

**DESIGN-BUILD CONTRACT  
RELATING TO THE DOWNTOWN TUNNEL/MIDTOWN TUNNEL/MLK  
EXTENSION PROJECT**

**DATED AS OF DECEMBER 5, 2011**

**BY AND BETWEEN**

**SKW Constructors, a Skanska, Kiewit, Weeks JV,  
as DB Contractor**

**AND**

**Elizabeth River Crossings Opco, LLC,  
as Concessionaire**

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This **DESIGN-BUILD CONTRACT** (this “Agreement”) is made and entered into as of December 5, 2011 by and between SKW CONSTRUCTORS, A SKANSKA, KIEWIT, WEEKS JV (the “DB Contractor”), and ELIZABETH RIVER CROSSINGS OPCO, LLC (the “Concessionaire” or “ERCO”).

## **ARTICLE 1**

### **RECITALS**

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

WHEREAS, the Act grants the Virginia Department of Transportation (the “Department”) the authority to allow private entities to develop and/or operate qualifying transportation facilities if the Department determines there is a need for the facilities and private involvement would provide the facilities to the public in a timely and cost-effective fashion.

WHEREAS, on July 1, 1995, the Department adopted guidelines for the selection of solicited and unsolicited proposals for negotiation under the Act, which were revised in April 2001 and October 31, 2005, with an addendum issued on December 5, 2008, and updated on December 8, 2010 (as revised and updated, the “Implementation Guidelines”).

WHEREAS, pursuant to the Act, on April 5, 2005, the Commissioner recommended that the Department pursue the procurement for (a) the development and operation of a new two-lane tunnel under the Elizabeth River between the cities of Portsmouth and Norfolk in the Commonwealth of Virginia; and (b) the maintenance, safety, and operational improvements to the Existing Midtown Tunnel, the Existing Downtown Tunnels, and the extension of the Martin Luther King Freeway from London Boulevard to Interstate 264.

WHEREAS, pursuant to the Act, on May 30, 2008, the Department issued a Solicitation for Conceptual Proposals (“SFP”) to request receipt of conceptual proposals to enable the Department to identify and shortlist offerors qualified to submit detailed proposals to finance, design, construct, operate, and maintain the Project.

WHEREAS, in accordance with the Implementation Guidelines, the Department duly posted and published notice of the SFP.

WHEREAS, during the posting period ending September 29, 2008, the Department received a conceptual proposal (the “Conceptual Proposal”) submitted by Elizabeth River Crossings LLC (“ERC”) to form a public-private partnership to develop and operate the Project.

WHEREAS, following a quality control review of the Conceptual Proposal to ensure its compliance with the Implementation Guidelines and the solicitation criteria, on October 29, 2008, the Commissioner accepted the Conceptual Proposal for further consideration.

WHEREAS, on February 19, 2009, the Secretary of Transportation designated an Independent Review Panel (“IRP”) to review and evaluate the Conceptual Proposal, based upon criteria set forth in the SFP, and for the purpose of developing recommendations to the Commonwealth Transportation Board (“CTB”) and the Department.

WHEREAS, following five public meetings wherein the IRP considered public comments, recommendations and comments from impacted jurisdictions, presentations provided by ERC and the Department staff, considering the Conceptual Proposal and using the selection and evaluation criteria pursuant to the SFP, the IRP determined that ERC was qualified and capable to undertake the development and operation of the Project.

WHEREAS, based on such evaluation, on July 16, 2009, the IRP recommended to the CTB that the Conceptual Proposal be further developed pursuant to the Act, and among other recommendations, recommended accelerating the procurement process to further determine the Project’s feasibility.

WHEREAS, on July 16, 2009, the CTB adopted a resolution consistent with the IRP’s findings.

WHEREAS, thereafter, the Commissioner directed the Department to negotiate an interim agreement, with respect to the Project, with ERC based on the SFP, the Conceptual Proposal, and recommendations of the CTB.

WHEREAS, on January 7, 2010, the Department and ERC entered into an Interim Agreement to Develop and/or Operate the Downtown Tunnel/Midtown Tunnel/Martin Luther King Freeway Extension Project in Virginia (as amended, the “Interim Agreement”).

WHEREAS, on January 7, 2010, ERC and the DB Contractor entered into a Back-To-Back Agreement (the “Back-To-Back Agreement”) whereby the DB Contractor agreed to fulfill certain of ERC’s obligations under the Interim Agreement and the Parties agreed to cooperate in pursuit of the award to ERC of a Comprehensive Agreement (as defined below), under which the DB Contractor would perform the design-build obligations of ERC.

WHEREAS, pursuant to the Interim Agreement, ERC was granted the exclusive right to negotiate with the Department for the development and operation of the Project, subject to the parties’ right to terminate the negotiations pursuant to the Interim Agreement.

WHEREAS, ERC and ERCO entered into an Assignment and Assumption Agreement, dated as of December 5, 2011, pursuant to which ERC assigned, and ERCO assumed, certain rights and obligations under the Interim Agreement.

WHEREAS, the Department and ERCO entered into a Termination of Interim Agreement and Release of Guaranty, dated as of December 5, 2011, terminating the Interim Agreement and releasing all guarantees thereunder.

WHEREAS, on December 5, 2011, the Department and the Concessionaire entered into a Comprehensive Agreement Relating to the Downtown Tunnel/Midtown Tunnel/Martin Luther King Freeway Extension Project (the “Comprehensive Agreement” or “CA”) that, among other

things, sets forth the right and obligation of the Concessionaire to develop, rehabilitate, construct and operate the Project pursuant to a long-term concession arrangement, which obligations include the DB Work.

WHEREAS, the Concessionaire desires that the DB Contractor undertake its obligations under the CA for the design and construction of the Project as set forth in this Agreement.

WHEREAS, the DB Contractor has represented that it has the skills and capabilities to perform the DB Work, and the Concessionaire and the DB Contractor desire to enter into this Agreement setting out the terms and conditions on which the DB Contractor will perform the DB Work.

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

## **ARTICLE 2**

### **DEFINITIONS**

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

## **ARTICLE 3**

### **BASIC ROLES AND RESPONSIBILITIES**

#### **Section 3.01. Basic Agreement.**

(a) The Parties agree that the Project will be designed, rehabilitated and constructed in accordance with this Agreement.

(b) The DB Contractor will perform, and will cause the DB Work to be performed, in accordance with (i) this Agreement and the other Contract Documents; (ii) Law (including, to the extent applicable, with all Federal Requirements and Laws applicable to a transportation project that has received or receives federal-aid funds); (iii) Governmental Approvals; (iv) Good Industry Practice; (v) Applicable Standards; (vi) the Technical Requirements; and (vii) the requirements of insurance policies required to be maintained hereunder.

(c) The DB Contractor will provide appropriate oversight, management and reporting of the design, rehabilitation, construction and completion of the Project (except for those matters expressly excluded from the scope of the DB Work as set forth in Exhibit CC) such that the Project is designed, rehabilitated, constructed, completed and delivered in accordance with this Agreement and will cooperate and coordinate the DB Work with the Tolling Contractor and other Concessionaire Contractors, including in accordance with the Interface Agreement.

(d) The DB Contractor may retain Subcontractors to perform certain of its responsibilities pursuant to this Agreement, subject to the terms and conditions of this Agreement. In any such event, the DB Contractor will remain fully and primarily responsible for the performance of such Subcontractors.

(e) The DB Contractor acknowledges the right of the Department under the CA to exercise oversight of the activities of the Concessionaire and its Contractors, including the DB Contractor, in accordance with the CA. Similarly, the Concessionaire shall have the right to exercise oversight of the activities of the DB Contractor and its Subcontractors in accordance with the terms of this Agreement, but will also be entitled to rely upon the DB Contractor to directly manage, oversee and resolve disputes involving its Subcontractors, without the involvement of the Concessionaire.

(f) The Concessionaire will use reasonable efforts in performing its rights and duties under this Agreement and the CA to minimize any disruption to or impairment of the performance of the DB Contractor's rights and obligations hereunder, *provided*, that nothing in this Section 3.01(f) will limit the Concessionaire's rights and obligations under this Agreement. Except as otherwise expressly provided in this Agreement, the Concessionaire shall have no liability to the DB Contractor if any such disruption to or impairment of the DB Work was caused by the Department.

(g) Except as otherwise expressly provided in this Agreement, all obligations of the Concessionaire under the CA with respect to the design, rehabilitation and construction of the Project shall be deemed included as part of the DB Contractor's obligations hereunder and shall be fulfilled by the DB Contractor as part of the DB Work.

(h) Skanska USA Civil Southeast Inc., Kiewit Infrastructure Co. and Weeks Marine, Inc., as the members of the DB Contractor, are jointly and severally liable for the obligations of the DB Contractor under this Agreement.

**Section 3.02. Project Agreements.** The DB Contractor expressly confirms and acknowledges that it is aware of the provisions of the CA and the other Contract Documents. The DB Contractor acknowledges that the following Project Agreements (all as more particularly described by the Comprehensive Agreement) will be executed on or before the Agreement Date, and under the CA the Concessionaire is to promptly deliver to the Department executed copies of the same:

- (a) Escrow Agreement attached as Exhibit D to the CA;
- (b) This Agreement; and
- (c) The Guaranties.

For the avoidance of doubt, the Parties agree that the foregoing reference to the Escrow Agreement to which the DB Contractor is not a party does not expand, limit or otherwise modify the DB Contractor's responsibilities as set forth in this Agreement.

**Section 3.03. Not Used.**

**Section 3.04. Not Used.**

**Section 3.05. Department's Rights under CA.** The DB Contractor shall, on behalf of the Concessionaire, accommodate the Department's rights with respect to the DB Work under the Comprehensive Agreement, including, but not limited to, the right of access to the Project Right of Way and the right to inspect the DB Work subject to and in accordance with the requirements of the Comprehensive Agreement. Notwithstanding anything to the contrary in this Agreement, this Agreement shall not impose any obligations, duties or liabilities upon the Department beyond those obligations, duties, or liabilities expressly assumed by the Department under the Comprehensive Agreement. Further, nothing in this Agreement shall create any direct cause of action by the DB Contractor against the Department, except to the extent this Agreement is assigned to the Department pursuant to Section 25.01.

**Section 3.06. Pay-if-Paid Provisions; Department Relief.**

(a) Pay-if-Paid Provisions. Whenever a provision in this Agreement provides that DB Contractor shall only be entitled to compensation in the event and only to the extent (or words of similar effect) that the Concessionaire actually receives the corresponding compensation under the Comprehensive Agreement, or that the DB Contractor's entitlement to compensation shall be conditional upon and only to the extent (or words of similar effect) that the Concessionaire receives the corresponding compensation under the Comprehensive Agreement, or other similar language providing that a payment to the DB Contractor is conditional upon receipt of the relevant amount by the Concessionaire from any other Person, then payment of the amount in question by the Department to the Concessionaire pursuant to the Comprehensive Agreement will be a strict condition precedent to the obligation of the Concessionaire to make a payment to the DB Contractor under the relevant provision of this Agreement.

(b) Department Relief. Whenever a provision in this Agreement provides that the DB Contractor shall only be entitled (or words of similar effect) to relief if the Department provides the Concessionaire with the corresponding relief under the Comprehensive Agreement, or that the DB Contractor's entitlement (or words of similar effect) to relief shall be conditional upon the Concessionaire's receipt of the corresponding relief under the Comprehensive Agreement, then the Concessionaire's receipt of the corresponding relief in question from the Department pursuant to the Comprehensive Agreement will be a strict condition precedent to the obligation of the Concessionaire to grant relief to the DB Contractor under the relevant provision of this Agreement.

**Section 3.07. Technical Requirements.** Where the Technical Requirements impose an obligation on the Concessionaire to act by or within a specified time and the DB Contractor is obligated as part of the DB Work to fulfill such obligation on behalf of the Concessionaire, the DB Contractor shall fulfill such obligation within the time specified by the Technical Requirements, and, unless this Agreement provides otherwise with respect to a given item (including when an item is subject to Concessionaire Review or Concessionaire Approval), the

DB Contractor shall provide such item to the Concessionaire for its review at least ten (10) Days prior to the date such item must be submitted to the Department, and the Concessionaire shall provide any comments at least five (5) Days prior to the date such item must be submitted to the Department. Any such review by the Concessionaire, or the Concessionaire's election or failure not to perform a review, will not diminish the DB Contractor's obligations or liabilities under this Agreement or the Concessionaire's rights under this Agreement. No reference to the Technical Requirements in this Agreement is intended to obligate the DB Contractor to perform the work that is expressly excluded from the scope of the DB Work as set forth in Exhibit CC.

**Section 3.08. Notices, Reports, Submissions, Approvals, Etc.** The DB Contractor will be responsible for the provision of all notices, reports, submissions, approvals and other matters required under the CA insofar as they relate to the DB Work and will obtain and submit the same to the Concessionaire in accordance with this Agreement at such time as may be necessary to preserve the Concessionaire's rights under the CA and to ensure that the Concessionaire is not rendered in breach of its obligations thereunder or under applicable Law. All such notices and other matters shall be provided to the Concessionaire for review prior to their submission to the Department. The DB Contractor agrees that no information that must be provided by the DB Contractor pursuant to this Agreement shall be submitted to the Department, the Lenders' Technical Advisor or any other third party without its first being submitted to the Concessionaire for review and approval.

#### **ARTICLE 4**

#### **NOT USED**

#### **ARTICLE 5**

#### **TOLLING**

**Section 5.01. Payment of Tolls by the DB Contactor.** The DB Contractor's construction vehicles will not be obligated to pay tolls until Final Completion, provided that such vehicles are used by the DB Contractor in performance of the DB Work hereunder.

**Section 5.02. Not Used.**

**Section 5.03. Not Used.**

**Section 5.04. Not Used.**

**Section 5.05. Suspension of Tolls.**

(a) In addition to its rights under Law, under the CA the Department has the right, in its sole discretion, to order immediate suspension of tolling in the event that any of the Project Assets are designated for immediate use as follows:

(i) as an emergency mass evacuation route based on a declared emergency issued pursuant to Law and tolling has been suspended on other tolled roadways operated by or on behalf of Department within the



evacuation route that are being used as emergency mass evacuation routes,  
or

(ii) as the alternate route for the diversion of traffic from another State Highway temporarily closed to all lanes in one or both directions due to: (A) a declared emergency issued pursuant to Law or (B) a significant incident involving one or more casualties requiring hospitalization or treatment by a medical professional or one or more fatalities on the affected State Highway from which such traffic is diverted; *provided*, that suspension of tolls will be limited to the lanes in the direction of the diversion.

(b) Under the CA the Department is to lift any such order given in accordance with Section 5.05(b) of the CA as soon as the need for such order ceases. The DB Contractor acknowledges and agrees that the Concessionaire will have no liability to the DB Contractor for any increase in costs or expenses attributable to any such order, and any such increase will be the DB Contractor's sole financial risk. Notwithstanding the foregoing, if the cause of suspension is a Delay Event or a Compensation Event, the DB Contractor may proceed in accordance with Article 13 or Article 14, as applicable. During any period for which tolling of a given Project Asset has been suspended by the Department, the DB Contractor shall be relieved of its obligation to pay liquidated damages under Section 8.10 that would otherwise have been payable with respect to such Project Asset for such period, but such obligation shall be reinstated when the suspension terminates.

(c) Each Party will provide reasonable assistance to the other Party and the Department in seeking any available reimbursement from Federal sources for lost Toll Revenues and expenses incurred as a result of a suspension and in pursuing insurance coverage.

**Section 5.06. Not Used.**

**Section 5.07. Not Used.**

**Section 5.08. Not Used.**

## ARTICLE 6

### **BASE CASE FINANCIAL MODEL**

**Section 6.01. Not Used.**

**Section 6.02. Base Case Financial Model Updates.**

(a) [Not used]

(b) Upon the occurrence of the following events, at the Concessionaire's request, the DB Contractor will cooperate with the Concessionaire and

provide such information applicable to the DB Work and within its possession and control that may be required for the Concessionaire to satisfy its obligations to the Department under Section 6.02 of the CA:

(i) [not used]

(ii) if a Delay Event occurs, the DB Contractor will provide such information to the Concessionaire within 45 Days after the determination of a Delay Event that extends any Design-Build Work Deadline under the CA;

(iii) if a Compensation Event occurs, the DB Contractor will provide such information to the Concessionaire within 45 Days after the determination of Concessionaire Damages under the CA due to occurrence of such Compensation Event; and

(iv) if the Department and the Concessionaire agree under the CA that any amendments to the CA have had or will have a material effect on future costs or Gross Revenues, the DB Contractor will provide such information to the Concessionaire within 45 Days after such agreement by the Department and the Concessionaire.

(c) [Not used]

**Section 6.03. Not Used.**

**Section 6.04. Not Used.**

## ARTICLE 7

### **PAYMENT OF CONTRACT SUM; FINANCIAL CLOSE; LENDER RIGHTS**

#### **Section 7.01. Contract Sum.**

(a) As consideration to the DB Contractor for the full and complete performance of the DB Work in accordance with the terms hereof and all costs incurred in connection therewith, the Concessionaire shall pay, and the DB Contractor shall accept, a firm, fixed-price, lump sum equal to One billion, four hundred sixty million, one hundred thirty thousand US Dollars (\$1,460,130,000.00), to be paid in installments as set forth in Section 7.02 (such amount, as it may be adjusted from time to time in accordance with this Agreement, herein referred to as the “Contract Sum”). In addition to the other adjustments to the Contract Sum provided in this Agreement, if the Concessionaire elects to require the DB Contractor to undertake one or more of the Additional Work Options set forth on Exhibit B-7, the Contract Sum shall be adjusted by the agreed amount specified for such Additional Work Option(s) in Exhibit B-7. The Public Funds Amount described in Section 7.03 will be utilized to pay a portion of the Contract Sum. The DB Contractor agrees that (a) it will comply with the requirements set forth in Exhibit M in order to obtain the Public Funds Amount as and when the same

is payable under the Comprehensive Agreement and Exhibit M, and (b) any failure of the Concessionaire to pay that portion of any Scheduled Payment due to the DB Contractor under this Agreement that was to be paid with the proceeds of the Public Funds Amount shall not constitute a breach or default by the Concessionaire to the extent resulting from the failure by the Department to make the Public Funds Amount available to the DB Contractor at the time and in the amounts set forth in the Comprehensive Agreement and Exhibit M; provided, however, that in such case the DB Contractor may assert that a Delay Event has occurred and suspend the applicable portion of the DB Work until payment of the Public Funds Amount is made (i) solely to the extent such relief is available to the Concessionaire under the CA and (ii) unless such failure by the Department to make the Public Funds Amount available to the DB Contractor is attributable to a breach by the DB Contractor of its obligations hereunder. The Concessionaire agrees to pursue all rights it may have under the Comprehensive Agreement as a result of such Department failure and to provide the DB Contractor with the benefit of any relief obtained by the Concessionaire thereunder. The Contract Sum is not subject to adjustment for any reason other than pursuant to a Scope Change Order authorized by the Concessionaire or to which the DB Contractor is entitled to claim as expressly specified herein.

(b) If Financial Close does not occur on or before March 31, 2012, the Contract Sum shall be adjusted as follows:

(i) If Financial Close occurs from April 1, 2012 to April 30, 2012 (inclusive), the Contract Sum shall be increased by \$8,330,000.00 to equal \$1,468,460,000.00;

(ii) If Financial Close occurs from May 1, 2012 to May 31, 2012 (inclusive), the Contract Sum shall be increased by an additional \$1,840,000.00 to equal \$1,470,300,000.00;

(iii) If Financial Close occurs from June 1, 2012 until the date that is 210 days after the Agreement Date (inclusive), the Contract Sum shall be increased by an additional \$1,840,000.00 for each calendar month similar to (ii) above; and

(iv) If Financial Close does not occur on or before the date that is 210 days after the Agreement Date, the Parties shall negotiate in good faith to agree on a mutually acceptable Contract Sum until such time as this Agreement is terminated pursuant to Section 20.04 or Section 20.07.

**Section 7.02. Payment Schedule.** Subject to the conditions for payment set forth in this Section 7.02, the Contract Sum shall be paid by the Concessionaire to the DB Contractor in monthly installments (“Scheduled Payments”) for performance of elements of the DB Work as specified on the Payment and Values Schedule as confirmed by the Concessionaire and the Lenders’ Technical Advisor (other than the Scheduled Payment designated as a “Mobilization Payment” on the Payment and Values Schedule, which shall be payable at the time specified in

the Payment and Values Schedule), subject to the applicable Project Asset Maximum Cumulative Drawdown Schedule applicable for work performed with respect to a given Project Asset as set forth in Exhibit FF hereto and in accordance with the Payment and Values Schedule, as may be adjusted from time to time pursuant to the terms of this Agreement. It is understood and agreed that although for administrative purposes the timing of payment of the Contract Sum has been allocated among the various Project Assets as set forth in the several Project Asset Maximum Cumulative Drawdown Schedules, no such allocation shall increase or diminish the DB Contractor's responsibility to complete the entire DB Work for the Contract Sum nor serve as the basis for evaluating or calculating any cost or liability attributable to the DB Contractor's failure to complete the entire DB Work.

(a) Request for Payment. No earlier than the third (3<sup>rd</sup>) and no later than the fifth (5<sup>th</sup>) Day of each month, the DB Contractor shall submit to the Concessionaire its request for payment consisting of (i) an invoice in the amount of the applicable Scheduled Payment; (ii) a certificate signed by the DB Contractor that the DB Contractor has performed the applicable elements of the DB Work required for such Scheduled Payment in accordance with the Payment and Values Schedule and attaching reasonable documentary evidence of the performance of the applicable elements of the DB Work sufficient for the Concessionaire and the Lenders' Technical Advisor to reasonably determine that such performance has occurred; (iii) (A) an interim lien and claim waiver from the DB Contractor in the form of Exhibit GG, including the certification required pursuant to Section 7.02(f) as to the absence of liens and other claims or (B) a bond meeting the requirements set forth in Section 7.02(f); (iv) the Monthly Progress Report for the immediately preceding month; (v) all cost details relating to such payment request as necessary for the Concessionaire to satisfy the requirements of the Lenders and the legal requirements of all Governmental Authorities; (vi) a certificate signed by the DB Contractor that the amounts requested are eligible for reimbursement from federal-aid funds pursuant to applicable Law and (vii) all other certifications, affidavits and information required by Section 7.03. Notwithstanding anything to the contrary contained herein, the Concessionaire shall not be obligated to make any payment for DB Work undertaken with respect to a given Project Asset to the extent that such payment, when added to all previous payments, exceeds the amount designated as the Maximum Cumulative Contract Sum Payment for the corresponding month on the applicable Project Asset Maximum Cumulative Drawdown Schedule. The Concessionaire and the DB Contractor shall use all reasonable efforts to cooperate with each other to cause each request for payment to be reviewed and certified by the end of each calendar month.

(b) Conditions to Scheduled Payments. Subject to the terms of this Agreement, and provided that the Concessionaire has received the DB Contractor's request for payment in accordance with Section 7.02(a), the Concessionaire shall make, or cause to be made, the undisputed portion of the corresponding Scheduled Payment to the DB Contractor within 30 Days after the Concessionaire received such request for payment, such payment to comply with the Code of Virginia §2.2, *et seq.*, which addresses prompt payment; provided, however, that the Concessionaire may withhold all or part of any Scheduled Payment upon the occurrence of any of the following events:

(i) the DB Contractor's request for payment does not include the lien waiver and certifications required by Section 7.02(a) and Section 7.02(f) or otherwise does not meet the requirements of Section 7.02(a);

(ii) the DB Contractor has not supplied the Concessionaire with the Monthly Progress Report for the month for which the request for payment has been made as described in Section 7.02(a);

(iii) one or more third parties have filed a mechanics' lien or similar claim against the Concessionaire or the Project or Project Right of Way resulting from the actions or inactions of the DB Contractor, any Subcontractor, or any person for whom the DB Contractor is legally responsible and the DB Contractor has not furnished in respect thereof a bond meeting the requirements of Section 7.02(f);

(iv) the DB Contractor has failed to make timely payments to Subcontractors as required under applicable Subcontracts and Law, including the Code of Virginia §2.2, *et seq.*, which addresses prompt payment; provided, however, that the foregoing shall not apply if the Concessionaire has wrongfully withheld payments due to the DB Contractor;

(v) the DB Contractor fails to pay any amounts owing to the Concessionaire under this Agreement;

(vi) the Lenders' Technical Advisor does not approve the request for payment for the reasons set forth in Section 7.02;

(vii) any event which would permit a Termination For Cause of this Agreement by the Concessionaire has occurred and is continuing beyond any applicable cure period; or

(viii) this Agreement is terminated before the Final Payment is made, in which event the Concessionaire shall not be obligated to make further Scheduled Payments or other payments except in accordance with Article 20.

(c) Deferral of Scheduled Payments. The DB Contractor shall re-invoice at the next regular monthly invoicing date any Scheduled Payment or portion thereof withheld under Section 7.02(b) once the cause for such withholding has been removed or resolved, and the Concessionaire shall make such Scheduled Payment, other than any portion thereof in dispute, without interest, if all the conditions to the Scheduled Payment have been satisfied. The DB Contractor shall continue to perform the DB Work, notwithstanding a withholding by the Concessionaire under Section 7.02(b).

(d) Final Payment. The Concessionaire shall pay the unpaid balance of the Contract Sum (the "Final Payment"), within 30 Days after the latest to occur of (i) the Final Completion; (ii) receipt by the Concessionaire of a final list and summary of the

work performed by all Subcontractors, the amount due to each Subcontractor, and certification by the DB Contractor that all undisputed amounts due to Subcontractors have been paid in full, (iii) receipt by the Concessionaire of a final lien and claim waiver, in the form of Exhibit HH, of all liens and other claims that the DB Contractor may have against the Concessionaire, the Project and the Project Right of Way, (iv) the certification required pursuant to Section 7.02(f) as to the absence of liens and other claims or, if the DB Contractor is unable to make such certification, a letter of credit or bond that has received Concessionaire Approval to protect the Concessionaire, the Department, the Project and the Project Right of Way from any and all liens and other claims made on account of such liens and such other claims, and (v) the satisfaction of all other conditions to a Scheduled Payment contained in this Agreement or to which the DB Contractor has otherwise agreed.

(e) Interest on Late Payments. Any undisputed amount not paid when due shall bear interest at the Bank Rate from the date such payment is due until the date it is actually paid. Any disputed amount which is ultimately determined to be payable shall bear interest at the Bank Rate from the date of such determination until the date it is actually paid. For the avoidance of doubt, to the extent the Concessionaire is entitled to any such interest payment under the Comprehensive Agreement, the DB Contractor shall only be entitled to such payment to the extent that the Concessionaire actually receives the corresponding interest payment under the Comprehensive Agreement.

(f) All Payments Subject to Absence of Liens. At the time of each Scheduled Payment hereunder, the DB Contractor shall certify to the Concessionaire that the Project, the Project Right of Way and any and all interests and estates therein, and all improvements and materials placed on the Project Right of Way, are, to the extent of the most recent payment received by the DB Contractor, free from any and all liens, security interests, encumbrances and other claims, including but not limited to claims in the nature of mechanics', labor or materialmen's liens or otherwise, arising out of or in connection with performance by the DB Contractor, or any Subcontractor, of the DB Work. If any lien, security interest, encumbrance or other claim is filed or notification of withholding money for labor or material furnished under this Agreement is served on the Concessionaire, the Department or any Lender, the Concessionaire may withhold from any Scheduled Payment or other amount payable to the DB Contractor under this Agreement or otherwise, an amount sufficient to discharge any or all such liens or claims, unless the DB Contractor shall furnish a bond in form, substance and amount reasonably satisfactory to the Concessionaire, the Department and the Lenders to protect Concessionaire, the Project and the Project Right of Way against such liens or claims, and, after 30 Days from the time such lien or claim is made, unless the DB Contractor shall have furnished a bond as described above, the Concessionaire may discharge such lien or claim with the moneys withheld, whereupon for purposes of this Agreement such moneys shall be deemed to have been paid to the DB Contractor hereunder.

(g) Payment or Use not Acceptance. No Scheduled Payment or other payment to the DB Contractor or any use of the Project by the Concessionaire shall alone constitute an acceptance of any of the DB Work or relieve the DB Contractor of any of its obligations or liabilities with respect thereto.

(h) Set-Off. The Concessionaire may deduct and set-off against any part of the balance due or to become due to the DB Contractor under this Agreement, any amounts due from the DB Contractor to the Concessionaire under or in connection with this Agreement, including liquidated damages due or to become due from the DB Contractor to the Concessionaire.

**Section 7.03. Public Funds.** Under the CA the Department is to make payments of the Public Funds Amount to the Concessionaire in accordance with the terms set forth in Section 7.02 of the CA and Exhibit M and the Concessionaire will utilize the Public Funds Amount to pay a portion of the Contract Sum. For any month in which the Public Funds Amount will be utilized to pay a portion of the Contract Sum, the DB Contractor shall provide with its request for payment under Section 7.02(a) all necessary certifications, affidavits and information required by Exhibit M for the disbursement of the Public Funds Amount from the Department (or the trustee) to the Concessionaire under the CA. The CA specifies that the Public Funds Amount will be (a) decreased by any amounts paid by the Department to the Concessionaire prior to the Financial Close Date for Early Work and (b) adjusted pursuant Section 7.03(b) of the CA. Subject to the DB Contractor's right to suspend the applicable portion of the DB Work pursuant to Section 7.01(a) until payment of the Public Funds Amount is made, the DB Contractor acknowledges and agrees that the Concessionaire shall have no liability to the DB Contractor for any failure of the Department to pay the Public Funds Amount as and when due under the CA, and the DB Contractor fully assumes the risk of non-payment by the Department of that portion of the Contract Sum equal to the Public Funds Amount other than the portion of the Public Funds Amount paid to the Concessionaire for the Early Work.

**Section 7.04. Financial Close.** Except as may be expressly agreed between the Concessionaire and the DB Contractor in writing after the Agreement Date, all of the Concessionaire's obligations under this Agreement are subject to the occurrence of Financial Close. Prior to Financial Close the DB Contractor shall execute and deliver (a) the DB Direct Agreement to the Collateral Agent, and (b) the Interface Agreement to each of the Concessionaire and the Tolling Contractor.

**Section 7.05. Not Used.**

**Section 7.06. Collateral Agent's Rights.** The Collateral Agent's rights are set forth in the DB Direct Agreement.

## ARTICLE 8

### DESIGN AND CONSTRUCTION OF THE PROJECT

**Section 8.01. General Obligations of the DB Contractor.**

(a) The DB Contractor will furnish or cause to be furnished all design, construction, commissioning, completion and other services, provide or cause to be provided all materials, equipment and labor to perform the DB Work reasonably inferable from this Agreement, and shall perform the DB Work in accordance with this Agreement and in such a manner that will satisfy in full the Concessionaire's obligations with respect

to that portion of the Work under the CA that is included in the DB Work (including the Concessionaire's obligations with respect to the design, rehabilitation, construction, commissioning and completion of the Project under the Technical Requirements, other than the matters expressly excluded from the scope of the DB Work as set forth in Exhibit CC), all on a lump-sum, fixed-price, turnkey basis and otherwise in accordance with this Agreement, the CA, the Technical Requirements and Law.

(b) Except as otherwise expressly provided in this Agreement, the Concessionaire makes no warranties or representations as to any surveys, data, reports or other information provided by the Concessionaire, the Department or other Persons, including the data and other information set forth in the Known Site Conditions Baseline Report attached as Exhibit P hereto and the Known Pre-Existing Hazardous Substances Report attached as Exhibit Q hereto concerning surface or subsurface conditions, the existing condition of the roadway and other Assets, drainage, the presence of Utilities, Hazardous Substances, contaminated ground water, archeological, paleontological and cultural resources, and endangered and threatened species, affecting the Project Right of Way or surrounding locations. The DB Contractor acknowledges that such information is for the DB Contractor's reference only and has not been verified by the Department or the Concessionaire, and that the DB Contractor will be responsible for conducting all surveys, studies and assessments as it deems appropriate for the Project, *provided*, that the foregoing will not limit the DB Contractor's rights with respect to Compensation Events and Delay Events.

(c) Except as otherwise expressly provided in this Agreement, the DB Contractor will bear the risk of all conditions occurring on, under or about the Project Right of Way on which the DB Work is performed, including:

- (i) physical conditions of an unusual nature that differ materially from those ordinarily encountered in the area;
- (ii) changes in surface topography;
- (iii) variations in subsurface moisture content;
- (iv) Utility facilities;
- (v) Hazardous Substances, including contaminated groundwater;
- (vi) any archeological, paleontological or cultural resources;  
and
- (vii) any species listed as threatened or endangered under Federal or State endangered species Law;

*provided*, that the foregoing will not limit the DB Contractor's rights with respect to Compensation Events and Delay Events.



(d) The DB Contractor will be responsible for coordinating and scheduling the DB Work with the Tolling Contractor as provided in the Interface Agreement, as well as with the other separate contractors working in the Project Right of Way.

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

(f) The DB Contractor, in consultation with the Concessionaire, will provide information to the public concerning the DB Work and associated construction activities in accordance with the Technical Requirements.

(g) The DB Contractor will, in accordance with the requirements and times set forth in the Technical Requirements (but subject to Section 3.07), prepare and submit for Concessionaire Approval, and the Concessionaire will submit to the Department for its review and approval, the Project Development Plans pertaining to the DB Work.

(h) The DB Contractor will not enter into any agreement with any Governmental Authority with jurisdiction over any Governmental Approval, Utility Owner, railroad, property owner or other third party having regulatory jurisdiction over any aspect of the Project or the DB Work or having any property interest affected by the Project or the DB Work that in any way purports to obligate the Concessionaire or the Department, or states or implies that the Concessionaire or the Department has an obligation, to the third party to carry out any activity during or after the end of the CA Term, unless the Concessionaire or the Department, as applicable, otherwise approves the same in writing in its sole discretion. Except in the case of an agreement approved by the Concessionaire or the Department, as applicable, pursuant to the preceding sentence, the DB Contractor has no power or authority to enter into any such agreement with a third party in the name or on behalf of the Concessionaire or the Department and the Parties agree that any purported agreement to that effect will be null and void.

(i) The DB Contractor shall participate in meetings between the Concessionaire and the Department pertaining to the DB Contractor or the DB Work if the Concessionaire or the Department so requests.

(j) The DB Contractor shall not allow any Liens or Claims of the DB Contractor, any Subcontractor or any Person claiming by or through the DB Contractor or any Subcontractor to attach at any time to any interest of the Department or the Concessionaire in the Project or the Project Right of Way.

(k) The DB Contractor shall at all times maintain all licenses required by Law, and shall comply with the requirements of the eVA or its successor.

**Section 8.02. Limited Notices to Proceed to Perform Certain DB Work.**

(a) Under Section 8.02 of the CA, the Concessionaire may request that the Department issue one or more Limited Notices to Proceed (“LNTTP”) authorizing the Concessionaire to commence certain portions of the Work as set forth in said Section 8.02. The DB Contractor shall provide such assistance with respect to the preparation of a request to issue an LNTTP with respect to portions of the DB Work as the Concessionaire may request. Prior to the request by the Concessionaire to the Department for issuance of an LNTTP, the Parties will agree upon the scope, schedule and payment terms (if applicable and not otherwise contemplated as a part of the mobilization payment) for the portion of the DB Work that is the subject of such LNTTP, as well as any modifications to such terms that may be necessary or appropriate to address any conditions or matters with respect to such LNTTP imposed or raised by the Department, all of which shall be set forth in a limited notice to proceed that would be issued by the Concessionaire to the DB Contractor (a “DB LNTTP”).

(b) The DB Contractor will deliver notice to the Concessionaire upon the satisfaction of the conditions to the issuance of any LNTTP for which the DB Contractor has agreed to be responsible pursuant to Section 8.02(a). When all conditions to the Department’s issuance of the LNTTP have been satisfied, the Concessionaire may request that the Department issue such LNTTP for the applicable portion of the DB Work. Subject to Section 10.05, if the Department notifies the Concessionaire that the Department believes any conditions for which the DB Contractor has agreed to be responsible have not been satisfied, the DB Contractor shall address those deficiencies such that the Concessionaire may re-submit a notice to the Department or, if the DB Contractor does not agree with the Department’s assessment, the DB Contractor may, subject to Section 21.06, direct the Concessionaire to refer the matter to the dispute resolution procedures pursuant to Article 21 of the CA). The DB Contractor shall be liable to the Concessionaire for any Losses incurred by the Concessionaire in respect of amounts that the Concessionaire is required to pay to the Concessionaire Contractors affected by such failure or delay in issuance of the LNTTP by the Department under the CA to the extent that such failure or delay is caused by the failure of the DB Contractor to satisfy any of the conditions to such issuance for which it has agreed to be responsible pursuant to Section 8.02(a). If such failure or delay in issuance of the LNTTP by the Department under the CA is caused by the failure of the Concessionaire or any of the Concessionaire Contractors to satisfy any of the conditions to the issuance of the LNTTP under the CA for which the Concessionaire or such contractor is responsible, then, subject to Section 14.05(c) and (d), the Concessionaire shall be liable to the DB Contractor for any Losses incurred by the DB Contractor as a result of such delay or failure. After receipt under the CA of the approval or deemed approval of the LNTTP from the Department, the Concessionaire shall issue the corresponding DB LNTTP to the DB Contractor.

(c) [Not used]

**Section 8.03. Conditions Precedent for Notices to Proceed.**

(a) Notice to Proceed with Design Work. Except as may be authorized by a DB LNTP, the DB Contractor will not commence any design DB Work unless and until the Concessionaire has issued the DB Design Work NTP, which issuance shall be subject to the Department's determination that the conditions set forth in Section 8.03(a) of the CA have been satisfied (or to the Department's waiver of such conditions) and the Department's delivery of the Design Work Notice to Proceed to the Concessionaire under the CA. The DB Contractor shall provide such cooperation and assistance as the Concessionaire may reasonably request with respect to the satisfaction of such conditions, and shall in particular be responsible for:

(i) As further provided in Section 8.04(b), on behalf of the Concessionaire, delivery to the Department and obtaining of the Department's approval of the Schedule of Submittals; and

(ii) Preparation of those portions of the following Project Development Plans that pertain to the DB Work, each of which shall be subject to Concessionaire Approval: (A) the DB Contractor Management Plan; (B) Document Management Plan; (C) Quality Management System Plan; (D) Design Quality Management Plan; and (E) DBE/SWaM Plan; and provision to the Concessionaire of necessary information in the DB Contractor's possession relating to the DB Work in connection with the Concessionaire's preparation of the Public Information and Communications Plan.

In addition to any rights of the Parties set forth in Section 10.05, the DB Contractor shall be liable to the Concessionaire for any Losses incurred by the Concessionaire in respect of the amounts that the Concessionaire is required pay to the Concessionaire Contractors affected by such failure or delay in issuance of the Design Work Notice to Proceed by the Department under the CA to the extent that such failure or delay is caused by the failure of the DB Contractor to satisfy any of the conditions to such issuance for which it is responsible hereunder. If such failure or delay in issuance of the Design Work Notice to Proceed by the Department under the CA is caused by the failure of the Concessionaire or any of the Concessionaire Contractors to satisfy any of the conditions to the issuance of the Design Work Notice to Proceed under the CA that the Concessionaire or such contractor is responsible for, then, subject to Section 14.05(c) and (d), the Concessionaire shall be liable to the DB Contractor for any Losses incurred by the DB Contractor as a result of such delay or failure.

