defaults, as well as any other then-existing breaches or failures to perform for which Developer received prior written notice from TxDOT but has not commenced diligent efforts to cure.

**17.3.4.1** In connection with such action, TxDOT may, to the extent and only to the extent reasonably required for or incident to curing the Developer Default or such other breaches or failures to perform for which Developer received prior written notice from TxDOT but has not commenced and continued diligent efforts to cure:

- (a) Employ security guards and other safeguards to protect the area in which TxDOT is working;
- (b) Spend such sums as are reasonably necessary to employ and pay such architects, engineers, consultants and contractors and obtain materials and equipment as may be required;
- (c) Draw on and use proceeds from payment and performance bonds, letters of credit and other performance security to pay such sums;
- (d) Execute all applications, certificates and other documents as may be required;

(e) Make decisions respecting, assume control over and continue Work as may be reasonably required;

(f) Meet with, coordinate with, direct and instruct contractors and suppliers, process invoices and applications for payment from contractors and suppliers, pay contractors and suppliers, and resolve claims of contractors, subcontractors and suppliers, and for this purpose Developer irrevocably appoints TxDOT as its attorney-in-fact with full power and authority to act for and bind Developer in its place and stead;

(g) Take any and all other actions as may be reasonably required for or incident to curing

(h) Prosecute and defend any action or proceeding incident to the Work undertaken.

**17.3.4.2** Developer shall reimburse TxDOT on demand TxDOT's Recoverable Costs in connection with the performance of any act or Work authorized by this Section 17.3.4.

**17.3.4.3** TxDOT shall have and is hereby granted a perpetual, non-rescindable right of entry by TxDOT and its Authorized Representatives, contractors, subcontractors, vendors and employees onto the Facility, the Facility Right of Way and any Project-Specific Locations, exercisable at any time or times without notice, for the purpose of carrying out TxDOT's step-in rights under this Section 17.3.4. Neither TxDOT 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 its entry onto the Facility, the Facility Right of Way or Project-Specific Locations in order to perform under this Section 17.3.4, 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 17.3.4, 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.

**17.3.4.4** TxDOT's rights under this Section 17.3.4 are subject to the right of any surety under payment and performance bonds to assume performance and completion of all bonded work.

**17.3.4.5** TxDOT's rights under this Section 17.3.4 are subject to the exercise of step-in rights by the Collateral Agent under the senior Security Documents, provided that the Collateral Agent (a) delivers to TxDOT written notice of the Collateral Agent's decision to exercise step-in rights, and commences the good faith, diligent exercise of such step-in rights, within the cure period available to Developer with respect to the Developer Default in question, and (b) thereafter continues such good faith, diligent exercise of remedies until the Developer Default is fully and completely cured.

### **17.3.5 Damages; Offset**

**17.3.5.1** Subject to Section 17.3.1 and the provisions on liquidated damages set forth in Section 17.4, TxDOT shall be entitled to recover any and all damages available at Law on account of the occurrence of a Developer Default, including loss of any

compensation due TxDOT under this Agreement proximately caused by the Developer Default, together with interest thereon from and after the date any amount becomes due to TxDOT until paid at the maximum rate permitted by Law or other rate specified therefor in this Agreement. Developer shall owe any damages that accrue after the occurrence of the Developer Default and the delivery of notice thereof, if any, required by this Agreement regardless of whether the Developer Default is subsequently cured.

**17.3.5.2** TxDOT may deduct and offset any Claim amount owing to it, provided such Claim amount has been liquidated through Dispute Resolution Procedures or otherwise, from and against any amounts TxDOT may owe to Developer or any Affiliate. If the Claim amount is not liquidated, TxDOT may elect to exercise its rights pursuant to the Facility Trust Agreement and direct the transfer of funds from the Toll Revenue Account to the TxDOT Claims Account up to the disputed portion of the Claim in accordance with the provisions of the Facility Trust Agreement. Upon liquidation, the disputed portion of the Claim may be satisfied first from the amounts held in the TxDOT Claims Account, and then through TxDOT's right of offset with respect to the liquidated Claim amounts.

### **17.3.6 Remedial Plan Delivery and Implementation**

**17.3.6.1** Upon the occurrence of a Persistent Developer Default, Developer shall, within 45 days after written notice of the Persistent Developer Default, be required to prepare and submit a remedial plan for TxDOT approval. The remedial plan shall set forth a schedule and specific actions to be taken by Developer to improve its performance and reduce Developer's cumulative number of Noncompliance Points assessed under Section 18.3 and cumulative number of breaches and failures to perform to the point that such Persistent Developer Default will not continue. 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 Specified Personnel, replacement of Contractors, and delivery of security to TxDOT.

**17.3.6.2** Developer's failure to deliver to TxDOT the required remedial plan within such 45 day period shall constitute a material Developer Default, which may result in issuance of a Warning Notice triggering a five-day cure period. Failure to comply in any material respect with the schedule or specific elements of the Remedial Plan shall constitute a material Developer Default which may result in issuance of a Warning Notice triggering a 30-day cure period. Developer's failure to cure the Developer Default within the applicable cure period after the Warning Notice may trigger a Default Termination Event under Article 19.

#### **17.3.6.3 Performance Security.**

Upon the occurrence of a Developer Default and expiration, without full and complete cure, of the cure period contemplated by Section 17.1.2, if any, available to Developer, without necessity for a Warning Notice, and without waiving or releasing Developer from any obligations, TxDOT shall be entitled to make demand upon, draw on and enforce and collect any bonds, letters of credit, guaranty or other performance security available to TxDOT under this Agreement with respect to the Developer Default in question for the purpose of applying the proceeds thereof to the satisfaction of Developer's obligations under this Agreement. Where access to a bond, letter of credit or other performance security is to satisfy damages owing, TxDOT shall be entitled to make demand, draw, enforce and collect regardless of whether the Developer Default is subsequently cured but only for the purpose of applying the

proceeds thereof to the satisfaction of Developer's obligations to pay such damages. The foregoing does not limit or affect TxDOT's right to draw on any letter of credit for any other reason, or at any earlier date, set forth in this Agreement. The foregoing does not limit or affect TxDOT's right to give notice to or make demand upon any Guarantor immediately upon occurrence of a Developer Default or other occurrence within the scope of the guaranteed obligations. The foregoing does not entitle TxDOT to make demand or draw upon the Payment and Performance Bond(s) provided by the Design-Build Contractor (as described in Section 16.2 of this Agreement) to the extent that the Design-Build Contractor is in compliance with the terms and conditions of the Design-Build Contract.

### **17.3.7 Suspension of Work**

**17.3.7.1** TxDOT shall have the right and authority to suspend any affected portion of the Work by written order to Developer for Developer's failure to cure and correct, within the applicable cure period available to Developer contemplated by Section 17.1.2 (if any), the following to the extent the following constitute Developer Defaults:

- (a) Performance of Nonconforming Work;
- (b) Failure to comply with any Law or Governmental Approval (including failure to handle, preserve and protect archeological, paleontological or historic resources, or failure to handle Hazardous Materials, in accordance with applicable Laws and Governmental Approvals);
- (c) The existence of conditions unsafe for workers, other Facility personnel or the general public, including certain failures to comply with Safety Standards or perform Safety Compliance as set forth in Section 17.3.3.5;
- (d) Certain failures to remove and replace personnel as set forth in Section 10.6.3;
- (e) Failure to provide proof of required insurance coverage as set forth in Section 16.1.2.4(c); and
- (f) Failure to carry out and comply with Directive Letters.

**17.3.7.2** Developer shall promptly comply with any such written suspension order. Developer shall promptly recommence the Work upon receipt of written notice from TxDOT directing Developer to resume work. TxDOT shall have no liability to Developer, and Developer shall have no right to a Relief Event, Extended Relief Event or Compensation Event, in connection with any such suspension.

**17.3.7.3** If TxDOT orders suspension of Work for any other reason, it shall be treated as a TxDOT Change.

### **17.3.8 Other Rights and Remedies**

Subject to Section 19.10, TxDOT shall also be entitled to exercise any other rights and remedies available under this Agreement or the Lease, or available at law or in equity.

### **17.3.9 Cumulative, Non-Exclusive Remedies**

Subject to Sections 17.3.11 and 19.10, each right and remedy of TxDOT hereunder shall be cumulative and shall be in addition to every other right or remedy provided herein or now or hereafter existing at Law or in equity or by statute or otherwise, and the exercise or beginning of the exercise by TxDOT of any one or more of any of such rights or remedies shall not preclude the simultaneous or later exercise by TxDOT of any or all other such rights or remedies.

### **17.3.10 Limitation on Consequential Damages**

**17.3.10.1** Notwithstanding any other provision of the FCA Documents and except as set forth in Section 17.3.10.2, to the extent permitted by applicable Law, Developer shall not be liable for punitive damages or indirect, incidental or consequential damages, whether arising out of breach of this Agreement or the Lease, tort (including negligence) or any other theory of liability, and TxDOT releases Developer from any such liability.

**17.3.10.2** The foregoing limitation on Developer's liability for consequential damages shall not apply to or limit any right of recovery TxDOT may have respecting the following:

- (a) Losses (including defense costs) to the extent (i) covered by the proceeds of insurance required to be carried pursuant to Section 16.1, (ii) covered by the proceeds of insurance actually carried by or insuring Developer under policies solely with respect to the Facility and the Work, regardless of whether required to be carried pursuant to Section 16.1, or (iii) Developer is deemed to have self-insured the Loss pursuant to Section 16.1.2.2(b)(ii);
- (b) Losses arising out of fraud, criminal conduct, intentional misconduct (which does not include any intentional Developer Default), recklessness or bad faith on the part of any Developer-Related Entity;
- (c) Developer's indemnities set forth in Section 16.5 or elsewhere in the FCA Documents;
- (d) Developer's obligation to pay liquidated damages in accordance with Section 17.4 or any other provision of the FCA Documents;
- (e) Losses arising out of Developer Releases of Hazardous Materials;
- (f) Developer's obligation to pay compensation to TxDOT as provided in Section 5.1 and Exhibit 7;
- (g) Loss of TxDOT's Revenue Share Amount attributable to a Developer Default (but without duplication of payments from business interruption insurance);
- (h) Amounts Developer may owe or be obligated to reimburse to TxDOT under the express provisions of the FCA Documents, including TxDOT's Recoverable Costs;
- (i) Interest, late charges, fees, transaction fees and charges, penalties and similar charges that the FCA Documents expressly state are due from Developer

to TxDOT; and

(j) Any credits, deductions or offsets that the FCA Documents expressly provide to TxDOT against amounts owing Developer.

## **17.4 Liquidated Damages**

### **17.4.1 Liquidated Damages for Failure to Close Initial Facility Debt**

**17.4.1.1** Developer shall be liable for and pay to TxDOT liquidated damages if (a) Developer for any reason fails to timely satisfy its financing obligations under Section 4.1.4 and (b) as a result thereof TxDOT terminates this Agreement and the Lease pursuant to Section 19.3.2. The amount of such liquidated damages shall equal (a) \$100,000,000 if Developer does not elect to extend the deadline under Section 4.1.4 and the conditions in the first sentence hereof are met and (b) twice the amount under clause (a) above if Developer elects to extend the deadline under Section 4.1.4, and the conditions in the first sentence hereof are met, in either case minus (c) the cumulative purchase prices and condemnation awards for the value of Facility ROW parcels acquired at Developer's expense and conveyed to TxDOT in accordance with Section 7 of the Technical Requirements prior to the date of termination, plus (d) the unpaid amount, if any, of the Concession Payment owing to TxDOT in the amount set forth in Part A of Exhibit 7 to this Agreement. Such liquidated damages shall constitute TxDOT's sole right to damages on account of such failure.

**17.4.1.2** If Developer has not entered into the Initial Funding Agreements and Initial Security Documents on the Effective Date, then concurrently with execution of this Agreement, Developer shall deliver, or has delivered, to TxDOT one or more letters of credit in the cumulative original amount of \$100,000,000. If Developer has not entered into the Initial Funding Agreements and Initial Security Documents by the deadline under Section 4.1.4 but desires to extend such deadline as provided in Section 4.1.4, then as a condition to the effective exercise of its right to extend, Developer shall deliver to TxDOT a replacement letter of credit or replacement letters of credit in the original cumulative amount of two times the amount stated in the foregoing sentence minus the cumulative purchase prices and condemnation awards for the value of Facility ROW parcels acquired at Developer's expense and conveyed to TxDOT in accordance with Section 7 of the Technical Requirements prior to the date of exercise of the right to extend. Whenever TxDOT acquires title to a Facility Right of Way parcel and the purchase price therefor or condemnation award for the value thereof is finally determined, Developer shall have the right to reduce the cumulative amount of such letters of credit (or replacement letters of credit) by such purchase price or condemnation award, either through the execution and delivery of an amendment or supplement to each original letter of credit, in form and substance first approved in writing by TxDOT, or through delivery to TxDOT of substitute or replacement letters of credit first approved in writing by TxDOT, in the same form as the original letters of credit and in the foregoing reduced cumulative amount. TxDOT shall be entitled to draw on such letters of credit to collect the liquidated damages owing under this Section 17.4.1 as and when such liquidated damages are payable pursuant to Section 17.4.1.1 without prior notice to or demand upon Developer for such liquidated damages.

**17.4.1.3** If the NEPA Finality Date has not occurred within one year after the Effective Date, Developer, at its option, may, in lieu of continuing or replacing any letter of credit under Section 17.4.1.2, deliver to TxDOT any combination of an unconditional, irrevocable written guaranty, in form and substance prescribed by TxDOT, executed by any one of Cintra Concesiones de Infraestructuras de Transporte, S.A. ("Cintra") or other affiliate acceptable to

TxDOT or by Zachry, Inc. or other affiliate acceptable to TxDOT, jointly and severally guaranteeing payment by Developer, when due, of the liquidated damages set forth in Section 17.4.1.1 less so much thereof as may be collected by TxDOT through draw on any such letter of credit for which no substitution with such a guaranty is made. If Developer elects to extend the deadline as provided in Section 4.1.4 and prior thereto TxDOT has received one or more such guarantees, then Developer must, as a condition to effective extension, deliver to TxDOT the replacement letter(s) of credit described in Section 17.4.1.2 or replacement guaranties for the full amount of the liquidated damages under Section 17.4.1.1(b), whereupon the obligations and liabilities of the Guarantors shall cease and TxDOT shall return the guarantees.

**17.4.1.4** Developer acknowledges that the time period TxDOT has provided to Developer to close the Initial Facility Debt is ample and reasonable, that without closing for the Initial Facility Debt there will be no practicable ability for Developer to timely perform its obligations under the FCA Documents, and that such liquidated damages are reasonable in order to compensate TxDOT for damages it will incur as a result of the lost opportunity to TxDOT represented by the FCA Documents. Such damages include the harm from the difficulty, and substantial additional expense, to TxDOT, to procure and deliver, operate and maintain the Facility through other means, loss of potential revenue share for TxDOT, loss of or substantial delay in use, enjoyment and benefit of the Facility by the general public, and injury to the credibility and reputation of TxDOT's transportation improvement program, including the Trans Texas Corridor program, with policy makers and with the general public who depend on and expect availability of service. Developer further acknowledges that these damages are incapable of accurate measurement because of, among other things, the unique nature of the Facility and the unavailability of a substitute for it.

**17.4.1.5** Upon Developer's satisfaction of its financing obligations under Section 4.1.4, TxDOT shall, upon receipt of the notice required under Section 4.1.4 and access to the Intellectual Property Escrow containing the documents that set forth the material commercial terms relating to the Initial Facility Debt, promptly return to Developer the originals of all letters of credit and guaranties provided under Section 17.4.1. Provided that TxDOT has had sufficient prior access to the documentation required by Section 4.1.4 setting out the material commercial terms of such Initial Facility Debt, TxDOT will cooperate with Developer in an effort to return such letters of credit simultaneously with the closing of the Initial Facility Debt.

## **17.4.2 Liquidated Damages for Delayed Service Commencement**

**17.4.2.1** Developer shall be liable for and pay to TxDOT liquidated damages with respect to any failure to achieve Service Commencement by the Service Commencement Deadline, as the same may be extended pursuant to this Agreement. The amount of such liquidated damages is set forth in Exhibit 20 to this Agreement. Such liquidated damages shall commence on the Service Commencement Deadline, as the same may be extended pursuant to this Agreement, and shall continue to accrue during the remainder of the Term until the date of Service Commencement. Such liquidated damages shall constitute TxDOT's sole right to damages for such delay.

**17.4.2.2** Developer acknowledges that such liquidated damages are reasonable in order to compensate TxDOT for damages it will incur as a result of late Service Commencement. Such damages include loss of potential revenue share for TxDOT due to late Service Commencement, loss of use, enjoyment and benefit of the Facility and connecting TxDOT transportation facilities by the general public, injury to the credibility and reputation of TxDOT's transportation improvement program, including the Trans Texas Corridor program,



with policy makers and with the general public who depend on and expect availability of service by the Service Commencement Deadline, which injury to credibility and reputation may directly result in loss of ridership on the Facility and connecting TxDOT transportation facilities and further loss of TxDOT's revenue share under this Agreement and/or toll revenues on such connecting facilities, 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 Facility and the unavailability of a substitute for it.

### **17.4.3 Liquidated Damages Respecting Noncompliance Points and Uncured Persistent Developer Default**

**17.4.3.1** Developer shall be liable for and pay to TxDOT liquidated damages for each Noncompliance Point assessed against Developer in the amount set forth in Exhibit 20 to this Agreement.

**17.4.3.2** In addition, Developer shall be liable for and pay to TxDOT liquidated damages with respect to accumulation of assessed Uncured Noncompliance Points. The trigger points for commencement of such liquidated damages and the measure of such liquidated damages shall be as set forth in Exhibit 20. Such liquidated damages shall continue to accrue until the date Developer demonstrates to TxDOT's reasonable satisfaction that it has fully and completely cured the breaches and failures that are the basis for assessment of such liquidated damages.

**17.4.3.3** Developer acknowledges that such liquidated damages are reasonable in order to compensate TxDOT (a) for its increased costs of administering this Agreement, for its potential loss of revenue share, and for potential harm to the credibility and reputation of TxDOT's transportation improvement program, including the Trans Texas Corridor program, with policy makers and with the general public, and (b) for potential harm and detriment to Users, by reason of the matters that result in accumulated Uncured Noncompliance Points or Uncured Persistent Developer Default. TxDOT's increased costs include the increased costs of monitoring and oversight, and could also include obligations to pay or reimburse other Governmental Entities with regulatory jurisdiction over the Facility for their increased costs of monitoring and enforcing Developer compliance with applicable Governmental Approvals. Detriment to the public may include additional wear and tear on vehicles and increased costs of congestion, travel time and accidents. In addition, the events and circumstances that result in the trigger of these liquidated damages are likely to reduce the quality of the Facility so as to adversely affect the experience of Users and their desire to continue using the Facility and connecting TxDOT transportation facilities. This loss of patronage and demand in turn will cause loss of Toll Revenues or suppress the ability to increase Toll Revenues, to the detriment of TxDOT's potential revenue share, and loss of toll revenues from connecting TxDOT transportation facilities. Developer further acknowledges that such increased costs and loss of revenue share, 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 Facility make it difficult to sort out causation and quantify the precise Toll Revenue loss attributable to the matters that will trigger these liquidated damages.

#### **17.4.4 Acknowledgements Regarding Liquidated Damages**

Developer further agrees and acknowledges that:

**17.4.4.1** In the event that Developer fails to satisfy its financing obligations under Section 4.1.4, fails to achieve Service Commencement by the Service Commencement Deadline, or commits breaches and failures resulting in Noncompliance Points or Uncured Persistent Developer Default, TxDOT will incur substantial damages;

**17.4.4.2** Such damages are incapable of accurate measurement and difficult to prove for the reasons stated in Sections 17.4.1.3, 17.4.2.4 and 17.4.3.2;

**17.4.4.3** As of the Effective Date, the amounts of liquidated damages under Sections 17.4.1, 17.4.2 and 17.4.3 represent good faith estimates and evaluations by the Parties as to the actual potential damages that TxDOT would incur as a result of failure to finance, late Service Commencement, or breaches and failures resulting in Noncompliance Points or Uncured Persistent Developer Default, and do not constitute a penalty;

**17.4.4.4** The Parties have agreed to such liquidated damages in order to fix and limit Developer's costs and to avoid later Disputes over what amounts of damages are properly chargeable to Developer;

**17.4.4.5** Such sums are reasonable in light of the anticipated or actual harm caused by failure to finance, delayed Service Commencement, or breaches and failures resulting in Noncompliance Points or Uncured Persistent Developer Default, the difficulties of the proof of loss, and the inconvenience or infeasibility of otherwise obtaining an adequate remedy; and

**17.4.4.6** Such liquidated damages are not intended to, and do not, liquidate Developer's liability for third party claims against TxDOT under the indemnification provisions of Section 16.5, even though third party claims against Indemnified Parties may arise out of the same event, breach or failure that gives rise to such liquidated damages.

