

**INTERIM AGREEMENT**  
**TO DEVELOP AND/OR OPERATE THE**  
**DOWNTOWN TUNNEL/MIDTOWN**  
**TUNNEL/MARTIN LUTHER KING**  
**FREEWAY EXTENSION PROJECT IN**  
**VIRGINIA**

**DATED AS OF JANUARY 7, 2010**

***BY AND AMONG***

**VIRGINIA DEPARTMENT OF TRANSPORTATION,**

**an Agency of the Commonwealth of Virginia**

***AND***

**ELIZABETH RIVER CROSSINGS LLC,**

**a Delaware Limited Liability Company**

## TABLE OF CONTENTS

<b>ARTICLE 1 DEFINITIONS.....</b>	<b>2</b>
1.1.    Definitions.....	2
1.2.    Rules of Usage. ....	2
<b>ARTICLE 2 PROJECT DESCRIPTION AND CORE TERMS OF THE AGREEMENT ...</b>	<b>3</b>
2.1    Description of the Project.....	3
2.2    Roles and Responsibilities.....	3
2.3    Comprehensive Agreement.....	5
2.4    Term of the Agreement. ....	6
2.5    Compliance with Applicable Law. ....	6
2.6    Exclusive Right to Develop the Project.....	6
<b>ARTICLE 3 SCOPE OF SERVICES .....</b>	<b>6</b>
3.1.    Scope of Services. ....	6
3.2    Review and Approval of Project Deliverables.....	8
<b>ARTICLE 4 AGREEMENT PRICE, CHANGES, AND PAYMENT .....</b>	<b>10</b>
4.1.    Agreement Price.....	10
4.2.    Change Orders. ....	10
4.3.    Schedule of Payments. ....	11
4.4.    Monthly Submittal Package.....	11
4.5.    Monthly Progress Payments. ....	11
4.6.    Payments and Withholdings. ....	12
4.7.    Right to Stop Work.....	12
4.8.    Risk Workshop.....	12
<b>ARTICLE 5 TERMINATION AND DEFAULT .....</b>	<b>13</b>
5.1.    Termination During Phase 1. ....	13
5.2.    Termination During Phase 2.....	13
5.3.    Delivery of Project Deliverables on Termination. ....	22
5.4.    Liability after Termination. ....	22
5.5.    Exclusive Termination Remedies. ....	22
5.6.    Payment Upon Termination.....	22
<b>ARTICLE 6 RECORDS AND AUDIT RIGHTS.....</b>	<b>22</b>
6.1.    Rights to Project Work Product and Other Documents .....	22
6.2.    Public Records.....	23
6.3.    Records and Audit Rights. ....	25
<b>ARTICLE 7 DELAY AND COMPENSATION EVENTS.....</b>	<b>25</b>
7.1.    Delay Events. ....	25
7.2.    Compensation Events. ....	26
7.3.    Time Impact Analysis for Proposed Time Extensions.....	27

<b>ARTICLE 8 INDEMNIFICATION AND INSURANCE REQUIREMENTS.....</b>	<b>28</b>
<b>8.1. Indemnification .....</b>	<b>28</b>
<b>8.2. Required Insurance. ....</b>	<b>31</b>
<b>ARTICLE 9 DISPUTE RESOLUTION .....</b>	<b>33</b>
<b>9.1. Administrative Process.....</b>	<b>33</b>
<b>9.2. Litigation.....</b>	<b>34</b>
<b>9.3. Attorney’s Fees.....</b>	<b>34</b>
<b>9.4. Declaratory Judgments. ....</b>	<b>34</b>
<b>ARTICLE 10 MISCELLANEOUS .....</b>	<b>34</b>
<b>10.1. Assignment.....</b>	<b>34</b>
<b>10.2. No Gift or Dedication.....</b>	<b>35</b>
<b>10.3. Notices. ....</b>	<b>35</b>
<b>10.4. Authorized Representatives.. ....</b>	<b>36</b>
<b>10.5. Organization; Good Standing; Due Authorization; Binding Effect; Etc. ....</b>	<b>36</b>
<b>10.6. Relationship of Parties.....</b>	<b>37</b>
<b>10.7. No Third Party Beneficiaries. ....</b>	<b>37</b>
<b>10.8. Waiver.....</b>	<b>37</b>
<b>10.9. No Brokers.....</b>	<b>37</b>
<b>10.10. Governing Law.....</b>	<b>38</b>
<b>10.11. VDOT’s Responsibility for Payment.....</b>	<b>38</b>
<b>10.12. Interest on Payments Due. ....</b>	<b>38</b>
<b>10.13. Use of Police Power. ....</b>	<b>38</b>
<b>10.14. Right to Oversee Work.....</b>	<b>38</b>
<b>10.15. Obligation to Refrain from Discrimination.....</b>	<b>38</b>
<b>10.16. Reserved Rights.....</b>	<b>38</b>
<b>10.17. VDOT Findings Under PPTA.....</b>	<b>39</b>
<b>10.18. Guaranty Requirements.....</b>	<b>39</b>
<b>10.19. Waiver of Consequential Damages.....</b>	<b>39</b>
<b>10.20. Survival. ....</b>	<b>39</b>
<b>10.21. Subpoena.....</b>	<b>39</b>
<b>10.22. Construction and Interpretation of Agreement. ....</b>	<b>40</b>
<b>10.23. Entire Agreement; Severability. ....</b>	<b>40</b>
<b>10.24. Amendment. ....</b>	<b>41</b>
<b>10.25. Headings.....</b>	<b>41</b>
<b>10.26. Counterparts. ....</b>	<b>41</b>
<b>10.27. Key Personnel and Key Members. ....</b>	<b>41</b>
<b>10.28. Suspension and Debarment, Lobbying, and Anti-Collusion Certifications. ..</b>	<b>42</b>