The delivery of the DB Design Work NTP will not constitute authorization to commence construction activities.

(b) Notice to Proceed for Construction. The DB Contractor will not commence construction of any Construction Segment unless and until the Concessionaire has issued the DB Construction Segment NTP for the applicable Construction Segment, which issuance shall be subject to the Department's determination that the conditions set forth in Section 8.03(b) of the CA have been satisfied (or to the Department's waiver of

such conditions) and the Department's delivery of the applicable Construction Segment Notice to Proceed to the Concessionaire under the CA. The DB Contractor shall provide such cooperation and assistance as the Concessionaire may reasonably request with respect to the satisfaction of such conditions, and shall in particular be responsible for:

(i) On behalf of the Concessionaire, delivery to the Department of correct and complete copies of all Design Public Hearing Documentation, the portion of the ETTM System Design Documentation for which the DB Contractor is responsible, and Construction Documentation relating to the applicable Construction Segment (each of which shall be subject to Concessionaire Review or Concessionaire Approval pursuant to Section 8.04(b)) pursuant to this Agreement, the CA and the Technical Requirements, and the Concessionaire's receipt from the Department of any prior written approvals thereof required by the Comprehensive Agreement and Federal Requirements;

(ii) Obtaining all Governmental Approvals (including any applicable Department approvals and Federal approvals and agreements) necessary for the construction of the applicable Construction Segment (and providing copies thereof to the Concessionaire and the Department), and satisfying all applicable pre-construction requirements of the Governmental Approvals imposed on the Concessionaire and the DB Contractor;

(iii) Obtaining, in accordance with Section 8.05, all rights of access or other property rights necessary for the commencement of construction within the applicable portion of a Construction Segment;

(iv) Subject to prior receipt of Concessionaire Approval thereof, obtaining, on behalf of the Concessionaire, the Department's approval of the following: (A) Baseline Schedule; (B) Construction Quality Management Plan; (C) Maintenance of Traffic Plan; (D) Environmental Management Plan; (E) ROW Acquisition and Relocation Plan; (F) Health, Safety and Security Plan; and (G) Utilities Plan; and

(v) Subject to prior receipt of Concessionaire Approval thereof, with respect to commencement of construction for the Existing Project Assets, obtaining, on behalf of the Concessionaire, the Department's approval of the DB Rehabilitation Plan attached as Exhibit R hereto.

The DB Contractor will deliver notice to the Concessionaire upon the satisfaction of the conditions to the issuance of any Construction Segment Notice to Proceed for which the DB Contractor is responsible pursuant to Section 8.03(b). When all conditions to the Department's issuance of the Construction Segment Notice to Proceed have been satisfied, the DB Contractor may request the Concessionaire (which request shall not to be unreasonably denied) to request that the Department issue such Construction Segment Notice to Proceed for the applicable portion of the DB Work. Subject to Section 10.05, if the Department notifies the Concessionaire

that the Department believes any conditions for which the DB Contractor has agreed is responsible have not been satisfied, the DB Contractor shall address those deficiencies such that the Concessionaire may re-submit a notice to the Department or, if the DB Contractor does not agree with the Department's assessment, the DB Contractor may, subject to Section 21.06, direct the Concessionaire to refer the matter to the dispute resolution procedures pursuant to Article 21 of the CA. The DB Contractor shall be liable to the Concessionaire for any Losses incurred by the Concessionaire in respect of the amounts that the Concessionaire is required pay to the Concessionaire Contractors affected by such failure or delay in issuance of the Construction Segment Notice to Proceed by the Department under the CA to the extent that such failure or delay is caused by the failure of the DB Contractor to satisfy any of the conditions to such issuance for which it is responsible hereunder. If such failure or delay in issuance of the Construction Segment Notice to Proceed by the Department under the CA is caused by the failure of any of the Concessionaire Contractors to satisfy any of the conditions to the issuance of such Construction Segment Notice to Proceed under the CA that such contractor is responsible for, then the Concessionaire shall be liable to the DB Contractor for any Losses incurred by the DB Contractor as a result of such delay or failure. After receipt under the CA of the approval or deemed issuance of the Construction Segment Notice to Proceed from the Department, the Concessionaire may issue the corresponding DB Construction Segment NTP to the DB Contractor.

(c) Unless the Department waives in writing (as distinguished from a deemed waiver) a condition precedent that requires action by the DB Contractor to be satisfied, the DB Contractor will remain bound to use diligent efforts to satisfy the condition precedent.

#### **Section 8.04. Design Work.**

(a) The DB Contractor will submit to the Concessionaire accurate and complete copies of all Design Documentation and Construction Documentation relating to the DB Work in accordance with the Schedule of Submittals, which the Concessionaire will deliver to the Department following Concessionaire Approval or Concessionaire Review, as applicable. Subject to Section 10.05, if the Department determines that any submittal is not in compliance in any respect, under the CA the Department will be entitled to cease all further review of such submittal and is to notify the Concessionaire with a description of such noncompliance together with its review comments. The Concessionaire will promptly forward the same to the DB Contractor, which shall, subject to Concessionaire Review, respond to all of the Department's comments and objections and make all modifications to the submittal necessary to bring such submittal into compliance with this Agreement and the CA and resubmit such documentation to the Concessionaire for resubmission to the Department in accordance with the foregoing procedures. Such re-submittal will identify all changes to the prior submittal.

(b) No later than thirty (30) Days prior to the anticipated date of issuance of the DB Design Work NTP, the DB Contractor shall submit for Concessionaire Approval a proposed Schedule of Submittals meeting the requirements of Section 8.04(b) of the CA and specifying in reasonable detail (i) all Design Documentation and Construction Documentation that require Concessionaire Approval or

Concessionaire Review in accordance with this Agreement or the Technical Requirements and/or the Department's review and approval in accordance with the CA and (ii) the time periods for such reviews and approvals. The Concessionaire shall provide its approval or disapproval of the proposed Schedule of Submittals within five (5) Days of receipt thereof, provided, that the Concessionaire's failure to respond shall not be deemed approval thereof. If the Concessionaire disapproves the proposed Schedule of Submittals, it shall submit its comments and objections to the DB Contractor and the DB Contractor will respond to all such comments and objections and will submit a revised Schedule of Submittals for Concessionaire Approval within five (5) Days of the Concessionaire's response. Subject to Section 10.05(b) and (c), the foregoing process shall be repeated until the Concessionaire approves the Schedule of Submittals. The DB Contractor shall, subject to Concessionaire Approval, update the Schedule of Submittals periodically as necessary in order to fulfill the Concessionaire's obligations with respect to such updates under the CA and the Technical Requirements, and will complete quality control and quality assurance reviews of all Design Documentation and Construction Documentation in respect of the DB Work to ensure that they are accurate and complete and comply with the requirements of this Agreement, the CA and the Technical Requirements prior to any submission to the Concessionaire or the Department. If permitted by the Department in satisfaction of the Concessionaire's obligation under the CA, quality assurance/quality control providers engaged by the DB Contractor may be jointly engaged by the Concessionaire with respect to the DB Work at no additional cost to the Concessionaire; provided, that if the Concessionaire expressly requests in writing for such quality assurance/quality control providers to perform additional services that are not included in the DB Work hereunder and the provision of such services results in actual additional out-of-pocket costs to the DB Contractor, the Concessionaire shall reimburse the DB Contractor for such additional out-of-pocket costs that are reasonable and documented.

(c) Whenever Concessionaire Review or Concessionaire Approval of the Design Documentation and Construction Documentation and other items submitted to the Concessionaire in accordance with this Agreement or the Technical Requirements is required hereunder, the Concessionaire will respond to the DB Contractor within the time specified in the Schedule of Submittals or, if no time is specified, by the later of (i) five (5) Days after the Concessionaire's acknowledgement of receipt from the DB Contractor or (ii) if applicable, five (5) Days prior to the date such item must be submitted by the Concessionaire to the Department under the CA. In the event that the Concessionaire fails to respond to the DB Contractor within the required time, such failure by the Concessionaire to respond will be deemed to be the Concessionaire's approval thereof, except to the extent that submittals deviate from the Technical Requirements, Governmental Approvals, or Law. Subject to Section 10.02(c) and Section 10.05(c), if the Concessionaire has responded to the DB Contractor (which response may include any response received from the Department), the DB Contractor will respond to all of the Concessionaire's and the Department's comments and objections and, to the extent Concessionaire Approval is required pursuant hereto, make modifications to the Design Documentation and Construction Documentation necessary to fully reflect and resolve all such comments and objections, and resubmit such documentation to the Concessionaire for Concessionaire Review or Concessionaire Approval, as applicable (except that in the

case of a resubmittal, the Concessionaire will have three (3) Days to respond, unless the Concessionaire notifies the DB Contractor within such three (3)-Day period that the Concessionaire has determined in its respective sole discretion that the resubmittal is of significant substance and requires the full five (5)-Day response period). With respect to items subject to Concessionaire Review, the DB Contractor will give due consideration to the Concessionaire's and the Department's suggested amendments and comments, but the DB Contractor will not be obligated to incorporate the Concessionaire's or the Department's suggested amendments or comments unless they are necessary for such submittal by the DB Contractor to the Concessionaire to comply with the applicable requirements of this Agreement or the CA. Whenever the Concessionaire is required to respond to the DB Contractor's request for the Concessionaire Approval or Concessionaire Review pursuant to this Section 8.04 (whether or not failure to respond is deemed approval), the Concessionaire will be deemed to have responded if it has notified the DB Contractor, within the applicable time period, that the Concessionaire requires additional time to obtain information or to perform reviews necessary or appropriate for a complete response.

(d) Failure to respond within the specified period will not constitute a deemed approval by the Concessionaire pursuant to Section 8.04(c) with respect to the Right of Way Acquisition Plan, Deviations pursuant to Section 14.03, or any other matter where the Concessionaire or the Department has sole discretion to approve or disapprove pursuant to this Agreement or the CA. Any failure of the Concessionaire to respond to the DB Contractor regarding the Concessionaire's approval of such documents or matters within the applicable period after delivery of the DB Contractor's request to the Concessionaire will be deemed disapproval by the Concessionaire. If the Concessionaire fails to respond within the applicable period, the Concessionaire will notify the DB Contractor of the status of the review of such submittals upon the request of the DB Contractor.

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

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

(g) Concessionaire Review of, Concessionaire Approval of, and the Concessionaire's comments on interim design submissions and the Construction Documentation are for the purpose of evaluating the DB Contractor's compliance with the requirements of this Agreement and will be performed in accordance with the terms of this Agreement, but shall not constitute a waiver or relinquishment by the Concessionaire of any of its rights under this Agreement, nor exonerate or relieve the DB Contractor from any obligation, warranty or liability hereunder.

(h) Following the Concessionaire's initial approval pursuant to this Section 8.04, the DB Contractor will have the right to propose amendments, supplements or other modifications to the Design Public Hearing Documentation, Design Documentation or the Construction Documentation or any part thereof, and the Concessionaire shall approve the same unless (i) approval from the Department is required pursuant to the CA and the Department has not provided such approval, or (ii) the proposal may adversely affect the Project's life-cycle operation and maintenance configuration or health or safety matters. If the DB Contractor seeks any such amendments, supplements or modifications that the Concessionaire is obligated to provide to the Department pursuant to the CA, the DB Contractor shall, on behalf of the Concessionaire, reimburse the Department, upon demand, for all the Allocable Costs it incurs to review and consider such proposed amendments, supplements or modifications that are subject to the Department's approval.

(i) In the event the DB Contractor's design differs from the schematic upon which the NEPA Documents were based, as between the DB Contractor and the Concessionaire, the DB Contractor will be fully responsible for all necessary actions, and will bear all risk of delay (except to the extent resulting from Delay Events) and all risk of increased cost, resulting from or arising out of any associated change in the Project location and design, including (i) conducting all necessary environmental studies and preparing all necessary environmental documents in compliance with applicable Environmental Laws, (ii) obtaining and complying with all necessary new Governmental Approvals (including any modifications, renewals and extensions of the NEPA Documents and other existing Governmental Approvals) or third party approvals or agreements, and (iii) bearing all risk and cost of litigation. The foregoing provisions will not apply, however, in the case of a Department Change or Department Project Enhancement. Under the CA, the Department and FHWA are to independently evaluate all environmental studies and documents and fulfill the other responsibilities assigned to them by 23 CFR Part 771; *provided*, that, except in the case of a Compensation Event that results in the change in the Project location and design, the DB Contractor shall, on behalf of the Concessionaire, fully reimburse the Department for the Allocable Costs it incurs to conduct further or supplemental environmental studies and to fulfill any other responsibilities assigned to it pursuant to 23 CFR Part 771.

**Section 8.05. Acquisition of Project Right of Way; Utility Relocations; Railroad Easements; Virginia Port Authority Lease.**

(a) Right of Way Acquisition Obligations. In order to fulfill the Concessionaire's obligations under the CA with respect to Project Right of Way



acquisition work, as part of the DB Work the DB Contractor will perform all Project Right of Way acquisition work necessary for the construction of the Project, including but not limited to all appraisals, appraisal reviews, negotiations with landowners and Utility Owners, relocation assistance and advisory services, and legal services. The DB Contractor will carry out such DB Work as follows:

(i) the DB Contractor will carry out the DB Work specified herein in accordance with the Technical Requirements, all applicable Federal and State Laws and the other requirements of this Agreement;

(ii) the DB Contractor will acquire all Project Right of Way in accordance with the Technical Requirements and Law, including but not limited to the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970, as amended (the “Uniform Act”) and Titles 25.1 and 33.1 of the Code of Virginia;

(iii) the DB Contractor will, in consultation with and on behalf of the Concessionaire, submit a Right of Way Acquisition Plan for the Department’s approval. The Right of Way Acquisition Plan will identify a schedule of right of way activities including the specific parcels to be acquired and all relocations. The Right of Way Acquisition Plan will allow for the orderly relocation of displaced persons based on time frames not less than those provided by the Uniform Act. In the event the Department fails to respond in 21 Days, such failure by the Department will not be deemed approval of the Right of Way Acquisition Plan. The Right of Way Acquisition Plan will be updated by the DB Contractor in consultation with the Concessionaire as necessary until Final Completion;

(iv) the DB Contractor will exercise due diligence and use reasonable care in determining whether property to be acquired may contain wastes or other materials or hazards requiring remedial action or treatment to the extent the DB Contractor has access to such property and will otherwise comply with the Technical Requirements, including the undertaking of studies, assessments and tests required by the Technical Requirements;

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

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

(b) Condemnation. The DB Contractor will use its best efforts (i) to acquire the Project Right of Way by making *bona fide* efforts to purchase the Project Right of Way from the owners of the property for amounts not to exceed just compensation therefore and (ii) to settle claims with landowners amicably, each in accordance with Law. If, despite the DB Contractor's best efforts, it is unable to reach agreement with landowners within 45 Days of its initial offer, pursuant to Section 8.05 of the CA the Department is to undertake any necessary condemnation proceedings. Prior to the Department filing a condemnation proceeding, the DB Contractor will prepare all necessary paperwork and supporting documentation required for the proceeding and it will, on behalf of the Concessionaire, deliver that documentation to the Department. Under the CA, the Department then will file the condemnation proceeding(s) and handle such proceeding(s) in accordance with the Technical Requirements.

(c) Property Outside the Project Right of Way. Except as provided in Sections 8.05(g) and 8.05(f), The DB Contractor will be responsible, at its own cost and expense, for the acquisition of, or causing the acquisition of, any property, temporary easements or other property rights outside of the Project Right of Way which may be necessary for any permanent or temporary works outside of the Project Right of Way required for performance of the DB Work, including those necessary to accommodate laydown, staging, drainage and other construction methods in connection with the construction of the Project.

(d) ROW Acquisition Costs.

(i) Except as provided in this Sections 8.05(d), 8.05(f) and 8.05(g), the DB Contractor will be responsible for performing all activities and services necessary for the acquisition of all Project Right of Way at its sole cost and expense and with no increase to the Contract Sum.

(ii) Responsibility for ROW Acquisition Costs will be allocated as follows:

(A) ROW Acquisition Costs Overage. To the extent that the ROW Acquisition Costs are greater than the ROW Baseline Cost, the overage will be allocated as follows:

(1) the DB Contractor will pay 100% of the ROW Acquisition Costs up to 110% of the ROW Baseline Cost;

(2) the DB Contractor will pay 50% of the ROW Acquisition Costs in excess of 110% but less than or equal to 120% of the ROW Baseline Cost, and under the CA the Department is obligated to pay the remaining 50%; and

(3) under the CA the Department is obligated to pay 100% of the ROW Costs in excess of 120% of the ROW Baseline Cost.

(B) ROW Acquisition Costs Savings. To the extent that the ROW Acquisition Costs are less than the ROW Baseline Cost, the savings will be allocated as follows:

(1) the DB Contractor will retain 100% of the savings equal to or less than 10% of the ROW Baseline Costs;

(2) the DB Contractor will, on behalf of the Concessionaire, pay the Department 50% of the savings in excess of 10% but less than or equal to 20% of the ROW Baseline Cost; and

(3) the DB Contractor will, on behalf of the Concessionaire, pay the Department 100% of the savings that exceed 20% of the ROW Baseline Cost.

(iii) The ROW Acquisition Costs for which the Department bears responsibility pursuant to Section 8.05(d)(ii)(A)(2)&(3) of the CA are to be paid by the Department to the Concessionaire, which shall promptly pay over the amount received to the DB Contractor. The DB Contractor shall, on behalf of the Concessionaire, pay any savings to which the Department is entitled pursuant to Section 8.05(d)(ii)(B)(2)&(3) of the CA directly to the Department to fulfill the Concessionaire's obligations under the CA with respect thereto, in each case no more than 30 Days after the date of determination thereof. The Concessionaire shall not be liable to the DB Contractor for the payment of any ROW Acquisition Costs for which the Department is responsible under the CA except to the extent the same are actually received by the Concessionaire from the Department. If the Department fails to pay such amounts, the Parties shall proceed in accordance with Section 21.06.

(e) Utility Relocations. The DB Contractor will perform all activities and services necessary for all Utility Relocations necessary to accommodate construction of the Project. The DB Contractor will perform Utility Relocations in accordance with the Technical Requirements. Pursuant to the CA and subject to the Law, the Department is to provide to the Concessionaire the benefit of any provisions in recorded Utility or other easements affecting the Project which require the easement holders to relocate at their expense, and the Department is to reasonably assist the Concessionaire in obtaining the benefit of all rights the Department has under any Utility easement, permit, or other right in real property relating to Utility Relocations, it being understood that such assistance will not entail the initiation of or participation in legal actions or proceedings.

The Concessionaire shall make any benefits and assistance so received available to the DB Contractor.

(f) Acquisition of Railroad Easements. Pursuant to the CA, the Department is to obtain, at the Department's sole cost and expense, any easements and other property rights necessary for the Work located on property owned by CSX Corporation and the Norfolk-Portsmouth Railroad Company, and facilitate the negotiation of a construction agreement between the Concessionaire and CSX Corporation and the Norfolk-Portsmouth Railroad Company, respectively ("Railroad Easements"). Notwithstanding the foregoing, the DB Contractor will reimburse the Department, on behalf of the Concessionaire, for actual costs incurred by the Department in the Department's efforts to obtain such Railroad Easements, to the extent such costs are incurred by the Department as a result of any DB Contractor Party's misconduct, negligence or other culpable act, error or omission. The Concessionaire shall make available to the DB Contractor all benefits and rights it receives under the Railroad Easements for the performance of the DB Work, and the DB Contractor shall perform and fulfill all of the Concessionaire's obligations under the Railroad Easements until Final Completion.

(g) Lease of Virginia Port Authority Property. The DB Contractor is responsible for entering into the Virginia Port Authority Lease with the Virginia Port Authority in order to perform certain portions of the DB Work. Under the CA the Department is to reimburse the Concessionaire for lease payments paid to the Virginia Port Authority by the Concessionaire or the DB Contractor pursuant to the Virginia Port Authority Lease. The DB Contractor agrees that it will make all such lease payments when due under the Virginia Port Authority Lease, and the Concessionaire agrees that it will pay over to the DB Contractor all reimbursements for such lease payments received from the Department. Prior to the payment by the Department of such amounts, the DB Contractor will, on behalf of the Concessionaire as required in Section 8.05(g) of the CA, submit to the Department on a monthly basis an invoice to the Department for such lease payments paid by the Design-Build Contractor, including supporting documentation. The DB Contractor acknowledges and agrees that the Concessionaire shall have no liability to the DB Contractor for any failure of the Department to reimburse such lease payments, and the DB Contractor fully assumes the risk of non-payment by the Department of such lease payments.

#### **Section 8.06. Governmental Approvals.**

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

(b) The Concessionaire will provide reasonable assistance and cooperation to the DB Contractor, as requested by the DB Contractor, in obtaining Governmental Approvals relating to the Project and any revisions, modifications,

amendments, supplements, renewals, reevaluations and extensions of Governmental Approvals.

(c) [not used]

(d) The DB Contractor will at all times and at its sole cost and expense (except as set forth in this Section 8.06(d)) comply with the NEPA Documents, including, without limitation, compliance necessitated by a change in the base design of the Project that is originated by the DB Contractor. If supplements to the NEPA Documents or additional NEPA Documents are needed following the Agreement Date, the CA provides that the Department is to prepare the necessary documentation using data and other information provided by the Concessionaire, and the Concessionaire is to reimburse the Department for its reasonable, documented costs incurred in the preparation of such documentation; *provided*, that under the CA the Department is to pay for (i) supplements to the existing NEPA Documents or additional NEPA Documents necessitated by a Department Change or Department Project Enhancement and (ii) the Concessionaire's Allocable Costs incurred by the Concessionaire in providing data and information relating to such supplements. The DB Contractor will provide such assistance as the Concessionaire requests in order to obtain the data and other information to be provided by the Concessionaire to the Department and, with respect to any Project changes originated by the DB Contractor, shall reimburse the Department, on behalf of the Concessionaire, for the Department's costs of preparing the documentation referred to above. If the Concessionaire requests that the DB Contractor assist in providing data and information to the Department relating to supplements to the existing NEPA Documents or additional NEPA Documents, the Concessionaire shall pay over to the DB Contractor the actual documented costs incurred by the DB Contractor in providing such assistance to the extent received by the Concessionaire from the Department under the CA.

**Section 8.07. Construction Work and Project Schedule.**

(a) The Initial Baseline Schedule will be the basis for monitoring the DB Contractor's performance of the DB Work until such time as a Baseline Schedule has been approved by the Concessionaire (which approval shall be subject to approval by the Department in accordance with the Technical Requirements).

(b) Under the CA the Concessionaire and the Department are to conduct monthly progress meetings in accordance with the Technical Requirements; the DB Contractor shall attend all such meetings unless otherwise directed by the Concessionaire. As part of, and in conjunction with, such meetings, the DB Contractor, subject to Concessionaire Approval, will provide the Department with any proposed update of the Project Schedule in accordance with the Technical Requirements. The Parties further agree to abide by the terms and procedures set forth in the Technical Requirements pertaining to project management and coordination matters.

(c) Except as provided otherwise in this Agreement, the DB Contractor will be financially responsible for all damage to the Project resulting from the DB Work. Neither the Concessionaire nor the Department will be responsible for any

construction means and methods of the DB Contractor or liability ensuing therefrom; provided, however, to the extent the Department incurs any liability under the CA if such means and methods were directed by the Department pursuant to a Department Change, then the DB Contractor shall not be responsible therefor to the extent liability is assumed by the Department and the Department actually pays for the costs thereof; and provided, further, that the foregoing will not limit the DB Contractor's right to a Department Change with respect to the Existing Project Assets pursuant to Section 8.11(c) unless the Excess Rehabilitation Work is attributable to the DB Contractor's failure to perform the DB Work in accordance with this Agreement.

(d) Whenever required by the Concessionaire or, under the CA, the Department, the DB Contractor will provide in writing a general description of the arrangements and methods that the DB Contractor proposes to adopt for the execution of the DB Work. The DB Contractor will not significantly alter the Baseline Schedule, or such arrangements and methods, without Concessionaire Approval and informing the Department, on behalf of the Concessionaire, and the DB Contractor will coordinate any such alterations to take into account the Department's resources and the work to be carried out by the Concessionaire's and the Department's separate contractors, if any.

(e) The DB Contractor may not alter the Critical Path, make any change that adversely or materially affects the Department's oversight resources or the Concessionaire's or the Department's separate contractors, or deviates from the Technical Requirements, without Concessionaire Approval (which approval shall be subject to approval by the Department in accordance with the CA).

(f) If the progress of the DB Work does not conform to the Baseline Schedule, as updated herein, the DB Contractor will submit for Concessionaire Approval a recovery schedule as required by the Technical Requirements, and will reasonably consider revisions to the Baseline Schedule proposed by the Concessionaire or, under the CA, the Department to achieve completion within the timeframe set forth in this Agreement.

#### **Section 8.08. Substantial Completion.**

(a) The DB Contractor will achieve Substantial Completion of each Project Asset on or before the Scheduled Substantial Completion Date for such Project Asset, subject to adjustment in accordance with this Agreement and subject to the assessment of liquidated damages pursuant to Section 8.10(a).

(b) The Concessionaire will countersign a Substantial Completion Certificate submitted by the DB Contractor with respect to a given Project Asset at such time as all conditions to Substantial Completion set forth in Section 8.08(c) are satisfied for such Project Asset; the Concessionaire's countersignature shall be subject to the issuance by the Department of a corresponding certificate of CA Substantial Completion pursuant to the CA.

(c) Substantial Completion of each Project Asset will have been achieved when each of the following conditions have occurred for the applicable Project Asset:

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

(ii) all major safety features are installed and functional, including, as required, shoulders, guard rails, striping and delineations, concrete traffic barriers, bridge railings, cable safety systems, metal beam guard fences, safety end treatments, terminal anchor sections and crash attenuators;

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

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

(v) 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 in accordance with and as permitted by a Department-approved traffic management plan solely in order to complete Punch List items);

(vi) the tolling commissioning process described in the Technical Requirements is completed, and the components of the ETTM System (other than the TMS) are completed, have passed all demonstration testing in accordance with the Construction Documentation and the Technical Requirements (other than the Integration Acceptance Test), including demonstration of interoperability with the E-ZPass network or any successor to E-ZPass then utilized on State Highways, and are ready for normal operation; provided, however, with respect to any Project Asset for which (A) a Tolling and O&M Notice to Proceed has been issued or (B) the Department has agreed in writing pursuant to Section 9.02(a)(viii) of the CA that the conditions set forth in Section 9.02(a)(viii) of CA have been satisfied, then the conditions of this Section 8.08(c)(vi) will be deemed satisfied;

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

(viii) the DB Contractor has otherwise completed the DB Work in accordance with this Agreement, including the Technical Requirements,

and with the Construction Documentation, such that the Project is in a physical condition that it can be used for normal and safe vehicular travel in all lanes and at all points of entry and exit, subject only to Punch List items;

(ix) the DB Contractor has delivered either (i) an interim lien and claim waiver, in the form of Exhibit GG hereto, of the DB Contractor's liens and other claims to the extent of the most recent payment received by the DB Contractor, or (ii) written evidence of posting of a bond by the DB Contractor meeting the requirements set forth in Section 7.02(f) in the amount equal to the aggregate of amounts of all liens and other claims on any part of the Project Asset that remain outstanding as of the date of Substantial Completion (or, if earlier, the date of the most recent payment to the DB Contractor);

(x) CA Substantial Completion with respect to the Project Asset has occurred under the Comprehensive Agreement as evidenced by the Department's issuance of a CA Substantial Completion Certificate thereunder with respect to the Project Asset; and

(xi) the Concessionaire has delivered to the DB Contractor the Substantial Completion Certificate signed by the DB Contractor and countersigned by the Concessionaire;

*provided*, that if any of the conditions in this Section 8.08(c) for which any of the Concessionaire Contractors is responsible has not been satisfied by such Concessionaire Contractor for reasons not attributable to the DB Contractor, then so long as all other conditions to Substantial Completion in this Section 8.08(c) have been satisfied, for all purposes of this Agreement the DB Contractor shall not be deemed to have failed to achieve Substantial Completion with respect to the applicable Project Asset, and the DB Contractor shall be entitled to claim a Scope Change Order for a Concessionaire-Caused Delay in accordance with Section 14.05(d) solely for direct impacts caused by the failure of such Concessionaire Contractor to satisfy any of the conditions in this Section 8.08(c) for reasons not attributable to the DB Contractor.

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

(e) At least twenty-eight (28) Days prior to the date when the DB Contractor anticipates to achieve Substantial Completion of a given Project Asset, it shall deliver to the Concessionaire a notice thereof (the "Notice of Project Asset Substantial Completion"). The Notice of Project Asset Substantial Completion shall contain a report of results of, and a description of, all DB Work completed in respect to the Project Asset in a form acceptable to the Concessionaire and with sufficient detail to enable it to establish whether Substantial Completion has been achieved, as well as a Substantial



Completion Certificate signed by the DB Contractor. Within ten (10) Days after receipt of the Notice of Project Asset Substantial Completion, the Concessionaire shall inspect the Project Asset and all DB Work completed by the DB Contractor related thereto and review the report submitted by the DB Contractor and either (a) provide written notice to the Department pursuant to Section 8.08(e) of the CA of anticipated CA Substantial Completion under the CA of such Project Asset, or (b) if reasonable cause exists for doing so, notify the DB Contractor that Substantial Completion has not been achieved stating the reasons therefor. Subject to Section 10.05, if the Concessionaire notifies the DB Contractor that Substantial Completion has not been achieved, the DB Contractor shall promptly take such action or perform such additional DB Work as will permit achievement of Substantial Completion and issue to the Concessionaire a revised Notice of Project Asset Substantial Completion signed by the DB Contractor. The foregoing process shall be repeated until the Concessionaire is satisfied with the Notice of Project Asset Substantial Completion and concurs that Substantial Completion of the Project Asset has occurred, whereupon it shall provide notice thereof to the Department. Within the 21-Day period after the Concessionaire provides such notice to the Department, the Concessionaire, the DB Contractor and, in accordance with Section 8.08(e) of the CA, the Department will meet, confer and exchange information on a regular basis with a goal being the Department's orderly, timely inspection of the applicable Project Asset and review of the final Construction Documentation for the applicable Project Asset and the Department's issuance of a CA Substantial Completion Certificate under the CA for the applicable Project Asset. In addition, the DB Contractor shall allow the Department to inspect the applicable Project Asset, review the final Construction Documentation for the applicable Project Asset and conduct such other investigation as may be necessary to determine whether CA Substantial Completion for the applicable Project Asset is achieved under the CA within such 21-Day period.

(f) Under the CA, if the Department disapproves the issuance of a CA Substantial Completion Certificate, then the Department is to provide a written notice to the Concessionaire specifying in reasonable detail its reasons for such disapproval within ten (10) Days of receipt of the final Construction Documentation and completion of the inspection for the applicable Project Asset, which the Concessionaire shall promptly provide to the DB Contractor to the extent such disapproval relates to the DB Work. Subject to Section 10.05 the DB Contractor will satisfy the conditions to CA Substantial Completion under the CA that were not met for the applicable Project Asset to which the Department's disapproval relates. Under the CA, the Department is to inspect, review and investigate the applicable Project Asset and the corrective work within five (5) Days after (i) the DB Contractor provides, on behalf of the Concessionaire, written notice that such work has been completed and (ii) the Department is provided access to such corrective work. If the Department and the DB Contractor cannot, despite good faith efforts, agree as to CA Substantial Completion under the CA for the applicable Project Asset, the DB Contractor may, subject to Section 21.06, direct the Concessionaire to refer the matter to the dispute resolution procedures pursuant to Article 21 of the CA.

(g) The DB Contractor will provide notice to the Concessionaire, which the Concessionaire shall promptly provide to the Department, if the Department has not approved or disapproved the issuance of a CA Substantial Completion Certificate

within 21 Days after delivery of the notice by the Concessionaire pursuant to Section 8.08(e) of the CA. If the Department has not notified the Concessionaire of such approval or disapproval within 15 Days after such Concessionaire notice, and if the delay is not a result of a DB Contractor Party's action or inaction, then such delay will constitute a CA Compensation Event and the provisions of Section 14.01 shall apply.

(h) If the Department approves the issuance of a CA Substantial Completion Certificate, under the CA the Department will provide with its CA Substantial Completion Certificate a CA Punch List of items to be completed to achieve CA Final Acceptance of the applicable Project Asset, which items shall be included in the Punch List under this Agreement except for items expressly excluded from the scope of the DB Work as set forth in Exhibit CC.

**Section 8.09. Final Acceptance.**

(a) The DB Contractor will achieve Final Acceptance on or before the Scheduled Final Acceptance Date for the applicable Project Asset, subject to adjustment in accordance with this Agreement and subject to the assessment of liquidated damages pursuant to Section 8.10(b).

(b) Final Acceptance of each Project Asset will have been achieved when each of the following conditions have occurred for the applicable Project Asset:

(i) Substantial Completion with respect to such Project Asset has occurred;

(ii) the components of the ETTM System have passed the Integration Acceptance Test;

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

(iv) all Punch List items will have been completed and delivered to the reasonable satisfaction of the Concessionaire and, in the case of items on the CA Punchlist, the Department;

(v) all Project Documentation, including Final As-Built Drawings and Construction Documentation, will have been delivered to the Concessionaire and the Department;

(vi) the DB Contractor will have paid for all DB Work performed by third parties to achieve Final Acceptance that the DB Contractor is obligated to pay (other than disputed amounts and amounts that are not yet due and payable);

(vii) the DB Contractor will have delivered to the Concessionaire and, on behalf of the Concessionaire, the Department all required certifications from the engineer of record and architect of record and all necessary Governmental Authorities;

(viii) the DB Contractor will have made all deliveries of Work Product to the Concessionaire that are required to be made pursuant to this Agreement;

(ix) CA Final Acceptance has occurred under the Comprehensive Agreement as evidenced by the Department's issuance of a CA Final Acceptance Certificate thereunder with respect to the Project Asset; and

(x) The Concessionaire has delivered to the DB Contractor the Final Acceptance Certificate signed by the DB Contractor and countersigned by the Concessionaire;

*provided*, that if any of the conditions in this Section 8.09(b) for which any of the Concessionaire Contractors is responsible has not been satisfied by such Concessionaire Contractor for reasons not attributable to the DB Contractor, then so long as all other conditions to Final Acceptance in this Section 8.09(b) have been satisfied, for all purposes of this Agreement the DB Contractor shall not be deemed to have failed to achieve Final Acceptance with respect to the applicable Project Asset, and the DB Contractor shall be entitled to claim a Scope Change Order for a Concessionaire-Caused Delay in accordance with Section 14.05(d) solely for direct impacts caused by the failure of such Concessionaire Contractor to satisfy any of the conditions in this Section 8.09(b) for reasons not attributable to the DB Contractor.

(c) At least twenty-eight (28) Days prior to the date when DB Contractor anticipates to achieve Final Acceptance of a given Project Asset, it shall deliver to the Concessionaire a notice thereof (the "Notice of Project Asset Final Acceptance"). The Notice of Project Asset Final Acceptance shall contain a report of results of, and a description of, all DB Work completed in respect to the Project Asset in a form acceptable to the Concessionaire and with sufficient detail to enable it to establish whether Final Acceptance has been achieved, as well as a Final Acceptance Certificate signed by the DB Contractor. Within ten (10) Days after receipt of the Notice of Project Asset Final Acceptance, the Concessionaire shall inspect the Project Asset and all DB Work completed by the DB Contractor related thereto and review the report submitted by the DB Contractor and either (a) provide written notice to the Department pursuant to Section 8.09(b) of the CA of anticipated CA Final Acceptance under the CA of such Project Asset, or (b) if reasonable cause exists for doing so, notify the DB Contractor that Final Acceptance has not been achieved stating the reasons therefor. Subject to Section 10.05, if the Concessionaire notifies the DB Contractor that Final Acceptance has not been achieved, the DB Contractor shall promptly take such action or perform such additional DB Work as will permit achievement of Final Acceptance and issue to the Concessionaire a revised Notice of Project Asset Final Acceptance signed by the DB

Contractor. The foregoing process shall be repeated until the Concessionaire is satisfied with the Notice of Project Asset Final Acceptance and concurs that Final Acceptance of the Project Asset has occurred, whereupon it shall provide notice thereof to the Department. Within the 21-Day period after the Concessionaire provides such notice to the Department, the Concessionaire, the DB Contractor and, in accordance with Section 8.09(c) of the CA, the Department will meet, confer and exchange information with the goal being the Department's orderly, timely inspection and review of the applicable Project Asset and final Construction Documentation for the applicable Project Asset and the Department's issuance of a CA Final Acceptance Certificate under the CA for the applicable Project Asset. In addition, the DB Contractor shall allow the Department to inspect the applicable Project Asset and CA Punch List items, review the final drawings for the applicable Project Asset and conduct such other investigation as may be necessary to evaluate whether the conditions to CA Final Acceptance under the CA for the applicable Project Asset have been satisfied.

(d) Subject to Section 10.05, within the 21-Day period after the Concessionaire provides notice to the Department as provided in Section 8.09(c), the Department is to issue a CA Final Acceptance Certificate under the CA or notify the Concessionaire why CA Final Acceptance under the CA has not been achieved. If the Department has failed to issue a CA Final Acceptance Certificate or to notify the Concessionaire why CA Final Acceptance had not been achieved within 21 Days after the expiration of the 21-Day period described in Section 8.09(c) (or in the case of any re-submittal in response to the Department's comments, within ten (10) Days after such re-submittal), a CA Final Acceptance Certificate will be deemed to be issued for purposes of the CA. Deemed issuance of the CA Final Acceptance Certificate will not, however, excuse the DB Contractor from satisfying all the conditions set forth in Section 8.09(b) to the extent the same may have been waived by the Concessionaire.

**Section 8.10. Liquidated Damages for Delayed Completion and Closures of Project Assets.**

(a) Liquidated Damages Related to Substantial Completion. Subject only to the adjustments made in accordance with this Agreement, the DB Contractor guarantees that Substantial Completion of each of the Project Assets will be achieved on or before the applicable Scheduled Substantial Completion Date. If the DB Contractor does not achieve Substantial Completion of each of the Project Assets by the applicable Scheduled Substantial Completion Date (and, in certain instances as provided in Section 13.01(e), if Substantial Completion is not achieved by given date even if the applicable Scheduled Substantial Completion Date is extended as a result of a Delay Event), the DB Contractor, as part of the consideration for awarding of this Agreement, shall pay to the Concessionaire liquidated damages as specified in Exhibit DD-1.

(b) Liquidated Damages Related to Final Acceptance. Subject only to the adjustments made in accordance with this Agreement, the DB Contractor guarantees that CA Final Acceptance of each of the Project Assets will be achieved on or before the applicable CA Scheduled Final Acceptance Date. If the DB Contractor does not achieve Final Acceptance of each of the Project Assets by the applicable CA Scheduled Final

Acceptance Date, the DB Contractor, as part of the consideration for awarding of this Agreement, shall pay to the Concessionaire liquidated damages as specified in Exhibit DD-2.

(c) Liquidated Damages Related to Full or Partial Closures of Existing Project Assets. The DB Contractor guarantees that performance of the DB Work with respect to the Existing Midtown Tunnel and the Existing Downtown Tunnels will strictly comply with the DB Rehabilitation Plan and the Time and Date Restrictions. If the DB Contractor (A) closes the Existing Midtown Tunnel or any of the Existing Downtown Tunnels except as permitted in the DB Rehabilitation Plan or (B) following any closure fails to re-open the lanes to traffic at the time specified in the DB Rehabilitation Plan, the DB Contractor, as part of the consideration for awarding of this Agreement, shall pay to the Concessionaire liquidated damages as specified in Exhibit DD-3.