#### **17.4.5 Payment; Satisfaction; Waiver**

**17.4.5.1** Developer shall pay any liquidated damages owing under this Section 17.4 within ten days after TxDOT delivers to Developer TxDOT's invoice or demand therefor, such invoice or demand to be issued not more often than monthly. Liquidated Damages shall be due and payable to TxDOT subject only to Developer's offset rights set forth in Section 5.1.4.

**17.4.5.2** TxDOT shall return to Developer any amounts received as Liquidated Damages on account of the assessment of a Noncompliance Point if the Noncompliance Point is subsequently cancelled pursuant to Section 18.4.6.

**17.4.5.3** TxDOT shall have the right to draw on any bond, certificate of deposit, letter of credit or other security provided by Developer pursuant to this Agreement, except any Handback Requirements Letter of Credit, to satisfy liquidated damages not paid when due.

**17.4.5.4** Permitting or requiring Developer to continue and finish the Work or any part thereof after the Service Commencement Deadline shall not act as a waiver of TxDOT's right to receive liquidated damages hereunder or any rights or remedies otherwise available to TxDOT.

#### **17.4.6 Non-Exclusive Remedy**

**17.4.6.1** Each item of liquidated damages provided under this Section 17.4 is in addition to, and not in substitution for, any other item of liquidated damages assessed under this Section 17.4, except that a Developer Default consisting of failure to achieve Service Commencement by the Service Commencement Deadline shall not be counted in determining whether liquidated damages are owing for Uncured Persistent Developer Default, and instead Section 17.4.2 shall exclusively govern the amount of liquidated damages on account of such failure.

**17.4.6.2** TxDOT's right to, and imposition of, liquidated damages are in addition, and without prejudice, to any other rights and remedies available to TxDOT under this Agreement, at law or in equity respecting the breach, failure to perform or Developer Default that is the basis for the liquidated damages or any other breach, failure to perform or Developer Default, except for recovery of the monetary damage that the liquidated damages are intended to compensate.

#### **17.5 Default by TxDOT; Cure Periods**

##### **17.5.1 TxDOT Default**

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

**17.5.1.1** TxDOT fails to make any payment due Developer under this Agreement when due;

**17.5.1.2** Any representation or warranty made by TxDOT in this Agreement is false or materially misleading or inaccurate when made or omits material information when made;

**17.5.1.3** TxDOT fails to observe or perform any other covenant, agreement, term or condition required to be observed or performed by TxDOT under this Agreement; or

**17.5.1.4** An event of default by TxDOT occurs under the Lease; or

**17.5.1.5** TxDOT confiscates or appropriates the Facility or any other material part of the Developer's Interest, excluding a Termination for Convenience or any other exercise of a right of termination set forth in this Agreement.

##### **17.5.2 Cure Periods**

TxDOT shall have the following cure periods with respect to the following TxDOT Defaults:

**17.5.2.1** Respecting a TxDOT Default under Section 17.5.1.1 or 17.5.1.5, a period of 30 days after Developer delivers to TxDOT written notice of the TxDOT Default; and

**17.5.2.2** Respecting a TxDOT Default under Section 17.5.1.2, 17.5.1.3 or 17.5.1.4, a period of 60 days after Developer delivers to TxDOT written notice of the TxDOT Default; provided that (a) as to Section 17.5.1.2, cure will be regarded as complete when the adverse effects of the breach are cured, and (b) if the TxDOT Default is of such a nature that the cure cannot with diligence be completed within such time period and TxDOT has commenced meaningful steps to cure immediately after receiving the default notice, TxDOT shall have such additional period of time, up to a maximum cure period of 180 days, as is reasonably necessary to diligently effect cure.

## **17.6 Developer Remedies for TxDOT Default**

### **17.6.1 Termination**

Subject to Section 19.10, Developer will have the right to terminate this Agreement and the Lease and recover termination damages as more particularly set forth in, and subject to the terms and conditions of, Section 19.4.

### **17.6.2 Damages and Other Remedies**

Developer shall have and may exercise the following remedies upon the occurrence of a TxDOT Default and expiration, without cure, of the applicable cure period:

**17.6.2.1** If Developer does not terminate this Agreement, then, subject to Section 17.6.3, Developer may treat the TxDOT Default as a Compensation Event on the terms and conditions set forth in Section 13.2, and TxDOT shall pay the full Compensation Amount in accordance with Section 13.2.6;

**17.6.2.2** If the TxDOT Default is a failure to pay when due any undisputed portion of a progress payment owing under a Change Order and TxDOT fails to cure such TxDOT Default within 30 days after receiving from Developer written notice thereof, Developer shall be entitled to suspend the Work under the Change Order until the default is cured; and

**17.6.2.3** Subject to Sections 17.6.3 and 19.10, Developer also shall be entitled to exercise any other remedies available under this Agreement or the Lease or at Law or in equity, including offset rights to the extent and only to the extent available under Section 5.1.4. Subject to Sections 17.6.3 and 19.10, each right and remedy of Developer hereunder shall be cumulative and shall be in addition to every other right or remedy provided herein or now or hereafter existing at Law or in equity or by statute or otherwise, 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.

### **17.6.3 Limitations on Remedies**

**17.6.3.1** Notwithstanding any other provision of the FCA Documents and except as forth in Section 17.6.3.2, to the extent permitted by applicable Law, TxDOT shall not be liable for punitive damages or any indirect, incidental or consequential damages, whether

arising out of breach of this Agreement or the Lease, tort (including negligence) or any other theory of liability, and Developer releases TxDOT from any such liability.

**17.6.3.2** The foregoing limitation on TxDOT's liability for consequential damages shall not apply to or limit any right of recovery Developer may have respecting the following:

(a) Losses arising out of fraud, criminal conduct, intentional misconduct (which does not include any intentional TxDOT Default), recklessness or bad faith on the part of TxDOT;

(c) TxDOT's indemnities set forth in Section 7.9.4;

(d) Losses arising out of releases of Hazardous Materials caused by TxDOT;

(e) Any amounts TxDOT may owe or be obligated to reimburse under the express provisions of this Agreement for Compensation Events or events of termination;

(f) Any other specified amounts TxDOT may owe or be obligated to reimburse to Developer under the express provisions of the FCA Documents;

(i) Interest and charges that the FCA Documents expressly state are due from TxDOT to Developer; and

(j) Any credits, deductions or offsets that the FCA Documents expressly provide to Developer against amounts owing TxDOT.

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

**17.6.3.4** Developer shall have no right to seek, and irrevocably waives and relinquishes any right to, non-monetary relief against TxDOT, except (a) for any sustainable action in mandamus, (b) for any sustainable action to stop, restrain or enjoin use, reproduction, duplication, modification, adaptation or disclosure of Proprietary Intellectual Property in violation of the licenses granted under Section 22.4, or to specifically enforce TxDOT's duty of confidentiality under Section 22.4.6, (c) for declaratory relief pursuant to the Dispute Resolution Procedures declaring the rights and obligations of the Parties under the FCA Documents, or (d) declaratory relief pursuant to the Dispute Resolution Procedures declaring specific terms and conditions that shall bind the Parties, but only where this Agreement expressly calls for such a method of resolving a Dispute.

**17.6.3.5** Without limiting the effect of Section 17.6.3.3, in the event TxDOT wrongfully withholds an approval or consent required under this Agreement, or wrongfully issues an objection to or disapproval of a Submittal or other matter under this Agreement, Developer's sole remedies against TxDOT shall be extensions of time to the extent provided in Section 13.1

for a Relief Event and damages to the extent provided in Section 13.2 for a Compensation Event.

#### **17.6.4 Procedure for Payment of Judgments**

Promptly after any Final Order or final, non-appealable judgment awarding compensation or damages to Developer, TxDOT shall institute payment procedures as set forth in applicable Law and use best efforts to obtain from the Legislature an appropriation for the full amount due. TxDOT shall not hinder or oppose Developer's own efforts to obtain an appropriation for the full amount due.

#### **17.7 Partnering**

**17.7.1** The provisions of this Section 17.7 are not part of the Informal Resolution Procedures or the Dispute Resolution Procedures contemplated under this Agreement, Sections 201.112 or 223.208 of the Code or the DRP Rules promulgated thereunder. Compliance with the provisions of this Section 17.7 or the terms of any partnering charter is not required as a condition precedent to any Party's right to initiate a claim or seek resolution of any Claim or Dispute under the relevant procedures specified in Section 17.8

**17.7.2** TxDOT and Developer have developed and intend to continue fostering a cohesive relationship to carry out their respective responsibilities under this Agreement through a voluntary, non-binding "partnering" process drawing upon the strengths of each organization to identify and achieve reciprocal goals.

**17.7.3** The objectives of the partnering process are (a) to identify potential problem areas, issues and differences of opinion early, (b) to develop and implement procedures for resolving them in order to prevent them from becoming Claims and Disputes, (c) to achieve effective and efficient performance and completion of the Work in accordance with the FCA Documents, and (d) to create mutual trust and respect for each Party's respective roles and interests in the Facility while recognizing the respective risks inherent in those roles.

**17.7.4** In continuance of their existing partnering process, within 90 Days after the Effective Date, TxDOT and Developer shall attend a team building workshop and through such workshop negotiate and sign a mutually acceptable non-binding partnering charter to govern the process of partnering for the Facility. The charter shall include non-binding rules and guidelines for engaging in free and open communications, discussions and partnering meetings between them, in order to further the goals of the partnering process. The charter shall call for the formation and meetings of a partnering panel, identify the Key Personnel of Developer and key representatives of TxDOT who shall serve on the partnering panel, and set the location for meetings. The charter also shall include non-binding rules and guidelines on whether and under what circumstances to select and use the services of a facilitator, where and when to conduct partnering panel meetings, who should attend such meetings, and, subject to Section 17.8.10, exchange of statements, materials and communications during partnering panel meetings. In any event, the partnering charter shall recognize and be consistent with the obligations of TxDOT and Developer contained in this Agreement with respect to communications, cooperation, coordination and procedures for resolving Claims and Disputes.

**17.7.5** Under the non-binding procedures, rules and guidelines of the partnering charter, the Parties will address at partnering meetings specific interface issues, oversight

interface issues, division of responsibilities, communication channels, application of alternative resolution principles and other matters.

**17.7.6** If Developer and TxDOT succeed in resolving a Claim or Dispute through the partnering procedures, they shall memorialize the resolution in writing, including execution of Change Orders as appropriate, and promptly perform their respective obligations in accordance therewith.

## **17.8 Dispute Resolution Procedures**

### **17.8.1 Disputes Governed by These Procedures**

(a) The Parties agree to be bound by and subject to the procedures established in this Section 17.8 as an agreement regarding dispute resolution procedures that shall survive expiration or earlier termination of the Term and thereafter for so long as either Party has any obligation originating under the DRP Governed Agreements.

(b) The provisions of this Section 17.8 are intended to accord with Section 201.112 of the Code and the DRP Rules promulgated thereunder.

(c) As used in this Section 17.8, the phrase "the procedures established in this Section 17.8" includes the procedures established in this Section 17.8, the Disputes Board Agreement, the DRP Rules, the Code, and the Texas Government Code.

(d) All Disputes arising under the DRP Governed Agreements shall be resolved pursuant to the Informal Resolution Procedures and, if not resolved thereby, the Dispute Resolution Procedures, except the following:

(i) Any equitable relief sought in Travis County, Texas district court that TxDOT is permitted to bring against Developer under Section 17.8.1.1(e);

(ii) Any mandamus action that Developer is permitted to bring against TxDOT under Sections 17.8.1.1(b), (c) and (d); and

(iii) Ineligible Matters.

(e) Any disagreement between the Parties as to whether the Informal Resolution Procedures and/or the Dispute Resolution Procedures apply to a particular Dispute, and any disagreement as to whether there has been an adverse change of Law, shall be treated as a Dispute for resolution in accordance with this Section 17.8.

(f) With respect to any Dispute for resolution in accordance with the procedures established in this Section 17.8, the Parties agree that (i) such Dispute must be asserted in writing to the other Party prior to the running of the applicable statute of limitations and (ii) provided that this is done, the applicable statute of limitations shall be tolled until the 30th day after conclusion of the last such procedure applicable to such Dispute.

#### **17.8.1.1 Jurisdiction of Travis County, Texas District Courts**

(a) The DRP Governed Agreements (excluding the Independent Engineer Agreement) collectively constitute a Facility Agreement entered into pursuant to the

authority of the CDA and as such are collectively considered a comprehensive development agreement as contemplated under of the Act, the Code, and the Rules, including within the meaning of Sections 223.208(b) and 223.208(e) of the Code, and are entered into in accordance with the provisions of the CDA after all prerequisites under the CDA have been satisfied. In accordance with Sections 223.208(b)(3) and 223.208(b)(6) of the Code, to secure TxDOT's payment obligations to the Developer now or hereinafter arising under the DRP Governed Agreements (including TxDOT's payment obligations arising on or after the date of expiration or earlier termination of the Term), TxDOT has granted and agreed to the TxDOT Security Obligations.

(b) As provided by Section 223.208(e) of the Code, the district courts of Travis County, Texas shall have exclusive jurisdiction and venue over and to determine and adjudicate all issues necessary to adjudicate an application for mandamus relief by Developer seeking to enforce (i) TxDOT's obligation to pay Termination Compensation or (ii) any of the TxDOT Security Obligations that secure payment of Termination Compensation. Therefore, if Developer has a Claim for Termination Compensation; and/or seeks to enforce a TxDOT Security Obligation described in clause (ii) of this subsection, and such matter is not resolved to its satisfaction through the Informal Resolution Procedures below (and mediation or other alternative dispute resolution process, but only if the Parties had mutually consented to endeavor to resolve such matter through mediation or other alternative dispute resolution process), Developer may invoke the jurisdiction of the district courts of Travis County, Texas and petition for a writ of mandamus against TxDOT, the Commission and the Comptroller to enforce a Claim for Termination Compensation and/or TxDOT Security Obligation described in clause (ii) of this subsection without attempting to resolve its Claim for Termination Compensation or enforce such TxDOT Security Obligation pursuant to any of the Dispute Resolution Procedures.

(c) In addition, Developer may seek mandamus relief against TxDOT in accordance with Section 17.8.7 of this Agreement.

(d) None of the Dispute Resolution Procedures established by this Section 17.8 shall be enforced or interpreted in a way that curtails Developer's right to mandamus relief in Travis County, Texas district court pursuant to Section 223.208(e) of the Code.

(e) TxDOT may invoke the jurisdiction of the district courts of Travis County, Texas to petition for equitable relief against Developer, including temporary restraining orders, injunctions, other interim or final declaratory relief or the appointment of a receiver, to the extent allowed by Law. However, any disagreement between the Parties as to the facts and Law underlying TxDOT's petition for equitable relief shall subsequently be resolved as a Dispute under the procedures established in this Section 17.8, and any hearing required by Law after the initial grant of equitable relief to TxDOT shall be timely referred to and conducted by the Disputes Board (without any requirement to first endeavor to resolve such Dispute through the Informal Resolution Procedures). Any interim equitable relief granted by a court then in effect at the time the Disputes Board Decision is issued shall be conformed to accord with Disputes Board Decision, and any permanent equitable relief subsequently granted by a court shall conform to the Disputes Board Decision. If either Party appeals the Disputes Board Decision hereunder and such decision is vacated by a Final Order Vacating Decision, TxDOT shall be entitled to interim equitable relief to preserve the status quo until the subsequent Disputes Board Decision is issued upon reconsideration of the underlying Dispute.



### **17.8.1.2 Adverse Changes of Law**

TxDOT and Developer agree that any change in the Code or the DRP Rules, or the enactment or amendment of any other Law, after the Effective Date, that would have a material adverse affect on any of TxDOT's or Developer's rights or remedies under the procedures established in this Section 17.8, which the Parties acknowledge and agree are material, substantive, vested contract rights of Developer under this Agreement shall constitute a retroactive application of law impairing vested contract rights that would, if given effect, be unconstitutional under Article I, Section 16, of the Texas Constitution, and therefore such change shall not be given retroactive effect and made applicable to the DRP Governed Agreements.

### **17.8.1.3 Change Of Law Authorizing Binding Arbitration**

(a) If there is any change to the Code or the DRP Rules, or the enactment or amendment of any other Law, after the Effective Date, that authorizes TxDOT to enter into binding arbitration to resolve Disputes, the Parties may, but are not required to, mutually agree to amend this Agreement pursuant to Section 24.3 to provide that Disputes (other than Ineligible Matters) be resolved by binding arbitration.

(b) If the Parties do not attain the mutual agreement described in subsection (a), then Disputes arising on or after the effective date of that Change in Law shall be resolved in accordance with the Dispute Resolution Procedures herein without giving effect to such Change in Law in accordance with Section 17.8.1.2 above.

### **17.8.1.4 Matters Ineligible for Dispute Resolution Procedures**

The Dispute Resolution Procedures shall not apply to the following (collectively, "**Ineligible Matters**"):

- (a) Any matters that the DRP Governed Agreements expressly state are final, binding or not subject to dispute resolution;
- (b) Any claim or dispute that does not arise under the DRP Governed Agreements;
- (c) Any claim covered by the Texas Tort Claims Act;
- (d) Any claim or dispute that is the subject of litigation in a lawsuit filed in court to which the procedures established in this Section 17.8 do not apply, including any effort to interplead a Party into such a lawsuit in order to make the procedures established in this Section 17.8 applicable; and
- (e) Any claim for, or dispute based on, remedies expressly created by statute, save and except if it is a Claim or Dispute that arose under the DRP Governed Agreements.

### **17.8.2 Informal Resolution As Condition Precedent**

As a condition precedent to the right to have any Dispute resolved pursuant to the Dispute Resolution Procedures or by a district court in Travis County, Texas, the claiming

Party must first attempt to resolve the Dispute directly with the responding Party through the informal resolution procedures described in Section 17.8.3 other than Section 17.8.3.3 (collectively, the "**Informal Resolution Procedures**"). Time limitations set forth for the Informal Resolution Procedures may be changed by mutual written agreement of the Parties. Changes to the time limitations for the Informal Resolution Procedures agreed upon by the Parties shall pertain to the particular Dispute only and shall not affect the time limitations for the Informal Resolution Procedures applicable to any subsequently arising Disputes.

### **17.8.3 Informal Resolution Procedures**

#### **17.8.3.1 Notice of Dispute to Designated Agent**

(a) A Party desiring to pursue a Dispute against the other Party shall initiate the Informal Resolution Procedures by serving a written notice on the responding Party's designated agent. Unless otherwise indicated by written notice from one Party to the other Party, each Party's designated agent shall be its Authorized Representative. The notice shall contain a concise statement describing:

(i) If the Parties have mutually agreed that the Dispute is a Fast-Track Dispute (or, if Section 17.8.13.3 applies, if either Party has elected to treat it as a Fast-Track Dispute);

(ii) The date of the act, inaction or omission giving rise to the Dispute;

(iii) An explanation of the Dispute, including a description of its nature, circumstances and cause;

(iv) A reference to any pertinent provision(s) from the DRP Governed Agreements;

(v) If applicable and then known, the estimated dollar amount of the Dispute, and how that estimate was determined (including any cost and revenue element that has been or may be affected);

(vi) If applicable, an analysis of the Facility Schedule and Milestone Schedule Deadlines showing any changes or disruptions (including an impacted delay analysis reflecting the disruption in the manner and sequence of performance that has been or will be caused, delivery schedules, staging, and adjusted Milestone Schedule Deadlines);

(vii) If applicable, the claiming Party's plan for mitigating the amount claimed and the delay claimed;

(viii) The claiming Party's desired resolution of the Dispute; and

(ix) Any other information the claiming Party considers relevant.

(b) The notice shall be signed by the designated representative of the Party asserting the Dispute, and shall constitute a certification by the Party asserting the Dispute that:

(i) The notice of Dispute is served in good faith; and

(ii) To the then current knowledge of such Party, except as to matters stated in the notice of Dispute as being unknown or subject to discovery, (1) all supporting information is reasonably believed by the Party asserting the Dispute to be accurate and complete and (2) the Dispute accurately reflects the amount of money or other right, remedy or relief to which the Party asserting the Dispute reasonably believes it is entitled; and

(iii) The designated representative is duly authorized to execute and deliver the notice and such certification on behalf of the claiming Party.