**LIST OF EXHIBITS:**

**EXHIBIT A: DEFINITIONS**

**EXHIBIT B: PHASE ONE PROJECT DELIVERABLES**

**EXHIBIT C: FINDINGS OF PUBLIC INTEREST**

**EXHIBIT D: DEPARTMENT DEBARMENT POLICY,**

**EXHIBIT E: FORM OF GUARANTY OF PERFORMANCE**

**EXHIBIT F: APPLICABLE STANDARDS**

**EXHIBIT G: BUDGET**

**EXHIBIT H: FORM OF CERTIFICATIONS**

This **INTERIM AGREEMENT** to develop and/or operate the Downtown Tunnel/Midtown Tunnel/Martin Luther King Freeway Extension (“MLK”) Project in Virginia (the “Agreement”) is made and entered into as of January 7, 2010, by and among:

(1) the **VIRGINIA DEPARTMENT OF TRANSPORTATION** (“VDOT”), an agency of the Commonwealth of Virginia, whose address is 1401 East Broad Street, Richmond, Virginia 23219; and

(2) **ELIZABETH RIVER CROSSINGS LLC**, a Delaware limited liability company (“ERC”), whose address is 99 Canal Center Plaza, Suite 125 Alexandria, VA 22314.

### **RECITALS**

**WHEREAS**, pursuant to the Public–Private Transportation Act of 1995, §§56-556 *et seq.* of the Virginia Code (the “PPTA”), the Commonwealth Transportation Secretary (the “Secretary”) has approved the procurement procedures in accordance with Virginia Code §56-573.1, and the Commonwealth Transportation Commissioner (the “Commissioner”) has approved the project described in Section 2.1 (the “Project”) in accordance with the Findings of Public Interest, attached as Exhibit C and incorporated by reference into this Agreement;

**WHEREAS**, the Parties have agreed to enter into this Agreement, consistent with the provisions of Virginia Code §56-566.1, to advance the development and/or operation of the Project; and

**WHEREAS**, the Parties agree that if a Comprehensive Agreement (the “CA”) for the Project ultimately is executed, except as specifically may be provided in a CA, this Agreement no longer shall be of any force and effect, and the relationship of the Parties and the Project shall be governed by such CA.

**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 agree as follows:

## **ARTICLE 1 DEFINITIONS**

**1.1. Definitions.** All capitalized terms used in this Agreement but not expressly defined in this Agreement have the respective meanings set forth in Exhibit A.

**1.2. Rules of Usage.** The following rules of usage shall apply to this Agreement unless otherwise required by the context:

.1 All personal pronouns, whether used in the masculine, feminine or neuter gender, shall include all other genders; the singular shall include the plural, and the plural shall include the singular.

.2 Unless otherwise indicated, references herein to articles, sections, subsections, paragraphs, clauses, sub-clauses, schedules or exhibits shall refer to the corresponding article, section, subsection, paragraph, clause, sub-clause, schedule or exhibit in or to this Agreement.

.3 Except where specifically restricted, reference to any Party includes that Party and its successors and permitted assigns.