(d) Liquidated Damages Related to Closures of Project Assets for Correction of Non-Conforming Work. If the DB Contractor closes all or part of a Project Asset when correcting, repairing or replacing deficient DB Work and/or rectifying a DB Defect or a Latent Defect pursuant to Section 8.11(b)(i) or (ii), as the case may be, the DB Contractor, as part of the consideration for awarding of this Agreement, shall pay to the Concessionaire liquidated damages in accordance with Section 8.11(b)(iii).

(e) Additional Provisions. The Parties acknowledge, recognize and agree on the following:

(i) because of the unique nature of the Project, it is difficult or impossible to determine with precision the amount of damages that would or might be incurred by the Concessionaire as a result of the DB Contractor's failure to timely complete the DB Work or to comply with the Time and Date Restrictions;

(ii) any sums assessed under this Section 8.10 are in the nature of liquidated damages, and not a penalty, and are fair and reasonable and such payment represents a reasonable estimate of fair compensation for Losses that may reasonably be anticipated from such failure;

(iii) any sums assessed under this Section 8.10 will be in lieu of all liability of the DB Contractor for any and all Losses, whether direct, special or consequential, and of any nature whatsoever incurred by the Concessionaire, which are caused solely by the DB Contractor's failure to achieve Substantial Completion and Final Acceptance by the applicable deadlines or by the DB Contractor's failure to comply with the Time and Date Restrictions;

(iv) any sums assessed under this Section 8.10 will be due and owing to the Concessionaire upon assessment of such damages, subject to the dispute resolution procedures of Article 21;

(v) notwithstanding the above, liquidated damages are not intended to excuse the DB Contractor from liability for any other breach of its obligations under this Agreement, or limit the Concessionaire's recourse to other remedies hereunder such as termination pursuant to Article 19 and Article 20; *provided*, that no DB Contractor Default will occur solely as a result of a delay in achieving Substantial Completion by the applicable Scheduled Substantial Completion Date except as set forth in Section 19.01(e); and

(vi) any sums assessed under this Section 8.10 will be reduced by any amount that the Concessionaire receives for business interruption or as delayed start-up insurance proceeds.

(f) Payment of Liquidated Damages. The DB Contractor will pay all undisputed liquidated damages under this Section 8.10 monthly in arrears not later than 30 Days after the end of each calendar month. The Concessionaire's rights of set-off under Section 7.02(h) hereof expressly apply to any amounts of liquidated damages not timely paid to the Concessionaire hereunder. Amounts that are subsequently determined through the dispute process set forth under Article 21 not to have been payable to the Concessionaire by the DB Contractor shall be refunded to the DB Contractor together with interest at the Bank Rate.

**Section 8.11. Warranties; Defective Design and Construction; Financial Responsibility for Rehabilitation Work.**

(a) Warranties.

(i) The DB Contractor hereby warrants to the Concessionaire that: (A) the design of the Project (other than those items expressly excluded from the scope of the DB Work as set forth in Exhibit CC) shall satisfy the requirements of this Agreement, the CA and the Technical Requirements, (B) all DB Work is complete and conforms to Good Industry Practice; (C) all DB Work, including all materials and equipment furnished as part of the DB Work, is new unless otherwise specified in the Technical Requirements or elsewhere in this Agreement, of good quality and free of defects in materials and workmanship; (D) all DB Work will conform to the requirements of this Agreement and the CA, including the Technical Requirements; and (E) the Final As-Built Drawings and Construction Documentation will be accurate and complete, comply with the requirements of this Agreement and the CA, including the Technical Requirements, and accurately reflect the condition of the Project as of Final Completion.

(ii) The warranties in Section 8.01(a) are exclusive and are in lieu of all other warranties by contract. No implied or statutory warranties will apply. Subject to Section 8.11(a)(iii) below, the foregoing warranties for DB Work relating to any Project Asset will be effective for a period of

one year beginning on the date on which the applicable Project Asset achieves Substantial Completion (as the same may be extended pursuant to the final sentence of this Section 8.11(a)(ii), the “Warranty Period”). Such warranties will survive termination of this Agreement for DB Work that was in place prior to termination. The applicable Warranty Period with respect any DB Work that is repaired or replaced during the original one-year Warranty Period shall be extended for an additional twelve (12) months from the date of such repair or replacement.

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

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

(b) Non-Conforming Work and Latent Defects.

(i) Non-Conforming Work During the Warranty Period. Until the end of the applicable Warranty Period, if any DB Work is found not to be in accordance with the requirements of this Agreement, or if there is otherwise any DB Defect, including in any materials and equipment furnished as part of the DB Work, and including any Non-Conforming Work, the Concessionaire (and the Department to the extent permitted by the CA) will be entitled, in addition to any other remedies:

(A) to demand that the DB Contractor correct, repair or replace the deficient DB Work and/or rectify such DB Defect at its sole expense (including the re-designing, re-construction, re-erecting and other reperformance of any DB Work resulting from the breach of the DB Contractor's warranty in Section 8.11(a)(i)); it being understood that, in such event, the Concessionaire (or the Department to the extent permitted under the CA) will be permitted to draw on the Letters of Credit provided by the DB Contractor, to the extent of the cost of any work performed by the Concessionaire or the Department; provided, that amounts that are subsequently determined through the dispute process set forth under Article 21 not to have been payable to the Concessionaire by the DB Contractor shall be refunded to the DB Contractor together with interest at the Bank Rate;

(B) to suspend any affected portion of the DB Work, by delivery of a written order to the DB Contractor, which order the Concessionaire will lift (or which the Department is to lift pursuant to the CA) after the DB Contractor fully cures or corrects such deficient DB Work or DB Defects;

(C) to correct or rectify such deficient DB Work or DB Defects itself and to obtain reimbursement of its Allocable Costs from the DB Contractor or from a draw on the Letters of Credit furnished pursuant to this Agreement; provided, that, except as provided in clause (D) below, the Concessionaire will not correct or rectify such deficient DB Work or DB Defects itself or seek reimbursement from the DB Contractor or draw on such Letters of Credit unless it has requested correction or rectification of, and the DB Contractor has failed, within thirty (30) Days after notice from the Concessionaire, to commence and diligently continue to correct or rectify the deficient DB Work or DB Defects;

(D) if the Concessionaire determines that it is economically advantageous or otherwise necessary to correct such deficient DB Work or DB Defects as part of a maintenance program, to do so and obtain reimbursement of the incremental costs thereof from the DB Contractor or from a draw on the Letters of Credit furnished pursuant to this Agreement; provided, that amounts that are subsequently determined through the dispute process set forth under Article 21 not to have been payable to the Concessionaire by the DB Contractor shall be refunded to



the DB Contractor together with interest at the Bank Rate;  
or

(E) to seek performance or reimbursement pursuant to the Guaranties.

The DB Contractor will have the right to dispute the Concessionaire's or, subject to Section 20.06, the Department's determination that the DB Work constitutes Non-Conforming Work by written notice to the Concessionaire, which notice will provide supporting information for the DB Contractor's position. Unless directed otherwise by the Concessionaire after receipt of such notice, the DB Contractor will carry out the DB Work required by the Concessionaire or, under the CA, the Department. If it is determined in accordance with the dispute resolution procedures in Article 21 that the DB Work in question conformed to the requirements of this Agreement, then the additional DB Work will be treated as a Scope Change (or, if required by the Department, a Department Change) pursuant to Article 14. The Concessionaire's correction or rectification of any deficient DB Work or DB Defects shall not in any way diminish the DB Contractor's obligations or liabilities under this Agreement or reduce its warranty obligations under this Section 8.11 with respect to the work undertaken by the Concessionaire. Nothing herein shall be deemed to preclude the Concessionaire from retaining a third-party contractor at its own cost to undertake any re-performance, repair, replacement or other performance of warranty claims hereunder.

(ii) Latent Defects. From the date of Final Acceptance of each Project Asset until the date that is sixty (60) months after such date of Final Acceptance (unless the applicable statute of limitations precludes a Claim by the Concessionaire at such time), if any Latent Defect (including in any materials and equipment furnished as part of the DB Work) is discovered, the Concessionaire (and the Department to the extent permitted by the CA) will be entitled:

(A) to demand that the DB Contractor rectify such Latent Defect at its sole expense;

(B) to rectify such Latent Defect itself and to obtain reimbursement of its Allocable Costs from the DB Contractor; *provided*, that, except as provided in clause (C) below, the Concessionaire will not rectify such Latent Defect itself or seek reimbursement from the DB Contractor unless it has requested rectification of, and the DB Contractor has failed, within thirty (30) Days after notice from the Concessionaire, to commence and diligently continue to rectify the Latent Defect; or

(C) if the Concessionaire determines that it is economically advantageous or otherwise necessary to rectify such Latent Defect as part of a maintenance program, to do so and obtain reimbursement of the incremental costs thereof from the DB Contractor; provided, that amounts that are subsequently determined through the dispute process set forth under Article 21 not to have been payable to the Concessionaire by the DB Contractor shall be refunded to the DB Contractor together with interest at the Bank Rate.

The DB Contractor will have the right to dispute the Concessionaire's determination that the DB Work constitutes Latent Defect by written notice to the Concessionaire, which notice will provide supporting information for the DB Contractor's position. Unless directed otherwise by the Concessionaire after receipt of such notice, the DB Contractor will carry out the DB Work required by the Concessionaire or, under the CA, the Department. If it is determined in accordance with the dispute resolution procedures in Article 21 that the DB Work in question did not constitute a Latent Defect, then the additional DB Work will be treated as a Scope Change (or, if required by the Department, a Department Change) pursuant to Article 14. The Concessionaire's rectification of any Latent Defect shall not in any way diminish the DB Contractor's obligations or liabilities under this Agreement with respect to the work undertaken by the Concessionaire. Nothing herein shall be deemed to preclude the Concessionaire from retaining a third-party contractor at its own cost to undertake any re-performance, repair, replacement or other performance of warranty claims hereunder.

(iii) Liquidated Damages. The DB Contractor guarantees that any performance by the DB Contractor of (A) any repair or replacement of the deficient DB Work or any rectification of any DB Defect pursuant to Section 8.11(b)(i) or (B) any rectification of any Latent Defect pursuant to Section 8.11(b)(ii) will not require the closure of all or any part of any Project Asset. If the DB Contractor closes all or any part of any Project Asset in connection with such repair, replacement or rectification, the DB Contractor, as part of the consideration for awarding of this Agreement, shall pay to the Concessionaire liquidated damages as specified in Exhibit DD-4.

(c) Financial Responsibility for Rehabilitation Work.

(i) Except for Compensation Events and as provided in Section 8.11(c)(ii), the DB Contractor has full responsibility for the Rehabilitation Work as identified in the DB Rehabilitation Plan for the Existing Project Assets.

(ii) To the extent the Concessionaire is required by the Department under the CA, and in turn the DB Contractor is required hereunder, to perform Rehabilitation Work on the Existing Project Assets that materially differs from the Rehabilitation Work identified in the DB Rehabilitation Plan for Existing Project Assets (“Excess Rehabilitation Work”), the DB Contractor may, subject to Section 21.06, direct the Concessionaire to seek a Department Change with respect to the Excess Rehabilitation Work pursuant to the CA; *provided, however*, that such additional Rehabilitation Work was not due to any act or omission by the DB Contractor or its Subcontractors in breach of the provisions of this Agreement.

### **Section 8.12. General Provisions.**

(a) DB Contractor’s Personnel. The DB Contractor shall provide all labor and personnel required in connection with the DB Work, including: (i) professional engineers licensed to perform engineering services in each jurisdiction where the performance of the DB Work requires such licensing; (ii) a Project engineer, lead structural, mechanical, electrical, instrumentation and control and civil engineers, cost and schedule engineers, and procurement, construction, start-up and training supervisors, all of whom have had extensive experience in projects of similar technology and magnitude; (iii) the Project Director and the Construction Manager; and (iv) the Quality Manager and other quality assurance personnel (who shall report directly to the DB Contractor’s home office managers and not to the Project personnel located at the Project Right of Way). The DB Contractor shall not remove or permit the release of any personnel described in clauses (a) through (d) without replacing them with other personnel of comparable or more extensive skill and experience. As of the Agreement Date, certain key personnel of the DB Contractor are identified on Exhibit KK. If any such persons are to be replaced, the DB Contractor shall, upon the Concessionaire’s request, provide for Concessionaire Approval the résumés of the proposed replacements, and shall arrange for interviews by the Concessionaire, and as required by the Department, of such persons if requested by the Concessionaire.

(b) Coordination with Concessionaire Contractors. The DB Contractor shall permit Concessionaire Contractors to introduce and store materials on the Project Right of Way and perform their services. The DB Contractor shall cooperate with the Concessionaire and Concessionaire Contractors (including the Tolling Contractor in accordance with the Interface Agreement) to coordinate the DB Work with the work of Concessionaire Contractors.

(c) Labor Relations. The DB Contractor shall be responsible and liable for all labor relations matters of the DB Contractor and Subcontractor personnel relating to the DB Work and shall at all times use commercially reasonable efforts to maintain harmony among the unions (if any) and other personnel employed in connection with the DB Work and act in a reasonable, professional and courteous manner with Concessionaire Contractors. The DB Contractor shall at all times use all commercially

reasonable efforts and judgment as an experienced contractor to adopt and implement policies and practices designed to avoid work stoppages, slowdowns, disputes and strikes.

(d) Employee Identification. All employees of the DB Contractor and its Subcontractors shall be identified by the use of a distinctive badge approved by the Concessionaire, which approval shall not be unreasonably withheld.

(e) Storage and Related Matters. The DB Contractor shall warehouse or otherwise provide appropriate storage (in accordance with manufacturers' recommendations) for all materials, supplies and equipment required for permanent and temporary construction, and shall provide for the procurement or disposal of, as appropriate, all soil, gravel and similar materials required for performance of the DB Work. All materials, supplies and equipment which are stored at a location other than on the Project Right of Way shall be (a) stored in a bonded warehouse or other appropriate location and (b) properly secured, tagged and identified for the Project to establish the rights of title provided under Section 25.15 of this Agreement, and segregated from other goods.

(f) Utilities; Fuel. The DB Contractor shall arrange, install and pay for all temporary Utilities and temporary Utilities Relocations. The DB Contractor shall also supply all fuel, chemicals and consumables, which are required to enable the DB Contractor to perform the DB Work; *provided, however*, that each of the Department and the DB Contractor will be responsible for price adjustments for fuel used during the performance of the DB Work in accordance with the Fuel Adjustment Provisions in Exhibit S. The price adjustments for fuel for which the Department bears responsibility pursuant to Section 8.12 of the CA are to be paid by the Department to the Concessionaire, which shall promptly pay over the amount received to the DB Contractor. The Concessionaire shall not be liable to the DB Contractor for the payment of any such price adjustments for which the Department is responsible under the CA except to the extent the same are actually received by the Concessionaire from the Department. If the Department fails to pay such amounts, the Parties shall proceed in accordance with Section 21.06.

(g) Spare Parts. The DB Contractor shall procure one (1) spare ventilation jet fan for each type used in the Project and turn the same over to the Concessionaire on the Substantial Completion Date of the Project Asset in which such type of ventilation jet fan is used; the cost of such spare ventilation jet fan(s) is included in the Contract Sum.

(h) Operating Manuals. Not later than six (6) months before the projected Substantial Completion Date of each Project Asset as set forth on the Project Schedule, the Contractor shall submit for Concessionaire Approval a draft of the complete equipment and system instructions and procedures for the operation and maintenance of the systems and items of plant and equipment incorporated into such Project Asset, excluding the ETTM System. If the Concessionaire does not approve the draft, it shall provide comments thereon to the DB Contractor within 30 Days after receipt, and the DB Contractor promptly shall incorporate or otherwise respond to the

Concessionaire's comments and submit a revised draft for Concessionaire Approval. Such procedure shall be repeated until receipt of Concessionaire Approval therefor, and the revised product shall be the "Operating Manual" for such Project Asset, subject to any revisions that may be needed upon Final Completion. The DB Contractor shall prepare in individually numbered bound volumes and deliver to the Concessionaire ten (10) sets of such approved Operating Manual for the Project Asset as well as one (1) set to the Department, and shall also provide each of Concessionaire and the Department the same in an electronic form that may be edited and revised electronically.

(i) Standard of Performance. With respect to the DB Contractor's performance of the DB Work, subject to the terms and conditions of this Agreement, (i) the DB Contractor shall comply with, and shall cause the DB Work and all components thereof (including the design, engineering, construction, testing and start-up of the portions of the Project included in the DB Work, and all equipment included within the portions of the Project included in the DB Work) to comply with, the Contract Documents, the Standard of Care, Laws, Government Approvals, Good Industry Practices and Applicable Standards, and (ii) the portions of the Project included in the DB Work shall be constructed and erected in a good and workmanlike manner. Except as otherwise expressly provided in this Agreement, the standard of performance set forth in this Section 8.12(i) shall apply to all aspects of the DB Work, and this Section 8.12(i) shall be deemed to be incorporated by reference into each provision of the Contract Documents describing the DB Work, the DB Contractor's obligations to perform the DB Work, or referring to the "requirements of this Agreement" or words of similar effect.

(j) Lenders' Technical Advisor. The documents which govern the Concessionaire's transactions with the Lenders may provide to the Lenders' Technical Advisor certain rights of review, inspection, certification and consultation with the Concessionaire concerning the Project and the DB Work in order that the Lenders' Technical Advisor may regularly and completely apprise the Lenders of the progress and other aspects of the Project and the DB Work. The DB Contractor shall fully and promptly cooperate with the Lenders' Technical Advisor as reasonably requested by the Concessionaire. Any acceptance or comment by the Lenders' Technical Advisor, the Concessionaire or the Lenders shall not be construed to impose on the Lenders' Technical Advisor, the Concessionaire or the Lenders any control of any portion of the DB Work, or relieve the DB Contractor of any of its duties, liabilities or obligations under this Agreement, the Comprehensive Agreement or the Technical Requirements. All communications to and from the Lenders' Technical Advisor regarding the DB Work shall be made through the Concessionaire, except as the DB Contractor is otherwise directed by the Concessionaire.

(k) Concessionaire's Right to Carry Out Work. If the DB Contractor defaults or neglects to carry out the DB Work in accordance with the requirements of this Agreement or if there are DB Defects, Latent Defects or deficiencies in the DB Work that the DB Contractor refuses or neglects to repair, in each case after giving effect to and without limiting the DB Contractor's right to cure or repair or correct performance as provided in this Agreement, and the DB Contractor fails within 30 Days (or, if another period is expressly set forth in this Agreement with regard to a specific aspect of the DB

Work, the period so set forth) after receipt of written notice from the Concessionaire to commence and continue correction of such default, neglect, DB Defect, Latent Defect or deficiency with diligence and promptness, the Concessionaire may, without prejudice to any other remedy the Concessionaire may have, correct same or cause it to be corrected in accordance with this Agreement. In the event the Concessionaire exercises its rights hereunder, an appropriate Scope Change Order shall be issued by the Concessionaire deducting from the payments then or thereafter due the DB Contractor the reasonable, documented, out-of-pocket cost of correcting such default, neglect, DB Defect, Latent Defect or deficiency. If the payments then or thereafter due the DB Contractor under this Agreement are not sufficient to cover such amount, the DB Contractor shall pay the difference to the Concessionaire within 30 Days after the Concessionaire issues an invoice for such amount together with supporting documentation.

## ARTICLE 9

### **PROJECT MANAGEMENT; OPERATIONS AND MAINTENANCE**

#### **Section 9.01. Transition of Operations and Maintenance to Concessionaire.**

(a) Care, Custody and Control of Existing Project Assets. The Parties acknowledge that under the CA the Department is to be responsible, at its sole cost and expense, for the operation and maintenance of the Existing Project Assets until the Existing Project Assets Tolling and O&M Work Commencement Date.

(b) Turnover Process. The DB Contractor shall cooperate with the Concessionaire in its transition of operations and maintenance of the Existing Project Assets from the Department to the Concessionaire, including with respect to the activities to be undertaken pursuant to the Turnover Plan attached as Exhibit T.

(c) [Not used]

#### **Section 9.02. Conditions Precedent to Tolling and O&M Work Commencement**

##### **Date.**

(a) Under the CA the Concessionaire may not initiate tolling or O&M Work on a Project Asset unless and until the Department issues a Tolling and O&M Work Notice to Proceed with respect to such Project Asset. The DB Contractor shall timely perform all DB Work with respect to the New Project Assets required in order for the Concessionaire to satisfy the following enumerated conditions precedent to the issuance of the Tolling and O&M Work Notice to Proceed pursuant to Section 9.02(a) of the CA, and will provide such assistance and cooperation as the Concessionaire may reasonably request in connection with the satisfaction of the other conditions precedent to the issuance of the Tolling and O&M Work Notice to Proceed. The DB Contractor shall specifically be responsible for:

(i) obtaining and maintaining all Governmental Approvals necessary for the operation of the New Project Asset to the extent the DB Contractor is otherwise responsible for obtaining the same as a condition

to commencing construction of such New Project Asset, and curing any material violation of the terms and conditions thereof by the DB Contractor or its Subcontractors;

(ii) completing those components of the ETTM System for which the DB Contractor is responsible as set forth in Exhibit CC;

(iii) ensuring that the TMS (if any) and safety features for TMS components are installed and functional;

(iv) achieving Substantial Completion of such New Project Asset, subject to the proviso in Section 8.09(b);

(v) securing the Department's agreement in writing to the Punch List for such New Project Asset (which shall be subject to Concessionaire Approval); and

(vi) paying the Department (or the Concessionaire for further payment to the Department) any amounts due and payable to the Department under the CA for which the DB Contractor is responsible under this Agreement.

(b) If the Department determines under the CA that any of the conditions set forth in Section 9.02(a) of the CA has not been satisfied for the applicable Project Asset, under the CA it is to notify the Concessionaire in writing setting forth, as applicable, why the conditions have not been satisfied. If any unsatisfied condition is the responsibility of the DB Contractor as set forth above, the DB Contractor shall be liable to the Concessionaire for any Losses, including any lost or reduced Toll Revenues, resulting from such failure of the DB Contractor to meet the conditions set forth in Section 9.02(a) of the CA. If under the CA the Concessionaire and the Department, despite good faith efforts, cannot reach agreement as to the unsatisfied condition that is the responsibility of the DB Contractor in a manner reasonably acceptable to the DB Contractor, the DB Contractor may, subject to Section 21.06, direct the Concessionaire to refer the matter to the dispute resolution procedures pursuant to Article 21 of the CA.

(c) The Department's issuance (or deemed issuance) of the Tolling and O&M Notice to Proceed for the applicable Project Asset under the CA will not constitute a waiver by the Concessionaire of any then-existing breach of this Agreement by the DB Contractor.

**Section 9.03. Obligation to Manage and Operate.** Following the Tolling and O&M Work Commencement Date for each of the Project Assets, under Section 9.03 of the CA the Concessionaire is to cause the applicable Project Asset to be managed, maintained, and operated within the O&M Boundaries in accordance with Law, all Governmental Approvals, the terms, conditions and standards set forth in the Comprehensive Agreement, including the requirements set forth in the Technical Requirements, and in accordance with Good Industry Practice. At such times that the DB Contractor is performing DB Work with respect to a Project Asset, it shall ensure that such performance shall not result in the Concessionaire's breach of its obligations

under the CA. With respect to DB Work that is performed on a Project Asset following the Tolling and O&M Work Commencement Date for such Project Asset, responsibility for care, custody and control of such Project Asset shall be allocated to the DB Contractor, and where such performance of the DB Work results in damage, additional maintenance or costs or any other additional obligation beyond the usual wear and tear for the operating tunnels, roadways and systems, the DB Contractor shall be responsible for repairing any such damage, performing any such additional maintenance, paying any such additional costs or other additional obligation. Without limiting the DB Contractor's obligations set forth above in this Section 9.03, specific items for which the DB Contractor shall be responsible while an Existing Project Asset is within its care, custody and control include:

(a) the management and control of traffic on the Existing Project Asset to the extent required for the performance of the DB Work for such Existing Project Asset, including temporary partial or full closures of the Existing Project Asset, subject to the Department's rights to assume control as expressly provided in the Comprehensive Agreement;

(b) immediate notification of the Concessionaire when DB Contractor becomes aware of the need for Incident response services;

(c) the maintenance of all electric systems, including ITS and tunnel control systems, from the time the DB Work begins on such systems until such time as Substantial Completion occurs for the Project Asset in which such systems are integrated, or a otherwise mutually agreed with the Concessionaire in writing;

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

(e) traffic management in accordance with the Technical Requirements to the extent required for the performance of the DB Work for such Existing Project Asset; and

(f) the compliance with the railroad traffic management requirements in accordance with the Comprehensive Agreement and any agreements entered into with the railroad companies to the extent required for the performance of the DB Work for such Existing Project Asset.

**Section 9.04. Not Used.**

**Section 9.05. Not Used.**

**Section 9.06. Police and Enforcement Services.**

(a) The DB Contractor will be solely responsible for obtaining enhanced levels of police services for the control of traffic for its construction activities or as otherwise needed in the performance of its obligations under this Agreement (and in each case at the DB Contractor's sole cost and expense). If requested by the DB Contractor, the Concessionaire will, pursuant to Section 9.06(a) of the CA, request the



Department to assist the DB Contractor in obtaining such enhanced levels of police services, but neither the Concessionaire nor the Department guarantees that such services can be obtained.

(b) [Not used]

(c) Neither the Concessionaire nor the Department will have any responsibility or liability to the DB Contractor resulting from or otherwise relating to the failure of the Virginia State Police or any other public agencies to provide policing services contemplated by this Section 9.06 or any of the acts or omissions of the Virginia State Police or such agencies with respect to such services.

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

**Section 9.07. Maintenance by the Department.**

(a) Under Section 9.07 of the CA, except as otherwise provided in the CA, the Department is to maintain, repair and, subject to and in accordance with the Department's normal course of operations and activities as in effect from time to time, cause to be open and operational, in a manner consistent with access to State Highways, the ramps, bridges and roadways directly connecting to the Project Assets, over which the Department has sole control. The foregoing does not restrict the Department's right under the CA to operate existing or new facilities, to modify existing facilities, to construct new facilities, including Project Enhancements, and to perform planned and emergency maintenance, renewal and replacement, safety and repair activities on existing and new facilities adjacent to or near the Project regardless of the impact of such activities on the Project.

(b) Activities undertaken by the Department pursuant to Section 9.07 of the CA will not constitute a Compensation Event, except as otherwise provided in this Agreement.

**Section 9.08. Not Used.**

**ARTICLE 10**

**PROJECT AND QUALITY MANAGEMENT; DEPARTMENT OVERSIGHT AND OTHER SERVICES**

**Section 10.01. Project and Quality Management.** The DB Contractor will provide oversight and management to control the scope, quality, cost, and on-time delivery of the DB Work. If the DB Contractor is required to correct or rectify any Non-Conforming Work in accordance with Section 8.11(b), the Parties will review the Quality Management System Plan to assess and determine whether changes to such plan are necessary to prevent such further Non-Conforming Work.

**Section 10.02. Department Right to Oversee Work.**

(a) The DB Contractor acknowledges and agrees that, pursuant to Section 10.02 of the CA, the Department will have the right at all times during the CA Term to carry out Oversight Services with respect to all aspects of the design, permitting, financing, acquisition, construction, installation, equipping, maintenance, repair, preservation, modification, operation, management and administration of the Project. The Department's Oversight Services will not impact its right to rely on the Concessionaire to perform its obligations pursuant to the Comprehensive Agreement or the Concessionaire's right to rely on the DB Contractor to perform its obligations pursuant to this Agreement.

(b) The DB Contractor will fully cooperate with the Concessionaire and the Department to facilitate the Department's conduct of Oversight Services. In the course of performing Oversight Services, under the CA the Department is to use reasonable efforts to minimize the effect and duration of any disruption to or impairment of the Work or the Project, but the Concessionaire shall have no obligation or liability to the DB Contractor should the Department fail to do so; *provided, however*, that the DB Contractor may, subject to Section 21.06, direct the Concessionaire to refer the matter to the dispute resolution procedures pursuant to Article 21 of the CA.

(c) The Department is to submit to the Concessionaire, in accordance with Section 8.04(c) of the CA, all Department comments related to the DB Contractor's submittals certified in accordance with this Agreement and the Technical Requirements, and the Concessionaire will promptly forward such comments to the DB Contractor. If after the process for reviewing such submittals, the Department determines that a submittal fails to comply with the applicable Technical Requirements, the Department will have the right, in accordance with the Comprehensive Agreement, to direct the Concessionaire to perform the Work in accordance with the Department's instructions. In such event, the DB Contractor will be obligated to diligently proceed with the DB Work in accordance with such directive, and will have the right, subject to Section 21.06, to (i) direct the Concessionaire to refer the matter to the dispute resolution procedures pursuant to Article 21 of the CA or, if it chooses, (ii) direct the Concessionaire to proceed with the expedited dispute resolution process set forth in Section 21.02. If it is finally determined in accordance with the dispute resolution procedures under the CA that the DB Contractor's submittal complied with the applicable Technical Requirements, the additional DB Work required by the Department's directive will be treated as a Department Change pursuant to Section 14.02.

**Section 10.03. Access and Inspection.** The Concessionaire, the Department and the FHWA, and their respective authorized agents, will have unrestricted access at all times to enter upon, inspect, sample, measure and physically test any part of the Project or the Project Right of Way, as well as any materials, supplies, machinery and equipment to be incorporated into or used in construction, operation or maintenance of the Project. Under Section 10.03 of the CA the Department also has the right, upon reasonable advance written notice (except as provided in Section 18.07(a) of the CA) to the Concessionaire, to inspect financial or other records relating to the Project, which right shall extend to certain financial and other records relating to the

Project maintained by the DB Contractor. Under the CA the Department is to provide the Concessionaire with a notice describing results of any such inspection, subject to any protections from disclosure under applicable Law, and the Concessionaire will provide a copy of such notice to the DB Contractor to the extent relating to the records maintained by the DB Contractor, subject to the limitations set forth in Section 18.07(f) of the CA. Under the CA, if at any time the Concessionaire has failed to perform any of its construction, operating or maintenance obligations in any material respect then, in addition to other remedies available pursuant to the Comprehensive Agreement and the other Project Agreements, the Department is entitled to increase the level of its monitoring of the Project and the Concessionaire's compliance with its construction, operation and maintenance obligations pursuant to this Agreement, until such time as the Concessionaire has demonstrated to the Department's reasonable satisfaction that it will perform and is capable of performing its construction, operation and maintenance obligations pursuant to this Agreement. The DB Contractor hereby agrees that to the extent such increased monitoring results from the DB Contractor's failure to perform its obligations hereunder, the DB Contractor will, on behalf of the Concessionaire, pay the Department any all Allocable Costs incurred by the Department for which the Concessionaire becomes obligated to pay as a result of such increased level of monitoring; *provided*, that if the increased monitoring is due to a delay in achieving Substantial Completion or Final Acceptance, the DB Contractor's obligation to pay shall be solely pursuant to Section 8.10.

**Section 10.04. Not Used.**

**Section 10.05. Concessionaire Approvals.**

(a) Except as otherwise expressly provided in this Agreement, in any case in which the Concessionaire's response to a request for its approval is required by the terms hereof within a specified time period (or such extended period of time as will have been mutually agreed by the DB Contractor and the Concessionaire, and *provided*, that any such time period will be extended for the duration of the results of a Force Majeure Event that prevents such performance), the failure by the Concessionaire to respond to a written request for such approval within such specified time period (as may be so extended) will be deemed to be the Concessionaire's approval of such request.

(b) In all cases where approvals, consents or determinations are required to be provided hereunder, such approvals or consents will not be withheld or delayed unreasonably (it being agreed that if the Department withholds such corresponding approval or consent under the CA, it shall be reasonable for the Concessionaire to withhold such approval or consent hereunder) and such determinations will be made reasonably except in cases where a different standard (such as, by way of example only, sole discretion) is specified. In cases where sole discretion is specified for an approval, consent, determination or other decision, the decision will not be subject to the dispute resolution procedures set forth in Article 21; in other cases, the DB Contractor may refer the matter to the dispute resolution procedures pursuant to Article 21.

(c) If the Concessionaire must submit a submittal made by the DB Contractor under this Agreement to the Department for review and approval more than twice due to the DB Contractor's failure to comply with the requirements of this

Agreement, the DB Contractor shall, on behalf of the Concessionaire, reimburse the Department for the Department's Allocable Costs incurred thereafter in reviewing any portions of such submittal. If the Concessionaire must submit a submittal made by the DB Contractor under this Agreement more than twice due to the Department's failure to comply with the requirements of the Comprehensive Agreement, under the CA the Department is to reimburse the Concessionaire for the Concessionaire's Allocable Costs incurred thereafter in preparing or submitting any portions of such submittal. The Concessionaire agrees that the DB Contractor may, subject to Section 21.06, direct the Concessionaire to seek recovery from the Department to compensate the DB Contractor for its additional costs thereof, which compensation shall be paid over to the DB Contractor solely if and to the extent received by the Concessionaire from the Department.

**Section 10.06. Limitations on the DB Contractor's Right to Rely.**

(a) The DB Contractor expressly acknowledges and agrees that the Concessionaire's rights, if any, under this Agreement:

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

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

(A) exist solely for the benefit and protection of the Concessionaire, (B) do not create or impose upon the Concessionaire any standard or duty of care toward any DB Contractor Party, all of which are hereby disclaimed, (C) may not be relied upon, nor may the Concessionaire's exercise or failure to exercise any such rights be relied upon, by the DB Contractor in determining whether the DB Contractor has satisfied the standards and requirements set forth in this Agreement and (D) may not be asserted, nor may the Concessionaire's exercise or failure to exercise any such rights be asserted, against the Concessionaire by the DB Contractor as a defense, legal or equitable, to the DB Contractor's obligation to fulfill such standards and requirements; provided, that the foregoing will not limit the Concessionaire's liabilities or obligations pursuant to this Agreement to the extent that its actions constitute a directive to the DB Contractor that it perform in a specific manner.

(b) The Concessionaire will be entitled to remedies for Non-Conforming Work and to identify additional DB Work which must be done to bring the DB Work and Project into compliance with requirements of this Agreement, regardless of whether previous review, comment, objection, rejection, approval, disapproval, acceptance, certification, concurrence, monitoring, testing, inspection, spot checking, auditing or other oversight were conducted or given by the Concessionaire.

(c) No rights of the Concessionaire described in Section 10.06(a), no exercise or failure to exercise such rights, no failure of the Concessionaire to meet any particular standard of care in the exercise of such rights, no issuance of permits or certificates of completion or acceptance and no Final Acceptance of any Project Assets or any Project Enhancement will:

(i) relieve the DB Contractor from performance of the DB Work or of its responsibility for the selection and the competent performance of its Subcontractors;

(ii) relieve the DB Contractor of any of its obligations or liabilities under this Agreement;

(iii) be deemed or construed to waive any of the Concessionaire's rights and remedies under this Agreement; or

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

(d) Notwithstanding Section 10.06(a), (b) and (c) above, (i) the DB Contractor will be entitled to rely on specific approved Deviations and interpretative engineering decisions the Department gives pursuant to the Comprehensive Agreement in accordance with the Technical Requirements, any Development Contract and any Law, and (ii) the Concessionaire is not relieved from any liability arising out of a knowing, intentional material misrepresentation under any written statement the Concessionaire delivers.

#### **Section 10.07. Suspension of the Work.**

(a) The DB Contractor acknowledges and agrees that under the CA the Department has the right and authority, without liability to the Concessionaire or the DB Contractor, to suspend any affected portion of the Work by written order to the Concessionaire to comply with any court order or judgment, to protect against a risk to the public health, safety or welfare, as more particularly set forth in Section 24.04(b) of the CA, including to workers, other personnel or the general public from unsafe or dangerous conditions, or upon the occurrence of any of the following by the DB Contractor:

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

(ii) failure to comply with any Law or Governmental Approval (including failure to handle, preserve and protect archeological, paleontological or cultural resources, or failure to handle Hazardous Substances, in accordance with applicable Laws and Governmental Approvals);

- (iii) failure to provide proof of required insurance coverage or to provide or maintain the required Performance Security;
- (iv) failure to carry out and comply with Directive Letters; and
- (v) failure to satisfy any conditions to commencing performance of the applicable portion of the DB Work set forth in Section 8.03.

(b) Under the CA the Department is to lift the suspension order promptly after it is permitted by the terms of the court order or judgment, after the dangerous or unsafe condition is rectified, or after the DB Contractor (acting on behalf of the Concessionaire) fully cures and corrects the applicable breach or failure to perform.

(c) The DB Contractor may, subject to Section 21.06, direct the Concessionaire to dispute the Department's suspension order by written notice to the Concessionaire, which notice will provide supporting information for the DB Contractor's position. Unless directed otherwise by the Concessionaire after receipt of such notice, the DB Contractor will carry out the DB Work required by the Department. If it is determined in accordance with the dispute resolution procedures in Article 21 of the CA that the DB Contractor was in compliance with its obligations under this Agreement, then the suspension order and any additional DB Work required by the Department under the CA will be treated as a Department Change pursuant to Section 14.02.

(d) The issuance of the Department's suspension order will not affect the DB Contractor's rights to cure or correct any such incidents giving rise to the issuance by the Department of the suspension order under the CA.

## ARTICLE 11

### NON-COMPLIANCE POINTS SYSTEM

#### **Section 11.01. Non-Compliance Points System.**

(a) The DB Contractor acknowledges that under the CA, certain Concessionaire acts, omissions, breaches or failures to perform its obligations under the CA (each such omission, breach or failure, a "Performance Shortfall") may result in the assessment by the Department of Non-Compliance Points. The Non-Compliance Points system is used by the Department to measure the Concessionaire's performance levels. The accumulation of Non-Compliance Points by the Concessionaire may trigger the remedies set forth or referenced in Articles 11 and 19 of the CA.

(b) The DB Contractor hereby agrees that if the assessment of Non-Compliance Points by the Department is a result of, or is contributed to by, the failure of the DB Work to conform with the requirements of this Agreement, then (A) until the expiration of the applicable Warranty Period with respect to the affected portion of the Project, in exercising its rights under Section 8.11(b)(i) the Concessionaire may require

the DB Contractor to expeditiously correct and rectify (at no cost to the Concessionaire) any deficient DB Work or DB Defects or (B) until the end of the period set forth in Section 8.11(b)(ii) with respect to the affected portion of the Project, in exercising its rights under Section 8.11(b)(ii) the Concessionaire may require the DB Contractor to expeditiously rectify (at no cost to the Concessionaire) any Latent Defects. If the DB Contractor fails to act within a reasonable period, the Concessionaire may order work by other contractors to correct or rectify such deficient DB Work, DB Defects or Latent Defects), which costs shall be reimbursed by the DB Contractor on demand, in each case subject to the DB Contractor's rights to dispute the existence of deficient DB Work, DB Defects or Latent Defects as provided in Section 8.11(b). The DB Contractor shall not have additional liability for the assessments of Non-Compliance Points.