(c) If the responding Party agrees with the claiming Party's position and desired resolution of the Dispute, it shall so state in a written response. The notice of the Dispute and such response shall suffice to evidence the Parties' resolution of the subject Dispute unless either Party requests further documentation. Upon either Party's request, within five Business Days after the claiming Party's receipt of the responding Party's response in agreement, the Parties' designated representatives shall state the resolution of the Dispute in writing as appropriate, including execution of Change Orders or other documentation as needed, and thereafter each Party shall then promptly perform its respective obligations in accordance with the agreed resolution of the Dispute.

(d) The Party asserting the Dispute shall not be prejudiced by its initial statement of the Dispute and shall have the ability at any time during the Informal Resolution Procedures and Dispute Resolution Procedures to modify its statement of the Dispute and/or the amount of money or other right, remedy or relief sought.

#### **17.8.3.2 Fast-Track Disputes**

With respect to any Dispute that the Parties mutually designate as a Fast-Track Dispute or that either Party designates as a Fast-Track Dispute pursuant to Section 17.8.13.3, the Informal Resolution Procedures shall be abbreviated in that the procedure contemplated in Section 17.8.3.3 shall not be required.

#### **17.8.3.3 CEO / Executive Director Meetings**

Commencing within 10 Business Days after the notice of Dispute is served and concluding 10 Business Days thereafter, the Chief Executive Officer of Developer and the Executive Director or the assistant Executive Director, shall meet and confer, in good faith, to seek to resolve the Dispute raised in the claiming Party's notice of Dispute. If they succeed in resolving the Dispute, Developer and TxDOT shall memorialize the resolution in writing, including execution of Change Orders or other documentation as appropriate, and thereafter each Party shall then promptly perform its respective obligations in accordance with the agreed resolution of the Dispute.

(ii) Either Party may refer the Dispute to the Disputes Board for resolution pursuant to Section 17.8.4.2; or

(iii) Developer may pursue any other relief that may be available in court pursuant to Section 17.8.1.1(b).

(b) The provisions of Section 17.8.3.4(a) are not conditions precedent to Developer's or TxDOT's rights to relief as may be available in court pursuant to Section 17.8.1.1(c) or Section 17.8.1.1(e) respectively.

#### **17.8.4 Disputes Board; Finality of Disputes Board Decision**

##### **17.8.4.1 Disputes Board Agreement**

(a) The Parties executed the Disputes Board Agreement on even date herewith. The Disputes Board Agreement governs all aspects of the Disputes Board, as well as all rights and responsibilities of the Parties with respect to the Disputes Board, that are not otherwise addressed in this Section 17.8, the DRP Rules and the Code.

(b) If the composition of either Party's Disputes Board Member Candidates' List has not been finalized prior to the Effective Date, that Party shall promptly appoint the members in accordance with the requirements and procedures of the Disputes Board Agreement.

(c) The Disputes Board shall conduct proceedings and, upon completion of its proceedings, issue written findings of fact, written conclusions of law, and a written decision to TxDOT and Developer.

(d) The Disputes Board shall have the authority to resolve any Dispute other than Ineligible Matters, any mandamus action that Developer is permitted to bring against TxDOT under Sections 17.8.1.1(b), (c) and (d), and any action for equitable relief sought in Travis County, Texas district court that TxDOT is permitted to bring against Developer under Section 17.8.1.1(e).

(e) The Disputes Board shall not have the authority to order that one Party compensate the other Party for attorneys' fees and expenses.

(f) If a Disputes Board Decision awards an amount payable by one Party to the other, such amount became or shall become due and payable on the date required for payment in accordance with the applicable DRP Governed Agreement. If the date of

payment is not specified in a DRP Governed Agreement, the payment shall be due ten days after the date the Final Order Implementing Decision for such decision becomes final under Section 17.8.6 (or, if the tenth day is not a Business Day, the next Business Day).

(g) Interest at LIBOR on an amount payable by one Party to the other shall accrue beginning on the date such amount was due and continuing until the date such amount is paid.

(h) If the notice of Dispute fails to meet the certification requirements under Section 17.8.3.1(b), on motion of the responding Party the Disputes Board shall suspend proceedings on the Dispute until a correct and complete written certification is delivered, and shall have the discretionary authority to dismiss the Dispute for lack of a correct certification if it is not delivered within a reasonable time as set by the Disputes Board. Prior to the entry by the Disputes Board of a final decision on a Dispute, the Disputes Board shall be required to require a defective certification to be corrected.

#### **17.8.4.2 Submission of Dispute to Disputes Board**

(a) Within 15 days (seven days for Fast-Track Disputes) after the end of the last time period under the Informal Resolution Proceedings, either Party may refer a Dispute to the Disputes Board for resolution by serving written notice on the other Party. The notice shall include the same information as a notice of Dispute issued under Section 17.8.3.1(a). Within 15 days (seven days for Fast-Track Disputes) after a Party refers a Dispute to the Disputes Board, the responding Party shall serve a written response upon the claiming Party's designated agent. The response shall include the same information as the notice of Dispute issued under Section 17.8.3.1(a), to the extent applicable; shall be signed by the designated representative of the responding Party; and shall constitute a certification by the responding Party that:

(i) The response to the claiming Party's notice of Dispute is served in good faith;

(ii) All supporting information is reasonably believed by the responding Party to be accurate and, except as otherwise reasonably explained in the response, complete; and

(iii) The responding Party disputes the amount of money or other right, remedy or relief to which the claiming Party believes it is entitled.

(b) Neither Party may attempt to seek resolution of a Dispute by the Disputes Board or litigate the merits of any Dispute in court if such Dispute is not timely referred to the Disputes Board within the 15 day time period under Section 17.8.4.2(a) above (except for Ineligible Matters and Disputes for which Developer or TxDOT is entitled to seek relief in court under Section 17.8.1.1(c) or Section 17.8.1.1(e) respectively).

(c) The responding Party shall also assert in its response any challenge it may then have to the Dispute Board's authority to resolve the Dispute if the responding Party then believes in good faith that the Dispute is an Ineligible Matter.

#### **17.8.4.3 Finality of Disputes Board Decision**

Upon completion of the remainder of the procedures required under the Code and the DRP Rules, each Disputes Board Decision shall be final, conclusive, binding upon and enforceable against the Parties.

#### **17.8.5 SOAH Administrative Hearings and Final Orders**

##### **17.8.5.1 Appeal of Disputes Board Decision**

(a) If, within 20 days after the Disputes Board's issuance of the Disputes Board Decision to TxDOT and Developer (the "**Appeal Period**"), either Party is dissatisfied with the Disputes Board Decision due to a good faith belief that Disputes Board Error occurred, (i) Developer may request the Executive Director to seek and/or (ii) TxDOT may seek a formal administrative hearing before SOAH pursuant to Texas Government Code, Chapter 2001, and Section 201.112 of the Code, solely on the grounds that Disputes Board Error occurred. Upon receipt of Developer's request for a formal administrative hearing before SOAH, the Executive Director shall, as a purely ministerial act, refer the matter to SOAH within ten Business Days after receipt of Developer's request.

(b) If Developer does not request, and TxDOT does not seek for itself, a formal administrative hearing before SOAH under Section 17.8.5.1(a) within the Appeal Period, then within ten Business Days after the expiration of the Appeal Period, the Executive Director shall issue the Final Order Implementing Decision as a purely ministerial act. If the Executive Director fails to issue the Final Order Implementing Decision within this ten Business Day time period, the Disputes Board Decision shall become effective as the Final Order Implementing Decision for all purposes on the next Business Day.

(c) Neither Party may attempt to:

(i) Seek an administrative hearing before SOAH on any Dispute after the Appeal Period has expired without either Party seeking an administrative hearing before SOAH;

(ii) Seek rehearing in any forum of a Dispute that is the subject of a Disputes Board Decision after the Appeal Period has expired without either Party seeking an administrative hearing before SOAH; or

(iii) Resubmit to the Disputes Board or litigate in court any Dispute that was the subject of and resolved by a prior final Disputes Board Decision.

##### **17.8.5.2 Appeal of Disputes Board Error to SOAH**

"Disputes Board Error" means one or more of the following:

(a) The Disputes Board failed, in any material respect, to properly follow or apply the procedures for handling, hearing and deciding on the Dispute established under this Section 17.8 and such failure prejudiced the rights of a Party; or

(b) The Disputes Board Decision was procured by, or there was evident partiality among the Disputes Board Members due to, a Conflict of Interest, Misconduct, corruption or fraud.

### **17.8.5.3 SOAH Proceeding and ALJ Proposal For Decision**

(a) Upon referral to SOAH of the question of whether Disputes Board Error occurred, the ALJ shall conduct a hearing solely on the question of whether Disputes Board Error occurred. The Disputes Board's written findings of fact, conclusions of law and Disputes Board Decision; any written dissenting findings, recommendations or opinions of a minority Disputes Board Member; and all submissions to the Disputes Board by the Parties shall be admissible in the SOAH proceeding, along with all other evidence the ALJ determines to be relevant. After timely closing of the record of the SOAH proceeding, the ALJ shall timely issue to the Executive Director and Developer the ALJ's written proposal for decision as to whether Disputes Board Error occurred.

(b) Each Party may file exceptions to the proposal for decision with the ALJ no later than seven days after issuance of the ALJ's proposal for decision and, in response to a Party's exceptions, the other Party may file a reply to the excepting Party's exceptions with the ALJ no later than 14 days after issuance of the proposal for decision. The ALJ shall review all exceptions and replies and notify TxDOT and Developer no later than 21 days after issuance of the proposal for decision whether the ALJ recommends any changes to the proposal for decision, amends the proposal for decision in response to exceptions and replies to exceptions, and/or corrects any clerical errors in the proposal for decision. The ALJ shall reissue its written proposal for decision to the Executive Director and TxDOT, together with written findings of fact and conclusions of law, if revised from those previously furnished to the Parties.

(c) Unless a Party in good faith challenges the Disputes Board's authority to resolve the Dispute because the Dispute is an Ineligible Matter (1) in the proceedings before the Disputes Board, (2) as a Disputes Board Error during the Appeal Period, (3) in the SOAH proceeding or (4) in exceptions to the ALJ's proposal for decision timely filed under Section 17.8.5.3(b) above, any objection to the Disputes Board's authority to resolve the applicable Dispute shall be deemed waived by such Party.

### **17.8.5.4 Final Orders of Executive Director**

(a) Within 28 days after receipt of the ALJ's proposal for decision:

(i) If, upon review of the ALJ's proposal for decision, the Executive Director concludes that Disputes Board Error occurred, the Executive Director shall issue a Final Order Vacating Decision. A "Final Order Vacating Decision" means an order of the Executive Director either adopting or rejecting the ALJ's proposal for decision, as applicable (and if the Executive Director rejects the ALJ's proposal for decision, accompanied by the written explanatory statement required under Section 201.112(c) of the Code); ruling that the Disputes Board Decision is invalid, void and of no force and effect; and remanding the Dispute to the Disputes Board for reconsideration. If the nature of the Disputes Board Error was a Conflict of Interest, Misconduct fraud or corruption of a Disputes Board Member, the remanded Dispute will be reconsidered by a reconstituted Disputes Board after removal of such Disputes Board Member; or

(ii) If, upon review of the ALJ's proposal for decision, the Executive Director concludes that no Disputes Board Error occurred, the Executive Director shall issue a Final Order Implementing Decision. A "Final Order Implementing Decision" means an order of the Executive Director either adopting or rejecting the ALJ's proposal for decision, as applicable (and if the Executive Director rejects the ALJ's proposal for decision, accompanied by the written explanatory statement required under Section 201.112(c) of the Code), and approving and fully implementing the Disputes Board Decision.

(b) The Parties agree and acknowledge that the Executive Director's issuance of either type of Final Order is a purely ministerial function of the Executive Director. If the Executive Director fails to issue one or the other type of Final Order within the foregoing 28 Day time period, then on the next Business Day:

(i) If the ALJ determined that Disputes Board Error occurred, a Final Order Vacating Decision shall be deemed to have been issued for all purposes by the Executive Director which (1) adopted the ALJ's proposal for decision; (2) ruled that the Disputes Board Decision is invalid, void and of no force and effect; and (3) remanded the Dispute to the Disputes Board for reconsideration (or, if the nature of the Disputes Board Error was a Conflict of Interest or Misconduct of a Disputes Board Member, a reconstituted Disputes Board after removal of such Disputes Board Member) without Disputes Board Error; or

(ii) If the ALJ determined that no Disputes Board Error occurred, a Final Order Implementing Decision shall be deemed to have been issued for all purposes by the Executive Director which adopted the ALJ's proposal for decision and fully implemented the Disputes Board Decision.

#### **17.8.6 Judicial Appeal of Final Orders Under Substantial Evidence Rule**

Each issued or deemed issue Final Order Implementing Decision and Final Order Vacating Decisions shall be considered a final order for purposes of Developer's ability to seek judicial appeal thereof under Section 201.112(d) of the Code under the substantial evidence rule. TxDOT and Developer hereby agree that (a) pursuant to Section 2001.144(a)(4) of the Texas Government Code, each Final Order Implementing Decision and Final Order Vacating Decision shall be final (and therefore eligible for appeal under Section 201.112(d) of the Code) on the date such final order is issued or deemed issued by the Executed Director and (b) pursuant to Section 2001.145 of the Texas Government Code, TxDOT and Developer hereby agree that the filing of a motion for rehearing shall not be a prerequisite for appeal of such final orders under Section 201.112(d) of the Code.

#### **17.8.7 Enforcement by Mandamus Action**

Developer shall be entitled to mandamus relief pursuant to Section 22.002(c) of the Texas Government Code if the Executive Director fails to timely seek an administrative hearing before SOAH upon Developer's request or to timely issue a proper and complete Final Order, all of which are identified in this Section 17.8 as ministerial acts required to be performed by the Executive Director.



### **17.8.8 Mediation or Other Alternative Dispute Resolution**

Developer and TxDOT, by mutual agreement, may refer a Dispute (as well as any dispute with a Utility Owner relating to any Utility Adjustment) to mediation or other alternative dispute resolution process for resolution. The Parties shall use diligent efforts to convene and conclude mediation proceedings within 30 days after they agree to refer the Dispute to mediation or other alternative dispute resolution process. Developer and TxDOT shall share equally the expenses of the mediation or other alternative dispute resolution process. If any Dispute has been referred to mediation or other alternative dispute resolution process for resolution by mutual agreement of the Parties, but the Dispute is not resolved within the foregoing 30 day period, then either Party can, on or after the 31<sup>st</sup> day, cease participating in such mediation or other alternative dispute resolution process. A Party shall give written notice to the other Party that it will no longer participate. The deadlines in this Section 17.8 for processing a Dispute are tolled, day for day, during mediation or other alternative dispute resolution.

### **17.8.9 Independent Engineer Evidence**

(a) The Independent Engineer's written evaluations, opinions, findings, reports, recommendations, objections, decisions, certifications or other determinations delivered to the Parties by the Independent Engineer pursuant to the terms of this Agreement (but not items separately delivered to TxDOT pursuant to any other agreement between TxDOT and the Independent Engineer) shall be treated as part of the record under review, shall be admissible in any proceeding before the Disputes Board and shall be accorded substantial weight by the Disputes Board (and, if applicable, any ALJ and court). No Party shall have any right to unilaterally seek, order or obtain from the Independent Engineer and introduce into evidence any further written evaluations, opinions, reports, recommendations, objections, decisions, certifications or other determinations respecting a Dispute after it is first asserted, whether in support or defense of the Party's position on such Dispute. However, either Party and/or the Disputes Board shall have the right to call the Independent Engineer to give oral or written testimony to explain or clarify the Independent Engineer's written evaluations, opinions, findings, reports, recommendations, objections, decisions, certifications or other determinations delivered to the Parties by the Independent Engineer pursuant to the terms of this Agreement.

(b) Wherever in this Agreement or the Technical Requirements it is stated that the Independent Engineer's written evaluations, opinions, findings, reports, recommendations, objections, decisions, certifications or other determinations delivered to the Parties by the Independent Engineer pursuant to the terms of this Agreement are to be given substantial weight in resolving Disputes, such provision does not preempt or substitute for the exercise of independent judgment by the Disputes Board and does not affect each Parties' right to discovery and presentation of other or contradictory evidence, including evidence relevant to the credibility of the Independent Engineer or error, omission, inconsistency, inaccuracy or deficiency by the Independent Engineer in applying the relevant requirements and provisions of the DRP Governed Agreements to the matter that is the subject of the Dispute.

### **17.8.10 Confidential Information**

**17.8.10.1** All discussions, negotiations, and Informal Resolution Procedures between the Parties to resolve a Dispute, and all documents and other written materials furnished to a Party or exchanged between the Parties during any such discussions,

negotiations, or Informal Resolution Procedures, shall be considered confidential and not subject to disclosure by either Party.

**17.8.10.2** With respect to all discussions, negotiations, testimony and evidence between the Parties and/or in a proceeding before the Disputes Board, an administrative hearing before an ALJ or a judicial proceeding in court:

(a) All information that has been deposited in an Intellectual Property Escrow pursuant to Section 22.5 of this Agreement shall be treated as confidential by the Parties and the Disputes Board, the ALJ and the court, as applicable, and, further, shall be subject to a protective order issued by the Disputes Board, the ALJ or the court, as applicable, to protect such information from disclosure to third Persons.

(b) Either or both Parties may also request a protective order in any Disputes Board proceeding, SOAH administrative hearing or judicial proceeding to prohibit disclosure to third Persons of any other information that such Party or Parties believe(s) is confidential. Whether such a protective order will be issued by the Disputes Board, the ALJ or the court, as applicable, shall be determined under the standards set forth in the Texas Rules of Evidence, the Texas Rules of Civil Procedure, Section 223.204 of the Code and the Public Information Act.

#### **17.8.11 Venue and Jurisdiction**

The Parties agree that the exclusive original jurisdiction and venue for any legal action or proceeding, at law or in equity, that is permitted to be brought by a Party in court arising out of the DRP Governed Agreements shall be the district courts of Travis County, Texas or, if applicable, the Supreme Court of Texas.

#### **17.8.12 Continuation of Disputed Work**

At all times during Dispute Resolution Procedures, Developer and all Contractors shall continue with the performance of the Work and their obligations, including any disputed Work or obligations, diligently and without delay, in accordance with this Agreement, except to the extent enjoined by order of a court or otherwise approved by TxDOT in its sole discretion. Developer acknowledges that it shall be solely responsible for the results of any delaying actions or inactions taken during the pendency of resolution of a Dispute relating to the Work under the Dispute Resolution Procedures even if Developer's position in connection with the Dispute ultimately prevails. In addition, during the pendency of resolution of a Dispute relating to the Work under the Dispute Resolution Procedures, the Parties shall continue to comply with all provisions of the DRP Governed Agreements, the Governmental Approvals and applicable Law. Throughout the course of any Work that is the subject of any Dispute that is the subject of Dispute Resolution Procedures, Developer shall keep separate and complete records of any extra costs, expenses, loss of Toll Revenues and/or other monetary effects resulting from the Dispute relating to the disputed Work and/or its resolution under the Dispute Resolution Procedures, and shall permit TxDOT access to these and any other records needed for evaluating the Dispute. Similar access to all such records is also permitted by (or the furnishing of copies to) the Disputes Board. These records shall be retained for a period of not less than one year after the date of resolution of the Dispute pertaining to such disputed Work.

### **17.8.13 Special Provisions for Disputes Over Certain Developer Defaults**

**17.8.13.1** Subject to Section 17.8.13.2, either Party may commence proceedings before the Disputes Board for a declaration of disputed rights and obligations of the Parties respecting a Developer Default or alleged Developer Default that is the subject of a Warning Notice. The Parties acknowledge that such a proceeding is authorized under Section 17.8.3.4 and is within the scope of TxDOT's right to seek equitable relief under Sections 17.3.8 and 17.3.9 and Developer's right to seek declaratory relief under Section 17.6.3.4(c). Developer acknowledges that Section 17.6.3.4 precludes action for injunctive relief (as distinguished from mandamus relief) respecting TxDOT's declaration of, or exercise of remedies for, a Developer Default or alleged Developer Default.

**17.8.13.2** At the option of either Party, and subject to Section 17.8.13.3, the following issues, and only the following issues (together the "Developer Default issues"), shall be designated and handled as a Fast-Track Dispute in any proceedings before the Disputes Board for a declaration of the rights and obligations of the Parties respecting a Developer Default or alleged Developer Default that is the subject of a Warning Notice:

- (a) Whether the alleged Developer Default has occurred;
- (b) Whether the Developer Default is the type for which a Warning Notice may be given under Section 17.2;
- (c) The applicable cure period available under this Agreement to Developer and its Lenders; and
- (d) Whether, as of the decision date of the Disputes Board, Developer or its Lenders has completely cured the Developer Default.