(c) [Not used]

(d) [Not used]

(e) [Not used]

**Section 11.02. Not Used.**

**Section 11.03. Not Used.**

**Section 11.04. Not Used.**

**Section 11.05. Not Used.**

**Section 11.06. Not Used.**

**Section 11.07. Not Used.**

**Section 11.08. Not Used.**

## ARTICLE 12

### **SAFETY COMPLIANCE ORDERS**

**Section 12.01. Not Used.**

**Section 12.02. Not Used.**

**Section 12.03. Safety Compliance Orders.**

(a) Under the CA the Department may, but is not obligated to, issue Safety Compliance Orders to the Concessionaire; *provided*, that no Safety Compliance Order may in any event order or direct the Concessionaire to do any act in violation of any Law. If the Concessionaire receives a Safety Compliance Order from the Department with respect to a Project Asset that has achieved Substantial Completion but has not yet achieved Final Acceptance and such Safety Compliance Order is attributable

to the failure of the DB Work to comply with the requirements of this Agreement, the Concessionaire shall promptly provide notice and a copy of the same to the DB Contractor, and the DB Contractor shall, and shall cause its Subcontractors to, comply with the same. Compliance with a Safety Compliance Order by the DB Contractor will not be deemed a default by the DB Contractor under the provisions of this Agreement, but the Concessionaire shall have all rights otherwise available under this Agreement to the extent the Safety Compliance Order results from the DB Contractor's failure to comply with its obligations under this Agreement.

(b) To the extent the Department consults with the Concessionaire prior to issuing a Safety Compliance Order regarding matters affecting the cost or performance of the DB Work, the Concessionaire shall afford the DB Contractor a reasonable opportunity to participate in such consultation.

(c) If the Department issues a Safety Compliance Order with which the DB Contractor must comply as provided in Section 12.03(a), the DB Contractor will proceed, at its sole cost and expense, with the necessary environmental, design and construction DB Work to carry out the Safety Compliance Order as follows:

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

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

(d) The DB Contractor will have the right, subject to Section 21.06, to direct the Concessionaire to dispute a Safety Compliance Order by providing written notice to the Concessionaire within 10 Days of the issuance of the Safety Compliance Order setting forth the DB Contractor's Claim that no condition exists to justify the disputed Safety Compliance Order and the Concessionaire's estimate of impact costs and the construction schedule, if applicable. The DB Contractor will nevertheless implement the Safety Compliance Order, but if it is finally determined in accordance with the dispute resolution procedures in Article 21 that conditions warranting the Safety Compliance Order did not exist, then the Safety Compliance Order will be treated as a Department Change pursuant to Section 14.02.

**Section 12.04. Not Used.**

**Section 12.05. Not Used.**



## ARTICLE 13

### DELAY EVENTS

#### **Section 13.01. Delay Event Notice and Determination.**

(a) If the DB Contractor is affected by a Delay Event, it will give written notice to the Concessionaire within 23 Days following the date on which the DB Contractor first became aware (or should have become aware, using all reasonable due diligence) that an event has occurred and that it is or will become a Delay Event (*provided*, that in the case of the same Delay Event being a continuing cause of delay, only one notice will be necessary) (a “DB Delay Event Notice”). Such DB Delay Event Notice will include, in such form and substance as is required to satisfy the Concessionaire’s obligations under the CA: (i) a detailed description of the Delay Event, (ii) details of the circumstances from which the Delay Event arises and (iii) an estimate of the duration of the delay in the performance of obligations pursuant to this Agreement attributable to such Delay Event and information in support thereof, if known at that time. Subject to Section 21.06, the Concessionaire shall submit a Delay Event Notice under the CA based on the DB Delay Event Notice submitted by the DB Contractor and thereafter assert its rights under the Comprehensive Agreement with respect to the Delay Event claimed by the DB Contractor. The DB Contractor will also provide such further information relating to the Delay Event as the Concessionaire or the Department may reasonably require. The DB Contractor will bear the burden of proving the occurrence of a Delay Event and the resulting impacts in accordance with the CA.

(b) If for any reason the DB Contractor fails to deliver a DB Delay Event Notice within such 23-Day period, the DB Contractor will be deemed to have irrevocably and forever waived and released any Claim or right to time extensions or any other relief with respect to such Delay Event pursuant to this Agreement; *provided*, that, subject to Section 21.06, the DB Contractor may direct the Concessionaire to pursue relief available under the CA with respect to such Delay Event.

(c) Upon the occurrence of a Delay Event, the DB Contractor will promptly undertake efforts to mitigate the effects of such Delay Event, including all steps that would generally be taken in accordance with Good Industry Practice. The DB Contractor will promptly deliver to the Concessionaire an explanation of the measures being undertaken to mitigate the delay and other consequences of the Delay Event. The DB Contractor will notify the Concessionaire within ten (10) Days following the date on which it first became aware (or should have become aware, using all reasonable due diligence) that such a Delay Event has ceased.

(d) Notwithstanding the occurrence of a Delay Event, the DB Contractor will continue its performance and observance pursuant to this Agreement of all of its obligations and covenants to be performed to the extent that it is reasonably able to do so and will use its reasonable efforts to minimize the effect and duration of the Delay Event. Without limiting the foregoing, the occurrence of a Delay Event will not excuse the DB Contractor from timely payment of amounts that are due and payable by

the DB Contractor pursuant to this Agreement (including liquidated damages and amounts payable as indemnities), from compliance with Law, or from compliance with the Technical Requirements, except temporary inability to comply with the Technical Requirements as a direct result of the Delay Event.

(e) Subject to the DB Contractor's giving the notice required in Section 13.01(a) and to the provisions of Section 13.02, but solely to the extent performance by the Concessionaire is excused by the Department under the CA, a Delay Event will result in an extension of a Scheduled Substantial Completion Date, a Scheduled Final Acceptance Date, or the Long Stop Date by an equal number of days that the corresponding CA Scheduled Substantial Completion Date, the corresponding CA Scheduled Final Acceptance Date, or the CA Long Stop Date is extended under the CA; *provided, however*, that notwithstanding any extension of a Scheduled Substantial Completion Date or a Scheduled Final Acceptance Date as a result of a Delay Event, a Delay Event shall not excuse the DB Contractor's obligation to pay liquidated damages under Section 8.10(a) or Section 8.10(b) that would have been payable had the Scheduled Substantial Completion Date not been extended, it being understood that relief from the obligation to pay such liquidated damages shall occur only if a Scheduled Substantial Completion Date or a Scheduled Final Acceptance Date is extended due to a Compensation Event or a Concessionaire-Caused Delay. All changes to a Scheduled Substantial Completion Date, a Scheduled Final Acceptance Date or the Long Stop Date and conforming changes to the Project Schedule shall be reflected in a Scope Change Order entered into pursuant to Section 14.05(a).

**Section 13.02. Delays Affecting Performance of the DB Work.** The DB Contractor acknowledges and agrees that pursuant to Section 13.02 of the CA, extensions of key milestone and/or activities identified on the most recent Project Schedule Update for Delay Events affecting the DB Work will be made based on Time Impact Analysis in accordance with the Technical Requirements, and will extend each of the Design-Build Work Deadlines under the CA affected thereby. If the Department does not agree on the extension proposed by the Concessionaire (on behalf of the DB Contractor), the DB Contractor may, subject to Section 21.06, direct the Concessionaire to refer the matter to the dispute resolution procedures in Article 21 of the CA.

**Section 13.03. Not Used.**

## ARTICLE 14

### **COMPENSATION EVENTS; DEPARTMENT CHANGES; DEVIATIONS; SCOPE CHANGE ORDERS**

**Section 14.01. Compensation Events.**

(a) Compensation Event Notice.

(i) If the DB Contractor is affected by a Compensation Event, it will give written notice to the Concessionaire within twenty-three (23)

Days following the date on which the DB Contractor first became aware (or should have become aware, using all reasonable due diligence) that an event has occurred and that it is or will become a Compensation Event (a “DB Compensation Event Notice”). The DB Compensation Event Notice will set forth, in such form and substance as is required to satisfy the Concessionaire’s obligations under the CA for such notice: (A) the Compensation Event and its date of occurrence in reasonable detail, (B) the amount by which the DB Contractor claims the Contract Sum should be adjusted as a result of the Compensation Event and (C) details of the calculation thereof. Subject to Section 21.06, the Concessionaire shall submit a Compensation Event Notice under the CA based on the DB Compensation Event Notice submitted by the DB Contractor and thereafter assert its rights under the Comprehensive Agreement with respect to the Compensation Event claimed by the DB Contractor.

(ii) If, for any reason, the DB Contractor fails to deliver such written DB Compensation Event Notice within such twenty-three (23)-Day period, the DB Contractor will be deemed to have irrevocably and forever waived and released any Claim or right to an adjustment to the Contract Sum or other relief as a result of such Compensation Event; *provided*, that, subject to Section 21.06, the DB Contractor may direct the Concessionaire to pursue relief available under the CA with respect to such Compensation Event.

(iii) After the Concessionaire submits a Compensation Event Notice under the CA based on a Compensation Event claimed by the DB Contractor, under the CA the Department may but it is not required to obtain from an independent engineering consultant a comprehensive report as to the Concessionaire’s estimate of the Net Cost Impact attributable to the Compensation Event (which will incorporate the adjustment to the Contract Sum sought by the DB Contractor). Under the CA, within 90 Days after receiving a Compensation Event Notice and the supporting documentation required by Section 14.01(a)(i), the Department is to provide to the Concessionaire a copy of such reports as it has elected to obtain. Under the CA, if the Department disagrees with the entitlement to or the amount of Concessionaire Damages claimed by the Concessionaire (which will incorporate the adjustment to the Contract Sum sought by the DB Contractor), the Concessionaire and the Department are to commence good faith negotiations to resolve the Dispute within 120 Days after the delivery of the Compensation Event Notice; the DB Contractor shall have the right to participate in such negotiations. If the Dispute cannot be resolved within such 120 Days, under the CA either the Department or the Concessionaire may submit the Dispute for resolution pursuant to Article 21 of the CA, and the DB Contractor may, subject to Section 21.06, direct the Concessionaire to submit such Dispute for resolution under the CA. All changes to the Contract Sum and conforming changes to the Payment

and Values Schedule shall be reflected in a Scope Change Order entered into pursuant to Section 14.05(a).

(b) Contract Sum Adjustment Determination.

(i) The Contract Sum shall be adjusted only in an amount necessary to compensate the DB Contractor for all reasonable, unavoidable costs and expenses incurred to perform changed work attributable to the Compensation Event and mitigate or avoid the effects of the Compensation Event (net of any savings incurred by the DB Contractor as a result of the Compensation Event) plus reasonable profit and overhead as agreed among the DB Contractor, the Concessionaire and the Department.

(ii) [Not used]

(iii) The Contract Sum adjustment associated with a Compensation Event will be net of all insurance proceeds payable to the DB Contractor with respect to such Compensation Event (or that would be payable to the DB Contractor but for the failure by the DB Contractor to comply with the insurance requirements set forth in Sections 17.01 through 17.07), and will include all costs of asserting a Claim for such insurance proceeds and any increased insurance premiums resulting from such Claim; *provided*, that any portion of an increased insurance premium resulting from any such Claim is certified in writing by the DB Contractor's insurance provider prior to payment by the Concessionaire to the extent received from the Department.

(iv) The DB Contractor will share with the Concessionaire and the Department all data, documents and information pertaining to the proposed Contract Sum adjustment on an Open Book Basis.

(v) The DB Contractor will take all steps reasonably necessary to mitigate the amount of the Contract Sum adjustment attributable to, and other consequences of, any Compensation Event, including all steps that would generally be taken in accordance with Good Industry Practice.

(vi) Under the CA, if the Concessionaire and the Department are unable to agree upon the amount of the Concessionaire Damages within 120 Days after the delivery of the Compensation Event Notice, then either party, by written notice to the other party, may terminate the negotiations and request the Dispute be resolved in accordance with Article 21 of the CA; the DB Contractor shall have the right to participate in such negotiations with respect to the Contract Sum adjustment component thereof. Under the CA the Department is to make payment to the Concessionaire of the undisputed portion of the Concessionaire Damages in accordance with Section 14.01(b) of the CA without regard to

the dispute resolution procedures, and, solely to the extent received from the Department, the Concessionaire shall pay the portion thereof attributable to the Contract Sum adjustment over to the DB Contractor in accordance with the terms of the Scope Change Order.

(vii) The Parties acknowledge that under the CA the Concessionaire is not entitled to Concessionaire Damages which are *de minimis* and, as a result, the DB Contractor will not be entitled to a Contract Sum adjustment under this Agreement if the Concessionaire is denied corresponding Concessionaire Damages that the Department deems *de minimis* under the CA.

(c) Compensation Event Payment. All payments to the DB Contractor of amounts claimed in respect of a Compensation Event are strictly subject to the Concessionaire's receipt thereof from the Department.

(d) [Not used]

(e) Sole Remedy and Release of Claims. Without limiting the DB Contractor's rights with respect to non-monetary relief for Delay Events in accordance with Article 13, the adjustment to the Contract Sum as determined according to this Section 14.01 will represent the sole right to compensation and damages for the adverse effects of a Compensation Event.

(f) Additional Provisions Related to Certain Compensation Events.

(i) If the DB Contractor is affected by any of the Compensation Events described in clauses (i) through (l) of the definition thereof, the Contract Sum may be adjusted by only 50% of the actual cost to the DB Contractor calculated in accordance with Section 14.01(b) for Critical Path delays attributable to such Compensation Events.

(ii) If the DB Contractor is affected by the Compensation Event described in clause (m) of the definition thereof, the DB Contractor will be entitled to the Contract Sum adjustment calculated in accordance with Section 14.01(b) attributable to such Compensation Event; provided, however, that:

(A) no Contract Sum adjustment shall be made for the actual costs to the DB Contractor that are up to \$10 million in the aggregate for such Compensation Event;

(B) the Contract Sum may be adjusted for the actual costs to the DB Contractor that are in excess of \$10 million but less than or equal to \$15 million for such Compensation Event; and

(C) no Contract Sum adjustment shall be made for the actual costs to the DB Contractor that are in excess of \$15 million for such Compensation Event.

(iii) If the DB Contractor is affected by the Compensation Event described in clause (n) of the definition thereof, the DB Contractor will be entitled to the Contract Sum adjustment calculated in accordance with Section 14.01(b) attributable to such Compensation Event; provided, however, that:

(A) in no event will the DB Contractor be entitled to a Contract Sum adjustment if the actual costs to the DB Contractor for such Compensation Event do not equal or exceed \$10 million per occurrence (“Claim Threshold”);

(B) if the actual costs to the DB Contractor for such Compensation Event meet the Claim Threshold, under the CA the Department will be solely responsible for such costs in excess of \$10 million for such Compensation Event; provided, however, that the DB Contractor will be solely responsible for such costs up to \$10 million per occurrence for the first two Compensation Events that meet the Claim Threshold; and

(C) under the CA the Department will be responsible for all Compensation Events after the first two Compensation Events occur that meet the Claim Threshold.

For the avoidance of doubt, the DB Contractor will be solely responsible for its actual costs attributable to Compensation Events that are less than \$10 million per occurrence.

The costs to the DB Contractor attributable to the Compensation Event described in clause (n) of the definition thereof for which the Department bears responsibility pursuant to Section 14.01(f)(iii) of the CA are to be paid by the Department to the Concessionaire, which shall promptly pay over the amount received to the DB Contractor. The Concessionaire shall not be liable to the DB Contractor for the payment of any such costs for which the Department is responsible under the CA except to the extent the same are actually received by the Concessionaire from the Department. If the Department fails to pay such amounts, the Parties shall proceed in accordance with Section 21.06.

(g) If the DB Contractor makes a Claim for a Compensation Event under Article 14 prior to Final Completion and the representation set forth in Section 23.01(n) was inaccurate on Agreement Date, the Concessionaire will not be liable for any Contract Sum adjustment with respect to such Claim if such Claim would not have been brought had such representation been accurate and, to the extent that such Claim would

have been brought for a reduced amount had such representation been accurate, the Concessionaire will only be liable for the Contract Sum adjustment equal to such reduced amount, subject to the DB Contractor complying with the requirements of this Article 14.

**Section 14.02. Department Changes.**

(a) Department's Right to Issue Change Orders. Under Section 14.02 of the CA, the Department may, at any time and from time to time during the CA Term, authorize and/or require changes in the Work (including the DB Work) pursuant to a Change Order or in the terms and conditions of the Technical Requirements (including changes in the standards applicable to the DB Work); *provided*, that under the CA the Department has no right to require any change that:

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

(b) Request for Change Proposal.

(i) If the Department desires to initiate a Department Change under the CA, the Department is to issue a Request for Change Proposal. Under the CA, the Request for Change Proposal is to set forth the nature, extent and details of the proposed Department Change. If the proposed Department Change relates to the DB Work, the Concessionaire shall forward the Request for Change Proposal to the DB Contractor, and the DB Contractor shall fulfill the Concessionaire's obligations under the CA with respect to the Department Change as provided in this Section 14.02.

(ii) Within fourteen (14) Days following the DB Contractor's receipt of the Request for Change Proposal, the DB Contractor will provide the Concessionaire with a preliminary written response, and within a reasonable time thereafter (not to exceed twenty (20) Days or such other timeframe agreed upon between the DB Contractor, the Concessionaire and the Department), with a definitive written response (a "Change Proposal"), as to whether, in the DB Contractor's opinion, the Department Change constitutes a Compensation Event, and if so, (A) a detailed assessment of the cost of implementing the Department Change and an estimate of any adjustment to the Contract Sum or other compensation to be requested as a result of the Department Change, and (B) an assessment of the effect of the proposed Department Change on the

Project Schedule, the Scheduled Substantial Completion Dates and the Long Stop Date, together with a TIA supporting such assessment.

(iii) Within twenty (20) Days following the delivery of the Change Proposal, the Concessionaire and the DB Contractor will exercise good faith efforts to negotiate a mutually acceptable Change Order, the final issuance of which shall be subject to the issuance by the Department under the CA of a corresponding CA Change Order making changes to the CA that are needed to reflect the terms of the Change Order agreed between the Concessionaire and the DB Contractor.

(iv) The DB Contractor may submit a request to the Concessionaire to be reimbursed for the costs of preparing a Change Proposal and conducting preliminary work to respond to a Request for Change Proposal made by the Department under the CA. Subject to the Concessionaire's receipt of payment from the Department for such costs, the Concessionaire shall reimburse the DB Contractor therefor. Upon payment of such costs, the Department will own all Work Product included in the Change Proposal.

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

(i) a CA Change Order setting forth, among other things, the adjusted scope of the DB Work and adjustments to the most recent update to the Project Schedule will have been mutually agreed upon between the Department and the Concessionaire and issued by the Department under the CA, and a Scope Change Order reflecting such CA Change Order shall have been mutually agreed upon between the Concessionaire and the DB Contractor and issued by the DB Contractor under this Agreement; and

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

(d) Disputed Work.

(i) Under the CA, if the Department and the Concessionaire agree that the Work in question constitutes a Department Change and are unable to reach an agreement on a CA Change Order, the Department may deliver to the Concessionaire a Directive Letter pursuant to Section 14.02(d) of the CA, directing the Concessionaire to proceed with the performance of the Work in question, notwithstanding such disagreement. Upon receipt of the Directive Letter, the Concessionaire shall issue a corresponding Work Order to the DB Contractor pursuant to Section



14.05(e) and the DB Contractor will implement and perform the DB Work in question in accordance with the Work Order. Under the CA the Department is to make payments to the Concessionaire for such DB Work performed on a force account basis pursuant to Section 14.02(e) of the CA, and, to the extent so received from the Department, the Concessionaire shall pay the DB Contractor on a force account basis pursuant to Section 14.02(e) hereof.

(ii) If the Department and the Concessionaire disagree whether the Work in question constitutes a Department Change, under the CA the Department has the right to issue a Directive Letter directing the Concessionaire to proceed with the performance of the Work in question, and if the Department does so, the Parties shall proceed as provided in Section 14.02(d)(i) and the DB Contractor will proceed with such work.

(iii) To the extent there are any Disputes related to any Work Order with respect to a Directive Letter issued by the Department, all such disputes will be subject to the dispute resolution procedures set forth in Article 21.

(e) Force Account. If the Concessionaire issues a Work Order to the DB Contractor pursuant to Section 14.02(d)(i), the Concessionaire will make interim payments to the DB Contractor on a monthly basis for the DB Work in question in accordance with the Force Account Provisions set forth in Exhibit X, other than for the cost of insurance not being provided by the DB Contractor, subject to subsequent adjustment through the dispute resolution procedures set forth in Article 21. All such payments by the Concessionaire are strictly subject to its receipt of corresponding payments from the Department under the CA.

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

### **Section 14.03. DB Contractor Requests for Deviations.**

(a) The DB Contractor may also request the Concessionaire to approve any material proposed or actual change, deviation, modification, alteration or exception from any of the Technical Requirements ("Deviations") by submitting a written change request in a form approved by the Concessionaire containing the details required below, in addition to setting forth the DB Contractor's estimate of impacts on costs and schedule attributable to the proposed Deviation, and the Concessionaire may in its sole discretion pass such change request for the Department's consideration pursuant to Section 14.03 of the Comprehensive Agreement. No Deviation shall exist or be effective for the purposes of the Project and this Agreement unless and until a written notice of the Department's approval thereof is provided to the DB Contractor by the

Concessionaire. At a minimum, the following information will be submitted with each change request:

- (i) a statement that the request is submitted pursuant to this Section 14.03(a);
- (ii) a statement concerning the basis for the request, benefits to the Department, the Concessionaire or the Project and an itemization of the contract items and requirements affected by the request;
- (iii) a detailed estimate of the time and/or cost savings and impacts on Gross Revenues;
- (iv) proposed specifications and recommendations as to the manner in which the requested changes are to be accomplished; and
- (v) the time by which the request must be approved so as to obtain the maximum cost-effectiveness.

(b) Each of the Concessionaire and, under the CA, the Department may consider and approve or disapprove, in its sole discretion, any such request, and the DB Contractor will bear the burden of persuading the Concessionaire and the Department that the Deviation sought constitutes sound and safe engineering consistent with Good Industry Practice and achieves the Concessionaire's and the Department's applicable safety standards and criteria. The Concessionaire's and the Department's decision will not be subject to the dispute resolution procedures of Article 21.

(c) The DB Contractor will be solely responsible for payment of any increased costs, any losses of Gross Revenues (net of tolling costs), all Allocable Costs and any schedule delays or other impacts resulting from the implementation of a Deviation that has been approved by the Concessionaire and, under the CA, the Department.

(d) If the implementation of a Deviation that has been approved by the Department and the Concessionaire results in any actual Net Cost Savings, the DB Contractor shall be entitled to 100% of the Concessionaire's share of such Net Cost Savings, as determined by the Concessionaire and the Department under the CA.

**Section 14.04. Not Used.**

**Section 14.05. Scope Change Orders Generally.**

(a) Scope Changes. A "Scope Change" means a material addition to, deletion from, suspension of or other modification to, the quality, function or intent of the Project as delineated in the Scope Document, or a material change to the requirements of this Agreement, but shall not include refinement, correction or detailing of the DB Work by the Concessionaire and the DB Contractor from time to time. For the avoidance of doubt, Scope Changes in respect of Delay Events, Department Changes or Compensation

Events shall be governed by Article 13, Section 14.01 and Section 14.02, respectively, and shall be formalized by issuance of a written Scope Change Order in the form attached to this Agreement as Exhibit II. The Concessionaire may order Scope Changes to the DB Work, in which event, as more specifically set forth in Section 14.05(b), one or more of the Contract Sum, the Payment and Values Schedule, the Project Schedule, the Scheduled Substantial Completion Dates and the Long Stop Date shall be adjusted accordingly, if necessary, as agreed by the Concessionaire and the DB Contractor. If either the Concessionaire or the DB Contractor believes a Scope Change is necessary, it shall proceed as set forth in this Section 14.05. If the Concessionaire believes that a particular item of DB Work is within the then-existing scope of DB Work but the DB Contractor believes that such DB Work constitutes a Scope Change, the DB Contractor shall diligently proceed with such DB Work as directed in writing by the Concessionaire; *provided*, that if the disputed item of DB Work is subsequently determined to constitute a Scope Change (whether by mutual agreement of the Parties or by operation of the dispute resolution provisions in Article 21), then such DB Work shall be deemed to have been the subject of a Work Order under Section 14.05(e) and the Concessionaire shall issue a Scope Change Order with respect thereto as provided in Section 14.05(f); otherwise, the DB Contractor shall not be entitled to a Scope Change Order with respect to such item of DB Work. If requested by the Concessionaire, the DB Contractor shall use commercially reasonable efforts to increase the aggregate amount of the Letters of Credit for the benefit of the Concessionaire by an amount equal to 6% of the aggregate increase in the Contract Sum that exceeds \$20,000,000 or any whole multiple thereof; such increase to be made within thirty (30) days of the date of the Scope Change Order or Work Order implementing the Scope Change that causes the aggregate increase in the Contract Sum to exceed \$20,000,000 or any whole multiple thereof; *provided*, that if the Scope Change results from the issuance by the Department of a Directive Letter pursuant to Section 14.02(d) of the CA, then the obligation to increase the Letters of Credit is subject to the costs incurred by the DB Contractor to effect such increase in the Letters of Credit being reimbursable under the CA. The Parties acknowledge that all Scope Changes may be subject to the Department's approval under the Comprehensive Agreement. In the event the Department requires modifications to this Agreement as a condition of its approval of any Scope Change, the Parties shall cooperate to effect such modifications.

(b) Scope Change Initiated by the Concessionaire. If a Scope Change is initiated by the Concessionaire, the Concessionaire shall give the DB Contractor a written "Proposal Request" (herein so called) setting forth in detail the nature of the requested change. Upon receipt of a Proposal Request, the DB Contractor shall promptly return to the Concessionaire two (2) completed copies of its written "Change Order Proposal" (herein so called) setting forth in detail, with a separate pay item (addition or deletion) for purchase and installation of equipment and materials and an otherwise suitable breakdown of costs by trades and work classifications, a stipulated sum proposed as an adjustment to the Contract Sum for the performance of the Scope Change set forth in the Proposal Request, together with any proposed adjustment to the Scheduled Substantial Completion Dates, the Long Stop Date, the Scope Document and the Payment and Values Schedule or other changes in the Contract Documents necessary because of such proposed Scope Change. The adjustment, if any, to the Scheduled Substantial Completion Dates, the Project Schedule and the Payment and Values Schedule specified

in any Change Order Proposal shall be limited to the delays to the Critical Path directly attributable to and necessarily incurred as a result of the proposed Scope Change. Each Change Order Proposal shall be accompanied by appropriate data reasonably acceptable to the Concessionaire supporting the proposed adjustments therein, including but not limited to bids, cost estimates, quotations from suppliers and wage schedules. If the Concessionaire approves the DB Contractor's Change Order Proposal, the Concessionaire will issue and the DB Contractor will execute and accept a written Scope Change Order in the form attached to this Agreement as Exhibit II, and the Contract Sum, the Payment and Values Schedule, the Project Schedule, the Scheduled Substantial Completion Dates and the Long Stop Date shall be adjusted as set forth in such Scope Change Order. If the Concessionaire does not approve the DB Contractor's Change Order Proposal, the Concessionaire may, at its option, execute and deliver to the DB Contractor a Work Order in accordance with Section 14.05(e) in lieu of the Scope Change Order.

(c) Scope Change Initiated by the DB Contractor. If the DB Contractor desires to initiate a Scope Change, including as a result of a Concessionaire-Caused Delay as provided in Section 14.05(d), the DB Contractor shall provide notice thereof to the Concessionaire. In the case of a proposed Scope Change as a result of a Concessionaire-Caused Delay as provided in Section 14.05(d), the DB Contractor must, as a condition to its entitlement to claim the Scope Change, provide such notice to the Concessionaire within ten (10) Days after first becoming aware (or after it should have become aware, using all due diligence) that a Scope Change may be necessary. Within twenty-one (21) Days after delivery of such a notice to the Concessionaire, the DB Contractor shall deliver to the Concessionaire (i) a Change Order Proposal meeting the requirements specified in Section 14.05(b), together with a detailed description of the proposed Scope Change, a reasonably detailed explanation of why the DB Contractor believes the proposed Scope Change is necessary, all relevant back up documentation, including drawings (original vs. latest), relevant technical/commercial agreement references, and a description of the critical activity which is directly affected, and by how long, or (ii) such of the foregoing information as is known to the DB Contractor at the time, together with its estimate of the date by which a full Change Order Proposal will be submitted to the Concessionaire. Subject to the final sentence of this Section 14.05(c), the Concessionaire shall approve a Change Order Proposal evidencing the DB Contractor's entitlement to claim a Scope Change Order in respect of a Concessionaire-Caused Delay under Section 14.05(d), but if the Concessionaire has a reasonable basis for objecting to any such Change Order Proposal, the Concessionaire shall state such objections in writing to the DB Contractor within ten (10) Days of receipt of the DB Contractor's Change Order Proposal and the Parties promptly shall meet to resolve their differences; the Concessionaire is under no obligation to approve any other Change Order Proposal initiated by the DB Contractor. The DB Contractor acknowledges and agrees that (i) timely notice and delivery of the required information as set forth in the second and third sentence of this Section 14.05(c) is essential to allow the Concessionaire to review the Change Order Proposal while the facts and conditions underlying the request therefor are contemporaneous and that the Concessionaire need not approve any Change Order Proposal to which the DB Contractor is otherwise entitled under this Agreement if the DB Contractor has failed to provide such timely notice and deliver such information

within the required time period and (ii) if it is ultimately determined that there was no Concessionaire-Caused Delay and any relief that would otherwise have been available from the Department under the CA is not provided due to the failure by the DB Contractor to claim a Delay Event under Article 13 or a Compensation Event under Article 14 and provide information in connection therewith when and as the same may have been needed to obtain such relief under the CA, then the DB Contractor shall be deemed to have waived any entitlement to a Scope Change Order or other relief.

(d) Scope Change Due to Concessionaire-Caused Delays. Except to the extent another consequence is expressly provided in this Agreement, the DB Contractor shall be entitled to claim a Scope Change Order adjusting one or more of the Contract Sum, the Payment and Milestone Schedule, the Scheduled Substantial Completion Dates and the Long Stop Date to the extent the DB Contractor's performance of the DB Work is adversely affected by a Concessionaire-Caused Delay and in respect of which the DB Contractor cannot, in the absence of incurring acceleration costs for impacts to the Critical Path or other costs impacting the Critical Path, overcome the effect thereof; *provided*, that if the Department's approval of any Scope Change Order is required under the CA and the Concessionaire is unable despite using its commercially reasonable efforts to secure such approval, then the Concessionaire shall not be obligated to issue such Scope Change Order but the DB Contractor shall have the right to seek monetary compensation from the Concessionaire pursuant to the dispute resolution procedures in Article 21 to compensate it from any Losses incurred as a result of the Concessionaire's inability to issue such Scope Change Order.

(e) Work Orders. If a Change Order Proposal delivered pursuant to Section 14.05(b) is not agreed to by the Concessionaire, or, as contemplated by Section 14.02(d) hereof, if the Department issues a Directive Letter pursuant to Section 14.02(d) of the Comprehensive Agreement, the Concessionaire may, at its option, execute and deliver to the DB Contractor a Work Order in lieu of the Scope Change Order procedures described in this Section 14.05. A "Work Order" is a written instruction to the DB Contractor to proceed with the Scope Change that is the subject of a Change Order Proposal or a Directive Letter. Subject to Section 14.02(e), payment for Scope Changes undertaken pursuant to a Work Order not resulting from the Department's issuance of a Directive Letter under the CA shall be calculated in accordance with Exhibit X, unless and until an adjustment to the Contract Sum has been agreed between the Concessionaire and the DB Contractor pursuant to an executed Scope Change Order.

(f) Performance of Scope of Changes. If the Concessionaire executes and delivers to the DB Contractor a Work Order, or if the Concessionaire and the DB Contractor agree to a Scope Change Order, the DB Contractor promptly shall perform the DB Work described in the Work Order or Scope Change Order. The Concessionaire shall not be responsible for premium time work unless (i) the Concessionaire has expressly directed the performance of premium time work, (ii) the need for such premium time work was not caused by the DB Contractor, and (iii) such premium time work was not contemplated by the DB Contractor's original work plan. With respect to DB Work performed pursuant to a Work Order, the DB Contractor shall deliver to the Concessionaire, within 20 Days after completion, invoices, statements, payroll data and

other evidence of the actual cost of the DB Work attributable to the Work Order that the Concessionaire may reasonably require. Promptly following (i) completion of the Scope Change required under a Work Order, (ii) agreement by the Concessionaire and the DB Contractor as to the adjustments to the Contract Sum, the Payment and Values Schedule, the Scheduled Substantial Completion Dates or the Long Stop Date which should be permitted as a result of such Work Order, and (iii) receipt by the Concessionaire of all required invoices, statements, payroll data and other evidence of the actual cost of the DB Work performed pursuant to such Work Order, the Concessionaire shall issue a Scope Change Order adjusting one or more of the Contract Sum, the Payment and Values Schedule, the Scheduled Substantial Completion Dates and the Long Stop Date as so agreed by the Concessionaire and the DB Contractor. If the Scope Change under a Work Order is performed over a period of more than one month, the DB Contractor may request, and shall be entitled to, payments for the Scope Change performed during each month in the same manner as payments requested for other DB Work. Agreement on any Scope Change Order shall constitute a final settlement on all items covered therein, subject to performance thereof and payment therefor pursuant to this Agreement.

(g) Scope Changes Due to DB Contractor Error. Notwithstanding anything in this Section 14.05 to the contrary, no Scope Change Order shall be issued and no adjustment of the Contract Sum, any Scheduled Substantial Completion Date, the Payment and Values Schedule or the Long Stop Date shall be made in connection with any correction of errors, omissions, deficiencies, or improper or defective work on the part of the DB Contractor or any Subcontractor in the performance of the DB Work hereunder, or correction of any improper, defective or deficient equipment supplied by the DB Contractor or any Subcontractor.

(h) Maintenance of Scheduled Substantial Completion Dates. With respect to any Scope Change proposed by the Concessionaire or the DB Contractor or required hereunder, the DB Contractor shall provide the Concessionaire with the option to cause the DB Contractor to perform the Scope Change without an adjustment in the Scheduled Substantial Completion Dates or the Project Schedule, *provided* that the Contract Sum is adjusted to compensate the DB Contractor for any reasonable additional costs incurred in performing the Scope Change in accordance with such time limitation. If the Concessionaire disputes the DB Contractor's estimate of such additional costs, such costs shall nonetheless be paid pending the resolution of the dispute. Amounts that are subsequently determined not to have been properly payable to the DB Contractor shall be refunded to the Concessionaire together with interest at the Bank Rate. Subject to the foregoing, the Concessionaire shall have the right to elect to cause such Scope Change to be performed without an adjustment in the Scheduled Substantial Completion Dates or any schedule for the Project whenever possible, or to cause such Scope Change to be performed upon any other terms and conditions set forth in the Change Order Proposal.

(i) Scope Change Order Dispute. In the event the DB Contractor makes a claim for a Scope Change Order to which it believes it is entitled solely resulting from a Concessionaire-Caused Delay pursuant to Section 14.05(d) and the Parties are unable to reach agreement regarding the terms of such Scope Change Order within 10 Business Days after the DB Contractor's submission of the Change Order Proposal and

supporting documentation, the Parties agree to a fast track adjudication process in accordance with this Section 14.05(i), as follows:

(i) A Party may submit the claim to a qualified independent third party arbitrator with substantial experience in complex transportation construction contracts; such arbitrator will be agreed by the Parties prior to the commencement of the first adjudication process under this Section 14.05(i) or Section 21.03, whichever occurs first, and such arbitrator(s) will be named on Exhibit JJ and will be acceptable arbitrators for future adjudication process under this Section 14.05(i) unless a Party sends a notice objecting to such Person's inclusion on Exhibit JJ prior to the commencement of the specific adjudication process. The other Party shall submit its response to the arbitrator within 10 Days of submission of the claim to the arbitrator by the initiating Party;

(ii) Such independent arbitrator will have 15 Days to make a preliminary determination whether the DB Contractor's claim and proposed cost adjustment amount appears in good faith to be valid, and if the independent arbitrator so determines, he/she shall then advise the Parties of an appropriate interim measure while the Parties proceed with the dispute resolution process as set out in clauses (iii), (iv) and (v) below;

(iii) Subject to the DB Contractor's suspension rights set forth in clause (iv) below, the Parties agree that such interim measure shall require the DB Contractor to proceed with the works set out in the disputed Scope Change Order and that claims and certification for such works shall occur in accordance with the conditions of this Agreement. If a payment has been made according to the terms of this Section 14.05(i), and the Claim underlying such payment is subsequently determined not to be valid, the DB Contractor shall repay all monies to the Concessionaire (including accumulated interest at the Bank Rate);

(iv) Upon certification by the independent arbitrator, the Concessionaire shall pay for the disputed Scope Change Order in accordance with this Agreement, and if the Concessionaire fails to make such payment, the DB Contractor shall be entitled to suspend only that portion of the DB Work that is affected by the specific disputed Scope Change Order until the Concessionaire makes the required payment. Any suspension of the DB Work by the DB Contractor under this Section 14.05(i) shall entitle the DB Contractor to make a claim for a Scope Change Order due to a Concessionaire-Caused Delay under the terms of this Agreement; and

(v) The disputes process employed by the Parties pursuant to this Section 14.05(i) shall be structured with the goal of fully resolving disputed Scope Change Orders and the DB Contractor's claims thereto

within 90 Days of submission by the DB Contractor of such Scope Change Order.

Nothing in this Section 14.05(i) shall be deemed to waive or otherwise affect any requirement in this Agreement that the Department approve a Scope Change Order under the CA before the Concessionaire may issue or implement the same, and the Concessionaire shall have no obligation to do so pending receipt of any required Department approval under the CA.

## ARTICLE 15

### INDEMNIFICATION

**Section 15.01. Indemnities of the DB Contractor.** In addition to the DB Contractor's indemnity obligations as set forth elsewhere in this Agreement, the DB Contractor will indemnify, defend, and hold harmless each DB Indemnitee from and against any Losses actually suffered or incurred by such DB Indemnitee (except to the extent such Losses are solely caused by the misconduct, negligence or other culpable act, error or omission of another DB Indemnitee), due to Third-Party Claims that are, directly or indirectly, based upon:

- (a) any actual or alleged failure by the DB Contractor to comply with, observe or perform any of the covenants, obligations, agreements, terms or conditions in this Agreement, the other Contract Documents or the Technical Requirements, or, any actual or alleged breach by the DB Contractor of its representations or warranties set forth herein or therein;
- (b) any actual or alleged misconduct, negligence or other culpable act, error or omission of a DB Contractor Party in connection with the Project;
- (c) any actual or alleged patent or copyright infringement or other actual or alleged improper appropriation or use by a DB Contractor Party of trade secrets, patents, proprietary information, know-how, trade marked or service marked materials, equipment, devices or processes, copyright rights or inventions in connection with the Project;
- (d) any actual or alleged inverse condemnation, trespass, nuisance or similar taking of or harm to real property committed or caused by a DB Contractor Party in connection with the Project arising from any actual or alleged (i) failure by the DB Contractor to comply with, observe or perform any of the covenants, obligations, agreements, terms or conditions in this Agreement; (ii) breach by the DB Contractor of its representations or warranties set forth in this Agreement or (iii) misconduct, negligence or other culpable act, error or omission of a DB Contractor Party; *provided*, however, that the DB Contractor will not be required to indemnify, defend or hold harmless a DB Indemnitee from and against any Losses actually suffered or incurred by such DB Indemnitee due to Third-Party Claims that are based upon any actual inverse condemnation arising from the establishment of the Project Right of Way as identified in the NEPA Documents and which are not required to be indemnified by the Concessionaire pursuant to Section 15.01(d) of the CA;



(e) [not used]

(f) [not used]

(g) any actual or alleged claim for brokerage commissions, fees or other compensation by any Person who acted on behalf of the DB Contractor, its Affiliates or their respective Representatives in connection with this Agreement or the Comprehensive Agreement;

(h) any actual or alleged claim related to the acquisition of Project Right of Way or other property acquired by the DB Contractor, any public or private nuisance, any damage to property (including utilities), and losses, personal injury or death, in each case in respect of carrying out the DB Work;

(i) payments of, or failure to pay, Taxes relating to the DB Contractor's income or other taxes required to be paid by the DB Contractor without reimbursement under this Agreement; or

(j) nonpayment of amounts due as a result of furnishing materials to the DB Contractor or any Subcontractor in connection with the DB Work to the extent the Concessionaire has paid the DB Contractor all undisputed amounts then due and payable from the Concessionaire to the DB Contractor under this Agreement.

**Section 15.02. Indemnities of the Concessionaire.** The Concessionaire will indemnify, defend, and hold harmless the DB Contractor from and against any Losses actually suffered or incurred by the DB Contractor (except to the extent such Losses are solely caused by the misconduct, negligence or other culpable act, error or omission of the DB Contractor), due to Third-Party Claims that are based upon any actual or alleged failure by the Concessionaire to comply with, observe or perform any of the covenants, obligations, agreements, terms or conditions in this Agreement.

**Section 15.03. Defense and Indemnification Procedures.**

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

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

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

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

(iii) the Indemnifying Party will not have employed counsel to represent the Indemnitee within a reasonable time after notice of the institution of such action; or

(iv) the Indemnifying Party authorizes the Indemnitee to employ separate counsel at the Indemnifying Party's expense.

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

**Section 15.04. Action in Case of Injunction.** If, in any claim, suit or proceeding identified in Section 15.01(c), a temporary restraining order or preliminary injunction is granted, the DB Contractor shall make every reasonable effort, by giving a satisfactory bond or otherwise, to secure the suspension of the injunction or restraining order. If, in any such claim, suit or proceeding, the Project or any part, combination or process thereof is held to constitute an infringement and its use is permanently enjoined, the DB Contractor shall at its own expense and without impairing performance requirements, either replace the infringing DB Work or part, combination or process thereof with non-infringing components or parts or modify the same so that they become non-infringing. If the DB Contractor is unable to do so within a reasonable time, the DB Contractor shall promptly make every reasonable effort to secure for the Concessionaire a license, at no cost to the Concessionaire, authorizing continued use of the infringing DB Work. No Scheduled Substantial Completion Date or any of the DB Contractor's

scheduling requirements under this Agreement shall be extended due to any temporary restraining order or injunction described hereunder.

## ARTICLE 16

### HAZARDOUS SUBSTANCES

#### **Section 16.01. General Obligations.**

(a) The DB Contractor will be responsible, in accordance with this Agreement, for the management, treatment, handling, storage, monitoring, remediation, removal, transport and/or disposal of any Hazardous Substances the presence of which constitutes a Hazardous Environmental Condition that are discovered on, in or under the Project Right of Way associated with each Project Asset commencing with the effective date of the earlier to occur of (i) first Construction Segment Notice to Proceed issued with respect to such Project Asset or (ii) the issuance of a DB LNTP hereunder with respect to such Project Asset (but limited to the Project Right of Way on which the DB Work is performed pursuant to such DB LNTP), and ending on the Substantial Completion Date of such Project Asset.

(b) Subject to Section 16.01(a), if the DB Contractor encounters any Hazardous Environmental Condition, then the DB Contractor will promptly notify the Concessionaire and the Department thereof. In the case of Hazardous Environmental Conditions that are attributable to Known Pre-Existing Hazardous Substances, the DB Contractor will thereafter proceed with Remedial Actions in accordance with the Environmental Management Plan. In the case of all other Hazardous Environmental Conditions and to the extent not covered by the Environmental Management Plan, the DB Contractor will develop a Remedial Action Plan setting out the scope of the Remedial Actions that the DB Contractor proposes to take in relation to the relevant Hazardous Environmental Condition, such actions to include, but not be limited to: (i) conducting such further investigations as may be necessary or appropriate to determine the nature and extent of the Hazardous Substances and submitting copies of such data and reports to each of the Concessionaire and the Department for its review and approval, (ii) taking reasonable steps, including in the case of excavation, construction, reconstruction or rehabilitation, modifications and/or construction techniques, to avoid or minimize excavation or dewatering in areas with Hazardous Substances, (iii) preparing and obtaining Governmental Approvals for remedial action plans, including Department approval, (iv) carrying out the Remedial Action Plan, including, as necessary, disposal of the Hazardous Substances and (v) timely informing the Concessionaire and the Department of all such actions.

(c) Before any Remedial Actions are taken that would inhibit the Concessionaire's or the Department's ability to ascertain the nature and extent of the Hazardous Environmental Condition, the DB Contractor will afford each of the Concessionaire and the Department the opportunity to inspect areas and locations that require Remedial Actions; *provided*, that in the case of a sudden release of any Hazardous Substances, the DB Contractor may take all reasonable actions necessary to

stabilize and contain the release without prior notice or inspection, but will promptly notify each of the Concessionaire and the Department of the sudden release and its location.

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

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

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

**Section 16.02. Pre-Existing Hazardous Substances.**

(a) Under the CA the Department is to reimburse, to the extent permitted by Law, the Concessionaire for the Concessionaire's Allocable Costs for Remedial Actions with respect to any Unknown Pre-Existing Hazardous Substances, the presence of which constitutes a Hazardous Environmental Condition. The DB Contractor shall prepare all necessary documentation seeking such reimbursement for submittal by the Concessionaire to the Department, and the Concessionaire shall pay over to the DB Contractor the reimbursed amounts to the extent received by the Concessionaire. To the extent the DB Contractor recovers costs from any available reimbursement program or third parties with respect to Unknown Pre-Existing Hazardous Substances, the DB Contractor will pay such amounts to the Concessionaire, less the actual costs incurred by the DB Contractor in seeking recovery in accordance with Section 16.01(e) and the Concessionaire will under the CA pay over to the Department such amounts. The DB Contractor shall prepare all necessary documentation for submittal by the Concessionaire to the Department supporting the amount recovered from any reimbursement program or third parties and the actual costs incurred by the DB Contractor in pursuing such recovery.

(b) Under the CA the Department is to assume, to the extent permitted by Law, responsibility for third party claims against the Concessionaire for personal injury, damages or harm to property or business due to any Pre-Existing Hazardous Substances, the presence of which constitutes a Hazardous Environmental Condition, and all related penalties, fines and administrative or civil sanctions arising out of or related to such Pre-Existing Hazardous Substances; except to the extent such claims are due to the negligence, recklessness, or willful misconduct of a Concessionaire Party. The DB Contractor shall be entitled to benefit from any responsibility so assumed by the Department.

(c) Other than in accordance with Section 16.01(c), the DB Contractor will provide cost estimates with respect to such Remedial Actions which may be reimbursed to the Concessionaire by the Department under the CA, to the Concessionaire for the Department's review and approval prior to proceeding with any such Remedial Actions. If the Concessionaire has not advised the DB Contractor that the Department has responded to the Concessionaire's request for such approval pursuant to Section 16.02(c) of the CA within 21 Days after the Department's acknowledgement of receipt (or in the case of an emergency a reasonably appropriate shorter period), the request will be deemed to be approved, except to the extent matters deviate from applicable Technical Requirements or Law.

**Section 16.03. DB Contractor Indemnifications Regarding Hazardous Substances.**

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

(i) Hazardous Substances introduced to or brought onto the Project Right of Way by a DB Contractor Party (even if discovered after Substantial Completion of the applicable Project Asset or Final Acceptance of the applicable Project Asset);

(ii) failure of any DB Contractor Party to comply with any requirement of the Contract Documents relating to Hazardous Substances (including any failure to perform any Remedial Action required in accordance with Section 16.01) or to otherwise comply with applicable Environmental Laws and Governmental Approvals; or

(iii) the exacerbation, release, spreading, migration, or toxicity of Hazardous Substances due to the negligence, recklessness, or willful misconduct of a DB Contractor Party (even if discovered after Substantial Completion of the applicable Project Asset or Final Acceptance of the applicable Project Asset).

(b) The DB Contractor will defend such Third-Party Claims in accordance with Section 15.03.

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

**Section 16.04. Generator Status.**

(a) Under the CA, the Department will be deemed the generator of Pre-Existing Hazardous Substances, the presence of which constitutes a Hazardous Environmental Condition, within the Project Right of Way. The Department has agreed in the CA to be identified as the generator of such Pre-Existing Hazardous Substances in waste manifests and any other documentation submitted to transporters, disposal facilities and any Governmental Authority.

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

**ARTICLE 17**

**INSURANCE; PERFORMANCE SECURITY**

**Section 17.01. Owner Controlled Insurance Program.**

(a) The Concessionaire has elected to implement an Owner Controlled Insurance Program ("OCIP") with respect to the Project. The OCIP is a series of insurance policies issued by one or more insurance companies to provide certain types of coverages for DB Work performed by the DB Contractor and eligible Subcontractors of all tiers. These coverages consist of (i) workers' compensation, (ii) general liability, including excess liability, (iii) contractors pollution liability and (iv) builder's risk. The coverages under the OCIP are more particularly described in Section 17.01(e). The OCIP does not provide professional liability, protection and indemnity, hull, vessel pollution liability, railroad protective liability, automobile liability, contractor's equipment, real and business personal property, ocean cargo or any other type of insurance or suretyship not specifically described in Section 17.01(e). The OCIP does not prohibit participants from purchasing any additional liability insurance. The Concessionaire assumes no obligation to provide insurance coverages other than those described in the actual OCIP policies.

(b) With respect to the DB Contractor and Subcontractors, coverage under the OCIP applies only to construction activities under the Contract Documents and, as to workers' compensation coverage, only construction activities performed at the Project Right of Way, provided, that the OCIP will also provide general liability and workers compensation coverage for DB Work performed at Sparrows Point, Maryland. Areas adjacent to or near the Project Right of Way where incidental operations are

performed may be covered, but only if they are solely dedicated to construction DB Work and reported to the OCIP Administrator and the OCIP Administrator has confirmed that they are covered. The DB Contractor acknowledges that, unless approved by the Concessionaire and accepted and endorsed on the policy by the OCIP insurer, locations outside the Project Right of Way are not covered under the OCIP even if the outside location is utilized as a batch plant dedicated to the Project or operations are for fabrication of materials to be used at the Project ROW or training of apprentices. Locations outside the Project Right of Way include the regularly established workplace, plant, factory, office, shop, warehouse, yard or other property of the DB Contractor or any Subcontractor. Operations of the DB Contractor or an enrolled Subcontractor outside the Project Right of Way, including product manufacturing or product assembling, may be covered if the DB Contractor or the Subcontractor requests coverage for specified operations and the operations are:

- (i) Solely dedicated to the performance of the DB Work;
- (ii) Approved in writing by the Concessionaire;
- (iii) Approved by the OCIP insurer and endorsed onto the general liability and workers' compensation OCIP insurance policies; and
- (iv) Acknowledged in writing by the OCIP Administrator.

(c) The DB Contractor acknowledges that the insurance provided under the OCIP does not extend coverage for product liability to other parties such as vendors and suppliers for any product manufactured, assembled, or worked on away from the Project Right of Way.

(d) Eligibility and enrollment in the OCIP are governed by the following terms:

(i) The DB Contractor shall participate in the OCIP's CGL policy coverage as an additional named insured and in the OCIP's workers' compensation and pollution liability coverage as a named insured.

(ii) Participation in the OCIP by eligible Subcontractors is mandatory but not automatic, as set forth in the OCIP Manual. The OCIP will apply to eligible Subcontractors only if and when they are enrolled. The DB Contractor shall, and shall cause each eligible Subcontractor to, enroll in the OCIP before starting work on the Project Right of Way by submitting an enrollment form in the form required by the OCIP Manual.

(iii) Eligible Subcontractors are Subcontractors who provide direct labor for construction activities at the Project Right of Way. Temporary labor services and employee leasing companies are to be treated as eligible Subcontractors if the services provided are construction activities at the Project Right of Way. Enrolled Subcontractors are

Subcontractors who have completed the enrollment procedures and received evidence of OCIP insurance. The enrollment process includes completion and acceptance of the forms included in the OCIP enrollment package.

(iv) Excluded Subcontractors are:

(A) Architects, engineers, surveyors, soil testing companies, and their consultants;

(B) Hazardous waste transport companies;

(C) Suppliers, vendors, and material dealers that do not perform construction activities at the Project Right of Way or subcontract installation;

(D) Guard services and non-construction janitorial services;

(E) Truckers including trucking to the Project where delivery is the only scope of work performed, haulers, drivers, and others who merely transport, pick up, deliver or carry materials, personnel, parts, and equipment to or from the Project Right of Way; and

(F) Subcontractors whose awarded subcontract value is less than \$25,000 or their anticipated time on site is less than one week.

(v) If an excluded Subcontractor performs direct labor at the Project Right of Way, it shall participate in the project safety program and comply with the safety requirements in the Technical Requirements.

(vi) OCIP insurance policies and OCIP coverages will not apply to excluded Subcontractors, even if such Subcontractors are erroneously enrolled in the OCIP. The DB Contractor is obligated to provide or cause to be provided insurance coverage for excluded Subcontractors that comply with the requirements of this Agreement, without the right to additional compensation for the premiums of such coverages.

(vii) The OCIP insurer reserves the right to reject late OCIP enrollments. If there have been losses in a period during which the DB Contractor or a Subcontractor delayed its enrollment, the OCIP will not furnish coverage to the DB Contractor or the Subcontractor for such losses and the DB Contractor will be deemed to have self-insured such losses under Section 17.06.



(viii) The DB Contractor acknowledges that the Concessionaire shall have the right to disqualify any eligible Subcontractor that fails or refuses to enroll in the OCIP before starting DB Work at the Project Right of Way, unless it becomes properly enrolled within three Business Days after the Concessionaire or OCIP Administrator delivers to the DB Contractor notice demanding enrollment. The DB Contractor shall immediately remove from the Project Right of Way any Subcontractor so disqualified.

(e) The insurance coverage under the OCIP is summarized as follows:

(i) Workers compensation insurance is provided on a statutory basis. If there is an exposure of injury to the Concessionaire's, any enrolled Concessionaire Contractor's, the DB Contractor's or an eligible Subcontractor's employees under the U.S. Longshore and Harbor Workers' Compensation Act, the Jones Act, or under laws, regulations or statutes applicable to maritime employees, coverage is included for such injuries or claims. Employer's Liability Insurance is provided for no less than:

(A) \$1,000,000 for each accident for bodily injury by accident;

(B) \$1,000,000 policy limit for bodily injury by disease; and

(C) \$1,000,000 for each employee for bodily injury by disease.

(ii) General Liability Insurance: The general annual aggregate limit is annually reinstated each policy year. Defense coverage is in addition to the policy limits. This policy will include deletion of any exclusion related to work within 50 feet of railroad right-of-ways and amendment of the professional liability exclusion via endorsement CG 2280. Completed-operations coverage will be extended for ten (10) years beyond the earlier of the date of Final Completion or expiration of the final OCIP policies. A single limit applies for the ten (10)-year period. Limits for bodily injury, including death arising from the bodily injury, and property damage are:

(A) \$2,000,000 for each occurrence;

(B) \$4,000,000 aggregate for completed operations; and

(C) \$4,000,000 general annual aggregate.

(iii) Umbrella or Excess Liability Insurance limits are not less than \$500,000,000 per occurrence and in the aggregate. Coverage is

excess and following form to the commercial general liability, employer's liability policies and the automobile liability policies of both the Concessionaire and the DB Contractor. General aggregate limits are annually reinstated.

(iv) Builders' Risk Insurance will include a limit of coverage of no less than \$250,000,000. The policy will include sub-limits for certain specified perils, including, but not limited to: offsite storage, expediting expenses, demolition and increased cost of construction, debris removal, mobile equipment and professional fees/loss adjustment expenses. Property in transit will be subject to a sublimit of \$20,000,000 (which will include transit of the tubes from the fabrication facility to the installation site) and property at a temporary location will be subject to a sublimit of \$25,000,000, and other sublimits. The policy will also include \$12,000,000 in coverage for Contractors Continuing Expense coverage for additional costs incurred by the DB Contractor as a consequence of a delay to the Project resulting from a covered builders' risk event.

(A) The Builders' Risk Insurance shall include a delayed-opening endorsement and business interruption endorsement of no less than \$87,500,000 representing loss of revenues of the Concessionaire in the event of a delay to the Project resulting from a covered builders risk event, or amount required under Exhibit Y.

(B) Contractor Pollution Liability for not less than \$25,000,000 per occurrence and in the aggregate. Coverage will be included for liability arising out of hazardous materials transport and non-owned treatment / disposal facilities.

(f) The descriptions of the OCIP coverages set forth in this Section 17.01 are not intended to be complete or meant to alter or amend any provision of the actual OCIP policies. The OCIP policy limits, coverage terms, coverage exclusions and limitations, and other policy terms and conditions are set forth in full in their respective policy forms. In the event of a conflict or omission between the policy limits, coverage terms, coverage exclusions and limitations, and other policy terms and conditions described in the OCIP policies and the summary or description thereof in this Section 17.01, the OCIP Manual, or elsewhere in the Contract Documents, the policy limits, coverage terms, coverage exclusions and limitations, and other policy terms and conditions set forth in the actual OCIP policies issued by the OCIP insurers shall control. In the event of a conflict between the provisions of this Section 17.01 and the OCIP Manual that does not involve any conflict with the provisions of the actual OCIP policies issued by the OCIP insurers, then the provisions of this Section 17.01 shall govern.

(g) The DB Contractor acknowledges that the Concessionaire will pay all OCIP premiums and other amounts owing to the OCIP insurers relating to the OCIP placement; provided, that: (a) all amounts paid to the DB Contractor for insurance

premium adjustments or increased costs for Department Changes and Department Directives shall be reimbursed to the Concessionaire for all OCIP policies and (b) deductibles and other claim-related OCIP administration expenses are governed by Section 17.01(i).

(h) The DB Contractor shall cooperate, and cause its enrolled Subcontractors to cooperate, with the Concessionaire in the administration and operation of the OCIP. Such cooperation shall include the following measures:

(i) Provide to the Concessionaire, its insurance representatives and the insurance company all information and documentation which the OCIP may require in connection with the issuance or maintenance of any OCIP policies, in such form and substance as the Concessionaire or its designee may require;

(ii) Provide to the Concessionaire, its insurance representative and the insurance company, on a monthly basis for the prior month (including months with no payroll), on-site payroll reports on the form required and described in the OCIP Manual, and such other payroll records relating to the DB Work as may be necessary for the proper computation of the insurance premiums;

(iii) For a period of up to three (3) years after the date of Final Completion or completion of any warranty work covered by the OCIP, whichever is later, permit the Concessionaire, its insurance representative and the insurance company to audit the enrolled parties' books and records and provide documentation as may be required to assure accuracy of those payroll reports and records;

(iv) Promptly comply with the requirements, obligations and recommendations of the Concessionaire, its insurance representative or insurance company so that the OCIP may be properly administered and so that the insurance companies will continue to provide the OCIP coverage as described in this Section 17.01. If the enrolled parties should fail to comply with any requirement, obligation or recommendation, the Concessionaire may, in addition to any other remedy, withhold compensation until the enrolled parties comply with such requirements, obligations and recommendations;

(v) Include OCIP provisions in all Subcontracts of eligible Subcontractors and notify the Concessionaire and its insurance representative of all Subcontracts awarded to eligible Subcontractors;

(vi) Comply with applicable loss control (safety) and claims reporting procedures; and

(vii) Maintain and have available the records identified above for a period of up to three years after the date of Final Completion or completion of any warranty work covered by the OCIP, whichever is later.

(i) Responsibility for deductibles under the OCIP and for claim-related administrative costs and expenses payable to the OCIP insurers and their agents and representatives shall be as follows:

(i) Deductibles for claims under Contractor Pollution Liability Insurance shall be the responsibility of the DB Contractor;

(ii) Deductibles for claims under Builder's Risk Insurance shall be the responsibility of the Party that is at fault or that has legal responsibility for the person or entity at fault; in all other instances the deductibles shall be borne equally by the Parties.

(iii) Subject to subsection (vi) of this Section 17.01(i), the DB Contractor shall be responsible for all deductibles for workers' compensation claims for the DB Contractor's or a Subcontractor's own employee.

(iv) Subject to subsection (vi) of this Section 17.01(i), the DB Contractor shall be responsible for deductibles for claims under General Liability Insurance that are associated with the performance of the DB Work or that occur at any location for which the DB Contractor then has care, custody and control under this Agreement or responsibility at law or by contract with a third party.

(v) The Party or Parties responsible for the deductible for any claim shall also be responsible for all claim-related administrative costs and expenses payable to the OCIP insurers and their agents and representatives.

(vi) The aggregate amount of all deductibles for which the DB Contractor is responsible under subsections (iii)-(iv) of this Section 17.01(i) collectively shall be \$14,000,000; thereafter, the Concessionaire shall be responsible for payment of the deductibles under such subsections.

(j) Except for completed operations coverage, OCIP insurance coverage for the DB Contractor will terminate upon Final Completion and OCIP insurance coverage for an enrolled Subcontractor will terminate upon that Subcontractor's completion of DB Work at the Project Right of Way. If the DB Contractor or a Subcontractor returns to the job site to perform warranty work, it must perform warranty work under its own worker's compensation insurance coverage; warranty work is covered only under the OCIP general liability insurance policy provided such work is performed within one year after acceptance of the DB Contractor's or the subject Subcontractor's work. For any work performed by the DB Contractor after Final

Completion, which would otherwise not be covered under the OCIP insurance completed operations coverage, the DB Contractor and any Subcontractors will be subject to the minimum insurance limits as described in Exhibit Y.

(k) The DB Contractor shall be responsible for compliance with the requirements of this Section 17.01, including compliance by its enrolled Subcontractors and by its excluded Subcontractors of all tiers.

(l) The DB Contractor agrees that the Concessionaire and the OCIP Administrator are not agents, partners, or guarantors of the OCIP insurer and that the Concessionaire is not responsible for any claims or disputes between or among the Concessionaire, the DB Contractor, the Subcontractors, and any OCIP insurer.

**Section 17.02. DB Contractor-Provided Insurance.**

(a) From the date on which the DB Work is to commence, the DB Contractor shall provide the following insurance with the indicated limits, with insurance carriers and in form reasonably satisfactory to the Concessionaire and the Department, and shall maintain such insurance in full force and effect until Final Completion (except with respect to erosion of limits due to unpaid claims and as otherwise specified below):

(i) Marine Protection and Indemnity coverage for not less than \$2,000,000 per occurrence. Coverage shall be maintained in full force and effect until the earlier of Final Completion or until no exposure exists;

(ii) Hull and Machinery coverage for not less than agreed value of each vessel or as determined by vessel owner. Coverage shall be maintained in full force and effect until the earlier of Final completion or until no exposure exists;

(iii) Vessel Pollution Liability coverage for not less than \$5,000,000 per occurrence for the discharge or substantial threat of a discharge of oil or hazardous substance, and \$1,000,000 per occurrence and in the aggregate for limited fines and penalties or salvage, cleaning, offloading and miscellaneous liability. Coverage shall be maintained in full force and effect until the earlier of Final Completion or until no exposure exists;

(iv) Automobile Liability coverage covering all licensed owned, non-owned and hired automobiles, trucks and trailers, for not less than \$1,000,000 combined single limit;

(v) Railroad Protective Liability coverage for not less than \$5,000,000 per occurrence and \$10,000,000 annual aggregate;

(vi) Contractor's Equipment coverage for equipment to be utilized in connection with the DB Work;

(vii) Real and Business Personal Property coverage for not less than \$5,000,000 for the batch plant, \$1,000,000 for the trailer complex and \$1,000,000 for personal property;

(viii) Professional Indemnity insurance Coverage A: Contractor's Professional Liability Coverage and Coverage B: Contractor's Protective Indemnity for acts, errors or omissions arising in connection with the DB Work for not less than \$25,000,000 any one claim and in the aggregate, and Excess Professional Indemnity for not less than \$25,000,000 any one claim and in the aggregate, to be maintained until the later of five (5) years following the Substantial Completion Date of the final Project Asset to achieve Substantial Completion or expiration of the applicable Warranty Period, and to include any work or design undertaken prior to the commencement of the DB Work; and

(ix) Ocean Cargo coverage for the value of cargo on any one vessel.

(b) Premiums. Deductibles and all related expenses for the policies of insurance set forth in this Section 17.02 shall be borne by the DB Contractor.

**Section 17.03. General Requirements Applicable to Insurance.**

The insurances which the DB Contractor is required to maintain under Section 17.02:

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

(b) except for professional liability insurance, hull and machinery insurance, railroad protective liability, and real and personal property insurance, each of the Concessionaire, the Lenders, the LTA and the Department will be named as an additional insured on a primary, non-contributory basis as their interests may appear; provided, that the Concessionaire will also be named as an additional insureds for real and personal property insurance;

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

(d) will be maintained with insurers that at the time coverage commences are authorized to do business in the State and have a current policyholder's management and financial size category rating of not less than "A-: VIII" according to A.M. Best's Financial Strength Rating and Financial Size Category, except as otherwise approved by the Concessionaire and the Department. Non-admitted insurance companies are not acceptable except for Professional Liability or as approved by the Concessionaire (which may be subject to approval by the Department);

(e) will be on terms approved by the Concessionaire (which may be subject to approval by the Department under the CA);

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

(g) without implying a right of cancellation that would not exist in the absence of these endorsements, will contain a term which requires the insurer to give not less than 30 Days' prior notice to the Concessionaire and the Department whenever the insurer gives the DB Contractor a notice of cancellation or any other notice with respect to the policy (except in the case of any non-premium payment policies, not less than ten (10) Days' prior notice, which the insurer will be obligated to give to the Concessionaire and the Department simultaneously with providing such notice to the DB Contractor);

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

(i) other than for professional liability insurance, each liability coverage will include cross-liability clauses allowing one insured to bring a claim against another insured party;

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

(k) [not used]

(l) will not include defense costs within the limits of coverage or permit erosion of coverage limits by defense costs, except that litigation and mediation defense costs may be included within the limits of coverage of professional and contractor pollution liability policies, marine protection and indemnity or brown water marine; and

(m) will provide that the coverage thereof is primary and noncontributory coverage with respect to all named or additional insureds, except for coverage that by its nature cannot be written as primary.

**Section 17.04. Proof of Coverage.** The DB Contractor will deliver to the Concessionaire policies, material forms, endorsements and premium indications of each insurance policy certified by the DB Contractor's insurance broker to be true and correct copies of such policies, forms, endorsements and premium indications, as a condition to receiving the applicable notices to proceed set forth in this Agreement, and annually thereafter no later than ten (10) Days prior to policy renewal or replacement. The DB Contractor will also deliver to the Concessionaire duplicate originals or copies of each Project-specific insurance policy and endorsements for the Project coverage of each other insurance policy certified by the DB Contractor's insurance broker to be true and correct copies of the originals no later than 53 Days after receiving the applicable notices to proceed set forth in this Agreement and annually

thereafter no later than 53 Days after policy renewal or replacement, and also whenever reasonably requested by the Concessionaire.

**Section 17.05. Unavailability of Insurance.**

(a) If any insurance required to be maintained pursuant to this Article 17 (including the limits, deductibles or any other terms under policies for such insurance) ceases to be available on a commercially reasonable basis, the DB Contractor will provide written notice to the Concessionaire accompanied by a letter from the DB Contractor's insurance advisor stating that such insurance is unavailable anywhere in the global market on a commercially reasonable basis. Such notice will be given not later than 37 Days prior to the scheduled date for renewal of any such policy. Except to the extent attributable to the DB Contractor or any DB Contractor Party, upon receipt of such notice by the Concessionaire, the Concessionaire shall notify the Department of such unavailability pursuant to Section 17.05 of the CA and will, unless prohibited by the Department, permit the DB Contractor to participate in the negotiations regarding the matters set forth in Section 17.05(c) and (d) of the CA. The DB Contractor shall benefit from any relief provided by the Department pursuant to the CA with respect to the DB Contractor's assertion that insurance is not available on a commercially reasonable basis.

(b) The DB Contractor will not be excused from satisfying the insurance requirements of this Article 17 merely because premiums for such insurance are higher than anticipated. To establish that the required coverages (or required terms of such coverages, including insurance policy limits) are not available on commercially reasonable terms, the DB Contractor will bear the burden of proving either that (i) the same is not available at all in the global insurance and reinsurance markets or (ii) the premiums for the same have so materially increased over those previously paid for the same coverage that no reasonable and prudent risk manager for a Person seeking to insure comparable risks would conclude that such increased premiums are justified by the risk protection afforded. For the purpose of clause (ii), the only increases in premiums that may be considered are those caused by changes in general market conditions in the insurance industry.

(c) [not used]

(d) [not used]

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

**Section 17.06. Failure to Obtain Insurance Coverage.**

(a) If in any instance the DB Contractor has not performed its obligations respecting insurance coverage set forth in this Agreement or is unable to



enforce and collect any such insurance for failure to assert Claims in accordance with the terms of the insurance policies, then for purposes of determining the DB Contractor's liability and the limits thereon or determining reductions in compensation due from the Concessionaire to the DB Contractor on account of available insurance, the DB Contractor will be treated as if it has elected to self-insure up to the full amount of insurance coverage which would have been available had the DB Contractor performed such obligations and not committed such failure.

(b) Nothing in this Section 17.06 or elsewhere in this Article 17 will be construed to treat the DB Contractor as electing to self-insure where the DB Contractor is unable to collect due to the bankruptcy or insolvency of any insurer which at the time the insurance policy is written meets the rating qualifications approved by the Concessionaire.

**Section 17.07. [Not Used].**

**Section 17.08. Performance Security.**

(a) [not used]

(b) Performance Security – DB Work.

(i) Guaranties. The DB Contractor shall cause each of the Guarantors to execute and deliver a guaranty in favor of the Concessionaire, in the form of Exhibit F-1 or Exhibit F-2, as applicable, as a security for all obligations of the DB Contractor under this Agreement (each, a “Guaranty” and collectively, the “Guaranties”). Such Guaranties must be provided by no later than the Agreement Date. Each Guaranty will name the Department a permitted assignee, with rights to draw upon or exercise other remedies thereunder if the Department succeeds to the position of the Concessionaire under this Agreement.

(ii) Letter of Credit. On the Agreement Date the DB Contractor shall provide the Concessionaire with one or more Letters of Credit in the form of Exhibit G issued by a Qualified Issuer in an aggregate amount equal to six percent (6%) of the Contract Sum as additional security for the DB Contractor's performance of its obligations hereunder. The Letters of Credit will name the Department a transferee beneficiary, with rights to draw upon or exercise other remedies thereunder if the Department succeeds to the position of the Concessionaire under this Agreement. Upon achievement of Substantial Completion for the last Project Asset to achieve Substantial Completion in accordance with this Agreement, the aggregate amount of the Letters of Credit in favor of the Concessionaire may be reduced by the DB Contractor to an amount equal to the sum of (A) one percent (1%) of the Contract Sum as of the date of such Substantial Completion plus (B) 150% of the projected cost to achieve Final Completion, including the cost to

complete the Punch List items, as reasonably estimated by the Concessionaire. Upon achievement of Final Completion under this Agreement, the DB Contractor may further reduce the aggregate amount of the Letters of Credit to an amount equal to one percent (1%) of the Contract Sum. Such reduced Letters of Credit shall remain in effect until the end of the Warranty Period for each applicable Project Asset. If any warranty claims asserted pursuant to Sections 8.11(a) and 8.11(b)(i) remain unresolved as of the date any Letter of Credit is otherwise permitted to expire pursuant to the preceding sentence, the DB Contractor shall cause the Letters of Credit to remain in effect through the date of resolution of such warranty claims; provided, that the aggregate amount of the Letters of Credit may be reduced to an amount equal to 150% of the total amount of such outstanding claims as determined by the Concessionaire in good faith. For so long as the DB Contractor is obligated to maintain the Letters of Credit, not later than 30 Days prior to the stated expiration dates of the Letters of Credit, the DB Contractor shall renew, or cause the renewal of, each outstanding Letter of Credit, or replace, or cause the replacement of, each such Letter of Credit with one or more replacement Letters of Credit from a Qualified Issuer and having a stated amount equal to that of the Letter of Credit being renewed or replaced. For so long as the DB Contractor is obligated to maintain the Letters of Credit, in the event (A) the issuer of a Letter of Credit shall fail to meet the requirements of a Qualified Issuer, (B) an issuer of a Letter of Credit shall fail to honor the beneficiary's properly documented request to draw on an outstanding Letter of Credit, or (C) the issuer of an outstanding Letter of Credit indicates its intent not to renew such Letter of Credit, within five (5) Business Days thereafter the DB Contractor shall provide a substitute Letter of Credit from a Qualified Issuer other than the bank that has been downgraded or failed to honor the outstanding Letter of Credit. If the Concessionaire does not receive a replacement Letter of Credit from a Qualified Issuer within the time specified in either of the two preceding sentences, it may draw on the full available amount of the applicable Letter of Credit. Amounts drawn in such circumstances shall be held directly by the Concessionaire and are available to be applied by the Concessionaire under the conditions set forth in such Letter of Credit, and, unless the amounts so drawn are not available to be applied by the Concessionaire due to the effect of bankruptcy or other similar laws, such amounts shall be considered part of the aggregate amount of the Letters of Credit required to be provided by the DB Contractor hereunder. In the case of all other draws, the Concessionaire will draw on all provided Letters of Credit pro rata based on the face amount of each such Letter of Credit, provided that if a draw on any the Letters of Credit is dishonored for any reason, the Concessionaire will have the right to draw on one or more of the remaining Letters of Credit for the amount that was dishonored.

(c) Additional Requirements.

(i) Unless otherwise specified in this Agreement or the DB Direct Agreement, a draw on the Performance Security or exercise of any rights thereunder will not be conditioned on prior resort to any other security of, or provided for the benefit of, any DB Contractor Party. If the Concessionaire receives proceeds of a draw on the Performance Security in excess of the relevant obligation, then the Concessionaire will promptly refund the excess to the DB Contractor (or to its designee) after all relevant obligations are satisfied in full together with interest at Bank Rate to the extent the receipt of such excess is attributable to the Concessionaire's act or omission.

(ii) In all cases, the costs and expenses of establishing, renewing, substituting, canceling, increasing, reducing or otherwise administering a Letter of Credit shall be borne by the DB Contractor.

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

(iv) After any draw by the Concessionaire on any Performance Security, the DB Contractor may dispute the Concessionaire's right to retain the proceeds in accordance with Section 21.03.

## ARTICLE 18

### OWNERSHIP AND ACCESS TO RECORDS

**Section 18.01. Maintenance of Records.** The DB Contractor will maintain and retain, or cause to be maintained or retained, proper books of records and accounts in which complete and correct entries will be made of its transactions in accordance with GAAP or any other generally accepted accounting standards which are acceptable to the Department. Such books and records will be maintained and retained at a location situated within the contiguous United States of America as designated by the DB Contractor by delivery of notice of such location to the Concessionaire. Further, the DB Contractor will maintain and retain, or cause to be maintained and retained, such books and records will in accordance with applicable Law, including those Laws applicable to projects receiving federal-aid funds and State bond proceeds.

### **Section 18.02. Public Records.**

(a) The DB Contractor acknowledges that any Work Product the Department owns and any document of which the Department obtains a copy that relates to the Project may be considered public records under the Virginia Public Records Act,

Sections 42.1-76 through 42.1-91 of the Code of Virginia or official records under the Virginia Freedom of Information Act, Sections 2.2-3700 through 2.2-3714 of the Code of Virginia, and as such may be subject to public disclosure. In the event of a request for disclosure of any such information, the CA specifies that the Department will comply with Law. In the CA the Department recognizes that certain Work Product the Department owns, and certain documents of which the Department obtains a copy that relate to the Project, including Escrow Documents obtained under Section 18.05 of the CA, may contain information exempt from disclosure under Section 2.2-3705.6(11) of the Code of Virginia, may constitute trade secrets as defined in the Uniform Trade Secrets Act, Sections 59.1-336 through 59.1-343 of the Code of Virginia, and may include confidential information which is otherwise subject to protection from misappropriation or disclosure, and the Department has agreed under the CA to keep such information confidential unless disclosure is required by Law. Should such records become the subject of a request for public disclosure, the Department is under the CA to promptly notify the Concessionaire of such request and the date by which the Department anticipates responding and is to consider the objections received from the Concessionaire in advance of such date. The Concessionaire will promptly provide the DB Contractor with a copy of any such notice received with respect to Work Product provided by or on behalf of the DB Contractor and forward any objections received from the DB Contractor to the Department.

(b) If the DB Contractor believes that any Work Product or any document subject to transmittal to or review by the Department under the terms of this Agreement, the CA or a Project Agreement contains proprietary or confidential information or trade secrets that are exempt or protected from disclosure pursuant to Law, the DB Contractor will use its reasonable efforts to identify such information prior to such transmittal or review and the Concessionaire shall allow the DB Contractor to participate in the conference contemplated by Section 18.02(b) of the CA prior to transmittal or review. Upon the written request of either party, the DB Contractor may participate in the development of the protocol contemplated by Section 18.02(b) of the CA regarding the transmittal, review and disclosure of Work Product or other documents produced or obtained by the DB Contractor so as to avoid violations of any Law and to protect, consistent with the requirements of Law, appropriate information from disclosure.

### **Section 18.03. Ownership of Work Product.**

(a) All Work Product (including records thereof in software form), including reports, studies, data, information, logs, records and similar terms, which is prepared or procured by or on behalf of the Concessionaire or Concessionaire Contractors, whether before or after the Agreement Date, will be and remain the exclusive property of the Concessionaire.

(b) All Work Product prepared by or on behalf of the DB Contractor with respect to the Project or the DB Work shall be exclusively the property of the Concessionaire and shall not be used by the DB Contractor in connection with any other project without the Concessionaire's prior written consent which may be granted or

withheld in its sole discretion. The foregoing does not apply to the DB Contractor's pre-existing technical experience, expertise, standard formats or the like. The DB Contractor agrees that all such documents, as well as any drawings, tracings, specifications, calculations, memoranda, data, notes and other materials which are supplied by the Concessionaire and come into the possession of the DB Contractor, shall be delivered to Concessionaire at the earlier of Final Acceptance of the last Construction Segment or termination of the DB Work hereunder, if not previously delivered hereunder, except to the extent the Concessionaire shall instruct the DB Contractor not to deliver such materials. The Concessionaire may not copy or disseminate such materials in connection with any project other than the Project unless the DB Contractor's name is deleted from such materials. The Concessionaire shall defend, indemnify and hold the DB Contractor harmless from any claim, demand or liability arising from reuse of the DB Contractor's documents if such reuse is not in connection with the Project.