**17.8.13.3** In order to exercise its option to designate and handle the Developer Default issues as a Fast-Track Dispute, Developer shall include written notice of exercise of such option in its written notice of Dispute over such issues given under Section 17.8.3.1. If Developer does not give such written notice of exercise within 15 Days after TxDOT delivers the Warning Notice, Developer's option shall automatically expire.

**17.8.13.4** If either Party elects to handle Developer Default issues as a Fast Track Dispute, then the Informal Resolution Procedures and notice periods shall be abbreviated as described in this Section 17.8 and the Disputes Board shall apply the Expedited Procedures for Fast-Track Disputes set forth in Sections E-1 through E-5 of Attachment 2 to the Disputes Board Agreement to resolve such issues.

### **17.9 Waiver of Consumer Rights**

TXDOT AND DEVELOPER HAVE ASSESSED THEIR RESPECTIVE RIGHTS, LIABILITIES AND OBLIGATIONS UNDER THE TEXAS DECEPTIVE TRADE PRACTICES - CONSUMER PROTECTION ACT, SECTION 17.41 ET. SEQ., BUSINESS & COMMERCE CODE (THE "DTPA"). TXDOT AND DEVELOPER AGREE THAT THE DTPA DOES NOT APPLY TO ANY CLAIM OR DISPUTE UNDER ANY FCA DOCUMENT SINCE THE TRANSACTIONS EVIDENCED BY THE FCA DOCUMENTS INVOLVE A TOTAL CONSIDERATION BY EACH OF TXDOT AND DEVELOPER IN EXCESS OF \$500,000. HOWEVER, IN THE EVENT THE DTPA IS DEEMED TO BE APPLICABLE BY A COURT OF

COMPETENT JURISDICTION, TXDOT AND DEVELOPER HEREBY WAIVE THEIR RIGHTS AGAINST ONE ANOTHER AND AGAINST THE DESIGN-BUILD CONTRACTOR AND ANY DEVELOPER-RELATED ENTITY UNDER THE DTPA, A LAW THAT GIVES CONSUMERS SPECIAL RIGHTS AND PROTECTIONS. AFTER CONSULTATION WITH ATTORNEYS OF THEIR OWN SELECTION, TXDOT AND DEVELOPER VOLUNTARILY CONSENT TO THIS WAIVER. THE PARTIES AGREE THAT THIS SECTION 17.9 CONSTITUTES A CONSPICUOUS LEGEND.

## ARTICLE 18. NONCOMPLIANCE POINTS

### 18.1 Noncompliance Points System

Attachment 1 to Exhibit 20 to this Agreement sets forth a table for the identification of Developer breaches or failures in performance of obligations under the Technical Requirements that may result in the assessment of Noncompliance Points. Noncompliance Points are a system to measure Developer performance levels and trigger the remedies set forth in this Article 18.

### 18.2 Assessment Notification and Cure Process

#### 18.2.1 Notification

**18.2.1.1** The Independent Engineer's duties shall include delivering written notice to TxDOT and Developer immediately upon discovery of the occurrence of any breach or failure specified in Attachment 1 to Exhibit 20. No such notification from the Independent Engineer, standing alone, shall be effective to impose Noncompliance Points, which right is reserved exclusively to TxDOT. The notice also shall set forth the Independent Engineer's recommendation whether to assess Noncompliance Points, and reasoning and analysis in support thereof. Thereafter, TxDOT shall deliver to Developer a written notice of determination.

**18.2.1.2** If TxDOT believes there has occurred any breach or failure to perform as specified in Attachment 1 to Exhibit 20, TxDOT may deliver to Developer and the Independent Engineer written notice thereof setting forth the breach or failure, the applicable cure period and the Noncompliance Points, if any, that TxDOT recommends to be assessed with respect thereto. Within ten days of receiving the notice, the Independent Engineer shall deliver to both Parties written notice setting forth his or her recommendation whether to assess Noncompliance Points, and reasoning and analysis in support thereof. Thereafter, TxDOT shall deliver to Developer a written notice of determination.

#### 18.2.2 Cure Periods

**18.2.2.1** Developer shall have the cure period for each breach or failure set forth in Attachment 1 to Exhibit 20.

**18.2.2.2** For breaches or failures identified by the assessment category "A" in Attachment 1 to Exhibit 20, Developer's cure period with respect to such breach or failure shall be deemed to start upon the date Developer first obtained knowledge of, or first reasonably should have known of, the breach or failure. For this purpose, Developer shall be deemed to first obtain knowledge of the breach or failure not later than the date of delivery of the initial notice to Developer. For breaches or failures identified by the assessment category "B" in attachment 1 to Exhibit 20, Developer's cure period shall be deemed to start upon the

date that the breach or failure occurred, whether or not an initial notice has been delivered to Developer.

**18.2.2.3** Each of the cure periods set forth in Attachment 1 to Exhibit 20, shall be the only cure period for Developer applicable to the breach or failure with respect to the assessment of Noncompliance Points.

### **18.2.3 Notification of Cure**

When Developer determines that it has completed cure of any breach or failure for which it is being assessed Noncompliance Points, Developer shall deliver written notice to TxDOT and the Independent Engineer identifying the breach or failure, stating that Developer has completed cure and briefly describing the cure, including any modifications to the FMP to protect against future similar breaches or failures. Thereafter, the Independent Engineer shall promptly inspect the Facility to verify completion of the cure and, if satisfied that the breach or failure has been cured, shall deliver to TxDOT and Developer a written certification of cure. TxDOT may independently inspect the Facility in order to assure compliance with FHWA requirements and, based upon reasonable investigation, may reasonably accept or reject such written certification. If the Independent Engineer fails to deliver a certification of cure within 30 Days, or if the certification is rejected by TxDOT, any Dispute shall be resolved according to the Dispute Resolution Procedures.

## **18.3 Assessment of Noncompliance Points**

**18.3.1** If at any time TxDOT serves notice of determination under Section 18.2 or notice of Developer breach or failure to perform under this Agreement, then, without prejudice to any other right or remedy available to TxDOT, TxDOT may assess Noncompliance Points in accordance with Exhibit 20, subject to the following terms and conditions.

**18.3.1.1** TxDOT shall not be entitled to assess Noncompliance Points under more than one category for any particular event or circumstance that is a breach or failure. Where a single act or omission gives rise to more than one breach or failure, it shall be treated as a single breach or failure for the purpose of assessing Noncompliance Points, and the highest amount of Noncompliance Points under the relevant breaches or failures shall apply.

**18.3.1.2** The number of points listed in Attachment 1 to Exhibit 20 for any particular breach or failure is the maximum number of Noncompliance Points that may be assessed for each event or circumstance that is a breach or failure, and TxDOT may, but is not obligated to, assess less than the maximum.

**18.3.1.3** If a breach or failure is capable of being remedied but is not fully and completely cured within the applicable cure period, then continuation of such breach or failure beyond such cure period shall be treated as a new and separate breach or failure, without necessity for further notice, for the purpose of assessing Noncompliance Points. Accordingly, a new cure period equal to the prior cure period shall commence upon expiration of the prior cure period, without further notice; and, if applicable, payment of a further amount of liquidated damages under Sections 17.4.3.1 and 17.4.3.2 shall be required. Regardless of the continuing assessment of Noncompliance Points under this Section 18.3.1, TxDOT shall be entitled to exercise its step-in rights under Section 17.3.4 and, if applicable, its work suspension rights under Section 17.3.8, after expiration of the initial cure period available to Developer. However, if and when TxDOT 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 cease to continue accruing with regard to the subject breach or failure.

**18.3.1.4** For breaches or failures identified by the assessment category "A" in Attachment 1 to Exhibit 20, provided that the breach or failure is not cured, Noncompliance Points shall first be assessed at the end of the first cure period, and shall be assessed again at the end of each subsequent cure period as described in Section 18.3.1.3.

**18.3.1.5** For breaches or failures identified by the assessment category "B" in Attachment 1 to Exhibit 20, Noncompliance Points shall first be assessed at the date on which the breach or failure occurred (the start of the first cure period). Provided that the breach or failure is not then cured, Noncompliance Points shall be assessed again at the end of the first and each subsequent cure period, as described in Section 18.3.1.3.

**18.3.2** The Independent Engineer's responsibilities shall include keeping current records of the number of assessed Noncompliance Points and uncured Noncompliance Points, the date of each assessment, and the date when each cure occurs. The Independent Engineer's responsibilities shall include reporting such information to TxDOT and Developer in writing at frequencies specified in the Independent Engineer Agreement and otherwise upon written request from TxDOT or Developer.

#### **18.4 Provisions Regarding Dispute Resolution**

**18.4.1** Developer may object to the assessment of Noncompliance Points or the starting point for the cure period respecting any breach or failure listed in Exhibit 20, by delivering to TxDOT and the Independent Engineer written notice of such objection not later than ten days after the Independent Engineer or TxDOT delivers its written notice of such breach or failure.

**18.4.2** Developer may object to TxDOT's rejection of any certification of completion of a cure given pursuant to Section 18.2.3 by delivering to TxDOT and the Independent Engineer written notice of such objection not later than 15 days after TxDOT delivers its written notice of rejection.

**18.4.3** 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 TxDOT or Independent Engineer notice, and shall be forever barred from challenging them.

**18.4.4** 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.

**18.4.5** Pending the resolution of any Dispute arising under this Section 18.4, the provisions of this Article 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, (c) the starting point or duration of the cure period must be adjusted, or (d) a breach or failure has been cured, then the number of Noncompliance Points assigned or assessed, the uncured Noncompliance Points balance, and the related liabilities of Developer shall be adjusted to reflect such decision.

**18.4.6** Pending the resolution of any Dispute arising under this Section 18.4, the number of Noncompliance Points in Dispute shall not be counted for the purpose of determining whether TxDOT may issue a Warning Notice under Section 17.2.1 for failure to timely submit or comply with the remedial plan.

**18.4.7** The opinion of the Independent Engineer shall receive substantial weight in resolving any Dispute arising under this Section 18.4.

## ARTICLE 19. TERMINATION

### 19.1 Termination for Convenience

**19.1.1** Pursuant to Section 19.1.3, or, under certain circumstances described therein, pursuant to Section 19.1.4, TxDOT may terminate this Agreement and the Lease in whole, but not in part, if TxDOT, in its sole discretion, elects to do so. Any termination of this Agreement by TxDOT that is not pursuant to one of Sections 19.2, 19.3, 19.5 or 19.12 shall be deemed to be a "Termination for Convenience," but not a termination pursuant to Section 19.1.4, for all purposes under this Agreement. Termination of this Agreement and the Lease shall not relieve Developer, TxDOT or any Guarantor or surety of its obligation for any claims arising prior to termination.

**19.1.2** In the event of a Termination for Convenience, Developer will be entitled to compensation determined in accordance with Exhibit 22 to this Agreement. Payment will be due and payable as and when provided in Exhibit 22.

**19.1.3** TxDOT may exercise Termination for Convenience, and such exercise shall be valid and effective, as to terminations other than those described in Section 19.1.4, only after (a) TxDOT delivers to Developer a written Notice of Termination for Convenience specifying the election to terminate and the effective date of such termination and (b) TxDOT pays Developer the Termination Compensation based on the final appraisal report issued pursuant to Section A.3(g) of Exhibit 22 in accordance with the requirements of Section E1 of Exhibit 22.

**19.1.4** TxDOT may, in its sole discretion, elect one time and one time only to exercise the Termination for Convenience pursuant to this Section 19.1.4 during the limited period and for the limited purpose set forth in this Section 19.1.4.

**19.1.4.1** Termination for Convenience under this Section 19.1.4 may be exercised by TxDOT only in order for the Facility to be developed, designed, constructed, operated and/or tolled, directly or through contracts with private firms, by a Governmental Tolling Entity, an entity that is wholly owned by a Governmental Tolling Entity or a local government corporation that is controlled by a Governmental Tolling Entity with no direct or indirect equity ownership by any person that is not a Governmental Tolling Entity; provided that in any such contracts for design, construction or toll operations, the compensation for services shall not include a profit interest directly or indirectly based upon revenues from the operation of the Facility.

**19.1.4.2** TxDOT's exercise of its Termination for Convenience right under this Section 19.1.4 shall be valid and effective only after (a) TxDOT delivers to Developer an irrevocable written notice of Termination for Convenience specifying the election to terminate under this Section 19.1.4 on or before the Section 19.1.4 Termination Deadline and (b) TxDOT

pays Developer the Termination Compensation described in Section A.4 of Exhibit 22 in accordance with the requirements of Section E.5 of Exhibit 22.

**19.1.4.3** In the event that TxDOT delivers a notice of Termination for Convenience pursuant to this Section 19.1.4 and fails to pay the Termination Compensation in accordance with Section E.5 of Exhibit 22, such event shall constitute a TxDOT Default, a Relief Event and a Compensation Event and Developer may, within 30 days thereafter, elect to either (i) pursue its remedies hereunder on the basis of such TxDOT Default, or (ii) continue the performance of its obligations under this Agreement, in which event Developer shall be entitled to seek a schedule adjustment in accordance with Section 13.1 and compensation in accordance with Section 13.2.

**19.1.4.4** If TxDOT exercises its Termination for Convenience right under this Section 19.1.4, the originals of any outstanding Letters of Credit delivered by Developer pursuant to this Agreement shall be delivered to Developer.

**19.1.4.5** In the event that, within ten years after the Termination Date, TxDOT (a) enters into a concession or similar agreement with any entity that is not an Affiliate of Developer, a Governmental Tolling Entity, an entity that is wholly owned by a Governmental Tolling Entity or a local government corporation that is controlled by a Governmental Tolling Entity with no direct or indirect equity ownership by any person that is not a Governmental Tolling Entity, under which agreement the entity receives (i) the right to impose or receive tolls from operation of all or any part of the Facility or (ii) the right to payments from TxDOT in order to earn a rate of return on investment or equity; or (b) issues a request for qualifications or other formal solicitation for such concession or similar agreement, then TxDOT shall pay Developer the Additional Termination Amount, if any, no later than the date of execution and delivery of such concession or similar agreement.

**19.1.4.6** If TxDOT exercises its Termination for Convenience right under this Section 19.1.4, the Fair Market Value of the Developer's Interest as of the date of delivery of TxDOT's notice of Termination for Convenience pursuant to this Section 19.1.4 shall be determined in accordance with the procedures set forth in Section A.3 of Exhibit 22.

## **19.2 Termination for Force Majeure Event or Extended Relief Event**

### **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 under the following circumstances:

**19.2.1.1** A Force Majeure Event or Extended Relief Event has occurred;

**19.2.1.2** Either:

(a) Such notice is delivered before the Service Commencement Date, the period of delay that is directly attributable to the Force Majeure Event or Extended Relief Event and affects a Critical Path for performance and completion of the Construction Work is 270 consecutive days or more, and such delay is not attributable to another concurrent delay; or

(b) Such notice is delivered after the Service Commencement Date, as a direct result of the Force Majeure Event or Extended Relief Event all or substantially all of



the Facility becomes and remains inoperable for a period of 270 consecutive days or more, and such suspension of operations is not attributable to another concurrent delay;

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

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

**19.2.1.5** The written notice sets forth in reasonable detail the Force Majeure Event or Extended Relief Event, a description of the direct result and its duration, and the notifying Party's intent to terminate this Agreement and the Lease.

## **19.2.2 Developer Options Upon TxDOT Notice**

If TxDOT 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 TxDOT written notice of Developer's choice not later than 30 days after TxDOT 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 TxDOT'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** TxDOT shall have no obligation to compensate Developer for any costs of restoration and repair, for any loss of Toll Revenues or for any other Losses arising out of the Force Majeure Event or Extended Relief Event;

**19.2.2.2** If the Force Majeure Event or Extended Relief Event occurred prior to the Service Commencement Date, any further extension of the Service Commencement Deadline, the Long Stop Date or other schedule milestone on account of the Force Majeure Event or Extended Relief Event shall be limited to an additional 95 Days (for a total of 365 Days), notwithstanding any contrary provision of Article 13, and TxDOT may require delivery and implementation of a Facility Recovery Schedule to avoid any additional delay; and

**19.2.2.3** This Agreement and the Lease shall continue in full force and effect and TxDOT's election to terminate shall not take effect.

## **19.2.3 TxDOT Options Upon Developer Notice**

If Developer gives written notice of conditional election to terminate, TxDOT shall have the option either to accept such notice or to continue this Agreement and the Lease in effect by delivering to Developer written notice of TxDOT's choice not later than 30 days after Developer delivers its notice. If TxDOT 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 TxDOT delivers timely written notice choosing to continue this Agreement and the Lease in effect, then:

**19.2.3.1** TxDOT shall be obligated to pay or reimburse Developer an amount equal to:

(a) The incremental increase in Developer's reasonable out-of-pocket costs and expenses to repair and restore any physical damage or destruction to the Facility directly caused by the Force Majeure Event or Extended Relief Event, which shall include, if applicable, any incremental increase in amounts Developer may owe to the Design-Build Contractor under the terms of the Design-Build Contract for (i) costs of repair and restoration and (ii) delay and disruption damages for the period of delay proximately caused by the Force Majeure Event or Extended Relief Event after the date Developer delivers its written notice of conditional election to terminate, which amount shall be due and payable 30 days after TxDOT receives a written, documented invoice therefor, plus

(b) Developer's reasonable extended overhead and administrative expenses for the period of any delay in achieving the Service Commencement Date from and after the date Developer delivers its written notice of conditional election to terminate, plus

(c) The loss of Toll Revenues from and after the date Developer delivers its written notice of conditional election to terminate directly resulting from the Force Majeure Event or Extended Relief Event, determined in the same manner, and subject to the same conditions and limitations, as for a Compensation Event under Section 13.2; minus

(d) The greatest of (i) 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, (ii) 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 Facility 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 (iii) the foregoing costs and losses that Developer is deemed to have self-insured pursuant to Section 16.1.2.2(b)(ii);

**19.2.3.2** Developer's rights to delay and relief from performance obligations under Section 13.1 shall continue to apply to the Force Majeure Event or Extended Relief Event; 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 TxDOT under Section 19.2.3 to keep this Agreement and the Lease in effect shall prejudice or waive TxDOT's right to thereafter give a written notice of conditional election to terminate with respect to the same or any other Force Majeure Event or Extended Relief Event.

#### **19.2.5 Concurrent Notices**

In the event TxDOT 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 Early Termination Date and Amount**

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 as described in Section E.2(c) of Exhibit 22 to this Agreement. Payment will be due and payable as and when provided in Exhibit 22.

### **19.3 Termination for Developer Default**

#### **19.3.1 Developer Defaults Triggering TxDOT Termination Rights**

The following Developer Defaults (each a "Default Termination Event"), and no other Developer Defaults, shall entitle TxDOT, 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 other than the Subordinated Security Documents. Developer agrees and acknowledges and stipulates that any of the following Developer Defaults would result in material and substantial harm to TxDOT'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.

**19.3.1.1** Developer fails to achieve Service Commencement by the latter of (a) the end of the 90-day Warning Notice period set forth in Section 17.2.1.2 and (b) the Long Stop Date, as the same may be extended pursuant to this Agreement;

**19.3.1.2** There occurs any other Developer Default for which TxDOT issues a Warning Notice under Section 17.2 and such Developer Default is not fully and completely cured within the applicable cure period, if any, set forth in Section 17.2.2.2 or available to Lenders under Section 20.4 (or, with respect to a Remedial Plan resulting from Persistent Developer Default, within the applicable cure period available to Developer under Section 17.3.6.2); or

**19.3.1.3** There occurs any Developer Default under Section 17.1.1.13 or 17.1.1.14, subject, if applicable, to lapse of any cure period under Section 17.1.2.7.

#### **19.3.2 Special Provision Regarding Financing Default**

As an additional Default Termination Event, TxDOT, at its sole election, shall be entitled to terminate this Agreement and the Lease, upon delivery of the written notice of default to Developer and Developer's failure to cure as provided in Section 4.1.4.3, if Developer fails to timely satisfy its financing obligation under Section 4.1.4. Such termination shall be effective upon such written notice of termination without need for Warning Notice or any other notice and without any additional cure period. Upon such termination, TxDOT shall be entitled to draw on the letter of credit securing such obligation as set forth in Section 4.1.4.

#### **19.3.3 Compensation to Developer**

Subject to Section 19.7.1.2, if TxDOT issues notice of termination of this Agreement and the Lease due to a Default Termination Event, Developer will be entitled to compensation to the

extent, and only to the extent, provided in Exhibit 22 to this Agreement; provided that in no event shall compensation be due for termination on account of or incident to a Developer Default under Section 17.1.1.13 or 17.1.1.14 or under Section 19.3.2. Payment shall be due and payable as and when provided in Exhibit 22.

#### **19.3.4 Effect of Disputes Board Decision Prior to Termination**

**19.3.4.1** If, prior to expiration of the applicable cure period for an actual or alleged Developer Default that is the subject of a Warning Notice, the Disputes Board renders a final decision declaring that TxDOT lacks the right to terminate for Developer Default by reason of one or more of the Developer Default issues described in Section 17.8.13.3, then TxDOT shall have no right to terminate for such actual or alleged Developer Default unless and until such decision is reversed or vacated (but without prejudice to TxDOT's right to exercise Termination for Convenience in accordance with Section 19.1).

**19.3.4.2** If, prior to expiration of the applicable cure period for an actual or alleged Developer Default that is the subject of a Warning Notice, and that TxDOT believes has not been cured within the applicable cure period, the Disputes Board does not render a final decision described in Section 19.3.4.1, then TxDOT shall have the right to proceed with termination on the basis of the actual or alleged Developer Default that is described in the applicable Warning Notice without awaiting such a final decision or the outcome of any appeal of a Disputes Board decision in favor of TxDOT, and such termination shall be effective on the date designated in TxDOT's notice of termination permitted under Section 19.3.1. No such termination, however, shall prejudice Developer's claims for monetary damages in the event, subsequent to termination, it is finally determined that TxDOT lacked the right to terminate for the actual or alleged Developer Default that is described in the applicable Warning Notice that forms the basis for TxDOT issuing a notice of termination pursuant to Section 19.3.1 (in which case the monetary damages shall be in the amount due for a Termination for Convenience but shall be payable upon final determination of the amount due rather than as a prerequisite to effective termination).

**19.3.4.3** For the purpose of this Section 19.3.4, "final decision" means that the Disputes Board has completed its hearings and proceedings and issued to the Parties a written Disputes Board Decision, together with its written findings of fact and conclusions of law in support of the Disputes Board Decision. "Final decision" does not mean or connote that all or any appeals of the Disputes Board Decision under the Dispute Resolution Procedures have been exhausted or initiated or that any order of the Executive Director has been issued. No interim, interlocutory or partial declaration by the Disputes Board under Section R-35(b) of Attachment 2 to the Disputes Board Agreement regarding TxDOT's right to terminate for Developer Default shall constitute a "final decision" for the purpose of this Section 19.3.4.

#### **19.4 Termination for TxDOT Default or Suspension of Work**

**19.4.1** In the event of a material TxDOT Default under Section 17.5.1.1 (failure to pay money due) that remains uncured following notice and expiration of the applicable cure period under Section 17.5.2, Developer may deliver to TxDOT a further written notice setting forth such TxDOT Default and warning TxDOT that Developer may elect to terminate this Agreement and the Lease if TxDOT does not cure such TxDOT Default within 60 days after the delivery of such notice. TxDOT may avoid termination by effecting cure within such 60-day period. Failing such cure, Developer shall have the right to terminate this Agreement and the Lease, effective immediately upon delivery of written notice of termination to TxDOT. In the event of such

termination, Developer will be entitled to compensation determined in accordance with Exhibit 22 to this Agreement. Payment shall be due and payable as and when provided in Exhibit 22. Any Dispute arising out of the determination of such compensation shall be resolved according to the Dispute Resolution Procedures.

**19.4.2** In the event TxDOT orders Developer to suspend Work on all or any material portion of the Facility for a reason other than those set forth in Section 17.3.8.1 and such suspension of Work continues for a period of 365 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 TxDOT. In the event of such termination, Developer will be entitled to compensation determined in accordance with Exhibit 22 to this Agreement. Payment shall be due and payable as and when provided in Exhibit 22. Any Dispute arising out of the determination of such compensation shall be resolved according to the Dispute Resolution Procedures.

## **19.5 Termination Upon Permanent Injunction or Lack of Custodial Arrangement Date or NEPA Finality Date**

**19.5.1** In the event a permanent injunction is issued against proceeding with, completing or operating the Facility or a substantial portion thereof pursuant to a lawsuit challenging the validity of the NEPA Approval, either Party shall have the right to terminate this Agreement and the Lease effective upon delivering written notice of election to terminate to the other Party. The foregoing excludes injunction resulting from failure by any Developer-Related Entity to locate or design the Facility or carry out the Work in accordance with the NEPA Approval or other Governmental Approval.

**19.5.2** In the event the Custodial Arrangement Date has not occurred by five years after the Effective Date or the NEPA Finality Date has not occurred by five years after the Effective Date, at Developer's request TxDOT and Developer shall promptly engage in good faith negotiations, for a period not exceeding 30 days, to determine whether and on what terms, if any, the Parties are willing to mutually amend the FCA Documents. Neither Party shall be under any obligation to amend. If after such negotiating period the Parties have not agreed to amendments, then either Party thereafter shall have the right to terminate this Agreement and the Lease effective upon delivering written notice of election to terminate to the other Party, provided such notice is delivered prior to the NEPA Finality Date.

**19.5.3** In the event of termination under this Section 19.5, (i) Developer will be entitled to compensation determined in accordance with Exhibit 22 to this Agreement and (ii) TxDOT shall immediately return to Developer the originals of all letters of credit and guarantees provided under Section 17.4.1 or Exhibits 7 or 23.

## **19.6 Termination Procedures and Duties**

Upon expiration of the Term or any earlier termination of this Agreement and the Lease for any reason, including due to TxDOT Default, the provisions of this Section 19.6 shall apply. 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 TxDOT on account of termination.

**19.6.1** In any case where notice of termination precedes the effective Early Termination Date:

**19.6.1.1** Developer shall continue performing the Work in accordance with, and without excuse from, all the standards, requirements and provisions of the FCA Documents, and without curtailment of services, quality and performance;

**19.6.1.2** Not later than 30 days after notice of termination is delivered, and annually thereafter within 30 days after the beginning of each Fiscal Year until the effective Early Termination Date (or rescission or expiration of the notice of termination), Developer shall deliver to the Intellectual Property Escrow for access and review by TxDOT an annual budget for the Facility for the current Fiscal Year in at least as much detail as any budget required by Lenders and Good Industry Practice, together with its annual budgets for the immediately preceding three Fiscal Years and detailed itemization of all costs and expenses for the immediately preceding three Fiscal Years organized by the line items in the budgets;

**19.6.1.3** Each current budget shall provide for operating and maintenance expenditures at least sufficient to continue services and operations at the levels experienced in years prior to notice of termination, taking into account inflationary effects, and in any case consistent with continuing performance to the requirements of the FCA Documents.

**19.6.1.4** At TxDOT's option, it may increase and direct the Independent Engineer to increase the level of its and the Independent Engineer's monitoring, inspection, sampling, measuring, testing, auditing and oversight of the Facility and Developer's compliance with the obligations under this Agreement, to such level as TxDOT reasonably sees fit to protect against curtailment of services, quality and performance, and Developer and TxDOT shall share equally the extra costs of the Independent Engineer;

**19.6.2** Within three days after receipt of a notice of termination, Developer shall meet and confer with TxDOT for the purpose of developing an interim transition plan for the orderly transition of Work, demobilization and transfer of the Facility and Facility Right of Way control to TxDOT. 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. The Parties shall use diligent efforts to complete a final transition plan within 30 days after such date. The transition plan shall be in form and substance acceptable to TxDOT in its good faith discretion and shall include and be consistent with the other provisions and procedures set forth in this Section 19.6, all of which procedures Developer shall immediately follow, regardless of any delay in preparation or acceptance of the transition plan or:

**19.6.3** From and after the Termination Date, even though Developer may be continuing services temporarily pursuant to a transition plan, Developer shall cease to own or have rights to Toll Revenues, except to the extent of any continuing pledge and security interest pursuant to Section 19.11 or the Facility Trust and Security Documents. On the Termination Date, or as soon thereafter as is possible, Developer shall relinquish and surrender full control and possession of the Facility and Facility Right of Way to TxDOT or TxDOT's Authorized Representative, and shall cause all persons and entities claiming under or through Developer to do likewise, in at least the condition required by the Handback Requirements.

**19.6.4** On the later of the Termination Date or the date Developer relinquishes full control and possession, TxDOT shall assume responsibility, at its expense, for the Facility and the Facility Right of Way, subject to any rights to damages against Developer where the termination is due to a Default Termination Event.

**19.6.5** If as of the Termination Date Developer has not completed construction of all or part of the Facility and Utility Adjustments that are part of the Construction Work, TxDOT may elect, by written notice to Developer and the Design-Build Contractor delivered no later than 90 days after the Termination Date, to continue in effect the Design-Build Contract or to require its termination. If TxDOT elects to continue the Design-Build Contract in effect, then Developer shall execute and deliver to TxDOT a written assignment, in form and substance acceptable to TxDOT, acting reasonably, of all Developer's right, title and interest in and to the Design-Build Contract, and TxDOT shall assume in writing Developer's obligations thereunder that arise from and after the Termination Date. If TxDOT elects to require termination of the Design-Build Contract, then Developer shall:

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

**19.6.5.2** Immediately safely demobilize and secure construction, staging, lay down and storage areas for the Facility and Utility Adjustments included in the Construction Work in a manner satisfactory to TxDOT, and remove all debris and waste materials except as otherwise approved by TxDOT in writing;

**19.6.5.3** Take such other actions as are necessary or appropriate to mitigate further cost;

**19.6.5.4** Subject to the prior written approval of TxDOT, which will not be unreasonably withheld, settle all outstanding liabilities and all claims arising out of the Design-Build Contract;

**19.6.5.5** Cause the Design-Build Contractor to execute and deliver to TxDOT a written assignment, in form and substance acceptable to TxDOT, acting reasonably, of all the Design-Build Contractor's right, title and interest in and to (a) all Utility Agreements, assignable agreements with railroads, and other third party agreements and permits, except subcontracts for performance of the Design and Construction Work, and (b) all assignable warranties, claims and causes of action held by the Design-Build Contractor against subcontractors and other third parties in connection with the Facility or the Work, to the extent the Facility or the Work is adversely affected by any subcontractor or other third party breach of warranty, contract or other legal obligation, provided TxDOT assumes in writing all of the Design-Build Contractor's obligations thereunder that arise after the Termination Date; and

**19.6.5.6** Carry out such other directions as TxDOT may reasonably give for termination of Design Work and Construction Work.

**19.6.6** If as of the Termination Date Developer has entered into any other contract for the design, construction, permitting, installation and equipping of the Facility or for Utility Adjustments, excluding the Independent Engineer Agreement, TxDOT shall elect, by written notice to Developer, to continue in effect such contract or to require its termination. If TxDOT elects to continue the contract in effect, then Developer shall execute and deliver to TxDOT a written assignment, in form and substance acceptable to TxDOT, acting reasonably, of all Developer's right, title and interest in and to the contract, and TxDOT shall assume in writing

Developer's obligations thereunder that arise from and after the Termination Date. If TxDOT elects to require termination of the contract, then Developer shall take actions comparable to those set forth in Section 19.6.5 with respect to the contract.

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

**19.6.8** On or about the Termination Date Developer shall execute and deliver to TxDOT a written assignment, in form and substance acceptable to TxDOT, acting reasonably, of all Developer's right, title and interest in and to the Independent Engineer Agreement, and TxDOT shall assume in writing Developer's obligations thereunder that arise from and after the date of assignment.

**19.6.9** Within 30 days after notice of termination is delivered, Developer shall provide TxDOT with 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 or entity on behalf of or for the account of Developer) for use in or respecting the Work or the Facility, or on order or previously completed but not yet delivered from suppliers for use in or respecting the Work or the Facility. In addition, on or about the Termination Date, Developer shall transfer title and deliver to TxDOT or TxDOT's Authorized Representative, through bills of sale or other documents of title, as directed by TxDOT, all such materials, goods, machinery, equipment, parts, supplies and other property, provided TxDOT assumes in writing all of Developer's obligations under any contracts relating to the foregoing that arise after the Termination Date.

**19.6.10** Developer shall take all action that may be necessary, or that TxDOT may reasonably direct, for the protection and preservation of the Facility, the Work and such materials, goods, machinery, equipment, parts, supplies and other property.

**19.6.11** At TxDOT's request, and, in the event of termination for TxDOT Default or Termination for Convenience, at TxDOT's sole cost and expense, Developer shall assist TxDOT, for a reasonable period, with TxDOT's hiring and training of personnel for operation of the Electronic Toll Collection System. Such assistance, if requested, shall include training and instruction on system features and operations, explanation and instruction regarding operating plans, rules, manuals and procedures, on-the-job training and other reasonable measures to enable the personnel being trained to properly and efficiently operate such system.

**19.6.12** On the Termination Date, Developer shall execute, acknowledge and deliver to TxDOT a quitclaim deed, in form and substance acceptable to TxDOT, acting reasonably, quitclaiming all of Developer's right, title, interest and estate in and to the Facility and Facility Right of Way.



**19.6.13** If applicable, on the Termination Date, Developer shall assign, transfer and set over to TxDOT the Handback Requirements Reserve and funds therein in accordance with Section 8.11.4.1.

**19.6.14** On or about the Termination Date, Developer shall execute and deliver to TxDOT the following, together with an executed bill of sale or other written instrument, in form and substance acceptable to TxDOT, acting reasonably, assigning and transferring to TxDOT all of Developer's right, title and interest in and to the following:

**19.6.14.1** All completed or partially completed drawings (including plans, elevations, sections, details and diagrams), specifications, designs, design documents, as-built and record plans, surveys, and other documents and information pertaining to the design or construction of the Facility or the Utility Adjustments;

**19.6.14.2** All samples, borings, boring logs, geotechnical data and similar data and information relating to the Facility or Facility Right of Way;

**19.6.14.3** All books, records, reports, test reports, studies and other documents of a similar nature relating to the Work, the Facility or the Facility Right of Way;

**19.6.14.4** All data and information relating to the use of the Facility by the traveling public or Toll Revenues, including (a) all data compiled or maintained by the Electronic Toll Collection System, whether then maintained on the system or in archives or storage, (b) all customer account information and (c) all studies, reports, projections, estimates and other market research or analysis relating to use of the Facility by the traveling public; and

**19.6.14.5** All other work product and Intellectual Property used or owned by Developer or any Affiliate relating to the Work, the Facility or the Facility Right of Way, except for Proprietary Intellectual Property held in an Intellectual Property Escrow.

**19.6.15** Effective as of the Termination Date, Developer shall assign and transfer to TxDOT all of Developer's right, title and interest in and to customer accounts relating to the Facility and funds credited thereto; provided that:

**19.6.15.1** As soon as reasonably practicable after the Termination Date, the Parties shall adjust and prorate the funds in such accounts, and any other funds collected from Facility customers, as follows:

(a) There shall be credited to Developer any debits to an account for customer use of the Facility prior to the Termination Date, to the extent there were sufficient funds in the account as of the Termination Date to cover the debited amount;

(b) There shall be credited to Developer any sums collected by or on behalf of TxDOT after the Termination Date from a customer respecting a Video Trip or toll violation that occurred prior to the Termination Date, but only net of the application of any sums collected to tolls owing for use of the Facility from and after the Termination Date; and

(c) Any debits to an account for customer use of the Facility from and after the Termination Date, if collected by Developer, shall be remitted to TxDOT; and

**19.6.15.2** TxDOT, by written notice to Developer, may elect not to take over customer accounts of Developer (if any) if TxDOT intends to cease tolls on the Facility following expiration or earlier termination of this Agreement. In such case, Developer shall promptly inform its account customers of the cessation of tolls and of the customer's choice either to cancel the account and receive refund of all unexpended funds or to transfer the account to the custody and control of another operator of any toll facility that has account interoperability with the Facility. The notice shall identify each such other facility and provide contact information for the operators thereof. The notice shall give customers a reasonable period to respond, and shall state that the account will be closed and funds returned unless the customer timely responds with a request to transfer the account. Developer shall thereafter conclude disposition of accounts and account funds in accordance with customer directions.

**19.6.16** Within 90 days after the Termination Date, the Parties shall adjust and prorate costs of operation and maintenance of the Facility, including utility 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 therefor to the other Party not later than 180 days following the Termination Date.

**19.6.17** On or about the Termination Date, Developer shall execute and deliver to TxDOT a written assignment, in form and substance acceptable to TxDOT, 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 used for or relating to the Facility or the Work.

**19.6.18** If Developer holds any lease or rental agreement for any customer service center or customer service outlet serving customers of the Facility, at TxDOT's request, Developer shall execute and deliver to TxDOT on or about the Termination Date a written assignment, in form and substance acceptable to TxDOT, acting reasonably, of such lease or rental agreement and Developer's right, title and interest thereunder, and TxDOT shall assume Developer's obligations thereunder arising from and after the date of assignment. Developer shall assist and cooperate with TxDOT in connection with its investigation and decision regarding any such lease or rental agreement, including providing TxDOT access to the premises for inspection and seeking any consent to assignment required by the landlord.

**19.6.19** On or about the Termination Date, Developer shall execute and deliver to TxDOT a written assignment, in form and substance acceptable to TxDOT, acting reasonably, of all Developer's right, title and interest in and to all warranties, claims (including claims under casualty insurance policies and business interruption insurance policies, but excluding claims under business interruption insurance policies made prior to the Valuation Date and only to the extent these amounts have already taken into account in assessing the Fair Market Value) and causes of action held by Developer against third parties in connection with the Facility or the Work.

**19.6.20** Developer shall otherwise assist TxDOT in such manner as TxDOT may require for a reasonable period following termination, and, in the event of termination for TxDOT Default or

Termination for Convenience, at TxDOT's sole costs and expense, to ensure the orderly transition of design, development, permitting, acquisition, construction, control, management, operation, maintenance, repair, tolling, rehabilitation, reconstruction, restoration, renewal and replacement of the Facility, and shall, if appropriate and if requested by TxDOT, take all steps as may be necessary to enforce the provisions of the Key Contracts pertaining to the surrender of the Facility.

### **19.7 No Separate Terminations of Agreement and Lease**

If for any reason this Agreement is terminated before the Lease is granted, then all right to obtain the Lease shall concurrently cease and terminate. TxDOT 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 in accordance with 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 in accordance with its terms shall also automatically constitute a termination of this Agreement, even if the notice of termination fails to declare a termination of this Agreement.

### **19.8 Effect of Termination**

#### **19.8.1 Cessation of Developer's Interest and Liens and Encumbrances**

Except as provided in Section 19.11 and the Facility Trust and Security Documents, termination of this Agreement and the Lease 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 Facility, the Facility Right of Way, the Toll Revenues and the Handback Requirements Reserve, 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 but not limited to the liens, pledges, assignments, collateral assignments, security interests and encumbrances of any and all Funding Agreements and Security Documents. In order to confirm the foregoing, at TxDOT's request, Developer shall promptly obtain and deliver to TxDOT recordable reconveyances, releases and discharges of all Security Documents, executed by the Lenders, but no such reconveyances, releases and discharges shall be necessary to the effectiveness of the foregoing.

#### **19.8.2 Facility Trust Agreement**

Except as provided otherwise in Section 19.11 and the Facility Trust and Security Documents, the Facility Trust Agreement, Facility Trust Fund and Developer's security interests in the Revenue Share Amount, the Developer Claims Account and the Post-Termination Revenue Account, together with all direct agreements with the custodian of accounts for TxDOT clearinghouse functions (if any), shall cease and terminate at the end of the Term, at which time the trustee shall distribute to the Party entitled thereto all funds remaining in each account.

#### **19.8.3 Contracts and Agreements**

Regardless of TxDOT's prior actual or constructive knowledge thereof, and except for the Facility Trust Agreement and direct agreements with the custodian of accounts for TxDOT clearinghouse functions should they survive the Termination Date, no contract or agreement to which Developer is a party as of the Termination Date shall bind TxDOT, unless TxDOT elects

to assume such contract or agreement in writing. Except in the case of TxDOT's express written assumption, no such contract or agreement shall entitle the contracting party to continue performance of work or services respecting the Facility following Developer's relinquishment to TxDOT of possession and control of the Facility, or to any claim, legal or equitable, against TxDOT.

## **19.9 Liability After Termination; Final Release**

**19.9.1** 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.

**19.9.2** Subject to Sections 19.6.15 and 19.6.16, if this Agreement is terminated under Section 19.1, 19.2, 19.3.1, 19.4 or 19.5, then TxDOT's payment to Developer of the amounts required thereunder (if any) shall constitute full and final satisfaction of, and upon payment TxDOT 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 TxDOT arising out of or relating to this Agreement or the Lease or termination thereof, or the Facility. Upon such payment, Developer shall execute and deliver to TxDOT all such releases and discharges as TxDOT 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.

## **19.10 Exclusive Termination Rights**

This Article 19, together with the express provisions on termination set forth in Sections 17.3.1, 17.6.1 and Article 20 and in the Lease, contain the entire and exclusive provisions and rights of TxDOT and Developer regarding termination of this Agreement and the Lease, and any and all other rights to terminate at law or in equity are hereby waived to the maximum extent permitted by Law.