**Section 18.04. Royalties and License Fees.** The DB Contractor shall pay all applicable and required initial royalties and license fees (it being understood that the DB Contractor is not responsible for ongoing maintenance and support fees) and shall procure for the benefit of the Concessionaire and/or the Department, as applicable, at the DB Contractor's sole expense (other than ongoing maintenance and support fees), the appropriate rights, licenses, agreements and permissions for materials, methods, processes and systems incorporated into the Project as part of the DB Work. In performing the DB Work, the DB Contractor shall not incorporate into the Project any materials, methods, processes or systems which involve the use of any confidential information, intellectual property or proprietary rights which the Concessionaire, the Department or the DB Contractor does not have the right to use or which may result in claims or suits against the Concessionaire, the Department or the DB Contractor arising out of claims of infringement of any domestic or foreign patent rights, copyrights or other proprietary rights, or applications for any such rights, or use of confidential information. Any Proprietary Intellectual Property of the DB Contractor with respect to items incorporated in the DB Work and the Project shall be assigned or licensed to the Department or the Concessionaire, as applicable, at no additional cost to the Department or the Concessionaire, in connection with the use or operation of the Project.

**Section 18.05. Escrow Documents.**

(a) General. On or before the CA Agreement Date, under the CA the Concessionaire, the Department and the Escrow Agent are required to execute and deliver the Escrow Agreement to implement the provisions of Section 18.05 of the CA, and no later than 14 days from the Agreement Date the Concessionaire is required to submit to the Department for its review and approval certain materials, including one copy of all documentary information generated with respect to the expected costs of the DB Work available to the Concessionaire under this Agreement (the "D-B Escrow Documents"). Prior to the Concessionaire's submission to the Department of the D-B Escrow Documents, the DB Contractor will provide such D-B Escrow Documents to the Concessionaire in such form and substance as required for the Concessionaire to meet the requirements of the CA relating to such submittal.

(b) Format and Contents.

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

(ii) The D-B Escrow Documents will be submitted in English and clearly itemize the estimated costs of performing each item of the DB Work. Cost items will be separated into sub-items as required to present a detailed cost estimate and allow a detailed cost review.

(iii) The D-B Escrow Documents will include: estimates for costs of the design professionals and consultants itemized by discipline both for development of the design, all quantity take-offs, crew size and shifts, equipment, calculations of rates of production and progress, copies of quotes from the DB Contractor, Subcontractors and suppliers, and memoranda, narratives, drawings and sketches showing site or work area layouts and equipment, add/deduct sheets, geotechnical reviews and consultant reports, and all other information used by the DB Contractor to arrive at the estimated prices for the DB Work. Estimated costs will be broken down into estimate categories for items such as direct labor, repair labor, equipment ownership and operation, expendable materials, permanent materials and subcontract costs as appropriate. Plant and equipment, indirect costs, bond rates and calculations, insurance costs and financing should be detailed. The DB Contractor's allocation of indirect costs, contingencies, and mark-up will be identified.

(iv) The D-B Escrow Documents will identify all costs. Estimated unit costs are acceptable without a detailed cost estimate, *provided*, that labor, equipment, materials and subcontracts, as applicable, are specified, and *provided further*, that indirect costs, contingencies, and mark-up, as applicable, are allocated.

(c) Submittal.

(i) Under the CA, the Concessionaire is required to submit the D-B Escrow Documents in a segregated sealed container clearly marked on the outside with the Concessionaire's name, reference to the Project, and the words "Downtown Tunnel/Midtown Tunnel/MLK Extension Project D-B Escrow Documents." The DB Contractor shall prepare the D-B Escrow Documents as set forth in this Section 18.05(c)(i) and shall provide same to the Concessionaire.

(ii) Under the CA, on or before the CA Agreement Date, representatives of the Department, assisted by members of the Concessionaire's and the DB Contractor's staff who are knowledgeable in how the D-B Escrow Documents were prepared, will examine, organize and inventory the D-B Escrow Documents. This examination will be to ensure that the D-B Escrow Documents are legible and complete. It will not include review of, and will not constitute approval of proposed construction methods, estimating assumptions, or interpretations of this Agreement. Such examination will not alter any condition or term of this Agreement or any other Project Agreement to which the DB Contractor is subject as provided herein.

(iii) Timely submission of complete D-B Escrow Documents as of the Agreement Date is an essential element of the DB Contractor's responsibility and a prerequisite to the execution and delivery of this Agreement by the Concessionaire.

(iv) To the extent the DB Contractor plans to contract out any part of the DB Work as of the Agreement Date, the DB Contractor will cause each Subcontractor whose total Subcontract price exceeds 5% of the Contract Sum as set forth in this Agreement to provide separate similar documentation to be included with those of the DB Contractor. Such documents will be opened and examined in the same manner and at the same time as the examination described above for the DB Contractor to the extent that they are relevant to the issue at hand.

(d) [not used]

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

SunTrust Bank  
919 East Main Street, Floor 7  
Richmond, Virginia 23219  
Attention: Corporate Agency Services  
Telephone: 804-782-5400  
Facsimile: 804-782-785

The Concessionaire will bear the cost for storing the D-B Escrow Documents.

(f) Examination.

(i) Subject to the terms of the Escrow Agreement, the D-B Escrow Documents may be examined by the Department and the Concessionaire at any time deemed necessary by the Department or the Concessionaire and the Department may delegate review of the D-B Escrow Documents to members of its staff or to Consultants; *provided*,

that, unless a Consultant is bound by a confidentiality agreement or other obligations to keep the D-B Escrow Documents confidential, each such Consultant will enter into a confidentiality agreement reasonably requested by the DB Contractor with respect to any such examination. No other person will have access to the D-B Escrow Documents. The DB Contractor will have the right to be present during an examination of the D-B Escrow Documents; provided, however, that such right will not in any way limit the Department's or the Concessionaire's right to review the D-B Escrow Documents if the D-B Contractor does not attend such examination. Notwithstanding the foregoing, the D-B Escrow Documents and information contained therein may be used:

(A) to assist in the negotiation of Concessionaire Damages, Net Cost Savings and Change Orders;

(B) in the resolution of any claim or dispute before any entity selected to resolve disputes; and

(C) in any dispute resolution procedure commenced hereunder.

(ii) Access to the D-B Escrow Documents will take place in the presence of duly designated representatives of the Department, the Concessionaire and the DB Contractor, except that, if the DB Contractor refuses to be present or to cooperate in any other way in the review of the documents, the Department and the Concessionaire may review such documents without the DB Contractor being present.

(g) Ownership. The D-B Escrow Documents are, and will always remain, the property of the DB Contractor, subject to joint review by the Department and the Concessionaire, as provided herein and the Comprehensive Agreement. Under the CA, the Department stipulated and expressly acknowledged that the D-B Escrow Documents constitute trade secrets, and each of the Concessionaire and the DB Contractor hereby acknowledges that the information contained in the D-B Escrow Documents constitutes trade secrets, as described in Section 18.05(g) of the CA.

(h) Final Disposition and Return of D-B Escrow Documents. Under the CA, the D-B Escrow Documents will be returned to the Concessionaire upon the earlier to occur of (i) completion of the DB Work, including tender of final payment and resolution of all claims or disputes arising under this Agreement or (ii) termination of the Comprehensive Agreement and resolution of all claims or disputes arising pursuant to the Comprehensive Agreement. Promptly after the receipt of the D-B Escrow Documents from the Department, the Concessionaire will return same to the DB Contractor.

**Section 18.06. Not Used.**



**Section 18.07. Inspection and Audit Rights.**

(a) Subject to Section 18.07(c), the DB Contractor will make available to the Concessionaire, the Department and the FHWA (including their employees, contractors, consultants, agents or designees), and allow each of them access to, such books, records and documents as they may reasonably request in connection with the Project for any purpose related to the Project, this Agreement and the CA, including but not limited to monitoring compliance with the terms and conditions of this Agreement and the CA. The Concessionaire will provide the DB Contractor 48 hours' prior written notice (or, in the case of access requested by the Department or the FHWA, prompt notice after receipt of notice from the Department or the FHWA) prior to exercising its rights to access and audit the Concessionaire's books, records and documents pursuant to this Section 18.07(a) and Section 18.07(b); *provided, however*, that such rights may be exercised unannounced and without prior notice by (i) the Concessionaire during a DB Contractor Default or where there is good faith suspicion of fraud under this Agreement or (ii) by the Department and/or FHWA during a "Concessionaire Default" under the CA or where there is good faith suspicion of fraud under the CA.

(b) Subject to Section 18.07(c), each of the Concessionaire, the Department and the State, at such Person's own expense, will have the right to carry out an audit of information relating to (i) the design and construction of the Project or (ii) other information required to be maintained or delivered by the DB Contractor pursuant to this Agreement. Such audit may extend, without limitation, to calculations undertaken, and financial or business reports provided, by or on behalf of the DB Contractor pursuant to this Agreement. Each such Person or its employees, agents, auditors, attorneys and consultants, at such Person's own expense, may examine, copy, take extracts from and audit all the books and records of the DB Contractor related to the Project, including all Subcontracts entered into under Section 24.02, subject to the limitations set forth in Section 18.07(f). In addition, each such Person or its employees, agents, auditors, attorneys and consultants, at such Person's own expense, may conduct a re-audit and observe the business operations of the DB Contractor to confirm the accuracy of books and records. In addition, at FHWA's request, the DB Contractor will make all its records relating to the Project available to the FHWA for inspection and audit.

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

(d) [Not used]

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

(f) No audit rights will extend to the make-up of the Contract Sum or unit price or rate hereunder once such amount, price or rate has been agreed.

(g) The DB Contractor will cooperate with the Concessionaire, the Department, the FHWA and the other persons mentioned in this Section 18.07 in the exercise of their rights hereunder or under the CA, as applicable. Under the CA, at the request of the Department, the Concessionaire will furnish or cause to be furnished to the Department such information relating to the operation, maintenance and repair of the Project as the Department may reasonably request for any purpose related to the Project or the Comprehensive Agreement and as will be in the possession and control of the Concessionaire, any Concessionaire Party, or any of their Representatives. The DB Contractor shall cooperate and otherwise provide such assistance with respect thereto as the Concessionaire may request. Under the CA, subject to Section 18.02 thereof, the Department is to keep confidential any information obtained from the Concessionaire, any Concessionaire Party or their Representatives that (i) constitutes trade secrets or commercial or financial information (A) where the trade secrets or commercial or financial information are proprietary, privileged or confidential or (B) where disclosure of the trade secrets or commercial or financial information may cause competitive harm and (ii) is designated as such by the Concessionaire, a Concessionaire Party or their Representatives in writing to the Department, and the Department has determined that such information qualifies for exemption from disclosure under Law.

## ARTICLE 19

### DEFAULTS AND REMEDIES

**Section 19.01. DB Contractor Defaults.** The occurrence of any one or more of the following events will constitute a “DB Contractor Default” pursuant to this Agreement:

(a) any representation or warranty made by the DB Contractor herein or in any other Project Agreement to which it is a party is false or misleading in any respect on the date made and a material adverse effect upon the Concessionaire or the Project results therefrom, and such circumstance continues without cure for a period of 90 Days following the date the Concessionaire delivers to the DB Contractor written notice thereof, with cure regarded as complete only when the adverse effects are remedied; provided, however, that any breach of the representation and warranty set forth in Section 23.01(n) will not constitute a DB Contractor Default;

(b) the DB Contractor fails to comply with, perform or observe any material obligation, covenant, agreement, term or condition in this Agreement (provided that the failure to achieve any goals or Good Faith Efforts relating to DBE or SWaM participation in Section 24.03 will not constitute a DB Contractor Default), and such failure continues without cure for a period of 30 Days following the date the Concessionaire delivers to the DB Contractor written notice thereof (giving particulars of the failure in reasonable detail) or for such longer period as may be reasonably necessary to cure such failure up to a maximum cure period of 180 Days; *provided*, that in the latter case, (i) the DB Contractor is proceeding with all due diligence to cure or cause to be

cured such failure, (ii) the failure is capable of being cured within a reasonable period of time, and (iii) such failure is in fact cured within such period of time; *provided*, further that this Section 19.01(b) will not apply to events covered by other provisions of this Section 19.01;

(c) the DB Contractor fails to pay to the Concessionaire when due any undisputed sum payable to the Concessionaire pursuant to this Agreement and such failure, including any failure to pay interest at the Bank Rate from the date due, continues without cure for a period of 30 Days following the date the Concessionaire delivers to the DB Contractor written notice thereof (which notice requirement shall be waived if Law precludes the giving of notice);

(d) the DB Contractor closes all or part of a Project Asset to traffic, at any time following Tolling and O&M Work Commencement for such Project Asset, other than in connection with any Permitted Closure in accordance with the DB Rehabilitation Plan, and such closure continues without cure for a period of eight (8) Days following the date the Concessionaire delivers to the DB Contractor written notice thereof;

(e) the DB Contractor fails to achieve Substantial Completion of all of the Project Assets by the Long Stop Date, as such date may be extended pursuant to this Agreement;

(f) [not used]

(g) the DB Contractor fails to maintain, or to cause to be maintained, in effect the insurance, the Guaranties, the Letters of Credit or other Performance Security as and when required pursuant to this Agreement for the benefit of relevant parties, or fails to comply with any requirement of this Agreement pertaining to the amount, terms or coverage of the same and such failure continues without cure for a period of three (3) Business Days following the date the Concessionaire delivers to the DB Contractor written notice thereof (which notice requirement shall be waived if Law precludes the giving of notice);

(h) [not used]

(i) this Agreement is Transferred by the DB Contractor, or there occurs a Change in Control, in contravention of Section 25.01;

(j) after exhaustion of all rights of appeal, (i) there occurs any suspension or debarment (distinguished from ineligibility due to lack of financial qualifications), or there goes into effect an agreement for voluntary exclusion, of the DB Contractor, any affiliate of the DB Contractor (as "affiliate" is defined in 29 CFR 98.905 or successor regulation of similar import) other than the Concessionaire, or DB Key Members whose work is not completed under any Subcontract, from bidding, proposing or contracting with any Federal or State department or agency or (ii) the DB Contractor, DB Key Members who have ongoing DB Work, or any of their respective officers, directors, or Administering Employees have been convicted of, or plead guilty or *nolo*

*contendere* to, a violation of Law for fraud, conspiracy, collusion, bribery, perjury, or material misrepresentation, as a result in whole or in part of activities relating to any project in the State, and such failure continues without cure for a period of 80 Days following the date the Concessionaire delivers to the DB Contractor written notice thereof (giving particulars of the failure in reasonable detail). If the offending Person is an officer, director or Administering Employee, cure will be regarded as complete when the DB Contractor proves that such Person has been removed from any position or ability to manage, direct or control the decisions of the DB Contractor or such DB Key Member (as applicable) or to perform DB Work; and if the Person debarred or suspended or subject to an agreement for voluntary exclusion is an affiliate of the DB Contractor (as "affiliate" is defined in 29 CFR 98.905 or successor regulation of similar import) other than the Concessionaire, or a DB Key Member, cure will be regarded as complete when the DB Contractor replaces such Person in accordance with this Agreement;

(k) the DB Contractor or any joint venture partner or member of the DB Contractor or any Guarantor (i) admits, in writing, that it is unable to pay its debts as they become due, (ii) makes an assignment for the benefit of its creditors, (iii) files a voluntary petition under Title 11 of the U.S. Code, or files any other petition or answer seeking, consenting to or acquiescing in any reorganization, liquidation, dissolution or similar relief under the present or any future U.S. bankruptcy code or any similar Law, or (iv) seeks or consents to or acquiesces in the appointment of any trustee, receiver, custodian, assignee, sequestrator, liquidator or other similar official of the DB Contractor or any Guarantor, or of all or any substantial part of its properties; provided, that if either or both of Skanska USA Civil Southeast Inc. or Kiewit Infrastructure Co. is not the cause of DB Contractor Default set forth in this Section 19.01(k), then such remaining joint venture members may cure such DB Contractor Default (A) by expressly assuming all of the obligations of the DB Contractor under this Agreement within thirty (30) Days of occurrence of such DB Contractor Default by a writing acceptable to the Concessionaire and (B) if the Lender's Technical Advisor certifies, within the same thirty (30)-day period, that such remaining members have the technical capabilities to achieve Substantial Completion of each of the Project Assets by the applicable Scheduled Substantial Completion Date;

(l) within 60 Days after the commencement of any proceeding against the DB Contractor or any joint venture partner or member of the DB Contractor or any Guarantor seeking any reorganization, liquidation, dissolution or similar relief under the present or any future U.S. bankruptcy code or any similar Law, such proceeding has not been dismissed, or, within 60 Days after the appointment, without the consent or acquiescence of the DB Contractor or the applicable Guarantor, of any trustee, receiver, custodian, assignee, sequestrator, liquidator or other similar official of the DB Contractor or the applicable Guarantor or of all or any substantial part of its properties, such appointment has not been vacated or stayed on appeal or otherwise, or, within 60 Days after the expiration of any such stay, such appointment has not been vacated; provided, that if either or both of Skanska USA Civil Southeast Inc. or Kiewit Infrastructure Co. is not the cause of DB Contractor Default set forth in this Section 19.01(l), then such remaining joint venture members may cure such DB Contractor Default (A) by expressly assuming all of the obligations of the DB Contractor under this Agreement within thirty

(30) Days of occurrence of such DB Contractor Default by a writing acceptable to the Concessionaire and (B) if the Lender's Technical Advisor certifies, within the same thirty (30)-day period, that such remaining members have the technical capabilities to achieve Substantial Completion of each of the Project Assets by the applicable Scheduled Substantial Completion Date;

(m) a levy under execution or attachment has been made against all or any part of the Project or any interest therein (including the Concessionaire's Interest) as a result of any Lien created, incurred, assumed or suffered to exist by the DB Contractor or any Person claiming through it (other than as a result of the Concessionaire's failure to pay an undisputed amount due hereunder), and such execution or attachment has not been vacated, removed or stayed by court order, bonding or otherwise within a period of 60 Days, unless such levy resulted from actions or omissions of the Concessionaire, the Department or their respective Representatives;

(n) [not used]

(o) the DB Contractor repudiates this Agreement or its obligations hereunder, or abandons any material part of the DB Work;

(p) the DB Contractor fails to diligently implement a recovery plan adopted pursuant to Section 8.07(f);

(q) the DB Contractor's payment of amounts due the Concessionaire or any other Person under this Agreement to which any Limitation of Liability applies (including with respect to liquidated damages) equals or exceeds such Limitation of Liability, or the DB Contractor so asserts in writing, except to the extent the DB Contractor irrevocably waives such Limitation of Liability, or agrees to an increase in such Limitation of Liability, in each case in a writing acceptable to the Concessionaire in its sole discretion;

(r) the DB Contractor fails to commence, within 10 Days of the issuance of any Notice to Proceed, performance of the DB Work that is the subject of such Notice to Proceed; and

(s) the Department terminates the Comprehensive Agreement as a result of the DB Contractor's breach of its obligations under this Agreement.

**Section 19.02. Concessionaire Remedies upon DB Contractor Default.**

Upon the occurrence of a DB Contractor Default, the Concessionaire may do any or all of the following as the Concessionaire, in its sole discretion, will determine:

(a) the Concessionaire may terminate this Agreement as provided in Section 20.05;

(b) the Concessionaire may (but will have no obligation to) cure the DB Contractor Default, and all costs and expenses reasonably incurred by the

Concessionaire in curing or attempting to cure such DB Contractor Default will be payable by the DB Contractor to the Concessionaire within five (5) Days after demand (which demand requirement shall be waived if Law prohibits the making of such demand), including accrued interest at the Bank Rate from the date such costs or expenses are incurred by the Concessionaire to the payment date; *provided*, that (i) the Concessionaire will not incur any liability to the DB Contractor for any act or omission of the Concessionaire or any other Person in the course of remedying or attempting to remedy any DB Contractor Default and (ii) the Concessionaire's cure of any DB Contractor Default will not waive or affect the Concessionaire's rights against the DB Contractor by reason of the DB Contractor Default;

(c) [not used];

(d) the Concessionaire may seek specific performance, injunction or other equitable remedies;

(e) without notice and without awaiting lapse of the period to cure, in the event of a DB Contractor Default under Section 19.01(d) (closure of all or any part of the Project or any lane in violation of this Agreement), or any failure to perform a Safety Compliance Order and such DB Contractor Default or failure to perform the Safety Compliance Order results in or prolongs an Emergency or danger to persons or property, each of the Concessionaire and, pursuant to the CA, the Department may, if the DB Contractor is then in control and possession thereof, enter and take control of the Project or applicable portion thereof to the extent the Concessionaire or the Department finds it necessary to rectify the closure, Emergency or danger, and may suspend DB Work and/or close or cause to be closed the portion of the Project affected by the Emergency or danger, until such time as such breach or failure is cured, or the Concessionaire terminates this Agreement, or the Department terminates the Comprehensive Agreement in accordance therewith. Under the CA, in the event of such action by the Department, the Department may, subject to Law, distrain against any of the materials and equipment purchased exclusively for the Project that are situated on the Project and the DB Contractor waives any statutory protections and exemptions in connection therewith. The DB Contractor will pay to the Concessionaire on demand the Concessionaire's reasonable costs and expenses in connection with the exercise of the Concessionaire's rights pursuant to this Section 19.02(e), and shall pay on behalf of the Concessionaire any amounts payable by the Concessionaire to the Department under Section 19.02(e) of the CA in connection with such action. So long as the Concessionaire or, pursuant to the CA, the Department undertakes such action in good faith, even if under a mistaken belief in the occurrence of such a breach or failure, such action will not be deemed unlawful or a breach of this Agreement or the CA, will not expose the Concessionaire or the Department to any liability to the DB Contractor and will not entitle the DB Contractor to any other remedy under this Agreement, the CA or otherwise; it being acknowledged that the Department has a high priority, paramount public interest in providing and maintaining continuous public access to the Project and in protecting public and worker safety. The foregoing will not, however, protect the Concessionaire from the DB Contractor's lawful Claims for recovery for third party bodily injury or property damage arising out of any such Department or Concessionaire action, if and to the extent (i) (A)

the Department or the Concessionaire was mistaken in believing such a breach or failure occurred, or (B) such injury or property damage was caused by the Concessionaire's or the Department's gross negligence, recklessness or willful misconduct, (ii) the third party liability is not insured and not required to be insured pursuant to this Agreement and (iii) the Concessionaire actually recovers from the Department for such lawful Claims for third party bodily injury or property damage. Immediately following rectification of such breach or failure, as determined by the Concessionaire, acting reasonably, or the Department acting under the CA, the Concessionaire or the Department, as applicable, will relinquish control and possession of the Project or applicable portion thereof back to the DB Contractor; and

(f) The Concessionaire may exercise any of its other rights and remedies provided for under this Agreement or at law or in equity, subject to any limitations thereon set forth in this Agreement, including Section 25.09.

**Section 19.03. Not Used.**

**Section 19.04. Concessionaire Defaults.** The occurrence of any one or more of the following events will constitute a "Concessionaire Default" pursuant to this Agreement:

(a) the Concessionaire (i) admits, in writing, that it is unable to pay its debts as they become due, (ii) makes an assignment for the benefit of its creditors, (iii) files a voluntary petition under Title 11 of the U.S. Code, or files any other petition or answer seeking, consenting to or acquiescing in any reorganization, liquidation, dissolution or similar relief under the present or any future U.S. bankruptcy code or any similar Law, or (iv) seeks or consents to or acquiesces in the appointment of any trustee, receiver, custodian, assignee, sequestrator, liquidator or other similar official of the Concessionaire or of all or any substantial part of its properties;

(b) within sixty (60) Days after the commencement of any proceeding against the Concessionaire seeking any reorganization, liquidation, dissolution or similar relief under the present or any future U.S. bankruptcy code or any similar Law, such proceeding has not been dismissed, or, within sixty (60) Days after the appointment, without the consent or acquiescence of the Concessionaire, of any trustee, receiver, custodian, assignee, sequestrator, liquidator or other similar official of the Concessionaire or of all or any substantial part of its properties, such appointment has not been vacated or stayed on appeal or otherwise, or, within sixty (60) Days after the expiration of any such stay, such appointment has not been vacated;

(c) the Concessionaire fails to pay to the DB Contractor when due any undisputed portion of the Scheduled Payment payable to the DB Contractor pursuant to this Agreement and such failure, including any failure to pay interest at the Bank Rate from the date due, continues without cure for a period of twenty (20) Days following the date the DB Contractor delivers to the Concessionaire written notice thereof (which notice requirement shall be waived if Law precludes the giving of notice); or

(d) the Concessionaire fails to pay to the DB Contractor when due any undisputed sum (other than the Scheduled Payment) payable to the DB Contractor pursuant to this Agreement and such failure, including any failure to pay interest at the Bank Rate from the date due, continues without cure for a period of thirty (30) Days following the date the DB Contractor delivers to the Concessionaire written notice thereof (which notice requirement shall be waived if Law precludes the giving of notice).

**Section 19.05. DB Contractor Remedies upon Concessionaire Default.**

(a) Upon the occurrence of a Concessionaire Default under Section 19.04(c), the DB Contractor may, subject to the DB Direct Agreement and the rights of the Department under the Comprehensive Agreement, suspend performance of the DB Work and, if the Concessionaire fails to pay the undisputed portion of amount due within 90 Days after written notice of such non-payment (which notice requirement shall be waived if Law prohibits the giving of such notice), terminate this Agreement to the extent provided in Section 20.06; or

(b) Upon the occurrence of a Concessionaire Default under Section 19.04(a) or (b), the DB Contractor may, subject to the DB Direct Agreement and the rights of the Department under the Comprehensive Agreement, terminate this Agreement to the extent provided in Section 20.06.

**ARTICLE 20**

**SUSPENSION; TERMINATION**

**Section 20.01. Suspension.**

(a) The Concessionaire's Right to Suspend the DB Work. The Concessionaire may elect to suspend completion of all or any part of the DB Work upon 10 Days' prior written notice to the DB Contractor (or, in emergency situations, upon such prior notice as circumstances permit) indicating (a) the portion of the DB Work the completion of which the Concessionaire has elected to defer, (b) the Concessionaire's estimate of the duration of such suspension; and (c) the effective date of such suspension of the DB Work. Upon receipt of and consistent with the effective date of such notice, the DB Contractor shall stop performance of the portion of the DB Work that the Concessionaire has elected to defer and shall continue to complete performance of the balance of the DB Work hereunder. In the event of a suspension of the DB Work pursuant to this Section 20.01, the suspension shall entitle the DB Contractor to make a claim for a Scope Change Order due to a Concessionaire-Caused Delay under the terms of this Agreement making required adjustments to one or more of the Scheduled Substantial Completion Dates, the Long Stop Date, the Contract Sum or the Payment and Values Schedule, as appropriate. The DB Contractor shall mitigate to the fullest extent reasonably possible any additional expenses to be borne by the Concessionaire as a result of suspension of the DB Work pursuant to this Section 20.01. In the event the entire DB Work is suspended pursuant to this Section 20.01 for a period of 365 consecutive Days, the DB Contractor may terminate this Agreement upon written notice to the



Concessionaire. In the event the DB Contractor terminates this Agreement pursuant to this Section 20.01, the Concessionaire shall pay the Termination Payment to the DB Contractor as calculated in accordance with and pursuant to the procedures set forth in Section 20.02(b) (notwithstanding the absence of a Concessionaire Default) as the DB Contractor's sole and exclusive remedy.

(b) The DB Contractor's Right to Suspend the DB Work. Subject to Sections 19.04(c) and 19.05(a), if the Concessionaire fails to pay to the DB Contractor when due any undisputed portion of the Scheduled Payment payable to the DB Contractor pursuant to this Agreement and such failure continues for a period of ten (10) Days following the date the DB Contractor delivers to the Concessionaire written notice of non-payment (which notice requirement shall be waived if Law precludes the giving of notice), the DB Contractor has the right to suspend all or any part of the DB Work upon the expiration of such ten (10)-day period.

**Section 20.02. Termination for Concessionaire Default under the Comprehensive Agreement.**

(a) If the Department terminates the Comprehensive Agreement due to a "Concessionaire Default" thereunder and such "Concessionaire Default" is not attributable to a failure of the DB Contractor to perform its obligations under this Agreement, then subject to the DB Direct Agreement and to the rights of Department under the Comprehensive Agreement, this Agreement shall, subject to Section 20.02(b), automatically terminate effective as of the termination date of the Comprehensive Agreement.

(b) If this Agreement is terminated pursuant to Section 20.02(a), the DB Contractor shall be entitled to receive a termination payment (the "Termination Payment") equal to the sum of (i) that portion of the Contract Sum that is due and payable to the DB Contractor by the Concessionaire and applicable to the DB Work completed up to the date of termination and which has not previously been paid to the DB Contractor, (ii) the direct, out-of-pocket costs reasonably incurred by the DB Contractor in withdrawing its equipment and personnel from the Project Right of Way and in otherwise demobilizing, and (iii) the direct, out-of-pocket costs reasonably incurred by the DB Contractor in terminating contracts with Subcontractors. Representatives of the Concessionaire and the DB Contractor shall determine the Contract Sum amount referred to in clause (i) above in accordance with the Payment and Values Schedule, and the DB Contractor shall document the costs claimed under clause (ii) above to the Concessionaire's reasonable satisfaction and shall supply the Concessionaire with copies of the Subcontractor invoices covering amounts claimed under clause (iii) above. The DB Contractor shall submit an invoice to the Concessionaire for the Termination Payment with the supporting information and documents referred to above, and Concessionaire shall pay such invoice within 30 Days after its receipt of same subject to the provisions of this Section 20.02(b) and unless it disputes certain elements thereof, in which event only the undisputed portion of the Termination Payment need be made within such 30-Day period and the dispute over the remainder of the claimed Termination Payment may be submitted to the appropriate dispute resolution process provided under

Article 21. The Termination Payment shall be subject to offset for amounts payable by the DB Contractor to the Concessionaire. As a condition precedent to receiving the Termination Payment, the DB Contractor shall comply with all the provisions of Section 20.08. Payment of the Termination Payment shall be the sole and exclusive liability of the Concessionaire, and the sole and exclusive remedy of the DB Contractor, with respect to termination of this Agreement pursuant to Section 20.02(a) and the events (including the applicable Concessionaire Default) giving rise to such termination, unless payment is not made by the Concessionaire in accordance with the terms of this paragraph. Termination pursuant to this Section 20.02 will not relieve either Party of its obligation for any Claim arising prior to termination. In no event shall the Concessionaire have any further liability to the DB Contractor in any such event for actual, incidental, consequential or other damages, notwithstanding the actual amount of damages that the DB Contractor may have sustained in connection with a termination pursuant to Section 20.02(a). Calculation of the Termination Payment has been agreed upon and fixed hereunder because of the difficulty of ascertaining the exact amount of such damages the DB Contractor will actually sustain in the event of a termination pursuant to Section 20.02(a), and the Concessionaire and the DB Contractor agree that the calculation of the Termination Payment is reasonable.

**Section 20.03. Termination for a Significant Force Majeure Event.**

(a) If a Significant Force Majeure Event occurs and the Department terminates the Comprehensive Agreement as a result thereof, then this Agreement shall, subject to Section 20.03(c), automatically terminate effective as of the termination date of the Comprehensive Agreement.

(b) [Not used]

(c) If this Agreement is terminated pursuant to Section 20.03(a) prior to Final Completion (and the Concessionaire's payment therefor), the DB Contractor shall be entitled to receive a termination payment (the "FM Termination Payment") equal to that portion of the Contract Sum that is due and payable to the DB Contractor by the Concessionaire and applicable to the DB Work completed up to the date of termination and which has not previously been paid to the DB Contractor. Representatives of the Concessionaire and the DB Contractor shall determine the Contract Sum amount in accordance with the Payment and Values Schedule. The DB Contractor shall submit an invoice to the Concessionaire for the FM Termination Payment, and Concessionaire shall pay such invoice within 30 Days after its receipt of same subject to the provisions of this Section 20.03(c) unless it disputes certain elements thereof, in which event only the undisputed portion of the FM Termination Payment need be made within such 30-Day period and the dispute over the remainder of the claimed FM Termination Payment may be submitted to the appropriate dispute resolution process provided under Article 21; *provided*, that amount of the FM Termination Payment that shall be payable by the Concessionaire hereunder shall be limited to the sum of (x) that portion of the "Significant Force Majeure Termination Amount" actually received by the Concessionaire under the CA that is attributable to the DB Work, plus (y) the proceeds of insurance actually received by the Concessionaire in respect of the event giving rise to

the termination under Section 20.03(a) pursuant to the insurance policies the Concessionaire is obligated to maintain under this Agreement. The FM Termination Payment shall be subject to offset for amounts payable by the DB Contractor to the Concessionaire. As a condition precedent to receiving the FM Termination Payment, the DB Contractor shall comply with all the provisions of Section 20.08. Payment of the FM Termination Payment shall be the sole and exclusive liability of the Concessionaire, and the sole and exclusive remedy of the DB Contractor, with respect to termination of this Agreement pursuant to Section 20.03(a) and the events (including the applicable Concessionaire Default) giving rise to such termination. In no event shall the Concessionaire have any further liability to the DB Contractor in any such event for actual, incidental, consequential or other damages, notwithstanding the actual amount of damages that Contractor may have sustained in connection with a termination pursuant to Section 20.03(a). Termination pursuant to this Section 20.03 will not relieve either Party of its obligation for any Claim arising prior to termination. Calculation of the FM Termination Payment has been agreed upon and fixed hereunder because of the difficulty of ascertaining the exact amount of such damages the DB Contractor will actually sustain in the event of a termination pursuant to Section 20.03(a), and the Concessionaire and the DB Contractor agree that the calculation of the FM Termination Payment is reasonable.

**Section 20.04. Termination for Failure to Achieve Financial Close.** If the Concessionaire fails to achieve Financial Close by the Financial Close Deadline for any reason not attributable to the DB Contractor's failure to perform its obligations under this Agreement, the DB Contractor may, at its sole discretion, elect to terminate this Agreement. If the DB Contractor elects to terminate this Agreement pursuant to this Section 20.04, it will provide written notice of termination to the Concessionaire and such termination will be effective immediately upon delivery of such notice. In the event of such termination, neither Party shall have any liability or obligation to the other, other than amounts payable in respect of DB Work performed pursuant to DB LNTPs.

**Section 20.05. Termination for DB Contractor Default.**

(a) At any time after the occurrence of a DB Contractor Default, the Concessionaire is entitled to terminate this Agreement.

(b) If the Concessionaire elects to terminate this Agreement pursuant to this Section 20.05, it will deliver to the DB Contractor written notice of its election to terminate, which termination will take effect not less than 10 Days after the delivery of such notice. If this Agreement is so terminated, the DB Contractor shall comply with all the provisions of Section 20.08.

(c) In the event of termination pursuant to this Section 20.05 prior to Final Completion, the Concessionaire may, if the Comprehensive Agreement has not been terminated, cause the DB Work to be completed by other contractors, and the DB Contractor shall pay for the cost of such completion and Losses suffered by the Concessionaire to the extent the same exceeds the Contract Sum. The Concessionaire shall, within a reasonable period of time after the DB Work is fully and finally completed by one or more other contractors, determine the total cost (including contractor fees) to

the Concessionaire for completing the DB Work, including all sums previously paid or then owned to the DB Contractor pursuant to this Agreement. If the Contract Sum is less than the sum of (i) the aggregate cost incurred by the Concessionaire to fully and finally complete the DB Work, (ii) all other Losses suffered by the Concessionaire as a result of a default or breach by the DB Contractor of its obligations hereunder (including all damages and other amounts payable by the Concessionaire to the Department under the CA as a result of the DB Contractor Default), and (iii) all amounts previously paid to the DB Contractor pursuant to this Agreement, the DB Contractor shall pay to the Concessionaire on demand the amount of such difference. Any amount owed by the Concessionaire to the DB Contractor for the month and level of completion of the DB Work shall be retained by the Concessionaire until after completion of the DB Work and applied by the Concessionaire to pay any amounts and Losses owed by the DB Contractor pursuant to this Section 20.05 or otherwise. Any excess shall be remitted to the DB Contractor within 60 Days after the DB Work is fully and finally completed.

(d) If the Department terminates the Comprehensive Agreement as a result of a breach by the DB Contractor of its obligations under this Agreement (including its obligations to fulfill the Concessionaire's obligations under the Comprehensive Agreement to the extent required under this Agreement) that was not caused by the Concessionaire's failure to perform its obligations under this Agreement, the DB Contractor shall compensate the Concessionaire for any Losses incurred by the Concessionaire as a result of such termination, which Losses shall include any amounts required to be paid by the Concessionaire to the Lenders. The DB Contractor shall also pay to the Concessionaire an additional amount equal to the amount of all equity invested in the Concessionaire by its direct and indirect owners, but the DB Contractor shall not be liable for any return on such equity.

**Section 20.06. Termination for Concessionaire Default.** Subject to the provisions of the DB Direct Agreement and to the rights of the Department under the Comprehensive Agreement, at any time after the occurrence of a Concessionaire Default, the DB Contractor is entitled to terminate this Agreement. If the DB Contractor elects to terminate this Agreement pursuant to this Section 20.06, it will deliver to the Concessionaire written notice of its election to terminate, which termination will take effect not less than ten (10) Days after the delivery of such notice. If this Agreement is terminated pursuant to this Section 20.06, the DB Contractor shall be entitled to receive a Termination Payment as calculated pursuant to Section 20.02(b). The DB Contractor shall submit an invoice to the Concessionaire for the Termination Payment, together with the supporting documentation described in Section 20.02(b), and Concessionaire shall pay such invoice within 30 Days after its receipt of same subject to the provisions of this Section 20.06 unless it disputes certain elements thereof, in which event only the undisputed portion of the Termination Payment need be made within such 30-Day period and the dispute over the remainder of the claimed Termination Payment may be submitted to the appropriate dispute resolution process provided under Article 21; *provided*, that if the Concessionaire Default results from the failure of the Department to perform any of its obligations under the Comprehensive Agreement or any other agreement between the Concessionaire and the Department, the amount of the Termination Payment that shall be payable by the Concessionaire hereunder shall be limited to that portion of the Department Default Termination Amount actually received by the Concessionaire under the CA that is attributable to the DB Work. The

Termination Payment shall be subject to offset for amounts payable by the DB Contractor to the Concessionaire. As a condition precedent to receiving the Termination Payment, the DB Contractor shall comply with all the provisions of Section 20.08. Payment of the Termination Payment shall be the sole and exclusive liability of the Concessionaire, and the sole and exclusive remedy of the DB Contractor, with respect to termination of this Agreement pursuant to this Section 20.06 and the events (including the applicable Concessionaire Default) giving rise to such termination. In no event shall the Concessionaire have any further liability to the DB Contractor in any such event for actual, incidental, consequential or other damages, notwithstanding the actual amount of damages that the DB Contractor may have sustained in connection with a termination pursuant to this Section 20.06. Termination pursuant to this Section 20.06 will not relieve either Party of its obligation for any Claim arising prior to termination. Calculation of the Termination Payment has been agreed upon and fixed hereunder because of the difficulty of ascertaining the exact amount of such damages the DB Contractor will actually sustain in the event of a termination pursuant to this Section 20.06, and the Concessionaire and the DB Contractor agree that the calculation of the Termination Payment is reasonable.

**Section 20.07. Department's Termination of the CA for Convenience.**

(a) If the Department terminates the Comprehensive Agreement for its convenience pursuant to Section 20.07 thereof, then this Agreement shall automatically terminate effective as of the termination date of the Comprehensive Agreement. Termination pursuant to this Section 20.07 will not relieve either Party of its obligation for any Claims arising prior to termination.