## **19.11 Covenant to Continue Tolling Facility**

In the event there exists as of the expiration of the Term or an Early Termination Date any outstanding unpaid amount owing from TxDOT to Developer, or any outstanding, unsatisfied Claim for sums owing from TxDOT to Developer, including any unpaid Termination Compensation, the terms and conditions of this Section 19.11 shall apply, and shall survive termination.

**19.11.1** TxDOT shall continue to operate and maintain the Facility, or cause it to be operated and maintained, as a tolled facility to the same or substantially equivalent standards as required of Developer under this Agreement.

**19.11.2** TxDOT shall set, adjust, impose and collect tolls and charges at rates and with User Classifications comparable to those for Comparable Limited Access State Highways that are tolled facilities, whether operated by TxDOT or any other Person, but in no event at rates and charges less than those in effect during the 12-month period preceding termination, subject to the limits established under Exhibit 4.

**19.11.3** TxDOT shall cause all tolls and additional charges to Users for Video Trips to be transferred into the Post-Termination Revenue Account under the Facility Trust Agreement;

and Developer shall have and retain a continuing perfected lien on, pledge of and security interest in the Post-Termination Revenue Account and the funds therein, other than Incidental Charges, pursuant to the security instruments executed and delivered by the Parties on the Effective Date, until all amounts due are paid in full.

**19.11.4** All direct agreements and other arrangements by Developer with any custodian of accounts for TxDOT clearinghouse functions shall remain in effect.

**19.11.5** The provisions of Section 10 of Exhibit 14 shall remain in effect.

**19.11.6** Pursuant to the terms of the Facility Trust Agreement, TxDOT shall have the right to (i) draw from the revenues deposited under the Facility Trust Agreement to pay as and when incurred TxDOT's reasonable and documented operating and maintenance costs and expenses respecting the Facility, (ii) fund subaccounts of the Facility Trust Fund for reasonable reserves for costs of reconstruction, rehabilitation, renewal and replacement of the Facility; and (iii) draw from the revenues deposited into such subaccounts TxDOT's reasonable documented costs of reconstruction, rehabilitation, renewal and replacement of the Facility.

**19.11.7** Pursuant to the terms of the Facility Trust Agreement, for undisputed amounts due Developer, Developer shall be entitled to monthly distributions of all revenues held under the Facility Trust Agreement net of TxDOT's permitted draws for such costs and expenses and net of such permitted reasonable reserves, until the undisputed amounts are paid in full.

**19.11.8** For disputed amounts due Developer, such net revenues shall continue to be held in trust under the Facility Trust Agreement until final, nonappealable decisions are rendered on all disputed amounts. TxDOT may apply, through the Dispute Resolution Procedures, for limitations on the amount so held in trust to the extent the Disputes Board or other applicable decision making body decides that any disputed portion of the Claim has no reasonable likelihood of award. The amounts of any final, nonappealable awards shall be funded in the same manner as undisputed amounts under Section 19.11.7 until paid in full.

**19.11.9** At such time as all amounts due Developer are paid in full, or at any earlier date that the funds held in trust, net of such costs, expenses and reserves, are sufficient to pay disputed and undisputed amounts that are outstanding, TxDOT's obligation to operate the Facility as a tolled facility shall cease, pursuant to the terms of the Facility Trust Agreement TxDOT's right to make withdrawals from the Post-Termination Revenue Account shall be restricted (subject to Section 19.11.8) to preserve the disputed or undisputed amounts that are outstanding, tolls or additional charges to Users for Video Trips thereafter collected by TxDOT shall not be subject to the provisions of this Section 19.11 nor subject to any pledge, lien, security interest or encumbrance in favor of Developer or any Lender, and TxDOT and Developer, promptly upon the other Party's request, shall execute such certificates, releases and other documents as the other Party reasonably requests to confirm the foregoing.

**19.11.10** At such time as all amounts payable to Developer are paid in full to Developer, the balance held under the Facility Trust Agreement, if any, shall be immediately distributed to TxDOT and the Facility Trust Agreement, Facility Trust Fund and Developer's security interests in the Post-Termination Revenue Account, together with all direct agreements with the custodian of accounts for TxDOT clearinghouse functions (if any), shall cease and terminate.

## **19.12 Termination by Court Ruling**

**19.12.1** Except in the circumstances described in Section F.3 or Section F.4 of Exhibit 22, termination by Court Ruling means, and becomes effective upon, (i) issuance of a final order by a court of competent jurisdiction to the effect that this Agreement, the Lease and the Principal Facility Documents are void and/or unenforceable in their entirety, or (ii) under the circumstances described in Section 24.14.2 or Section 24.14.4. The final court order shall be treated as the notice of termination.

**19.12.2** Once Termination by Court Ruling becomes effective, TxDOT and Developer shall cooperate to implement Sections 19.6, 19.7, 19.8, 19.9 and 19.11.

**19.12.3** Notwithstanding Section 19.12.2, if a Termination by Court Ruling occurs, Developer shall be entitled to compensation to the extent, and only to the extent, provided in Exhibit 22 to this Agreement.

## **ARTICLE 20. LENDERS' RIGHTS**

### **20.1 Conditions and Limitations Respecting Lenders' Rights**

**20.1.1** No Security Document shall be valid or effective, and no Lender shall be entitled to the rights, benefits and protections of this Article 20, unless the Security Document, other related Security Documents and related Funding Agreements strictly comply with Section 4.3.

**20.1.2** No 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 20, unless the Refinancing is in compliance with Section 4.4.3.1.

**20.1.3** No Funding Agreement or Security Document shall be binding upon TxDOT 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 20, unless and until (i) 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, has been deposited into the Intellectual Property Escrow and (ii) TxDOT has received 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 TxDOT unless and until TxDOT 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, has been deposited into the Intellectual Property Escrow and TxDOT has received 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 TxDOT unless and until TxDOT 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.

**20.1.4** No Lender shall be entitled to the rights, benefits and protections of this Article 20 unless the Funding Agreements in favor of the Lender are secured by senior or first tier subordinate Security Documents. For avoidance of doubt, no Lender holding Facility Debt

secured by a Subordinated Security Document shall have any rights, benefits or protections under this Article 20.

**20.1.5** A Lender shall not, by virtue of its Funding Agreement or Security Document, acquire any greater rights to or interest in the Facility, the Lease or Toll Revenues than Developer has at any applicable time under this Agreement, other than the provisions in this Article 20 for the specific protection of Lenders.

**20.1.6** All rights acquired by Lenders under any Funding Agreement or Security Document shall be subject to the provisions of this Agreement and the Lease and to the rights of TxDOT hereunder and thereunder.

**20.1.7** The following provisions of this Article 20 shall apply only to Security Documents, and the Lenders thereunder, that comply with Sections 20.1.1, 20.1.2, 20.1.3 and 20.1.4. None of the following provisions of this Article 20 shall be construed inconsistently with the provisions of this Section 20.1. The provisions of this Article 20 that are binding on TxDOT shall inure only to the benefit of such Lenders, and create no rights in favor of Developer.

## **20.2 Effect of Amendments**

While any Security Document is in effect, no agreement between TxDOT and Developer for the modification or amendment of this Agreement or the Lease that in any way could 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.

## **20.3 Notices to Collateral Agent**

As long as any Security Document shall remain unsatisfied of record, TxDOT shall promptly provide the Collateral Agent with a copy of any notice it sends to Developer concerning an actual or potential breach of this Agreement or the Lease or an actual or potential Developer Default, including any Warning Notice, and any notice it sends to Developer, the Design-Build Contractor or any O&M Contractor of default by the Design-Build Contractor or any O&M Contractor under the Design-Build Contract or O&M Contract.

## **20.4 Opportunity to Cure and Step-In**

As long as any Security Document shall remain unsatisfied of record, the following provisions shall apply with respect to any such Security Document and the related Lender or Lenders and Funding Agreements.

**20.4.1** Should any Developer Default occur which would either immediately or, following the applicable cure period or the giving of notice or both, constitute a Default Termination Event enabling TxDOT to terminate or suspend its obligations under this Agreement, TxDOT shall not terminate this Agreement or the Lease until it first delivers to the Collateral Agent a Warning Notice and provides the Collateral Agent a reasonable opportunity to cure such Developer Default, as provided below, provided that no opportunity to cure beyond that provided to Developer shall be required for failure of Developer to timely deliver or perform any remedial plan required under Section 17.3.6, and neither a Warning Notice nor opportunity to cure shall be required for a Developer Default under Section 17.1.1.13 or 17.1.1.14. The Lender shall have the right (but not the obligation) to remedy such Developer Default or cause the same to be remedied by its Substituted Entity; and TxDOT shall accept such performance

by or at the instigation of the Lender or Substituted Entity as if the same had been done by Developer.

**20.4.2** If such Developer Default consists of Developer's failure to pay a monetary obligation, the Collateral Agent may cure such Developer Default by paying all amounts due within 30 days after TxDOT delivers the Warning Notice to the Collateral Agent (such 30-day period to be in addition to any cure period provided to Developer). If cure is not effected within such 30-day period, TxDOT may proceed to terminate this Agreement and the Lease without further notice to, or opportunity to cure by, the Lender.

**20.4.3** If the Developer Default consists of Developer's failure to achieve Service Commencement by the Service Commencement Deadline, as the same may be extended pursuant to this Agreement, then the Collateral Agent shall have until the latter of (a) the end of the 90 day Warning Notice period set forth in Section 17.2.1.2 and (b) the Long Stop Date, as the same may be extended pursuant to this Agreement, to achieve or cause Developer to achieve Service Commencement. If Service Commencement is not achieved by such date, TxDOT may proceed to terminate this Agreement and the Lease without further notice to, or opportunity to cure by, the Lender.

**20.4.4** As to each Developer Default, other than the failure to pay a monetary obligation, other than the failure to achieve Service Commencement by the Service Commencement Deadline and other than Developer Defaults governed by Section 20.4.7, the Collateral Agent shall have the same period to cure as is available to Developer under Section 17.2.2, plus 30 days from receipt by the Collateral Agent of a Warning Notice or Notice of Default, whichever is later. If no cure period is available to Developer, then the Collateral Agent's cure period shall be 30 days. However, such period to cure shall be extended if the default is capable of being corrected without having possession of the Facility but cannot reasonably be corrected within such cure period and the Collateral Agent or the Substituted Entity begins meaningful steps to correct such matter within 30 days after TxDOT delivers the Warning Notice and thereafter prosecutes the cure to completion with good faith, diligence and continuity, in any event not to exceed a cure period of that available to Developer under Section 17.2.2 plus 180 days.

**20.4.5** The Collateral Agent shall have the right to postpone and extend the time to cure any Developer Default governed by Section 20.4.4 capable of being cured only through possession of the Facility if the Collateral Agent shall:

**20.4.5.1** Within the cure period available therefor under Section 20.4.2, cure all Developer Defaults which may be cured by the payment of a sum of money, and within the cure period available therefor under Section 20.4.4, undertake to cure any other Developer Default governed by Section 20.4.4 then existing or thereafter occurring and capable of being cured without possession;

**20.4.5.2** Continue to pay when due all fees, rent and other amounts due from Developer under this Agreement or the Lease;

**20.4.5.3** Not later than 30 days after receiving the Warning Notice, initiate and thereafter pursue with good faith, diligence and continuity lawful processes and steps to obtain possession, custody and control of the Facility; and



**20.4.5.4** Promptly execute all documents reasonably requested by TxDOT affecting the transactions contemplated by this Section and this Agreement.

**20.4.6** The Collateral Agent shall exercise the right provided in Section 20.4.5 by giving TxDOT written notice of the exercise of the same 30 days after TxDOT delivers to the Collateral Agent the Warning Notice. If the Collateral Agent shall have obtained possession diligently and with continuity, and in any event within 180 days after such written notice to TxDOT, shall have delivered to TxDOT within 15 days after obtaining possession an assumption in writing of all duties, obligations and liabilities of Developer under this Agreement and the Lease, and shall have thereafter diligently and with continuity cured all Developer Defaults which are capable of being cured through possession, then the Developer Default shall be removed, this Agreement and the Lease shall not be terminated, and the Lender or the Substituted Entity shall succeed to the Developer's Interest. In connection with any Developer Default or any condition imposed upon Developer to exercise any rights contained in this Agreement which cannot be cured or performed until the Collateral Agent obtains possession, the Collateral Agent shall have a time after it obtains possession as may be necessary with exercise of good faith, diligence and continuity to cure such Developer Default or perform such condition, in any event not to exceed 120 days after the date it obtains possession.

**20.4.7** If the Developer Default is peculiar to Developer and is not curable by the Collateral Agent regardless of whether it obtains possession or control of the Facility, such as a Developer Default under Section 17.1.1.13 or 17.1.1.14, or if the Developer Default is a failure to timely deliver and perform a remedial plan required under Section 17.3.6, then TxDOT may terminate this Agreement and the Lease without providing a cure period to any Lender.

**20.4.8** If TxDOT terminates this Agreement and the Lease under Section 20.4.7 for inability of the Collateral Agent, despite diligent, continuous efforts, to obtain possession within 180 days, or under Section 20.4.7, then TxDOT shall promptly deliver to the Collateral Agent pursuant to the notice provisions of this Agreement written notice of the termination and a statement of any and all sums which would at that time be due under this Agreement and the Lease then known to TxDOT. Thereafter the Collateral Agent or its Substituted Entity, to the extent then permitted by Law, shall have the option to obtain a new facility concession agreement and new facility lease (together the "New Agreements") in accordance with and upon the following terms and conditions:

**20.4.8.1** In order to exercise such option, the Collateral Agent must deliver to TxDOT, within 30 days after TxDOT delivers its written notice of termination, (a) a request for New Agreements, (b) a written commitment that the Collateral Agent (or its Substituted Entity) will enter into the New Agreements and pay all the amounts described in Section 20.4.8.4, and (c) originals of such New Agreements, duly executed and acknowledged by the Collateral Agent (or its Substituted Entity). If any of the foregoing is not delivered within such 30-day period, the option in favor of the Collateral Agent (and all related Lenders) shall automatically expire;

**20.4.8.2** Within 30 days after timely receipt of the written notice, written commitment and New Agreements duly executed, TxDOT shall enter into the New Agreements with the Collateral Agent or its Substituted Entity, subject to any extension of such 30-day period as TxDOT deems necessary to clear any claims of Developer to continued rights and possession;

**20.4.8.3** The New Agreements shall be effective as of the date of termination of this Agreement and the Lease and shall be for the remainder of the term of this

Agreement and the Lease, at the rent and upon the terms, covenants, and conditions contained in this Agreement and the Lease; and

**20.4.8.4** Upon the execution and as conditions to the effectiveness of the New Agreements, the Collateral Agent or its Substituted Entity shall perform all of the following:

(a) Pay to TxDOT any and all sums which would, at the time of the execution of the New Agreements, be due under this Agreement or the Lease but for such termination;

(b) Otherwise fully remedy any existing Developer Defaults under this Agreement or the Lease (provided, however, that with respect to any Developer Default which cannot be cured until the Collateral Agent or its Substituted Entity obtains possession, it shall have such time, after it obtains possession, as is necessary with the exercise of good faith, diligence and continuity to cure such default, in any event not to exceed 120 days after the date it obtains possession); and

(c) Pay to TxDOT all reasonable costs and expenses, including TxDOT's Recoverable Costs, incurred by TxDOT in connection with (i) such default and termination, (ii) the assertion of rights, interests and defenses in any bankruptcy proceeding, (iii) the recovery of possession of the Facility, (iv) all TxDOT activities during its period of possession of, and respecting, the Facility, including permitting, design, acquisition, construction, equipping, maintenance, operation and management activities, and (v) the preparation, execution, and delivery of such New Agreements. Upon request of the Collateral Agent or Substituted Entity, TxDOT will provide a written, documented statement of such costs and expenses.

**20.4.8.5** Upon execution of the New Agreements and payment of all sums due TxDOT, TxDOT shall (a) assign and deliver to the Collateral Agent or its Substituted Entity, without warranty or representation, all the property, contracts, documents and information that Developer may have assigned and delivered to TxDOT upon termination of this Agreement pursuant to Section 19.6, and (b) if applicable, transfer into a new Handback Requirements Reserve established by the Collateral Agent or Substituted Entity in accordance with this Agreement, all funds TxDOT received from the Handback Requirements Reserve pursuant to Section 8.11.4.1 (or from draw on a Handback Requirements Letter of Credit) less so much thereof that TxDOT spent or is entitled to as reimbursement for costs of Renewal Work TxDOT performed prior to the effectiveness of the New Agreements.

**20.4.8.6** The New Agreements shall run for the remainder of the term of this Agreement and the Lease. The New Agreements shall otherwise contain the same covenants, terms and conditions and limitations as this Agreement and the Lease (except for any requirements which have been fulfilled by Developer prior to termination and except that Section 15.1 (and any equivalent provisions of the Lease) shall be revised to be particular to the Collateral Agent or its Substituted Entity).

**20.4.8.7** If the holders of more than one Security Document make written requests upon TxDOT for New Agreements in accordance with this Section 20.4.8, TxDOT shall grant the New Agreements to, as applicable, the holder whose Security Document was the earliest to be recorded or filed (unless otherwise agreed in writing by such holder); and thereupon the written requests of each holder whose Security Document was recorded or filed later shall be deemed to be void. In the event of any dispute or disagreement as to the

respective priorities of any such Security Documents, the certification or assurance as to such priorities by any reputable title insurance company doing business in the State shall be conclusively binding upon all parties concerned.

**20.4.8.8** The provisions of this Section 20.4.8 shall survive the termination of this Agreement and shall continue in full force and effect thereafter to the same extent as if this Section were a separate and independent contract made by TxDOT and the Lender.

**20.4.9** Any curing of any Default Termination Event 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 FCA Documents or any Principal Facility Documents, except with respect to the work, services or actions taken or performed by or on behalf of the Collateral Agent.

**20.4.10** Nothing in this Section 20.4 or elsewhere in this Agreement shall preclude or delay TxDOT from exercising any remedies other than termination of this Agreement and the Lease due to Developer Default, including TxDOT's rights to cure the Developer Default at Developer's expense and to remove and replace Developer.

## **20.5 Forebearance**

**20.5.1** TxDOT, as a third party beneficiary under the Design-Build Contract or the O&M Contract, shall forbear from exercising remedies against the Design-Build Contractor or any O&M Contractor if (a) Developer or the Collateral Agent commences the good faith, diligent exercise of remedies available to Developer under the Design-Build Contract or O&M Contract within 15 days after TxDOT delivers written notice to Developer and the Collateral Agent of default by the Design-Build Contractor or any O&M Contractor, and (b) thereafter continues such good faith, diligent exercise of remedies until the default is cured.

**20.5.2** At TxDOT's reasonable request from time to time, Developer shall provide to TxDOT written reports on the status of any such default, cure and exercise of remedies.

## **20.6 Substituted Entities**

**20.6.1** 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 properly 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 approved by TxDOT. TxDOT shall have no obligation to recognize any claim to the Developer's Interest by any person or entity that has acquired the 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 approved by TxDOT.

**20.6.2** 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 TxDOT approval, upon delivery to TxDOT 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 TxDOT certifying, representing and warranting such ownership.

**20.6.3** TxDOT shall have no obligation to approve a person or entity as a Substituted Entity unless the Lender demonstrates 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 FCA Documents and Principal Facility Documents and (b) the proposed Substituted Entity and its contractors are in compliance with TxDOT's rules, regulations and adopted written policies regarding organizational conflicts of interest. TxDOT will approve or disapprove a proposed Substituted Entity within 30 days after it receives from the Lender a request for approval together with (a) 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 TxDOT may request, and (b) such evidence of organization, authority, incumbency certificates, certificates regarding debarment or suspension, and other certificates, representations and warranties as TxDOT may reasonably request. TxDOT 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 TxDOT requests for qualifications for concession or similar agreements for comparable projects and facilities. If for any reason TxDOT does not act within such 30-day period, or any extension thereof by mutual agreement of TxDOT and the Lender, TxDOT shall be deemed to disapprove.

**20.6.4** A Lender may request approval of more than one Substituted Entity. A Lender may request approval at any time or times. Any approval by TxDOT of a Substituted Entity shall expire one year after the approval is issued, unless within such one-year period the Substituted Entity has succeeded to the Developer's Interest. TxDOT may revoke an approval if at any time prior to succeeding to the Developer's Interest the Substituted Entity ceases to be in compliance with TxDOT's rules and regulations regarding organizational conflicts of interest.

## **20.7 Receivers**

**20.7.1** The appointment of a receiver at the behest of Developer shall be subject to TxDOT's prior written approval in its sole discretion. The appointment of a receiver at the behest of any Lender not in compliance with Sections 20.1.1, 20.1.2, 20.1.3 and 20.1.4 shall be void and may be challenged by TxDOT in any proceeding. The appointment of a receiver at the behest of any Lender in compliance with Sections 20.1.1, 20.1.2, 20.1.3 and 20.1.4 shall be subject to the following terms and conditions:

**20.7.1.1** TxDOT's prior approval shall not be required for the appointment of the receiver or the selection of the person or entity to serve as receiver;

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

**20.7.1.3** TxDOT may appear in any such proceeding to challenge the selection of the person or entity to serve as receiver, but waives any other right to oppose the appointment of the receiver; and

**20.7.1.4** TxDOT may at any time seek an order for replacement of the receiver by a different receiver.

**20.7.2** No receiver appointed at the behest of Developer or any Lender shall have any power or authority to replace the Design-Build Contractor or any O&M Contractor except by reason of default or unless the replacement is a Substituted Entity approved by TxDOT.

## **20.8 Other Lender Rights**

**20.8.1** In addition to all other rights herein granted, the Lender shall have the right to be subrogated to any and all rights of Developer under this Agreement and the Lease with respect to curing any Developer Default. TxDOT shall permit the Collateral Agent and its Substituted Entity the same access to the Facility and Facility Right of Way as is permitted to Developer hereunder. TxDOT 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 Facility and Facility Right of Way and to perform all acts required to be performed herein, in the Lease, and in any Principal Facility Document, but only in the event of a Developer Default or a default under the Lender's Funding Agreement or Security Document. TxDOT shall accept any such performance by the Collateral Agent as though the same had been done or performed by Developer.

**20.8.2** The creating or granting of a Security Document shall not be deemed to constitute an assignment or transfer of this Agreement, the leasehold estate under the Lease or the Developer's Interest, nor shall any Lender, as such, be deemed to be an assignee or transferee of this Agreement, the leasehold estate under the Lease or the 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 the leasehold estate under the Lease or the 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 personally liable under the provisions of this Agreement or the Lease unless and until such time as the Lender or such owner becomes the owner of the Developer's Interest. Upon any permitted assignment of this Agreement, the Lease and the Developer's Interest by a Lender or any owner of the 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 TxDOT a recordable instrument of assumption as required under Section 21.4.

**20.8.3** Lender or the Collateral Agent may exercise its rights and remedies under a Security Document with respect to all, but not less than all, of the Developer's Interest.

**20.8.4** The exercise by a Lender of its rights with respect to the Developer's Interest under its Security Documents, this Article 20, 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, shall not require the consent of TxDOT or constitute a breach of any provision of or a default under the FCA Documents. The foregoing does not affect the obligation to obtain approval of persons or entities as Substituted Entities pursuant to Section 20.6.

**20.8.5** Whenever TxDOT or Developer obtains knowledge of any condemnation proceedings by a third party affecting the Facility or Facility Right of Way, it shall promptly give notice thereof to each Lender. Each Lender shall have the right to intervene and be made a party to any such condemnation proceedings, and TxDOT and Developer do hereby consent that each Lender may be made such a party or an intervener.

## **20.9 Estoppel Certificates and Consent**

**20.9.1** At any time and from time to time, within 15 days after written request of any Lender or proposed Lender, TxDOT, without charge, shall (a) consent to (i) the exercise by any Lender of its rights under and in accordance with this Article 20 in the event of a Developer Default and (ii) a pledge by Developer of its rights under this Agreement to any Lender or proposed Lender and (b) certify to its best knowledge by written instrument duly executed and acknowledged, to any Lender or proposed Lender as follows:

**20.9.1.1** 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;

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

**20.9.1.3** As to the existence of any Developer Default;

**20.9.1.4** As to the existence of events which, by the passage of time or notice or both, would constitute a Developer Default;

**20.9.1.5** As to the then accumulated amount of Noncompliance Points;

**20.9.1.6** As to the existence of any claims by TxDOT regarding this Agreement;

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

**20.9.1.8** As to whether a specified acceptance, approval or consent of TxDOT called for under this Agreement has been granted;

**20.9.1.9** Whether any Lender or group of Lenders and their Security Documents, or any proposed Lender or proposed group of Lenders and their proposed Funding Agreements and Security Documents, meet the conditions and limitations set forth in Section 4.3 and Section 20.1; and

**20.9.1.10** As to any other matters of fact as may be reasonably requested.

**20.9.2** TxDOT 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 TxDOT either before the Substituted Entity or proposed Substituted Entity succeeds to the Developer's Interest or within 60 days after the Substituted Entity has succeeded to the Developer's Interest.

**20.9.3** 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 TxDOT.

## **20.10 No Surrender**

No mutual agreement to cancel or surrender this Agreement or the Lease shall be effective unless consented to in writing by the Collateral Agent, which consent Developer shall be solely responsible to obtain.

## **ARTICLE 21. ASSIGNMENT AND TRANSFER**

### **21.1 Restrictions on Assignment, Subletting and Other Transfers**

**21.1.1** Developer shall not voluntarily or involuntarily sell, assign, convey transfer, pledge, mortgage or otherwise encumber the Developer's Interest or any portion thereof without TxDOT's prior written approval, except:

**21.1.1.1** To Lenders for security as permitted by this Agreement, provided Developer retains responsibility for the performance of Developer's obligations under the FCA Documents;

**21.1.1.2** To any Lender affiliate that is a Substituted Entity or to any other Substituted Entity approved by TxDOT; provided that such Substituted Entity assumes in writing full responsibility for performance of the obligations of Developer under this Agreement, the Lease, the other FCA Documents, and the Principal Facility Documents arising from and after the date of assignment; or

**21.1.1.3** To any entity that is under the same ultimate management control as Developer and in which the applicable percent of equity interest set forth in Section 21.2.1 is held during the applicable period by the Persons specified in Section 21.2.1.

**21.1.2** Developer shall not sublease or grant any other special occupancy or use of the Facility to any other Person that is not in the ordinary course of Developer performing the Work, without TxDOT's prior written approval.

**21.1.3** 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 TxDOT, at its option, may, by Warning Notice, declare any such attempted action to be a material Developer Default.

### **21.2 Restrictions on Change of Control**

**21.2.1** The members of Developer that on the Effective Date exercise management control over Developer (each an "Initial Controlling Member"), shall at all times until at least two years after the Service Commencement Date maintain and exercise between them effective management control of Developer and ownership of at least 50% of the equity interest in Developer. Until at least two years after the Service Commencement Date, each Initial Controlling Member shall retain ownership of no less than 50% of the equity interest in Developer that such Initial Controlling Member held on the Effective Date. For the avoidance of doubt, "equity interest" as used herein means a unit of ownership in Developer. Thereafter, any

Change of Control of Developer shall be subject to TxDOT's prior written approval, in accordance with Section 21.3.

**21.2.2** If there occurs any voluntary or involuntary Change of Control without TxDOT's prior written approval, TxDOT, at its option, may, by Warning Notice, declare it to be a material Developer Default.

### **21.3 Standards and Procedures for TxDOT Approval**

**21.3.1** Where TxDOT's prior approval is required for a proposed sale, assignment, conveyance, transfer, pledge, mortgage, encumbrance, sublease or grant of other special occupancy or use, or for any proposed Change in Control, and such transaction is proposed at any time during the period ending two years after the Service Commencement Date, TxDOT may withhold or condition its approval in its sole discretion. Any such decision of TxDOT to withhold consent shall be final, binding and not subject to the Dispute Resolution Procedures.

**21.3.2** Thereafter, TxDOT shall not unreasonably withhold its approval thereto. Among other reasonable factors and considerations, it shall be reasonable for TxDOT to withhold its approval if:

**21.3.2.1** Developer fails to demonstrate to TxDOT's reasonable satisfaction that the proposed assignee, sublessee, grantee or transferee, or the proposed transferee of rights and/or equity interests that would amount to a Change in Control (collectively the "transferee"), and its proposed contractors (a) have the financial resources, qualifications and experience to timely perform Developer's obligations under the FCA Documents and Principal Facility Documents and (b) are in compliance with TxDOT's rules, regulations and adopted written policies regarding organizational conflicts of interest;

**21.3.2.2** Less than all of Developer's Interest is proposed to be assigned, conveyed, transferred, pledged, mortgaged, encumbered, sublet or granted; or

**21.3.2.3** At the time of the proposed sale, assignment, conveyance, transfer, pledge, mortgage, encumbrance, sublease or grant of other special occupancy or use requiring TxDOT's prior approval, or of any proposed Change in Control, there exists any uncured Developer Default or any event or circumstance that with the lapse of time, the giving of notice or both would constitute a Developer Default, unless TxDOT receives from the proposed transferee assurances of cure and performance acceptable to TxDOT in its good faith discretion.

**21.3.3** TxDOT will approve or disapprove within 30 days after it receives from the Developer a request for approval together with (a) a reasonably detailed description of the proposed transaction, (b) such information, evidence and supporting documentation as TxDOT may request concerning the identity, financial resources, qualifications, experience and potential conflicts of interest of the proposed transferee, its contractors and the other Persons listed in Section 21.3.2.2 and (c) such evidence of organization and authority, and such incumbency certificates, certificates regarding debarment or suspension, and other certificates, representations and warranties as TxDOT may reasonably request. TxDOT will evaluate the identity, financial resources, qualifications, experience and potential conflicts of interest 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 TxDOT requests for qualifications for concession or similar agreements



for comparable projects and facilities. If for any reason TxDOT does not act within such 30-day period, or any extension thereof by mutual agreement of the Parties, TxDOT shall be deemed to disapprove.

#### **21.4 Assignment by TxDOT**

TxDOT may assign all or any portion of its rights, title and interests in and to the FCA Documents, Payment and Performance Bond(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 TxDOT, (b) without Developer's consent, to any bond trustee as security and (c) to others with the prior written consent of Developer.

#### **21.5 Notice and Assumption**

Assignments and transfers of the Developer's Interest permitted under this Section 21 or otherwise approved in writing by TxDOT shall be effective only upon TxDOT's receipt of written notice of the assignment or transfer and a written recordable instrument executed by the transferee, in form and substance acceptable to TxDOT, in which the transferee, without condition or reservation, assumes all of Developer's obligations, duties and liabilities under this Agreement, the Lease and the other FCA Documents then in effect and agrees to perform and observe all provisions thereof applicable to Developer. Each transferee, including any Person who acquires the Developer's Interest pursuant to foreclosure, transfer in lieu of foreclosure or similar proceeding, shall take the Developer's Interest subject to, and shall be bound by, the Facility Management Plan, the Key Contracts, the Utility Agreements, all agreements between the transferor and railroads, the Governmental Approvals, and all agreements between the transferor and Governmental Entities with jurisdiction over the Facility or the Work, except to the extent otherwise approved by TxDOT in writing in its good faith discretion. Except with respect to assignments and transfers pursuant to foreclosure, transfer in lieu of foreclosure or similar proceeding, the transferor and transferee shall give TxDOT written notice of the assignment not less than 30 Days prior to the effective date thereof.

#### **21.6 Change of Organization or Name**

**21.6.1** Developer shall not change the legal form of its organization in a manner that adversely affects TxDOT's rights, protections and remedies under the FCA Documents without the prior written approval of TxDOT, which consent may be granted or withheld in TxDOT's sole discretion.

**21.6.2** In the event 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 22. RECORDS AND AUDITS; INTELLECTUAL PROPERTY**

#### **22.1 Maintenance and Inspection of Records**

**22.1.1** Developer shall keep and maintain in Travis, Caldwell or Guadalupe County, Texas, or in another location TxDOT approves in writing in its sole discretion, all books, records and documents relating to the Facility, Facility Right of Way, Utility Adjustments or Work, including copies of all original documents delivered to TxDOT. Developer shall keep and maintain such books, records and documents in accordance with applicable provisions of the

FCA Documents, including Sections 2.5 and 2.6 and Attachment 4 of the Technical Requirements, and of the Facility Management Plan, and in accordance with Good Industry Practice. Developer shall notify TxDOT where such records and documents are kept.

**22.1.2** Developer shall make all its books, records and documents available for inspection by TxDOT and the Independent Engineer at Developer's offices in Austin, Texas, or pursuant to the Intellectual Property Escrow at all times during normal business hours, without charge. Developer shall provide, or make available for review pursuant to the Intellectual Property Escrow, to TxDOT and the Independent Engineer copies thereof (a) as and when expressly required by the FCA Documents or (b) for those not expressly required, upon request and at no expense to Developer. TxDOT 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. The right of inspection includes the right to make extracts and take notes except as provided pursuant to the Intellectual Property Escrow. The provisions of this Section 22.1.2 are subject to the following:

**22.1.2.1** Developer reserves the right to assert exemptions from disclosure for information that would be exempt under applicable State Law from discovery or introduction into evidence in legal actions, provided that in no event shall Developer be entitled to assert any such exemption to withhold traffic and revenue data; and

**22.1.2.2** Unless otherwise lawfully required by the FHWA, Developer may make available copies of books, records and documents containing trade secrets and confidential proprietary information with such information redacted, provided Developer deposits unredacted copies thereof in the Intellectual Property Escrow within five Business Days after receiving TxDOT's notice, and without restriction on TxDOT's right of access thereto for inspection. Unless otherwise lawfully required by the FHWA, TxDOT shall have no right to make extracts of such trade secrets and confidential proprietary information except in connection with resolution of Claims and Disputes. In no event shall Developer be entitled to apply this Section 22.1.2.2 to traffic and revenue data.

**22.1.3** Developer shall retain records and documents for the respective time periods set forth in Attachment 4 to the Technical Requirements, or, if not addressed in Attachment 4, for a minimum of five years after the date the record or document is generated; provided that if the FCA 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. Refer to Section 8.8.3 regarding the time period for retention of Patron Confidential Information.

## **22.2 Audits**

**22.2.1** TxDOT shall have such rights to review and audit Developer, its Contractors and their respective books and records as and when TxDOT deems necessary for purposes of verifying compliance with the FCA Documents and applicable Law. Without limiting the foregoing, TxDOT shall have the right to audit Developer's Facility Management Plan and compliance therewith, including the right to inspect Work and/or activities and to verify the accuracy and adequacy of the Facility Management Plan and its component parts, plans and other documentation.

**22.2.2** All Claims filed against TxDOT shall be subject to audit at any time following the filing of the Claim. The audit may be performed by employees of TxDOT or by an auditor under contract with TxDOT. No notice is required before commencing any audit before 60 days after the expiration of the term of this Agreement. Thereafter, TxDOT shall provide 20 days notice to Developer, any Contractors or their respective agents before commencing an audit. Developer, Contractors or their agents shall provide adequate facilities, acceptable to TxDOT, for the audit during normal business hours. Developer, Contractors or their agents shall cooperate with the auditors. Failure of Developer, Contractors or their agents to maintain and retain sufficient books and records relating to Developer's performance of the Work to allow the auditors to verify all or a portion of the Claim relating to Developer's performance of the Work or to permit the auditor access to such books and records shall constitute a waiver of the relevant portion of the Claim relating to Developer's performance of the Work and shall bar any recovery thereunder. At a minimum, the auditors shall have available to them the following documents to the extent they relate to Developer's performance of the Work:

- 22.2.2.1** Daily time sheets and supervisor's daily reports;
- 22.2.2.2** Union agreements;
- 22.2.2.3** Insurance, welfare, and benefits records;
- 22.2.2.4** Payroll registers;
- 22.2.2.5** Earnings records;
- 22.2.2.6** Payroll tax forms;
- 22.2.2.7** Material invoices and requisitions;
- 22.2.2.8** Material cost distribution work sheet;
- 22.2.2.9** Equipment records (list of company equipment, rates, etc.);
- 22.2.2.10** Contractors' (including suppliers') invoices;
- 22.2.2.11** Contractors' and agents' payment certificates;
- 22.2.2.12** Canceled checks (payroll and suppliers);
- 22.2.2.13** Job cost report;
- 22.2.2.14** Job payroll ledger;
- 22.2.2.15** General ledger;
- 22.2.2.16** Cash disbursements journal;
- 22.2.2.17** Daily records of Toll Revenues;

**22.2.2.18** All documents that relate to each and every Claim together with all documents that support the amount of damages as to each Claim; and

**22.2.2.19** Work sheets used to prepare the Claim establishing (a) the cost components of the Claim, including labor, benefits and insurance, materials, equipment, Contractors, all documents that establish the time periods, individuals involved, the hours for the individuals, and the rates for the individuals, and (b) the lost revenue components of the Claim.

**22.2.3** Full compliance by Developer with the provisions of this Section 22.2.2 is a contractual condition precedent to Developer's right to seek relief on the relevant portion of a Claim under Section 17.8.

**22.2.4** Rights of the Independent Engineer to review and audit Developer, its Contractors and their respective books and records are set forth in Sections 9.1.7 and 9.3 and the Technical Requirements. Any rights of the FHWA to review and audit Developer, its Contractors and their respective books and records are set forth in Exhibit 8.

**22.2.5** TxDOT's and the Independent Engineer's rights of audit include the right to observe the business operations of Developer and its Contractors to confirm the accuracy of books and records.

**22.2.6** Developer shall include in the Facility Management Plan internal procedures to facilitate review and audit by TxDOT, the Independent Engineer and, if applicable, FHWA.

**22.2.7** Developer represents and warrants the completeness and accuracy of all information it or its agents provides in connection with TxDOT or Independent Engineer audits, and shall use good faith efforts to assure the completeness and accuracy of all information provided by its Contractors in connection with TxDOT or Independent Engineer audits.

**22.2.8** Developer's internal and third party quality and compliance auditing responsibilities shall be set forth in the Facility Management Plan, consistent with the audit requirements referred to in Section 9.1.7 and described in Attachment 1 of the Technical Requirements. In addition, Developer shall perform Audit Inspections as set forth in Section 19.7 of the Technical Requirements.

**22.2.9** Nothing in the FCA 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.

## **22.3 Public Information Act**

**22.3.1** Developer acknowledges and agrees that, except as provided by Section 223.204 of the Texas Transportation Code, all Submittals, records, documents, drawings, plans, specifications and other materials in TxDOT's possession, including materials submitted by Developer to TxDOT, are subject to the provisions of the Public Information Act, including the exceptions to disclosure of information thereunder. If Developer or its Affiliates believe(s) information or materials submitted to TxDOT constitute trade secrets, proprietary information or other information that is not subject to the Public Information Act pursuant to Section 223.204 of the Code or is excepted from disclosure under the Public Information Act, Developer or its Affiliates shall be solely responsible for specifically and conspicuously designating that information by placing "CONFIDENTIAL" in the center header of each such document or page affected, as it determines to be appropriate so as to clearly identify any specific proprietary information, trade secrets or confidential commercial and financial information. Nothing contained in this Section 22.3 shall modify or amend requirements and obligations imposed on

TxDOT by the Public Information Act or other applicable Law, and the provisions of the Public Information Act or other Laws shall control in the event of a conflict between the procedures described above and the applicable Law.

**22.3.2** If TxDOT receives a request for public disclosure of materials marked "CONFIDENTIAL," TxDOT 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 Information Act or other applicable Law within the time period specified in the notice issued by TxDOT and allowed under the Public Information Act. Under no circumstances, however, will TxDOT 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 innocent inadvertence or innocent mistake on the part of TxDOT or its officers, employees, contractors or consultants.

**22.3.3** In the event of any proceeding or litigation concerning the disclosure of any material submitted by Developer to TxDOT, TxDOT's sole involvement will be as a stakeholder 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 TxDOT reserves the right, in its sole discretion, to intervene or participate in the litigation in such manner as it deems necessary or desirable. Except in the case of TxDOT's voluntary intervention or participation in litigation, Developer shall pay and reimburse TxDOT within 30 days after receipt of written demand and reasonable supporting documentation for all costs and fees, including attorneys' fees and costs, TxDOT incurs in connection with any litigation, proceeding or request for disclosure.

## **22.4 Intellectual Property**

**22.4.1** All Proprietary Intellectual Property, including with respect to Technology Enhancements, shall remain exclusively the property of Developer or its Affiliates or Contractors that supply the same, notwithstanding any delivery of copies thereof to TxDOT.

**22.4.2** TxDOT 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 of Developer used in the performance of the Work,, including with respect to Technology Enhancements, solely in connection with the operation of the Facility and any State Highway, tolled or not tolled, that is owned and operated by TxDOT or other State or regional Governmental Entity; provided that TxDOT shall have the right to exercise such license only at the following times:

**22.4.2.1** From and after the expiration or earlier termination of the Term for any reason whatsoever;

**22.4.2.2** During any time that TxDOT is exercising its step-in rights pursuant to Section 17.3.4, in which case TxDOT may exercise such license only in connection with the Facility; and

**22.4.2.3** During any time that a receiver is appointed for Developer, in which case TxDOT may exercise such license only in connection with the Facility.