(b) [Not used]

(c) In the event this Agreement is terminated pursuant to Section 20.07(a), the Concessionaire shall pay the Termination Payment to the DB Contractor as calculated in accordance with and pursuant to the procedures set forth in Section 20.02(b) (notwithstanding the absence of a Concessionaire Default) as the DB Contractor's sole and exclusive remedy; *provided*, that amount of the Termination Payment that shall be payable by the Concessionaire hereunder shall be limited to that portion of the Department Convenience Termination Amount actually received by the Concessionaire under the CA that is attributable to the DB Work.

**Section 20.08. DB Contractor Actions Upon Termination.**

(a) On delivery of notice of termination of this Agreement for any reason, the provisions of this Section 20.08 will apply. The DB Contractor will timely comply with such provisions independently of, and without regard to, the timing for determining, adjusting, settling and paying any amounts due to the Concessionaire or the DB Contractor on account of termination. In addition:

(b) The DB Contractor will conduct all discussions and negotiations to determine the amount of any termination compensation, and will share with the

Concessionaire and, if applicable under the CA, the Department, all data, documents and information pertaining thereto, on an Open Book Basis.

(c) Promptly after receipt of a notice of termination, the DB Contractor will meet and confer with the Concessionaire and, if applicable under the CA, the Department, for the purpose of developing an interim transition plan for the orderly transition of the DB Work, demobilization and transfer to the Concessionaire or the Department, as applicable, of control of the Project and Project Right of Way. The Parties will use diligent efforts to complete preparation of the interim transition plan within 15 Days after the date the DB Contractor receives the notice of termination. The Parties will use diligent efforts to complete a final transition plan within 30 Days after such date. The transition plan will be in form and substance acceptable to the Concessionaire in its good faith discretion and will include and be consistent with the other provisions and procedures set forth in this Section 20.08, all of which procedures the DB Contractor will promptly follow, regardless of any delay in preparation or acceptance of the transition plan.

(d) Upon receipt of a notice of termination, the DB Contractor will take all action that may be necessary, or that the Concessionaire or the Department, as applicable under the CA, may reasonably direct, for the protection and preservation of the Project, the DB Work and such materials, goods, machinery, equipment, parts, supplies and other property.

(e) The DB Contractor will deliver to the Concessionaire or the Department, as applicable under the CA, on the effective date of any termination:

(i) all tangible personal property, reports, books, and records necessary or useful for the design, construction, operation or maintenance of the Project, and, to the extent provided in Article 18, Work Product and Intellectual Property used or owned by the DB Contractor or any Subcontractor relating to the Project or the DB Work; excluding, however, all machinery, equipment and tools owned or leased by the DB Contractor or any Subcontractor and not incorporated or intended to be incorporated into the Project;

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

(iii) all other intangible personal property used or owned by the DB Contractor and relating to or derived from the Project or the DB Work.

(f) Under the CA, if, as of the date on which the notice of termination of the CA is delivered, the DB Contractor has not completed construction of all or part of the Project included within the DB Work, the Department may, subject to the provisions of the DB Direct Agreement, elect, by written notice to the Concessionaire and the DB

Contractor delivered within 90 Days after the date on which the notice of termination is delivered, to continue in effect this Agreement or to require its termination. If the Department does not deliver written notice of election within such time period, the Department will be deemed to elect to require termination of this Agreement. If the Department elects to continue this Agreement in effect, then the Concessionaire will execute and deliver to the Department a written assignment, in form and substance acceptable to the Department, acting reasonably, of all the Concessionaire's right, title and interest in and to this Agreement, and the Department will assume in writing the Concessionaire's obligations hereunder that arise from and after the end of the CA Term. The DB Contractor shall fully cooperate with such assignment and any associated transition of responsibilities under this Agreement, and from and after the effective date of such assignment the Concessionaire shall be released from all liabilities and obligations arising under this Agreement. If the Department elects (or is deemed to elect) to require termination of this Agreement, then:

(i) unless the Department has granted Replacement Agreements to a Lender or its Substituted Concessionaire, the DB Contractor shall immediately stop work and stop and cancel orders for materials, services or facilities unless otherwise authorized in writing by the Department;

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

(iii) the DB Contractor shall take such other actions as are necessary or appropriate to mitigate further cost;

(iv) the DB Contractor shall, subject to the prior written approval of the Department, settle all outstanding liabilities and all Claims arising out of this Agreement and the performance of the DB Work;

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

(vi) the DB Contractor shall carry out such other directions as the Department may give for suspension or termination of DB Work performed under this Agreement.

(g) If the CA is not being terminated in connection with a termination of this Agreement, then if requested by the Concessionaire, the DB Contractor will make every reasonable effort to cancel any existing Subcontracts upon terms satisfactory to the Concessionaire. Solely except to the extent included in a Termination Payment due to the DB Contractor, any payments to be made to a Subcontractor as a result of any such termination shall be at the expense of the DB Contractor. The DB Contractor shall also, upon request by the Concessionaire, (i) deliver and assign to the Concessionaire (but in no event shall the Concessionaire be liable for any action or default of the DB Contractor occurring prior to such delivery and assignment except to the extent such action or default was caused by the Concessionaire, and each Subcontract shall so provide) any and all Subcontracts, purchase order, bonds and options made by the DB Contractor in performance of the DB Work, and (ii) deliver to the Concessionaire originals of all Construction Documentation and, if the termination occurs at a time when the design of the Project is incomplete, originals of all Design Documentation in process (except that the DB Contractor may keep for its records copies, and, if sufficient originals exist, an original set, thereof), all other materials relating to the DB Work which belong to Concessionaire, and all papers and documents relating to the Governmental Approvals, orders placed, bills and invoices, lien releases and financial management under this Agreement. All deliveries hereunder shall be made free and clear of any liens, security interests or encumbrances, except such as may be created by the Concessionaire.

(h) [Not used]

**Section 20.09. Liability After Termination; Consequences of Termination.**

(a) If this Agreement is terminated by reason of a Concessionaire Default or a DB Contractor Default, such termination will not excuse the defaulting party from any liability arising out of such default to the extent provided in this Agreement.

(b) If this Agreement is terminated by any reason other than a Concessionaire Default or a DB Contractor Default, no Party will have any further obligation or liability except for performance of its obligations which are either expressly stated in this Agreement to survive termination or by their sense and context are intended to survive termination.

**Section 20.10. Exclusive Termination Remedies.**

(a) Each of the DB Contractor and the Concessionaire hereby acknowledges and agrees that it may only terminate this Agreement in accordance with the express terms hereof.

(b) Article 19 and this Article 20 set forth the entire and exclusive provisions and rights of the DB Contractor and the Concessionaire regarding termination of this Agreement, and any and all other rights at law or in equity to terminate or to payment of compensation upon termination are hereby waived to the maximum extent permitted by Law.

(c) [Not used]



(d) [Not used]

(e) [Not used]

(f) [Not used]

**Section 20.11. Not Used.**

**ARTICLE 21**

**DISPUTE RESOLUTION**

**Section 21.01. General.**

(a) The Parties will attempt to resolve any Disputes arising out of this Agreement through good faith negotiations between designated representatives.

(b) If the Dispute cannot be resolved in accordance with Section 21.01(a) above within ten (10) Days of the initiation of good faith negotiations between designated representatives, then either Party will have the right to submit the Dispute involving any claim or controversy between the Concessionaire and the DB Contractor not exceeding \$2,500,000 in value to binding arbitration in accordance with this Section 21.01(b) upon written notice of either Party delivered to the other of such Party's intention to arbitrate, the nature of the dispute, the amount claimed and the decision sought, *provided* that a dispute relating to a Scope Change Order shall be resolved in accordance with Section 14.05(i). Arbitration under this Section 21.01(b) shall be conducted by JAMS or its successor in accordance with its Streamlined Arbitration Rules and the Federal Arbitration Act, 9 USC Section 1 *et seq.* The notice of intent to arbitrate also shall specify the name and address of an arbitrator selected by the Party requesting arbitration. The other Party shall within ten (10) Business Days of receipt of the arbitration notice select its arbitrator; *provided* that if it fails to do so, the arbitrator appointed by the Party requesting arbitration shall serve as the sole arbitrator of the dispute. However, if both Parties name an arbitrator, the two arbitrators thus selected shall within 10 Business Days of the selection of the second arbitrator select the third arbitrator. All arbitrators shall be qualified, independent and neutral. The decision of any two of the three arbitrators on any issue shall be final. Unless the Parties otherwise agree, all arbitration proceedings shall be held in Richmond, Virginia. The Concessionaire and the DB Contractor shall proceed with any arbitration expeditiously. All conclusions and decisions of the arbitration shall be made consistent with applicable legal principles and the arbitrators' good faith interpretation of the terms and provisions of this Agreement. The award of the arbitrators will be final and binding on both Parties and may be enforced in any court having jurisdiction over the Party against which enforcement is sought. Each Party shall bear its own expenses, including but not limited to counsel fees and witness fees. If the arbitrators determine that the claim or defense of either Party was frivolous (*i.e.*, without justifiable merit), they may require that the Party at fault pay or reimburse the other Party for costs of the arbitration in whole or in part, except that all expenses of the arbitration shall be apportioned in the award of the

arbitrators based upon the respective merit of the positions of the Parties. NOTWITHSTANDING THE FOREGOING, EQUITABLE REMEDIES, INCLUDING INJUNCTION AND SPECIFIC PERFORMANCE, SHALL BE AVAILABLE TO THE PARTIES BY JUDICIAL PROCEEDINGS AT ANY TIME AND, FOR THIS PURPOSE AND FOR THE PURPOSE OF ENFORCING ANY ARBITRAL AWARD OR DECISIONS, THE PARTIES HEREBY SUBMIT TO THE EXCLUSIVE JURISDICTION AND VENUE OF THE FEDERAL AND STATE COURTS IN RICHMOND, VIRGINIA. THE PARTIES ALSO SUBMIT TO THE EXCLUSIVE JURISDICTION AND VENUE OF THE FEDERAL AND STATE COURTS IN RICHMOND, VIRGINIA, REGARDING ANY DISPUTE BETWEEN THE PARTIES WHERE THE AMOUNT IN CONTROVERSY EXCEEDS \$2,500,000. EACH OF THE PARTIES HEREBY IRREVOCABLY AND UNCONDITIONALLY WAIVES TRIAL BY JURY IN ANY LEGAL ACTION OR PROCEEDING UNDER THIS AGREEMENT AND FOR ANY COUNTERCLAIM IN SUCH AN ACTION OR PROCEEDING. THE PROVISIONS OF THIS SECTION 21.01(b) SHALL SURVIVE THE TERMINATION OF THIS AGREEMENT.

(c) [Not used]

(d) Any of the time periods specified in this Section 21.01 may be extended by mutual agreement of the Parties.

**Section 21.02. Disputes Involving Technical Requirements.**

(a) If the DB Contractor disputes a Department directive issued in accordance with Section 10.02(c) of the CA that relates to the DB Work (“TR Dispute”), and the DB Contractor, the Concessionaire and the Department have not been able to resolve such TR Dispute through good faith negotiations between designated representatives, then under the CA each of the Concessionaire and the Department has the right: (i) first, to initiate the Steering Committee process set forth in Section 21.01(b) of the CA, and then, if applicable, (ii) the mediation process set forth in Section 21.01(c) of the CA. The DB Contractor, subject to Section 21.06, may direct the Concessionaire to commence and proceed with such processes and shall cooperate with the Concessionaire in connection therewith.

(b) Under the CA, if the TR Dispute remains unresolved after the Concessionaire and the Department have proceeded through the processes in Section 21.02(a) of the CA, then each of the Concessionaire and the Department has the right to proceed with the TR Formal Dispute Panel (“TR Dispute Panel”) process set forth in dispute resolution provisions in Exhibit Z to the CA. Except for the interim relief set forth in Section 21.02(c) of the CA, any TR Dispute decision issued by the TR Dispute Panel (the “TR Dispute Decision”) will be non-binding. If the TR Dispute has not been resolved within sixty (60) Days after the issuance of the TR Dispute Decision, or if the TR Dispute Panel fails to issue a TR Dispute Decision within 14 Days after the closing of the TR Dispute Panel hearing, then each of the Concessionaire and the Department has the right to proceed in accordance with the CA. The DB Contractor, subject to Section 21.06, may direct the Concessionaire to commence and proceed in accordance with

Section 21.03 of the CA and shall cooperate with the Concessionaire in connection therewith. Under the CA the TR Dispute Decision will be admissible as evidence in subsequent legal proceedings, but will be given no greater weight than any other evidence submitted by the parties.

(c) In the event the TR Dispute Decision agrees with the Concessionaire's position, then, subject to the Department's reservation of rights pending any actions under Section 21.03 of the CA taken by the Department, the Department's directive will be deemed a Department Change and under the CA the Concessionaire will be entitled, as interim relief, to be paid for 65% of the direct design and construction costs associated with such Department Change on a force account basis calculated in accordance with Section 14.02(e) of the CA, subject to the Concessionaire's right to seek to recover through an action under Section 21.03 of the CA (which the Concessionaire shall, subject to Section 21.06, pursue if so directed by the DB Contractor) the remaining 35% of the direct design and construction costs and Concessionaire Damages, if any, not paid by the Department pursuant to the interim relief described herein. To the extent the Concessionaire actually receives any such payments from the Department, the Concessionaire shall pay all such amounts relating to the DB Work over to the DB Contractor.

**Section 21.03. Expedited Review of Draws on Performance Security.**

In the event the Concessionaire draws on any Performance Security provided by the DB Contractor hereunder and the DB Contractor disputes the Concessionaire's right to do so or the amount drawn by the Concessionaire, the Parties agree to a fast-track adjudication process in accordance with this Section 21.03, as follows:

(a) The DB Contractor may submit the dispute to a qualified independent third party arbitrator with substantial experience in complex transportation construction contracts, stating the basis on which it believes the draw or the amount thereof was not permitted under the terms of this Agreement; such arbitrator will be agreed by the Parties prior to the commencement of the first adjudication process under this Section 21.03 or Section 14.05(i), whichever occurs first, and such arbitrator(s) will be named on Exhibit JJ and will be acceptable arbitrators for future adjudication process under this Section 21.03 unless a Party sends a notice objecting to such Person's inclusion on Exhibit JJ prior to the commencement of the specific adjudication process. The Concessionaire shall submit its response to the arbitrator within 10 Days of submission of the dispute to the arbitrator by the DB Contractor;

(b) Such independent arbitrator will have 15 calendar days to make a determination whether the Concessionaire's draw or the amount thereof appears to be prima facie valid pursuant to the terms of this Agreement. If the independent arbitrator so determines, he/she shall so advise the Parties, the Concessionaire may retain the proceeds so drawn and apply the same as permitted under this Agreement, and the DB Contractor may thereafter proceed in accordance with Section 21.01. If the independent arbitrator determines that the draw or the amount thereof does not appear to be prima facie valid pursuant to the terms of this Agreement, he/she shall so advise the Parties, the

Concessionaire shall promptly return to the DB Contractor the amount specified by the independent arbitrator (if any amount may be retained by the Concessionaire, the Concessionaire may apply the same as permitted under this Agreement), and the Concessionaire may thereafter proceed in accordance with Section 21.01; and

(c) The costs of the fast-track adjudication process shall be borne by the DB Contractor if the independent arbitrator determines that the draw and amount appear prima facie valid, and by the Concessionaire if the draw or amount thereof does not appear prima facie valid.

**Section 21.04. Conduct During Pendency of Dispute.**

(a) Notwithstanding anything to the contrary in this Agreement, neither Party will be required to await the resolution of dispute proceedings regarding the reasons for terminating this Agreement before exercising such Party's termination rights as set forth in this Agreement.

(b) Pending final resolution of any Dispute (except a Dispute regarding the cause for terminating this Agreement), the Parties will continue to fulfill their respective obligations under this Agreement.

**Section 21.05. Costs of Dispute Resolution.**

(a) Each Party will bear its own attorneys' fees and costs in any Dispute or litigation arising out of or pertaining to this Agreement, and no Party will seek or accept an award of attorneys' fees or costs, except as otherwise expressly provided herein.

(b) Under the CA the fees and costs of any mediator and the TR Dispute Panel members will be borne equally by each of the Concessionaire and the Department. The Concessionaire's share thereof, as well as of Dispute or litigation, shall be paid by the DB Contractor with respect to any matter the DB Contractor has directed the Concessionaire to pursue against the Department.

**Section 21.06. Disputes Regarding CA Delay Events, Department Changes, CA Compensation Events and Department Determinations.**

(a) In the event the DB Contractor and the Concessionaire cannot agree on (1) the amount or other terms of any claim to be presented by the Concessionaire to the Department under the Comprehensive Agreement as a result of the occurrence of a Compensation Event or a Department Change, (2) the period of time by which the Concessionaire should request the Department to extend any CA Scheduled Substantial Completion Date or the CA Long Stop Date upon the occurrence of a Delay Event entitling the DB Contractor to claim a Scope Change Order hereunder, (3) disputes relating to the Technical Requirements described in Section 21.02 or (4) any other event affecting the DB Contractor's performance of the DB Work in respect of which the Concessionaire has a right under the Comprehensive Agreement to seek a determination, payment or other relief from the Department, then Concessionaire shall, if the DB

Contractor so directs, seek to enforce its rights and remedies under the Comprehensive Agreement that relate to the DB Contractor's rights and obligations with respect to the DB Work in the same manner and with the same diligence as the Concessionaire would assert its own Claims and defenses, but in no event with less diligence as the Concessionaire would exert if the DB Contractor were permitted hereunder to assert its own Claims and defenses and settle Disputes related thereto for its own account. The DB Contractor shall assist the Concessionaire as requested by the Concessionaire with respect to the negotiation of any claim amount or other relief with the Department.

(b) To the extent permitted under the CA or by the Department, the Concessionaire shall allow the DB Contractor (i) to participate directly in asserting its Claims and defenses in dispute resolution procedures under the Comprehensive Agreement regarding the DB Work or the performance of the Concessionaire's obligations under the CA regarding the DB Work for which the DB Contractor is responsible under this Agreement, and (ii) to control the advancement of such Claims assertion of such defenses in the resolution of disputes under the CA regarding the DB Work or the performance of the Concessionaire's obligations under the CA regarding the DB Work for which the DB Contractor is responsible under this Agreement.

(c) The DB Contractor shall indemnify, defend and hold harmless the Concessionaire from and against all costs, expenses, Claims and Losses incurred or suffered in connection with or as a result of the Concessionaire's bringing a claim against the Department pursuant to Section 21.06(a) and the participation by the DB Contractor in or control by the DB Contractor of dispute resolution procedures under the CA pursuant to Section 21.06(b), including any thereof for which the Concessionaire is liable to the Department or any other Person (including the Lenders).

(d) The DB Contractor shall not be entitled to any further relief under this Agreement in respect of any Delay Event, Compensation Event or other event that is the subject of a claim the DB Contractor has directed the Concessionaire to pursue against the Department pursuant to Section 21.06(a) or that the DB Contractor participates in or controls pursuant to Section 21.06(b) if (A) the Concessionaire obtains the relief requested by the DB Contractor, (B) the DB Contractor agrees to a compromise with the Department, or (C) the matter is finally resolved in accordance with the Comprehensive Agreement. This provision of this Section 21.06(d) shall not affect any other provision of this Agreement specifying that the Concessionaire's obligation to provide the DB Contractor with relief under this Agreement shall be dependent upon and to no greater extent than any relief the Concessionaire actually receives from the Department under the Comprehensive Agreement.

#### **Section 21.07. Concurrent Disputes.**

(a) Notwithstanding any other provision in this Agreement to the contrary, if any issue in dispute between the Parties is also the subject of, or relates to, a dispute being or to be determined under the Comprehensive Agreement, the Parties shall seek to cause the dispute hereunder to be consolidated with the dispute resolution process or litigation occurring under the Comprehensive Agreement, and the Parties shall meet

with the Department to coordinate such consolidation. If such consolidation does not occur, then any ongoing proceeding regarding the dispute hereunder shall be stayed pending final resolution of the dispute under the Comprehensive Agreement, which resolution shall be binding on the parties for all purposes of this Agreement.

(b) If any dispute arises between the Parties with respect to a matter that is already the subject of, or shares common issues of law or fact with, an ongoing dispute being determined under the Tolling Contract, the dispute hereunder shall be consolidated with the dispute occurring under the Tolling Contract and shall be resolved thereunder.

## ARTICLE 22

### **RESERVED RIGHTS**

**Section 22.01. Not used.**

**Section 22.02. Department Reservation of Rights.**

(a) Under the CA the Department has reserved to itself all ownership, development, maintenance, repair, replacement, operation, use and enjoyment of, and access to, the Reserved Rights.

(b) The DB Contractor acknowledges and will give effect to the exercise by the Department, under the CA, of the right (for itself and its representatives, as well as others claiming by, through or under the Department) to enter the Project and each and every part thereof at all reasonable times, in the following circumstances, in addition to those otherwise set forth in this Agreement:

(i) in the event of an actual or reported emergency, danger, threat, circumstance or event that is reasonably believed by the Department or its designee (including relevant police, fire, emergency services, armed forces, and any other security or emergency personnel in accordance with Section 9.06 of the CA to have caused (or to present the imminent potential to cause) injury to individuals, damage to property, or threat to the Environment or to public safety, to take, at such times, as the Department determines necessary in its discretion and with notice to the Concessionaire if practicable under the circumstances (which notice shall be given by the Concessionaire to the DB Contractor), such actions as the Department or such designee determines necessary to respond to or to rectify such emergency, danger, threat, circumstance or event; and

(ii) in the event of any circumstance or event that is reasonably believed by the Department to have caused an impairment to the continuous operation of the Project as a public highway, and if the Department in its discretion determines that the DB Contractor on behalf of the Concessionaire as provided in this Agreement is not then taking all necessary steps to respond to or to rectify such circumstance or event, to

take, at such times as the Department determines necessary in its discretion and with notice to the Concessionaire if practicable under the circumstances (which notice shall be given by the Concessionaire to the DB Contractor), such actions as the Department determines may be necessary to respond to or to rectify such circumstance or event or to restore the operation of the Project, and all costs and expenses incurred by the Department in connection with or related to such actions will be paid by the DB Contractor on behalf of the Concessionaire.

(c) The DB Contractor acknowledges and agrees that all rights to own, lease, sell, assign, transfer, utilize, develop or take advantage of the Reserved Rights are reserved to the Department under the CA, and the DB Contractor will not engage in any activity infringing upon the Reserved Rights, it being agreed that the development and construction of the Project in accordance with this Agreement will not infringe upon the Reserved Rights.

**Section 22.03. Not Used.**

**Section 22.04. Not Used.**

**Section 22.05. Not Used.**

## ARTICLE 23

### **REPRESENTATIONS AND WARRANTIES**

**Section 23.01. DB Contractor's Representations and Warranties.** The DB Contractor (or, with respect to representations regarding the individual joint venture members of the DB Contractor, each such member solely as to itself and not as to any other member) hereby represents and warrants to the Concessionaire as of the Agreement Date as follows:

(a) the DB Contractor is a joint venture duly formed under the laws of the State, is qualified to conduct business in the State, has the requisite power and all required licenses to carry on its present and proposed activities, and has full power, right and authority to execute and perform each and all of its obligations under this Agreement;

(b) the only members of the DB Contractor are Skanska USA Civil Southeast Inc., Kiewit Infrastructure Co. and Weeks Marine, Inc., and each such member is duly formed under the laws under the state of its organization, is qualified to conduct business in the State, has the requisite power and all required licenses to carry on its present and proposed activities, and has full power, right and authority to execute and perform each and all of its obligations under this Agreement;

(c) the DB Contractor and each member thereof has taken or caused to be taken all requisite action to authorize the execution and delivery of, and the performance of its obligations under, this Agreement;

(d) the person executing this Agreement on behalf of the member of the DB Contractor has been duly authorized to execute this Agreement on behalf of such member;

(e) this Agreement has been duly authorized, executed and delivered by each member of the DB Contractor and constitutes a valid and legally binding obligation of such member, enforceable against it in accordance with its terms, subject only to applicable bankruptcy, insolvency and similar laws affecting the enforceability of the rights of creditors generally and to general principles of equity;

(f) neither the execution and delivery of this Agreement by the members of the DB Contractor, nor the consummation of the transactions contemplated hereby, is in conflict with or will result in a default under or a violation of the governing instruments of any member of the DB Contractor or any other agreements or instruments to which it is a party or by which it is bound;

(g) there is no action, suit, proceeding, investigation or litigation pending and served on the DB Contractor or any member thereof which challenges its authority to execute, deliver or perform, or the validity or enforceability of, this Agreement, or which challenges the authority of the Person executing this Agreement on its behalf; and the DB Contractor and each member thereof has disclosed to the Concessionaire any pending and unserved or threatened action, suit, proceeding, investigation or litigation with respect to such matters of which the DB Contractor is aware;

(h) the DB Contractor and each member thereof is in material compliance with all Laws applicable to it or its activities in connection with this Agreement;

(i) none of the DB Contractor, any member thereof, or its respective affiliates (as "affiliate" is defined in 29 CFR 98.905) is suspended or debarred, subject to a proceeding to suspend or debar it, or subject to an agreement for voluntary exclusion, from bidding, proposing or contracting with any Federal or State department or agency;

(j) no event which, with the passage of time or the giving of notice, would constitute a DB Contractor Default has occurred;

(k) except with respect to the Pond 16 Issue, no event which, with the passage of time or the giving of notice, would constitute a Delay Event or a Compensation Event for which the DB Contractor may assert any Claim or seek any relief under this Agreement has occurred;

(l) [not used]

(m) [not used]

(n) the DB Contractor performed all work which forms the basis of the ROW Cost and Acquisition Baseline Schedule, the Baseline Asset Condition Report, the



Known Site Conditions Baseline Report and the Known Pre-Existing Hazardous Substances Report in accordance with (i) Law; (ii) Governmental Approvals; and (iii) prudent industry practices, methods, techniques and standards (including the Applicable IA Standards) and using the degree of care that would be expected to be exercised by a prudent, skilled and experienced developer engaged in the same kinds of undertakings and under the same or similar circumstances, conditions, scope and limitations (including limitations on access to the Project Right of Way and the Existing Project Assets and limitations agreed with the Concessionaire as to the scope of the work to be undertaken prior to the Agreement Date) as those applying to such work;

(o) the DB Contractor and each member thereof is prequalified with the Department to perform the DB Work in accordance with the Department's Rules Governing Prequalification Privileges;

(p) the audited consolidated financial statements of each of the Guarantors for the most recent reporting year prior to execution of this Agreement for which such audited statements are available have been prepared on a basis consistently applied and using GAAP or equivalent accounting principles utilized and generally accepted in the country of incorporation or formation of such party, and audited by an independent certified public accountant (applying GAAP or equivalent auditing standards utilized and generally accepted in the country of incorporation or formation of such party) and represent a true and fair view of the consolidated financial condition of each such group and are unqualified for the accounting period in question; and

(q) all written information and certifications furnished by or on behalf of the DB Contractor to the Concessionaire or the Department, or any of its respective representatives or advisors, as part of or in connection with this Agreement or delivered by or on behalf of the DB Contractor to the Concessionaire or the Department or any Person on its behalf pursuant to this Agreement has been and is true and accurate in all material respects when given and taken as a whole and there are no other facts or matters the omission of which would have made any statement or information contained in the written information provided to the Concessionaire or the Department or to any of its respective representatives or advisors that is misleading in any material respect and all expressions of opinion contained therein were honestly made on reasonable grounds after due and careful inquiry.

The Department is an express third-party beneficiary of the foregoing representations and warranties and shall have the right to pursue remedies for any breach thereof at any time that neither the Concessionaire nor the Lenders are pursuing remedies with respect thereto.

**Section 23.02. Concessionaire's Representations and Warranties.** The Concessionaire hereby represents and warrants to the DB Contractor as of the Agreement Date as follows:

(a) The Concessionaire is a duly organized limited liability company created under the laws of the State of Delaware, is qualified to conduct business in the State, has the requisite power and all required licenses to carry on its present and

proposed activities, and has full power, right and authority to execute and perform each and all of its obligations under this Agreement;

(b) [not used]

(c) the Concessionaire has taken or caused to be taken all requisite action to authorize the execution and delivery of, and the performance of its obligations under, this Agreement;

(d) each person executing this Agreement of the Concessionaire has been duly authorized to execute this Agreement on behalf of the Concessionaire;

(e) this Agreement has been duly authorized, executed and delivered by the Concessionaire and constitutes a valid and legally binding obligation of the Concessionaire, enforceable against it in accordance with its terms, subject only to applicable bankruptcy, insolvency and similar laws affecting the enforceability of the rights of creditors generally and to general principles of equity;

(f) neither the execution and delivery by the Concessionaire of this Agreement, nor the consummation of the transactions contemplated hereby, is in conflict with or will result in a default under or a violation of the governing instruments of the Concessionaire or any other agreements or instruments to which it is a party or by which it is bound;

(g) there is no action, suit, proceeding, investigation or litigation pending and served on the Concessionaire which challenges the Concessionaire's authority to execute, deliver or perform, or the validity or enforceability of, this Agreement, or which challenges the authority of the Concessionaire official executing this Agreement on its behalf; and the Concessionaire has disclosed to the Department any pending and unserved or threatened action, suit, proceeding, investigation or litigation with respect to such matters of which the Concessionaire is aware;

(h) the Concessionaire is in material compliance with all Laws applicable to the Concessionaire or its activities in connection with this Agreement;

(i) none of the Concessionaire or any affiliate of the Concessionaire (as "affiliate" is defined in 29 CFR 98.905) other than any such affiliate that is also an affiliate of the DB Contractor is suspended or debarred, subject to a proceeding to suspend or debar it, or subject to an agreement for voluntary exclusion, from bidding, proposing or contracting with any Federal or State department or agency; and

(j) [not used]

(k) no event which, with the passage of time or the giving of notice, would constitute a Concessionaire Default, has occurred.

(l) [not used]

(m) [not used]

(n) [not used]

**Section 23.03. Not Used.**

**ARTICLE 24**

**CONTRACTING PRACTICES AND PUBLIC WELFARE CONSIDERATIONS**

**Section 24.01. Obligation to Refrain from Discrimination.** The DB Contractor covenants and agrees that it will not discriminate and it will require all Subcontractors not to discriminate against any person, or group of persons, on account of age, sex, marital status, race, creed, color, national origin, religion or the presence of any sensory, mental or physical handicap in the permitting, design, acquisition, construction, maintenance, operation or management of the Project, nor will the DB Contractor establish or permit any such practice or practices of discrimination or segregation with reference to the selection, use, hiring, firing, promotion or termination of employees, Subcontractors, and vendors or with reference to the use, occupancy or enjoyment of or access to or toll rates charged for use of the Project; *provided*, that the prohibition against discrimination on the basis of sensory, mental or physical handicap will not apply if the particular disability prevents the proper performance of the particular person involved.

**Section 24.02. Subcontracting.**

(a) The DB Contractor may perform portions of but not the entire DB Work through Subcontractors with the expertise, qualifications, experience, competence, skills and know-how to perform the responsibilities being contracted in accordance with all Law, all Governmental Approvals, and the terms, conditions and standards set forth in this Agreement.

(b) [Not used]

(c) Before entering into any Subcontract replacing the initial Designer, the DB Contractor will submit a true and complete copy of the proposed Subcontract for Concessionaire Approval.

(d) The DB Contractor shall, for the protection of the Concessionaire and the Department, obtain from all Subcontractors guarantees and warranties on all machinery, equipment, services, materials, supplies and other items used and installed hereunder, and such guarantees and warranties shall not be amended, modified or otherwise discharged without the prior written consent of the Concessionaire. The DB Contractor shall use commercially reasonable efforts to cause such guarantees and warranties from Subcontractors having Subcontracts to cover periods of not less than one (1) year from the date of Final Completion and to include parts, shipping, service and labor for all warranty repairs with respect thereto. The DB Contractor shall enforce guarantees and warranties to the fullest extent thereof on behalf of the Concessionaire and the Department until expiration of the applicable Warranty Period. At the

Concessionaire's request or, if later, upon the expiration of the applicable Warranty Period, the DB Contractor shall assign to the Concessionaire or, as directed by the Concessionaire, to the Department, all guarantees and warranties of all Subcontractors then remaining in effect (and all such guarantees and warranties shall be assignable to the Lenders); provided, however, that (i) such assignment shall not relieve the DB Contractor of its warranty obligations under this Agreement and (ii) the DB Contractor shall have the prior right to enforce the guarantees and warranties of Subcontractors to the extent necessary to assure satisfaction of the DB Contractor's warranty obligations to the Concessionaire under this Agreement. Neither the DB Contractor, any Subcontractor nor any Person under the DB Contractor's control shall take any action which could release, void, impair or waive any warranties or guarantees on equipment, materials or services that it procures from others.

(e) Each Subcontract for the performance of the DB Work that the DB Contractor executes at a minimum:

(i) will set forth a standard of professional responsibility or a standard for commercial practice equal to prudent industry standards for work of similar scope and scale and will set forth effective procedures for Claims and change orders;

(ii) will establish provisions for prompt payment by the DB Contractor in accordance with the provisions of Sections 2.2-4347 through 4355 of the Code of Virginia, which would apply if the Department was contracting with such Subcontractor;

(iii) will require the Subcontractor to carry out its scope of work in accordance with the requirements of this Agreement;

(iv) will set forth warranties, guarantees and liability provisions of the contracting party in accordance with Good Industry Practice for work of similar scope and scale;

(v) will be fully assignable to the Concessionaire upon termination of this Agreement and to the Department upon termination of the Comprehensive Agreement, such assignability to include the benefit of all Subcontractor warranties, indemnities, guarantees and professional responsibility;

(vi) will include express requirements that, if the Concessionaire or the Department succeeds to the DB Contractor's rights under the subject Subcontract (by assignment or otherwise), then the relevant Subcontractor agrees that it will (A) maintain usual and customary books and records for the type and scope of operations of business in which it is engaged (e.g., DB Contractor, equipment supplier, designer, service provider), (B) permit audit thereof by the Concessionaire, and provide progress reports to the Concessionaire

appropriate for the type of Subcontract it is performing sufficient to enable the Concessionaire to provide the reports it is required to furnish the Department pursuant to this Agreement and (C) allow the Department, to assume the benefit of the Concessionaire's Subcontract rights and the work performed thereunder, with liability only for those remaining obligations accruing after the date of assumption, but excluding any monetary claims or obligations that the Concessionaire may have against such Subcontractor that existed prior to the Department's assumption of such Subcontract; and

(vii) [not used]

(viii) [not used]

(ix) [not used]

(x) will be consistent in all other respects with the terms and conditions of this Agreement to the extent such terms and conditions are applicable to the scope of work of such Subcontractor.

(f) The DB Contractor will not enter into any Subcontract at any level with any Person if that Person or any of its affiliates (as "affiliate" is defined in 29 CFR § 98.905), or any of their respective officers, directors and employees, (i) is then suspended or debarred, subject to a proceeding to suspend or debar it, or subject to an agreement for voluntary exclusion, from bidding, proposing or contracting with any Federal or State department or agency, (ii) has been convicted, pled guilty or *nolo contendere* to a violation of Law involving fraud, conspiracy, collusion, bribery, perjury, material misrepresentation, or any other violation that shows a similar lack of moral or ethical integrity or (iii) is then barred or restricted from owning, operating or providing services for the Project under Law, including the Foreign Investment and National Security Act of 2007, 50 USC App. 2170 (HR556).

(g) The DB Contractor will include in each Subcontract for the performance of the DB Work a provision requiring the Subcontractor to maintain all licenses required by Law and comply with the requirements of the eVA or its successor.

(h) [Not used]

(i) The DB Contractor will not subcontract any part of the DB Work to a Subcontractor who is not prequalified with the Department in accordance with the Department's Rules Governing Prequalification Privileges, unless otherwise indicated in this Agreement. This restriction does not apply to contract specialty items, consultants, manufacturers, suppliers, haulers, or snow removal service providers.

(j) The appointment of Subcontractors will not relieve the DB Contractor of its responsibilities hereunder, including for the overall management of the DB Work or for the quality of work, materials and services provided hereunder. The DB Contractor will at all times be held fully responsible to the Concessionaire for the acts

and omissions of its Subcontractors and persons employed by them and no Subcontract entered into by the DB Contractor will impose any obligation or liability upon the Concessionaire or the Department to any such Subcontractor or any of its employees. Nothing in this Agreement will create any contractual relationship between the Concessionaire and a Subcontractor or between the Department and a Subcontractor.

(k) [Not used]

(l) From and after the Agreement Date, the DB Contractor will be solely responsible for paying each Subcontractor and any other Person to whom any amount is due from the DB Contractor or any Subcontractor for services, equipment, materials and supplies in connection with the DB Work. Pursuant to Section 2.2-4354 of the Code of Virginia, the DB Contractor shall, within seven (7) Days following receipt of monies from the Concessionaire for work performed by any Subcontractor, either (i) pay such Subcontractor for the proportionate share of the total payment received from the Concessionaire attributable to the DB Work performed by such Subcontractor or (ii) notify the Concessionaire and such Subcontractor, in writing, of the DB Contractor's intention to withhold all or a part of the Subcontractor's payment, specifying the reason for the non-payment. The DB Contractor shall include in all of its Subcontracts a provision that (A) obligates the DB Contractor to pay interest to its Subcontractors on all amounts owed by the DB Contractor that remain unpaid after seven (7) Days following receipt of monies from the Concessionaire for work performed by the Subcontractor, except for amounts withheld as allowed in clause (ii) of this Section 24.02(l); (B) states, "Unless otherwise provided under the terms of this contract, interest will accrue at the rate of one percent per month." and (C) obligates each Subcontractor to include or otherwise be subject to the same payment and interest requirements as specified in this Section 24.02(l) with respect to each lower-tier Subcontractor.

(m) [Not used]

(n) [Not used]

**Section 24.03. Disadvantaged Business Enterprise (DBE) and Small, Women-Owned and Minority Business (SWaM) Requirements.**

(a) General.

(i) The Parties recognize the importance of pursuing, inviting and developing the participation of minority, women-owned and small businesses through the DBE and SWaM programs, where applicable.

(ii) The DB Contractor shall not and will not permit its Subcontractors to discriminate on the basis of race, color, national origin, or sex in the performance of this Agreement. The DB Contractor will carry out applicable Federal Requirements, including but not limited to the requirements of 49 CFR part 26, in the administration of this Agreement and the award and administration to subcontracts pursuant to this Agreement. Failure by the DB Contractor to carry out the requirements in

this Section 24.03 will subject the Concessionaire to the remedies set forth in this Section 24.03 and shall not result in a right to terminate this Agreement.

(b) DB Work.

(i) During performance of the DB Work, in an effort to comply with 49 CFR Part 26 and support Executive Order 33 (2006), under the CA the Department has established a goal of 12% for DBE participation and 23% for SWaM participation, such percentages totaling an aggregate goal of 35% of the DBE/SWaM Design-Build Contract Value. The DB Contractor and the Concessionaire agree to manage this goal as follows:

(A) On December 26 of each year, beginning with the first December following the Agreement Date until the Final Completion, the DB Contractor will submit an updated DBE/SWaM Plan that defines the DB Contractor's approach to meeting the DBE/SWaM participation goals set forth in this Section 24.03;

(B) the DB Contractor will have dedicated resources to the DBE/SWaM inclusion program to ensure compliance with 49 CFR Part 26, the DBE/SWaM Plan, nondiscrimination provisions, technical assistance activities, communication of subcontracting and generate reports specific to DBE/SWaM utilization;

(C) the DB Contractor will be responsible for achieving the overall goal of 35% by providing maximum contracting opportunities for DBE and SWaM businesses;

(D) the DB Contractor will provide to the Concessionaire each calendar quarter documentation of all executed Subcontracts and payments to DBE and SWaM businesses;

(E) the DB Contractor will have the opportunity to establish DBE and SWaM only statement of work packages with an estimated contract value of \$250,000 or less; and

(F) the DB Contractor will provide Good Faith Efforts documentation using form C-49 and other supplemental information as appropriate for Subcontracts that do not include DBE and SWaM participation. The DB Contractor agrees that if the Department accepts the Good Faith Efforts documentation on a particular bid item group, the DB Contractor will make reasonable efforts to accomplish the overall goal using other bid item groups.