**22.4.3** TxDOT shall not at any time sell any Proprietary Intellectual Property of Developer or 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.

**22.4.4** The right to transfer the license is limited to any Governmental Entity that succeeds to the power and authority of TxDOT generally or with respect to the Facility.

**22.4.5** The right to sublicense is limited to other State or regional Governmental Entities, that own and operate toll roads and/or related operations, and to subcontractors retained by such State or regional Governmental Entities in their operations, subject to confidentiality agreements and usage restrictions reasonably acceptable to Developer, and provided further that such subcontractors shall not be direct investors in the toll roads or related operations. Usage of the sublicense in violation of this Section 22.4.5 or such confidentiality agreements or usage restrictions shall result in termination of the sublicense rights to such other State or regional Governmental Entity.

**22.4.6** Subject to Section 22.3, TxDOT shall:

**22.4.6.1** 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 TxDOT relating thereto;

**22.4.6.2** Enter into a confidentiality agreement reasonably requested by Developer with respect to the licensed Proprietary Intellectual Property; and

**22.4.6.3** 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.

**22.4.7** Notwithstanding any contrary provision of this Agreement, in no event shall TxDOT 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 22.4.6 if such breach is not the result of gross negligence or intentional misconduct. Developer hereby irrevocably waives all claims to any such damages. The foregoing provisions do not limit Developer's equitable remedies set forth in Section 17.6.3.4.

**22.4.8** 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.

**22.4.9** With respect to any Proprietary Intellectual Property, including with respect to Technology Enhancements, that is owned by a Person other than Developer, including any Affiliate, and that is not "shrink wrap" software or other mass-produced product for which licenses are readily available to the general public, Developer shall obtain from such owner, both for Developer and TxDOT, nonexclusive, transferable, irrevocable, fully paid up licenses. Developer shall obtain the license 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 Facility. The license shall grant the right to use, reproduce, modify, adapt and disclose such Proprietary Intellectual Property solely in connection with the Facility and any State Highway, tolled or not tolled, owned and operated by TxDOT or other State or regional Governmental Entity. The license shall be of at least identical scope, purpose, duration and applicability as the license granted under Section 22.4.2. The limitations on sale, transfer, sublicensing and disclosure by TxDOT set forth in Sections 22.4.3 through 22.4.6 shall also apply to TxDOT's licenses in such Proprietary Intellectual Property.

## **22.5 Intellectual Property Escrows**

**22.5.1** TxDOT 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 directly to TxDOT, as public disclosure could deprive Developer and/or Contractors of commercial value. Developer further acknowledges that TxDOT nevertheless must be ensured access to such Proprietary Intellectual Property at any time, and must be assured that the Proprietary Intellectual Property is released and delivered to TxDOT in either of the following circumstances:

**22.5.1.1** In the case of Proprietary Intellectual Property owned by Developer or any Affiliate, (a) this Agreement is terminated for Developer Default, (b) a business failure (including voluntary or involuntary bankruptcy, and 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 pursuant to the license or any sublicense thereof.

**22.5.1.2** 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 TxDOT Default) and either (a) a business failure (including voluntary or involuntary bankruptcy, and insolvency) 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 that is the subject of a license under Section 22.4.

**22.5.2** In lieu of delivering the Proprietary Intellectual Property directly to TxDOT, Developer may elect to deposit it with a neutral custodian. In such event, TxDOT and Developer shall (a) mutually select one or more escrow companies or other neutral custodian (each an "Escrow Agent") engaged in the business of receiving and maintaining escrows of software source code or other Intellectual Property, and (b) establish one or more escrows (each an "Intellectual Property Escrow") with the Escrow Agent on terms and conditions reasonably acceptable to TxDOT and Developer for the deposit, retention and upkeep of source code and/or other Proprietary Intellectual Property and related documentation. 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. TxDOT shall not be responsible for the fees and costs of the Escrow Agent. Intellectual Property Escrows shall provide rights of access and inspection to both TxDOT and the Independent Engineer, subject to reasonable and necessary restrictions to protect the confidentiality and proprietary nature of the contents of the Intellectual Property Escrow.

**22.5.3** If Developer elects to deposit the Financial Model Formulas and Base Case Financial Model into an Intellectual Property Escrow rather than deliver them directly to TxDOT, Developer shall:

**22.5.3.1** Include with the deposit of the Financial Model Formulas and Base Case Financial Model a complete set of the assumptions, traffic models, traffic data and other data that form part of the Base Case Financial Model, including projections and calculations with respect to revenues, expenses, the repayment of Facility Debt and Distributions to equity investors;

**22.5.3.2** Also deposit, as and when prepared, each Base Case Financial Model Update and a complete set of the updated and revised assumptions, traffic models, traffic data and other data that form part of the Base Case Financial Model Update, including updated and revised projections and calculations with respect to revenues, expenses, the repayment of Facility Debt and Distributions to equity investors; and

**22.5.3.3** Deposit them in a form or forms that are acceptable to TxDOT, that fully reveal their content on an Open Book Basis, and that will conveniently enable TxDOT at any time upon request to gain access thereto and to electronically operate and manipulate the same in order to run projections and scenarios respecting the Facility and to print out and examine such projections and scenarios.

**22.5.4** The Intellectual Property Escrows shall survive expiration or earlier termination of this Agreement regardless of the reason.

## **ARTICLE 23. FEDERAL REQUIREMENTS**

### **23.1 Compliance with Federal Requirements**

Regardless of whether federal credit or funds are made available to Developer for the Facility, Developer shall comply and require its Contractors to comply with all federal requirements applicable to transportation projects that receive federal credit or funds, including those set forth in Exhibit 8. If Developer uses TIFIA credit or loans to finance the Facility or any portion thereof, Developer shall provide any compliance certifications and milestone payment schedules required in connection with TIFIA.

### **23.2 Role of and Cooperation with FHWA**

Developer acknowledges and agrees that FHWA will have certain approval rights with respect to the Facility, including the right to provide certain oversight and technical services with respect to the Work, if federal credit or funds are made available to Developer for the Facility. Developer shall cooperate with FHWA in the reasonable exercise of FHWA's duties and responsibilities in connection with the Facility.

## **ARTICLE 24. MISCELLANEOUS**

### **24.1 Replacement of Independent Engineer**

**24.1.1** The Parties recognize that from time to time it will be necessary to replace the Independent Engineer in the event any party to the Independent Engineer Agreement elects not to extend or renew it at expiration of its term, or in the event it is terminated in accordance with



its terms prior to expiration. Whenever it becomes necessary to replace the Independent Engineer, TxDOT, in consultation with Developer, shall select and appoint a replacement Independent Engineer according to the terms and procedures set forth in this Section 24.1.

**24.1.2** The replacement shall satisfy TxDOT's then existing rules, regulations and applicable written policies concerning organizational conflicts of interest, as well as any comparable written policies of Developer designed to assure neutrality of the Independent Engineer.

**24.1.3** If TxDOT then maintains a list of firms qualified to serve as independent engineers under TxDOT comprehensive development agreements, the replacement shall be one of the listed firms and shall be selected either through TxDOT's competitive selection processes or, if permitted by applicable Law and acceptable to TxDOT, through negotiation. Developer shall have the right and obligation to consult and confer with TxDOT in the course of the competitive selection process and to participate with TxDOT in any negotiations. TxDOT may elect, however, not to select a replacement from the list and instead proceed under Section 24.1.4.

**24.1.4** If TxDOT does not then maintain such a list of firms, then TxDOT shall procure a replacement through TxDOT's competitive qualification and procurement processes, and Developer shall have the right and obligation to consult and confer with TxDOT regarding the qualifications, evaluation and selection of competing firms.

**24.1.5** The Independent Engineer Agreement with the replacement shall be on substantially the same terms and conditions as the prior Independent Engineer Agreement, except for pricing and except for any changes in scope of work or other terms and conditions mutually acceptable to TxDOT and Developer.

**24.1.6** Developer shall be obligated to execute the Independent Engineer Agreement with the replacement unless Developer diligently participates, consults and confers with TxDOT in the selection and delivers to TxDOT, before TxDOT concludes its selection and negotiation process, written notice of objection to the firm selected or to pricing or changes in scope of work or other terms and conditions, stating the reasons for objection in reasonable detail. If Developer has the right to refuse, and does refuse, to execute an Independent Engineer Agreement with the replacement due to such a reasonable objection, then TxDOT shall commence a new procurement to select a replacement. All the provisions of this Section 24.1 shall apply to the new procurement.

**24.1.7** The Parties shall use diligent efforts to select and appoint a replacement Independent Engineer sufficiently prior to expiration or termination of the existing Independent Engineer Agreement to permit a smooth transition of the Independent Engineer functions and responsibilities from the then-existing Independent Engineer to the replacement. If necessary, the Parties shall grant, and the then-existing Independent Engineer shall accept, short-term extensions of its Independent Engineer Agreement to accommodate selection and appointment of the replacement and its transition into effective service.

## **24.2 Taxes**

**24.2.1** Developer shall pay, prior to delinquency, all applicable Taxes. Developer shall have no right to a Compensation Event or other Claim due to its misinterpretation of Laws respecting Taxes or incorrect assumptions regarding applicability of Taxes.

**24.2.2** TxDOT shall reimburse Developer for certain State sales taxes to the extent set forth in Exhibit 23 to this Agreement.

**24.2.3** Developer acknowledges that TxDOT makes no representations or warranties, and assumes no liability, with regard to treatment or allocation of Developer's investments, expenditures or revenues respecting the Facility under any State or federal tax laws or regulations.

### **24.3 Amendments**

The FCA Documents may be amended only by a written instrument duly executed by the Parties or their respective successors or assigns.

### **24.4 Waiver**

**24.4.1** No waiver of any term, covenant or condition of this Agreement or the other FCA Documents shall be valid unless in writing and signed by the obligee Party.

**24.4.2** No waiver by any Party of any right or remedy under this Agreement or the other FCA Documents shall be deemed to be a waiver of any other or subsequent right or remedy under this Agreement or the other FCA 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.

**24.4.3** 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 FCA Documents.

**24.4.4** Either Party's waiver of any breach or failure to enforce any of the terms, covenants, conditions or other provisions of the FCA 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 FCA 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.

**24.4.5** Subject to Section 13.2.7, the acceptance of any payment or reimbursement by a Party shall not waive any preceding or then-existing breach or default by the other Party of any term, covenant or condition of this Agreement or the other FCA Documents, other than the other Party's prior failure to pay the particular amount or part thereof so accepted, regardless of the paid party's knowledge of such preceding or then-existing breach or default at the time of acceptance of such payment or reimbursement. Nor shall such acceptance continue, extend or affect: (a) the service of any notice, any Dispute Resolution Procedures or final judgment; (b) any time within which the other Party is required to perform any obligation; or (c) any other notice or demand.

## **24.5 Independent Contractor**

**24.5.1** Developer is an independent contractor, and nothing contained in the FCA Documents shall be construed as constituting any relationship with TxDOT other than that of Facility developer and independent contractor, and that of landlord and tenant under the Lease.

**24.5.2** Nothing in the FCA Documents is intended or shall be construed to create any partnership, joint venture or similar relationship between TxDOT 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 TxDOT control or joint control over Developer's financial decisions or discretionary actions concerning the Facility and Work.

**24.5.3** In no event shall the relationship between TxDOT and Developer be construed as creating any relationship whatsoever between TxDOT and Developer's employees. Neither Developer nor any of its employees is or shall be deemed to be an employee of TxDOT. Except as otherwise specified in the FCA 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.

## **24.6 Successors and Assigns**

The FCA Documents shall be binding upon and inure to the benefit of TxDOT and Developer and their permitted successors, assigns and legal representatives.

## **24.7 Designation of Representatives; Cooperation with Representatives**

**24.7.1** TxDOT 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 FCA Documents ("Authorized Representative"). Exhibit 24 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 24.12.

**24.7.2** Developer shall cooperate with TxDOT and all representatives of TxDOT designated as described above.

## **24.8 Survival**

TxDOT's and Developer's representations and warranties, the dispute resolution provisions contained in Section 17.8, the indemnifications, limitations and releases contained in Sections 7.9.4 and 16.5, the express obligations of the Parties following termination, 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.

## **24.9 Limitation on Third Party Beneficiaries**

It is not intended by any of the provisions of the FCA 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 20) identify third parties and state that they are entitled to benefits hereunder. Except as otherwise provided in this Section 24.9, the duties, obligations and responsibilities of the Parties to the FCA Documents with respect to third parties shall remain as imposed by Law. The FCA Documents shall not be construed to create a contractual relationship of any kind between TxDOT and a Contractor or any Person other than Developer.

## **24.10 No Personal Liability of TxDOT Employees; No Tort Liability**

**24.10.1** TxDOT's Authorized Representatives are acting solely as agents and representatives of TxDOT when carrying out the provisions of or exercising the power or authority granted to them under this Agreement. They shall not be liable either personally or as employees of TxDOT for actions in their ordinary course of employment.

**24.10.2** The Parties agree to provide to each other's Authorized Representative written notice of any claim which such Party may receive from any third party relating in any way to the matters addressed in this Agreement, and shall otherwise provide notice in such form and within such period as is required by Law.

## **24.11 Governing Law**

The FCA Documents shall be governed by and construed in accordance with the laws of the State of Texas.

## **24.12 Notices and Communications**

**24.12.1** Notices under the FCA 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):

**24.12.2** All notices, correspondence and other communications to Developer shall be delivered to the following address or as otherwise directed by Developer's Authorized Representative:

SH 130 Concession Company, LLC  
7700 Chevy Chase Drive, Suite 500  
Austin, Texas 78752-1562  
Attention: Diego Marin Garcia  
Telephone: (512) 637-8585  
Facsimile: (512) 637-1498  
E-mail: dmarin@cintra.us.com

In addition, copies of all notices to proceed, notices regarding Disputes, and suspension, termination and default notices shall be delivered to the following persons:

Bracewell & Giuliani, LLP  
711 Louisiana Street, Suite 2300  
Houston, Texas 77007  
Attention: Thomas O. Moore, III  
Telephone: (713) 221-1409  
Facsimile: (713) 221-2100

E-mail: [thomas.moore@bgllp.com](mailto:thomas.moore@bgllp.com)

**24.12.3** All notices, correspondence and other communications to TxDOT shall be marked as regarding the SH 130 Segments 5 and 6 Facility and shall be delivered to the following address or as otherwise directed by TxDOT's Authorized Representative:

Texas Department of Transportation  
16620 U.S. 281 N., Suite 200  
San Antonio, TX 78232  
Attn: Mr. Frank Holzmann, P.E.  
Telephone: (210) 403-4300  
Facsimile: (210) 403-4315  
E-mail: [fholzma@dot.state.tx.us](mailto:fholzma@dot.state.tx.us)

In addition, copies of all notices regarding Disputes, and termination and default notices shall be delivered to the following person:

Texas Department of Transportation  
Office of General Counsel  
125 East 11<sup>th</sup> Street  
Austin, Texas 78701  
Attn: Mr. John J. Ingram  
Telephone: (512) 463-8630  
Facsimile: (512) 475-3070  
E-mail: [jingram@dot.state.tx.us](mailto:jingram@dot.state.tx.us)

**24.12.4** 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. Central Standard or Daylight Time (as applicable) and all other notices received after 5:00 p.m. 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.). Any technical or other communications pertaining to the Work shall be conducted by Developer's Authorized Representative and technical representatives designated by TxDOT.

### **24.13 Integration of FCA Documents**

TxDOT and Developer agree and expressly intend that this Agreement, the Lease and other FCA Documents and the Principal Facility Documents constitute a single, non-severable, integrated agreement whose terms are interdependent and non-divisible.

## **24.14 Severability**

**24.14.1** If any clause, provision, section or part of the FCA Documents or any other Principal Facility Document (other than the Design-Build Contract or any O&M Contract) 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 Base Case Financial Model Update (or, if there has been no Update, the Base Case Financial Model) and TxDOT's and Developer'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 FCA Documents or such other Principal Facility Documents, which shall be construed and enforced as if the FCA Documents did not contain such invalid or unenforceable clause, provision, section or part.

**24.14.2** If after the efforts required by Section 24.14.1, the Parties mutually agree that without the section or part of the FCA Documents or such other Principal Facility Documents that the court ruled to be invalid, there is no interpretation or reformation of the FCA Documents or such other Principal Facility Documents that can reasonably be adopted which will return the Parties to the benefits of their original bargain, the Parties can mutually agree to treat the court order as a Termination by Court Ruling pursuant to Section 19.12.

**24.14.3** If after the efforts required by Section 24.14.1, the Parties are unable to mutually agree about whether, without the section or part of the FCA Documents or such other Principal Facility Documents that the court ruled to be invalid, there is any interpretation or reformation of the FCA Documents or such other Principal Facility Documents that could reasonably be adopted which would return the Parties to the material benefits of their original bargain, either Party can refer that question to the Disputes Board for resolution pursuant to Section 17.8. The Parties agree that if the Disputes Board determines that there is no interpretation or reformation that can be reasonably adopted which will return the Parties to the material benefits of their original bargain, such a determination by the Disputes Board shall be deemed for all purposes under this Agreement as a Termination by Court Ruling, or in the circumstances similar to those described in Section F.3 or Section F.4 of Exhibit 22, a Termination for Convenience or a Termination for Developer Default, as appropriate.

**24.14.4** If there is no mutual agreement of the Parties pursuant to Section 24.14.2, a referral to the Disputes Board must occur before the 61st Day after the court order becomes final. Otherwise, the court order shall be treated as a Termination by Court Ruling pursuant to Section 19.12. The Parties may by mutual agreement extend this deadline.

## **24.15 Headings**

The captions of the sections of this Agreement are for convenience only and shall not be deemed part of this Agreement or considered in construing this Agreement.

## **24.16 Construction and Interpretation of Agreement.**

**24.16.1** 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.

**24.16.2** If any term or provision of this Agreement, the deletion of which would not adversely affect the receipt by either Party of any material benefit hereunder, shall be held by a court of competent jurisdiction to be invalid or unenforceable, the remainder of this Agreement shall not be affected thereby and each other term and provision of this Agreement shall be valid and enforceable to the fullest extent permitted by law. It is the intention of the Parties, and the Parties agree, that in lieu of each clause or provision of this Agreement that is illegal, invalid or unenforceable, the Parties in good faith shall supply as a part of this Agreement an enforceable clause or provision as similar in terms to such illegal, invalid or unenforceable clause or provision as may be possible.

**24.16.3** The captions of the articles, sections and subsections herein are inserted solely for convenience and under no circumstances are they or any of them to be treated or construed as part of this instrument.

**24.16.4** References in this instrument to this "Agreement" mean, refer to and include this instrument as well as any riders, exhibits, addenda and attachments hereto (which are hereby incorporated herein by reference) or other documents expressly incorporated by reference in this instrument. Any references to any covenant, condition, obligation and/or undertaking "herein," "hereunder" or "pursuant hereto" (or language of like import) mean, refer to and include the covenants, conditions, obligations and undertakings existing pursuant to this instrument and any riders, exhibits, addenda, attachments or other documents affixed to or expressly incorporated by reference in this instrument. All terms defined in this instrument shall be deemed to have the same meanings in all riders, exhibits, addenda, attachments or other documents affixed to or expressly incorporated by reference in this instrument unless the context thereof clearly requires the contrary. Unless expressly provided otherwise, all references to Articles and Sections refer to the Articles and Sections set forth in this Agreement. Unless otherwise stated in this Agreement or the other FCA Documents, words which have well-known technical or construction industry meanings are used in this Agreement or the other FCA 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 FCA Documents, it shall be deemed to be followed by the words "without limitation".

**24.16.5** 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.

**24.16.6** In the Agreement, unless specified otherwise, references to payment of "interest" shall mean monthly compounding interest.

**24.17 Entire Agreement**

The FCA Documents, the Facility Right of Entry Agreement, the Intellectual Property Escrow, the Lease Escrow Agreement and the Facility Trust and Security 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.

**24.18 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.

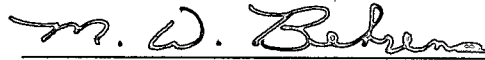
**Developer**

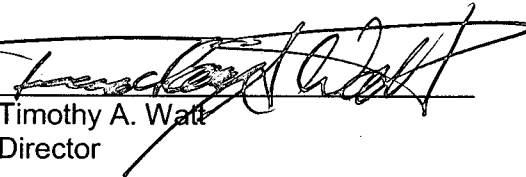
**TxDOT**

**SH 130 CONCESSION COMPANY, LLC**

**TEXAS DEPARTMENT OF  
TRANSPORTATION**

By:   
Name: Jose Maria Lopez de Fuentes  
Title: Director

By:   
Name: Michael W. Behrens, P.E.  
Title: Executive Director

By:   
Name: Timothy A. Watt  
Title: Director