(ii) During the performance of the DB Work, the Parties will work cooperatively to accomplish the DBE and SWaM objectives. Under the CA the Department is to assist the Concessionaire in meeting the DB Work goals by offering assistance to include the following items:

(A) the Department and the Concessionaire will jointly conduct outreach meetings for DBE and SWaM firms; the DB Contractor shall participate in such meetings;

(B) the Department will identify to the Concessionaire DBE and SWaM firms that are eligible to bid on the specific bid item groups, which information the Concessionaire will provide to the DB Contractor; and

(C) the Department will provide access to technical and managerial assistance to eligible DBE and SWaM firms through the Business Opportunity Workforce Development Center based upon available funds, which access shall be made available by the Concessionaire to the DB Contractor.

(iii) The DB Contractor acknowledges that the Department's assistance and cooperation will not eliminate or reduce the DB Contractor's responsibility to achieve the DB Work goals or demonstrate Good Faith Efforts. The DB Contractor is expected to utilize a variety of means and methods and creative strategies to do so. These strategies should be employed for all phases of the DB Work. The DB Contractor is expected to meet the goal or demonstrate that a Good Faith Efforts has been made. The DB Contractor will submit quarterly reports of Good Faith Efforts documentation, and, DBE and SWaM payments on form C-63 to the Concessionaire for forwarding to the Department Representative.

(iv) When there is a contract goal for the DB Work, the DB Contractor must make Good Faith Efforts to meet the goal either through obtaining enough DBE and SWaM participation or documenting the Good Faith Efforts it made to do so. 49 CFR Part 26 explicitly provides that the Department must not disregard showings of Good Faith Efforts, and it gives the Concessionaire and the DB Contractor the right to have the Department reconsider a decision that their Good Faith Efforts were insufficient. The Department must seriously consider the DB Contractor's documentation of Good Faith Efforts. The Department will issue a guidance memorandum on Good Faith Efforts, providing examples, procedures and reporting requirements for the Concessionaire, which the Concessionaire shall provide to the DB Contractor.

(c) [not used]

(d) DBE/SWaM Reporting and Assessment.



(i) Within twelve (12) Days after each calendar quarter ends the DB Contractor will submit to the Concessionaire (who will submit same to the Chief of Administration in accordance with the CA) a quarterly report on the DB Contractor's efforts to (A) satisfy the DBE/SWaM goals set forth in this Section 24.03 or (B) demonstrate Good Faith Efforts to accomplish the DBE/SWaM goals set forth in this Section 24.03.

(ii) An assessment and confirmation as to whether the DB Contractor has (A) satisfied the DBE and SWaM goals, (B) demonstrated Good Faith Efforts to satisfy such goals or (C) failed to satisfy the requirement of clauses (A) and (B) of this Section 24.03(d)(ii) will be made by the Chief of Administration under the CA and communicated to the Concessionaire within 30 Days after receipt of each quarterly report being submitted by the Concessionaire and the Concessionaire will notify the DB Contractor thereof.

Work. (e) Failure to Demonstrate DBE Good Faith Efforts Related to DB

(i) If the Chief of Administration notifies the Concessionaire and the Concessionaire notifies the DB Contractor pursuant to Section 24.03(d) that the DB Contractor has failed to satisfy the requirements of clause (A) and (B) of Section 24.03(d)(ii) with respect to the DBE goals for the DB Work for a quarterly period, the DB Contractor will have until the end of the next consecutive quarter to demonstrate that it has satisfied the requirements of either clause (A) and (B) of Section 24.03(d)(ii) with respect to such DBE goals.

(ii) If the DB Contractor has failed to satisfy the requirements of clause (A) and (B) of Section 24.03(d)(ii) with respect to the DBE goals for the DB Work for two consecutive quarters based on the determinations by the Chief of Administration pursuant to the CA, the DB Contractor will prepare and submit, at the DB Contractor's sole cost and expense, a DBE Performance Improvement Plan for the Department's review and approval. The DBE Performance Improvement Plan will describe the specific actions and measures that the DB Contractor will undertake to improve its performance with respect to satisfying the requirements of clause (A) and (B) of Section 24.03(d)(ii) with respect to the DBE goals for the DB Work. The DB Contractor will submit the DBE Performance Improvement Plan to the Concessionaire within 12 days after receiving notice from the Chief of Administration forwarded by the Concessionaire pursuant to Section 24.03(d) that the DB Contractor has failed to satisfy the requirements of clause (A) and (B) of Section 24.03(d)(ii). Under the CA, the Concessionaire is to reimburse the Department for its Allocable Costs in reviewing, approving and monitoring the Concessionaire's compliance with the DBE Performance Improvement Plan until the

Concessionaire satisfies the requirements of either clause (A) or (B) of Section 24.03(d)(ii) of the CA with respect to the DBE goals for the DB Work. The DB Contractor agrees to pay to the Concessionaire any such amounts required for the reimbursement of the Department in reviewing, approving and monitoring the DB Contractor's compliance with the DBE Performance Improvement Plan until the DB Contractor satisfies the requirements of either clause (A) or (B) of Section 24.03(d)(ii) with respect to the DBE goals for the DB Work and the Concessionaire will pay the same over to the Department.

(iii) If the Concessionaire under the CA has failed to satisfy the requirements of clause (A) and (B) of Section 24.03(d)(ii) of the CA or the DB Contractor has failed to satisfy the requirements of clause (A) and (B) of Section 24.03(d)(ii) with respect to the DBE goals for the DB Work for three consecutive quarters based on the determinations by the Chief of Administration pursuant to the CA, under the CA the Department may debar or disqualify the Concessionaire and its key members from participating in State procurements through the Department until the earlier to occur of (i) the Concessionaire satisfies the requirements of either clause (A) or (B) of Section 24.03(d)(ii) of the CA with respect to the DBE goals for the DB Work or (ii) twenty-four months after CA Final Completion. Only the Commissioner of Highways for the Department may waive the provisions of Section 24.03(e)(ii) of the CA. If the Concessionaire is disqualified as a result of the failure of the DB Contractor to fulfill its obligations under this Section 24.03 for reasons not attributable to the Concessionaire, then the DB Contractor shall indemnify, defend and hold harmless the Concessionaire from and against any Losses actually suffered or incurred by the Concessionaire as a result of such failure. If the DB Contractor is disqualified as a result of its failure to fulfill its obligations under this Section 24.03 for reasons not attributable to the Concessionaire, then the DB Contractor shall not be relieved of any of its obligations under this Agreement and shall be fully liable to the Concessionaire for any failure to timely and fully fulfill such obligations in accordance with the terms of this Agreement.

(iv) If the Chief of Administration under the CA determines that the Concessionaire has satisfied the requirements of either clause (A) or (B) of Section 24.03(d)(ii) based on the satisfaction by the DB Contractor of the requirements of either clause (A) or (B) of Section 24.03(d)(ii) with respect to the DBE goals for the DB Work performed to date, then any prior determinations by the Chief of Administration of the failure by the Concessionaire under the CA and the DB Contractor's failure hereunder to satisfy the requirements of clause (A) and (B) of Section 24.03(d)(ii) with respect to such DBE goals will be disregarded, the DB Contractor will be deemed to be in compliance with this Section 24.03, and any future determinations of a failure satisfy the requirements

of clause (A) and (B) of Section 24.03(d)(ii) with respect to such DBE goals will trigger the provisions set forth in Section 24.03(e).

(v) Any decision or action taken by Chief of Administration or the Department pursuant to Section 24.03(d) of the CA is subject to the dispute resolution procedures set forth in Article 21 of the CA and the DB Contractor may, subject to Section 21.06, direct the Concessionaire to refer any such decision or action to the dispute resolution procedures pursuant to Article 21 of the CA.

Work. (f) Failure to Demonstrate SWaM Good Faith Efforts Related to DB

(i) If the Chief of Administration notifies the Concessionaire and the Concessionaire notifies the DB Contractor pursuant to Section 24.03(d) that the DB Contractor has failed to satisfy the requirements of clause (A) and (B) of Section 24.03(d)(ii) with respect to the SWaM goals for the DB Work for a quarterly period, the DB Contractor will have until the end of the next consecutive quarter to demonstrate that it has satisfied the requirements of either clause (A) and (B) of Section 24.03(d)(ii) with respect to such SWaM goals.

(ii) If the DB Contractor has failed to satisfy the requirements of clause (A) and (B) of Section 24.03(d)(ii) with respect to the SWaM goals for the DB Work for two consecutive quarters based on the determinations by the Chief of Administration pursuant to the CA, the DB Contractor will prepare and submit, at the DB Contractor's sole cost and expense, a SWaM Performance Improvement Plan for the Department's review and approval. The SWaM Performance Improvement Plan will describe the specific actions and measures that the DB Contractor will undertake to improve its performance with respect to satisfying the requirements of clause (A) and (B) of Section 24.03(d)(ii) with respect to the SWaM goals for the DB Work. The DB Contractor will submit the SWaM Performance Improvement Plan to the Concessionaire within 12 days after receiving notice from the Chief of Administration forwarded by the Concessionaire pursuant to Section 24.03(d) that the DB Contractor has failed to satisfy the requirements of clause (A) and (B) of Section 24.03(d)(ii). Under the CA, the Concessionaire is to reimburse the Department for its Allocable Costs in reviewing, approving and monitoring the Concessionaire's compliance with the SWaM Performance Improvement Plan until the Concessionaire satisfies the requirements of either clause (A) or (B) of Section 24.03(d)(ii) of the CA with respect to the SWaM goals for the DB Work. The DB Contractor agrees to pay to the Concessionaire any such amounts required for the reimbursement of the Department in reviewing, approving and monitoring the DB Contractor's compliance with the SWaM Performance Improvement Plan until the DB Contractor satisfies the requirements of either clause (A) or

(B) of Section 24.03(d)(ii) with respect to the SWaM goals for the DB Work and the Concessionaire will pay the same over to the Department.

(iii) If the Concessionaire under the CA has failed to satisfy the requirements of clause (A) and (B) of Section 24.03(d)(ii) of the CA or the DB Contractor has failed to satisfy the requirements of clause (A) and (B) of Section 24.03(d)(ii) with respect to the SWaM goals for the DB Work for three consecutive quarters based on the determinations by the Chief of Administration pursuant to the CA, under the CA the Department may debar or disqualify the Concessionaire and its key members from participating in State procurements through the Department until the earlier to occur of (i) the Concessionaire satisfies the requirements of either clause (A) or (B) of Section 24.03(d)(ii) of the CA with respect to the SWaM goals for the DB Work or (ii) twenty-four months after CA Final Completion. Only the Commissioner of Highways for the Department may waive the provisions of Section 24.03(f)(ii) of the CA. If the Concessionaire is disqualified as a result of the failure of the DB Contractor to fulfill its obligations under this Section 24.03 for reasons not attributable to the Concessionaire, then the DB Contractor shall indemnify, defend and hold harmless the Concessionaire from and against any Losses actually suffered or incurred by the Concessionaire as a result of such failure. If the DB Contractor is disqualified as a result of its failure to fulfill its obligations under this Section 24.03 for reasons not attributable to the Concessionaire, then the DB Contractor shall not be relieved of any of its obligations under this Agreement and shall be fully liable to the Concessionaire for any failure to timely and fully fulfill such obligations in accordance with the terms of this Agreement.

(iv) If the Chief of Administration under the CA determines that the Concessionaire has satisfied the requirements of either clause (A) or (B) of Section 24.03(d)(ii) based on the satisfaction by the DB Contractor of the requirements of either clause (A) or (B) of Section 24.03(d)(ii) with respect to the SWaM goals for the DB Work performed to date, then any prior determinations by the Chief of Administration of the failure by the Concessionaire under the CA and the DB Contractor's failure hereunder to satisfy the requirements of clause (A) and (B) of Section 24.03(d)(ii) with respect to such SWaM goals will be disregarded, the DB Contractor will be deemed to be in compliance with this Section 24.03, and any future determinations of a failure satisfy the requirements of clause (A) and (B) of Section 24.03(d)(ii) with respect to such SWaM goals will trigger the provisions set forth in Section 24.03(f).

(v) Any decision or action taken by Chief of Administration or the Department pursuant to Section 24.03(d) of the CA is subject to the dispute resolution procedures set forth in Article 21 of the CA and the DB Contractor may, subject to Section 21.06, direct the Concessionaire to

refer any such decision or action to the dispute resolution procedures pursuant to Article 21 of the CA.

**Section 24.04. Public Safety and Welfare.** The Parties recognize and agree that protection of the health, safety and welfare of the public and all persons engaged in connection with the performance of the Concessionaire's obligations pursuant to this Agreement is a priority. Accordingly, the DB Contractor will comply with the following provisions, along with all other Laws and the Technical Requirements:

(a) the DB Contractor will comply, and will require all Subcontractors to comply, with all construction safety and health standards established by Law. Neither the DB Contractor nor any Subcontractor will require any worker to work in surroundings or under working conditions that are unsanitary, hazardous or dangerous to his or her health or safety, as determined under construction safety and health standards promulgated by the U.S. Secretary of Labor in accordance with Section 107 of the Contract Work Hours and Safety Standards Act; and

(b) under the CA, the Department may require the Concessionaire to suspend any DB Work or other activities related to the Project, which, in the sole discretion of the Department, presents a risk to the public health, safety or welfare, and to take such other actions as the Department may require to prevent such risk; *provided*, that if it is determined in accordance with the dispute resolution procedures in Article 21 that the DB Contractor was in compliance with its obligations under this Agreement, then the suspension order will be treated as a Department Change pursuant to Section 14.02. If the DB Work is so suspended for reasons not attributable to the Concessionaire, then the DB Contractor shall not be relieved of any of its obligations under this Agreement and shall be fully liable to the Concessionaire for any failure to timely and fully fulfill such obligations in accordance with the terms of this Agreement.

**Section 24.05. Labor, Employment and DBE/SWaM Related Matters.** The DB Contractor will comply, and will cause its Subcontractors to comply, with the provisions set forth in the Labor, Employment and DBE/SWaM Related Matters attached as Exhibit AA to this Agreement.

**Section 24.06. Federal Immigration Reform and Control Act.** In accordance with Section 2.2-4311.1 of the Code of Virginia, the DB Contractor certifies that it does not and agrees that it will not during the period of performance of any DB Work knowingly employ an unauthorized alien as defined in the Federal Immigration Reform and Control Act of 1986. The DB Contractor further agrees that it will require all of its Subcontractors to certify that they do not and will not knowingly employ an unauthorized alien as defined by such Act.

**ARTICLE 25**

**MISCELLANEOUS**

**Section 25.01. Assignment.**

(a) Neither Party shall have the right, power or authority to assign or otherwise Transfer this Agreement or any portion thereof, either voluntarily or involuntarily, or by operation of law, without the prior written consent of the other Party, which consent may be granted or withheld in the sole discretion of such other Party; provided, that the Concessionaire may assign all of its rights and interests in and under this Agreement to the Lenders as collateral security for its obligations, and the Lenders may further assign such rights without the DB Contractor's consent thereto as provided in the DB Direct Agreement. The Concessionaire also may assign to the Department any or all of its rights under this Agreement without the DB Contractor's consent and the Department will assume liability only for those remaining obligations accruing after the date of assumption, but excluding any monetary claims or obligations that the Concessionaire may have against the DB Contractor that existed prior to the Department's assumption of this Agreement. Nothing in this Section 25.01 shall be deemed to preclude the DB Contractor from subcontracting discrete portions of the Work in accordance with Section 24.02.

(b) [Not used]

(c) [Not used]

(d) [Not used]

(e) A Change in Control of the DB Contractor will be deemed to be a Transfer for purposes of this Section 25.01. In addition, any change in the identity of the members of the DB Contractor will be deemed to be a Transfer for purposes of this Section 25.01.

(f) Any Transfer made in violation of this Section 25.01 will be null and void *ab initio* and of no force and effect.

**Section 25.02. Ethical Standards.**

(a) The DB Contractor shall comply with and enforce the written policies adopted by the Concessionaire (and provided to the DB Contractor from time to time as the same may be modified or amended) establishing ethical standards of conduct for all its directors, officers and supervisory or management personnel in dealing with the Department and employment relations. Such policies as currently in effect are set forth as Exhibit NN.

(b) Without limiting the foregoing provisions of this Section 25.02, the DB Contractor further agrees: (i) no gifts, gratuities, or favors of any nature whatsoever will be given or offered by or on behalf of it to personnel of the Department; and (ii) it

will not employ any personnel of the Department for any services during the period the DB Work is being performed, without the prior written consent of the Department. If the Department determines, after investigation, that DB Contractor or any of its employees, representatives, or agents of any person acting in its behalf have violated this provision, the DB Contractor may, at the discretion of the Department, be disqualified from bidding on future contracts with the Department for a period of six (6) months from the date of the Department's determination of such a violation. Any implicated employees, agents, or representatives of the Contractor may be prohibited from working on any contract awarded by the Department for the period of disqualification.

**Section 25.03. Not Used.**

**Section 25.04. Authorized Representatives.**

(a) Each of the Concessionaire and the DB Contractor hereby designates the following individuals as its initial Concessionaire Representative(s) and DB Contractor Representative(s), respectively, to administer this Agreement on its respective behalf:

- (i) For the Concessionaire: Greg Woodsmall.
- (ii) For the DB Contractor: Wade Watson.

(b) The Concessionaire Representatives and the DB Contractor Representatives will be reasonably available to each other and will have the authority to issue instructions and other communications on behalf of the Concessionaire and the DB Contractor, respectively, and will be the recipient of notices and other written communications from the other Party pursuant to this Agreement (except any notice initiating or relating to the dispute resolution procedures of Article 21 will be given in accordance with Section 25.05). However, such Representatives will not have the authority to make decisions or give instructions binding upon the Concessionaire or the DB Contractor, except to the extent expressly authorized by the Concessionaire or the DB Contractor, as the case may be, in writing. In the event the Concessionaire or the DB Contractor designates different Representatives, it will give the other Party written notice of the identity of and contact information for the new Concessionaire Representative(s) or DB Contractor Representative(s), as the case may be.

**Section 25.05. Notices.**

(a) Whenever under the provisions of this Agreement it will be necessary or desirable for one Party to serve any notice, request, demand, report or other communication on another Party, the same will be in writing and will not be effective for any purpose unless and until actually received by the addressee or unless served (i) personally, (ii) by independent, reputable, overnight commercial courier, (iii) by facsimile transmission, where the transmitting party includes a cover sheet identifying the name, location and identity of the transmitting Party, the phone number of the transmitting device, the date and time of transmission and the number of pages transmitted (including the cover page), where the transmitting device or receiving device

records verification of receipt and the date and time of transmission receipt and the phone number of the other device, and where the facsimile transmission is immediately followed by service of the original of the subject item in another manner permitted herein or (iv) by deposit in the United States mail, postage and fees fully prepaid, registered or certified mail, with return receipt requested, addressed as follows:

If to the DB Contractor:

SKW Constructors, a Skanska, Kiewit,  
Weeks JV  
c/o Skanska USA Civil Southeast Inc.  
295 Bendix Road  
Virginia Beach, VA 23452  
Tel.: (757) 420-4140  
Fax: (757) 420-4089  
Attn: Wade Watson, Project Director

If to the Concessionaire:

Elizabeth River Crossings Opco, LLC  
99 Canal Center Plaza  
Suite 125  
Alexandria, VA 22314  
Tel.: (703) 340 1200  
Fax: (703) 340 1201  
Attn: Greg Woodsmall, Interim Chief  
Executive Officer

With a copy to:

Orrick, Herrington & Sutcliffe LLP  
51 West 52nd Street  
New York, NY 10019-6142  
Tel: (212) 506-5000  
Fax: (212) 506-5151  
Attn: Daniel A. Mathews

(b) Any Party may, from time to time, by notice in writing served upon the other Party as aforesaid, designate an additional and/or a different mailing address or an additional and/or a different person to whom all such notices, requests, demands, reports and communications are thereafter to be addressed. Any notice, request, demand, report or other communication served personally will be deemed delivered upon receipt, if served by mail or independent courier will be deemed delivered on the date of receipt as shown by the addressee's registry or certification receipt or on the date receipt at the appropriate address is refused, as shown on the records or manifest of the United States Postal Service or independent courier, and if served by facsimile



transmission will be deemed delivered on the date of receipt as shown on the received facsimile (*provided*, that the original is thereafter delivered as aforesaid).

**Section 25.06. Binding Effect.** This Agreement will be binding upon and will inure to the benefit of the Parties hereto and their respective legal representatives, successors and permitted assigns, and wherever a reference in this Agreement is made to any of the Parties hereto, such reference also will be deemed to include, wherever applicable, a reference to the legal representatives, successors and permitted assigns of such Party, as if in every case so expressed.

**Section 25.07. Relationship of Parties.**

(a) The relationship of the DB Contractor to the Concessionaire will be one of an independent contractor, not an agent, partner, lessee, joint or co-venturer or employee, and neither the DB Contractor nor the Concessionaire will have any rights to direct or control the activities of the other or their respective Affiliates, contractors or consultants, except as otherwise expressly provided in this Agreement.

(b) Officers, employees and agents of the DB Contractor or the DB Contractor will in no event be considered employees, agents, partners or representatives of the other.

**Section 25.08. No Third-Party Beneficiaries.** Nothing contained in this Agreement is intended or will be construed as creating or conferring any rights, benefits or remedies upon, or creating any obligations of the Parties toward, any person or entity not a party to this Agreement, except rights expressly contained herein for the benefit of the Department, the Lenders, the Collateral Agent and/or Indemnitees.

**Section 25.09. Limitation of Liability.**

(a) CONSEQUENTIAL DAMAGES. NEITHER THE CONCESSIONAIRE NOR THE DB CONTRACTOR SHALL BE LIABLE TO THE OTHER FOR ANY CONSEQUENTIAL, SPECIAL, INDIRECT, INCIDENTAL, PUNITIVE OR EXEMPLARY DAMAGES, INCLUDING LOSS OF USE OR LOSS OF PROFIT, EXCEPT WHERE THIS AGREEMENT SPECIFIES THAT THE DB CONTRACTOR SHALL BE RESPONSIBLE FOR SPECIFIC LOSSES OF THE CONCESSIONAIRE THAT WOULD OTHERWISE BE CONSIDERED CONSEQUENTIAL DAMAGES HEREUNDER. EACH PARTY HEREBY RELEASES THE OTHER AND ITS CONTRACTORS AND AGENTS FROM ANY SUCH LIABILITY. THE FOREGOING EXCLUSION (I) SHALL NOT PRECLUDE RECOVERY, WHERE APPLICABLE, OF LIQUIDATED DAMAGES AS PROVIDED IN THIS AGREEMENT AND (II) SHALL NOT BE CONSTRUED TO LIMIT RECOVERY UNDER ANY INDEMNITY IN ARTICLE 15 FOR THIRD PARTY CLAIMS FOR DAMAGE TO OR DESTRUCTION OF PROPERTY OF, OR DEATH OF OR BODILY INJURY TO, ANY PERSON.

(b) Limitation on DB Contractor's Liquidated Damages. The aggregate amount of liquidated damages for which the DB Contractor shall be liable

under this Agreement shall be an amount equal to ten percent (10%) of the Contract Sum. The Parties agree that the liquidated damages payable by the DB Contractor hereunder do not constitute consequential damages.

(c) Limitation of Certain DB Contractor Liabilities. Notwithstanding anything herein to the contrary, the total liability of the DB Contractor in contract, tort, equity or otherwise (including negligence, warranty, strict liability or otherwise) relative to or arising out of this Agreement, including liquidated damages paid under this Agreement, shall not exceed an amount equal to forty-five percent (45%) of the Contract Sum; provided, that the foregoing limitation shall not apply to or include:

- (i) the proceeds of OCIP insurance;
- (ii) costs, liabilities or obligations that arise from gross negligence, willful misconduct or actual fraud of the DB Contractor;
- (iii) Losses, Claims, expenses, costs, liabilities or obligations that arise from the DB Contractor's abandonment of the DB Work; or
- (iv) the DB Contractor's indemnity obligations under Article 15 and Section 16.03.

**Section 25.10. Waiver.**

(a) No waiver by any Party of any right or remedy pursuant to this Agreement will be deemed to be a waiver of any other or subsequent right or remedy pursuant to this Agreement. The consent by one Party to any act by the other Party requiring such consent will not be deemed to render unnecessary the obtaining of consent to any subsequent act for which consent is required, regardless of whether similar to the act for which consent is given.

(b) No act, delay or omission done, suffered or permitted by one Party or its agents will be deemed to waive, exhaust or impair any right, remedy or power of such party pursuant to this Agreement, or to relieve the other Party from the full performance of its obligations pursuant to this Agreement.

(c) No waiver of any term, covenant or condition of this Agreement will be valid unless in writing and executed by the obligee Party.

(d) The acceptance of any payment or reimbursement by a Party will not (i) waive any preceding or then-existing breach or default by the other Party of any term, covenant or condition of this Agreement, other than the other Party's prior failure to pay the particular amount or part thereof so accepted, regardless of the paid Party's knowledge of such preceding or then-existing breach or default at the time of acceptance of such payment or reimbursement or (ii) continue, extend or affect (A) the service of any notice, any suit, arbitration or other legal proceeding or final judgment, (B) any time within which the other Party is required to perform any obligation or (C) any other notice or demand.

(e) No custom or practice between the Parties in the administration of the terms of this Agreement will be construed to waive or lessen the right of a Party to insist upon performance by the other Party in strict compliance with the terms of this Agreement.

**Section 25.11. No Brokers.** Except for any financial adviser or investment banker whose fee will be paid by the Party retaining such adviser or banker (or in the case of a Concessionaire Financial Party, by such party of the Concessionaire,) each Party represents and warrants that it has not dealt with any real estate or business opportunity broker or agent or any finder in connection with this Agreement. Each Party agrees, to the extent permitted by Law, to indemnify, protect, defend with counsel acceptable to the other Party and hold harmless the other Party against any Claim for commission, finder's fee or like compensation asserted by any real estate or business opportunity broker, agent, finder or other Person claiming to have dealt with the indemnifying Party in connection with this Agreement.

**Section 25.12. Governing Law; Compliance with Law and Federal Requirements.**

(a) This Agreement will be governed by and construed in accordance with the Laws of the State applicable to contracts executed and to be performed within the State.

(b) The DB Contractor will keep fully informed of and comply and require its Subcontractors to comply with Law. The DB Contractor will execute and file the documents, statements, and affidavits required under any Law required by or affecting this Agreement or the execution of the DB Work. The DB Contractor will permit examination of any records made subject to such examination by such Law.

(c) The DB Contractor will comply and require its Subcontractors to comply with all Laws applicable to a transportation project that receives Federal credit or funds, including the Federal Requirements set forth in Exhibit BB.

(d) The DB Contractor acknowledges and agrees that the USDOT will have certain approval rights with respect to the Project, including the right to provide certain oversight and technical services with respect to the DB Work. The DB Contractor will cooperate with USDOT and provide such access to the Project and information as USDOT may request in the exercise of USDOT's duties, rights and responsibilities in connection with the Project.

**Section 25.13. Use of Police Power.** Nothing in this Agreement limits the authority of the Department to exercise its regulatory and police powers granted by Law, including its powers of condemnation with respect to all or any part of the Project, the Project Right of Way and any of the Concessionaire's or the DB Contractor's rights hereunder.

**Section 25.14. Survival.** All representations and warranties, the dispute resolution procedures, the indemnifications, limitations, releases, obligations to pay termination compensation and all other provisions which by their inherent character should survive expiration or earlier termination of this Agreement and/or completion of the DB Work will

survive the expiration or earlier termination of this Agreement and/or the completion of the DB Work.

**Section 25.15. Title to the Project.** Title to all materials, supplies, equipment and machinery used in connection with the DB Work which become a permanent part of the Project shall vest in the Department upon the earliest of (i) the occurrence of any event by which title passes from the Subcontractor providing such materials, supplies, equipment or machinery, (ii) full payment therefor by the DB Contractor, (iii) full payment therefor by the Concessionaire, (iv) incorporation into the Project at the Project Right of Way, or (v) delivery of equipment or materials for the Project to an approved off-site location. Title to water, soil, rock, gravel, sand, minerals, timber and any other resources developed or obtained in the excavation or the performance by the DB Contractor of the DB Work and the right to use said items or dispose of the same, other than any materials incorporated into the Project, is hereby expressly vested in and reserved by the Concessionaire. The DB Contractor shall not have any right, title or interest in said resources.

**Section 25.16. Construction and Interpretation of Agreement.**

(a) The language in all parts of this Agreement will in all cases be construed simply, as a whole and in accordance with its fair meaning and not strictly for or against any Party. The Parties acknowledge and agree that this Agreement has been prepared jointly by the Parties and has been the subject of arm's length and careful negotiation over a considerable period of time, that each Party has been given the opportunity to independently review this Agreement with legal counsel, and that each Party has the requisite experience and sophistication to understand, interpret and agree to the particular language of the provisions hereof. Accordingly, in the event of an ambiguity in or Dispute regarding the interpretation of this Agreement, this Agreement will not be interpreted or construed against the party preparing it, and instead other rules of interpretation and construction will be utilized.

(b) If any term or provision of this Agreement, the deletion of which would not adversely affect the receipt of any material benefit by either Party hereunder, will be held by a court of competent jurisdiction to be invalid or unenforceable, the remainder of this Agreement will not be affected thereby and each other term and provision of this Agreement will be valid and enforceable to the fullest extent permitted by Law. It is the intention of the Parties to this Agreement, and the Parties hereto agree, that in lieu of each clause or provision of this Agreement that is illegal, invalid or unenforceable, the Parties in good faith will supply as a part of this Agreement an enforceable clause or provision as similar in terms to such illegal, invalid or unenforceable clause or provision as may be possible.

(c) The captions of the articles and sections herein are inserted solely for convenience and under no circumstances are they or any of them to be treated or construed as part of this instrument.

(d) References in this instrument to this "Agreement" mean, refer to and include this instrument as well as any riders, exhibits, addenda and attachments

hereto (which are hereby incorporated herein by reference) or other documents expressly incorporated by reference in this instrument. Any references to any covenant, condition, obligation and/or undertaking “herein,” “hereunder” or “pursuant hereto” (or language of like import) mean, refer to and include the covenants, conditions, obligations and undertakings existing pursuant to this instrument and any riders, exhibits, addenda, attachments or other documents affixed to or expressly incorporated by reference in this instrument. All terms defined in this instrument will be deemed to have the same meanings in all riders, exhibits, addenda, attachments or other documents affixed to or expressly incorporated by reference in this instrument unless the context thereof clearly requires the contrary. All references to a subsection or clause “above” or “below” refer to the denoted subsection or clause within the section in which the reference appears. Unless expressly provided otherwise, all references to “Articles” and “Sections” refer to the articles and sections set forth in this Agreement. Unless otherwise stated in this Agreement or the Contract Documents, words which have well-known technical or construction industry meanings are used in this Agreement or the Project Agreements in accordance with such recognized meaning. Wherever the word “including,” “includes” or “include” is used in this Agreement or the other Contract Documents, except where immediately preceded by the word “not,” it will be deemed to be followed by the words “without limitation.” Wherever reference is made in the Project Agreements to a particular Governmental Authority, it includes any public agency succeeding to the powers and authority of such Governmental Authority.

(e) As used in this Agreement and as the context may require, the singular includes the plural and vice versa, and the masculine gender includes the feminine and vice versa.

(f) In the event of any conflict or inconsistency between this Agreement and the other Contract Documents, the conflict or inconsistency will be resolved by applying the following order of document precedence, from highest to lowest:

- (i) The Comprehensive Agreement and Exhibit A thereto, as the same may be amended and in effect from time to time;
- (ii) Exhibits to the Comprehensive Agreement, excluding Exhibit A thereto, this Agreement, the Technical Requirements and the Scope Document;
- (iii) Duly authorized and executed Scope Change Orders and amendments to the articles of this Agreement and Exhibit A;
- (iv) the Articles of this Agreement and Exhibit A;
- (v) Exhibit CC (Scope Document);
- (vi) the Technical Requirements, as amended; and
- (vii) the other exhibits to this Agreement, as amended.

**Section 25.17. Counterparts.** This instrument may be executed in two or more counterparts, each of which will be deemed an original, but all of which together will constitute one and the same instrument.

**Section 25.18. Entire Agreement; Amendment.** THIS AGREEMENT CONSTITUTES THE ENTIRE AND EXCLUSIVE AGREEMENT BETWEEN THE PARTIES RELATING TO THE SPECIFIC MATTERS COVERED HEREIN AND THEREIN. ALL PRIOR WRITTEN AND PRIOR OR CONTEMPORANEOUS VERBAL AGREEMENTS, UNDERSTANDINGS, REPRESENTATIONS AND/OR PRACTICES RELATIVE TO THE FOREGOING, INCLUDING THE BACK-TO-BACK AGREEMENT, ARE HEREBY SUPERSEDED, REVOKED AND RENDERED INEFFECTIVE FOR ANY PURPOSE. THIS AGREEMENT MAY BE ALTERED, AMENDED OR REVOKED ONLY BY AN INSTRUMENT IN WRITING SIGNED BY EACH PARTY HERETO, OR ITS PERMITTED SUCCESSOR OR ASSIGNEE. NO ORAL AGREEMENT OR IMPLIED COVENANT WILL BE HELD TO VARY THE TERMS HEREOF, ANY STATUTE, LAW OR CUSTOM TO THE CONTRARY NOTWITHSTANDING.

**Section 25.19. Payment of Concessionaire Damages and Other Amounts by the Department.** The DB Contractor acknowledges that it is familiar with Section 25.19 of the Comprehensive Agreement and has accepted the risk of any nonpayment of any amounts payable hereunder for which the Department is responsible or for which the Concessionaire's obligation to pay is subject to prior payment by the Department.

**Section 25.20. Taxes.** The DB Contractor is solely responsible for the payment of Taxes accrued or arising out of the performance of its obligations pursuant to this Agreement.

**Section 25.21. Payments to DB Contractor or Concessionaire.** Except as otherwise expressly provided herein, payments due to the DB Contractor or the Concessionaire hereunder, as applicable, will be due and payable within 30 Days of receipt by the Concessionaire or the DB Contractor, as applicable, of an invoice therefor, together with any supporting documentation.

**Section 25.22. Interest on Overdue Amounts.** Any amount not paid when due pursuant to this Agreement will bear interest from the date such payment is due until payment is made (after as well as before judgment) at a variable rate per annum at all times equal to the Bank Rate, which interest will be payable on demand. Interest will be compounded annually and payable on the date on which the related overdue amount is paid.

**Section 25.23. Confidentiality.**

(a) Except as set forth in this Section 25.23, each Party shall hold in confidence for a period ending five (5) years after the earlier of (i) Final Completion or (ii) the earlier termination hereof, any confidential information (marked as such) supplied to it by the other Party or otherwise related to the Contract Documents or the Project. The DB Contractor shall inform its Subcontractors, suppliers, vendors and employees of its obligations under this Section 25.23 and shall require each of its Subcontractors, suppliers, vendors and employees to execute confidentiality arrangements substantially in

the form of this Section 25.23. Notwithstanding the foregoing, each Party may disclose the following categories of information or any combination thereof:

(i) information which was in the public domain prior to receipt thereof by such Party or which subsequently becomes part of the public domain by publication or otherwise except by a wrongful act of the other Party or, in the case of the DB Contractor, any Subcontractor;

(ii) information that such Party can show was lawfully in its possession prior to receipt thereof from the other party through no breach of any confidentiality obligation;

(iii) information received by such Party from a third party having no obligation of confidentiality with respect thereto;

(iv) information at any time developed independently by such Party, *provided* it is not developed from otherwise confidential information;

(v) information disclosed pursuant to and in conformity with the law or a judicial order or in connection with any legal proceedings or arbitration procedures; and

(vi) information required to be disclosed under securities laws applicable to publicly traded companies and their subsidiaries or reporting required by a Governmental Authority if such Party informs the other Party of the need for such disclosure and, if reasonably requested by the other Party, seeks, through a protective order or other appropriate mechanism, to maintain the confidentiality of such information.

(b) The provisions of this Section 25.23 shall continue in full force and effect in accordance with their terms, and shall survive any termination of this Agreement.

(c) The DB Contractor shall not issue any press or similar media release or any advertisement, or publish, release or disclose any photograph or other information concerning this Agreement or the Project, including in accordance with the Public Information Plan, without the express prior written consent of the Concessionaire, which consent shall not be unreasonably withheld. The DB Contractor shall include this restriction in all Subcontracts and purchase orders. The DB Contractor shall give prior notice to the Concessionaire of any information contained in documents filed with public authorities or any other public disclosure which would result in the dissemination of confidential information. The Concessionaire when marketing the Project may use the DB Contractor's name and logo. The Concessionaire shall provide the DB Contractor a copy for review and comment where any press release or any paid advertisement containing the name or logo of the DB Contractor, or any of the DB Contractor's parent entities, and may require the DB Contractor to make a responding press release.

**Section 25.24. Recourse Limited to Concessionaire's Assets.** The Concessionaire and the DB Contractor acknowledge that the Concessionaire has entered into this Agreement entirely on its own behalf, and that, except with regard to claims of fraud, the DB Contractor shall have no recourse against any member, owner, parent, subsidiary or Affiliate company or the officers, directors, employees, agents, successors or assigns of any thereof for any reason.

**Section 25.25. Time of the Essence.** Without prejudice to any provision of this Agreement relating to liquidated damages, delay or termination for default relating to delay, time is of the essence in the performance of this Agreement.

[THE REMAINDER OF THIS PAGE INTENTIONALLY LEFT BLANK,  
SIGNATURE PAGE(S) TO FOLLOW]



IN WITNESS WHEREOF, the Parties, intending to be legally bound, have executed this Design-Build Agreement Relating to the Downtown Tunnel/Midtown Tunnel/MLK Extension Project as of the date first written above.

**DB Contractor:**

SKW CONSTRUCTORS, A SKANSKA, KIEWIT,  
WEEKS JV,

By its members:

SKANSKA USA CIVIL SOUTHEAST INC.

By: \_\_\_\_\_

Name: \_\_\_\_\_

Title: \_\_\_\_\_

KIEWIT INFRASTRUCTURE CO.

By: \_\_\_\_\_

Name: \_\_\_\_\_

Title: \_\_\_\_\_

WEEKS MARINE, INC.

By: \_\_\_\_\_

Name: \_\_\_\_\_

Title: \_\_\_\_\_

**Concessionaire:**

ELIZABETH RIVER CROSSINGS OPCO, LLC

By: \_\_\_\_\_

Name: \_\_\_\_\_

Title: \_\_\_\_\_

By: \_\_\_\_\_

Name: \_\_\_\_\_

Title: \_\_\_\_\_