.4 The headings, subheadings, and table of contents are solely for convenience of reference and shall not constitute a part of this Agreement; nor shall they affect the meaning, construction, or effect of any provision hereof.

.5 Except as otherwise expressly provided, reference to any agreement means such agreement as amended, modified or supplemented from time to time in accordance with the applicable provisions thereof.

.6 A reference to a statute or to a regulation issued by a Governmental Authority includes the statute or regulation in force on the Agreement Date, together with all amendments and supplements thereto and any statute or regulation substituted for such statute or regulations;

.7 A reference to a Governmental Authority, department, board, commission or other public body or to a public officer includes an entity or officer that or who succeeds to substantially the same functions as those performed by such public body or officer as of the Agreement Date;

.8 All statements of or references to dollar amounts or money in this Agreement are to the lawful currency of the United States of America; and

.9 All accounting and financial terms used herein shall be interpreted and applied in accordance with generally accepted accounting principles in the United States of America, consistently applied.

**ARTICLE 2**  
**PROJECT DESCRIPTION AND CORE TERMS OF THE AGREEMENT**

**2.1 Description of the Project.** The Downtown Tunnel/Midtown Tunnel/Martin Luther King Freeway Extension Project pursuant to the Conceptual Proposal submitted by ERC (the “Project”) is comprised of the development and operation of a new two-lane tunnel under the Elizabeth River, maintenance, safety, and operational improvements to the existing Midtown and Downtown Tunnels, and the extension of the MLK from London Boulevard to Interstate 264 (I-264). The Project is located between two urban cities, Portsmouth and Norfolk, in the Commonwealth of Virginia (“Commonwealth”).

**2.2 Roles and Responsibilities.** The Parties commit at all times to cooperate fully with each other, and proceed on the basis of trust and good faith, to permit each party to realize the benefits afforded under this Agreement. The roles of the Parties in furtherance of the Project shall be as follows:

.1 VDOT. VDOT shall be the sole owner of fee simple title, easements, or other applicable real property rights to the Project, the rights of way, and all improvements constructed and tangible personal property installed thereon, with full power and authority to possess, control, and use the Project and the rights of way. VDOT shall:

.1 provide any public sector Commonwealth funds to the Project as specified in this Agreement;

.2 provide input, appropriate responses, publicly available data towards the development and review of the Project Deliverables, any documents in the possession of VDOT relating to the current condition, operations, maintenance and security of existing elements of the Project *provided* ERC executes the appropriate non-disclosure agreements required by VDOT’s policies for critical infrastructure information and sensitive security information and other pertinent issues reasonably necessary for ERC to perform its obligations under this Agreement;

.3 pay to ERC any such amounts as may be stipulated by this Agreement; *provided* that the Parties acknowledge and agree that any payment of public funds is subject to Section 10.11; and

.4 provide Regulatory Approvals requested by ERC which are reasonably necessary for ERC to perform its obligations under this Agreement and for which VDOT is the issuing agency; *provided* the provisions of this Section 2.2.1.4 shall not supersede any provision of this Agreement providing for the conditions to, or

time of approval of any such Regulatory Approval, or any express right of VDOT to withhold consent in its sole discretion.

.2 ERC. ERC shall perform all work and provide all materials, equipment, tools, labor, and, subject to Section 2.2.1.4 above, all Regulatory Approvals necessary to develop the Project Deliverables described in and reasonably inferable from the terms of this Agreement.

.1 ERC shall cooperate with VDOT and other Governmental Authorities and give the work required by this Agreement the attention necessary to meet the Project Schedule. ERC shall perform, or cause to be performed, the work required by this Agreement, using appropriate skill and experience in accordance with the following requirements:

.1 specific standards, methods, and requirements set forth in this Agreement, including the Applicable Standards and the Technical Requirements, as the Applicable Standards may be further refined in Phase 1 and changed from time to time during the term of this Agreement as mutually agreed by the Parties;

.2 all Applicable Law;

.3 all Regulatory Approvals;

.4 the application of professional engineering judgment taking into consideration any and all elements of design, maintenance and operations as reflected in the specific standards, methods, and requirements set forth in this Agreement, including the Applicable Standards and the Technical Requirements;

.5 prudent industry practices, methods, techniques and standards and using the degree of care that would be expected to be exercised by a prudent, skilled and experienced developer or entity engaged in the same kinds of undertakings as the Project under the same or similar circumstances or conditions as those applying to the design and development of the Project; and

.6 the requirements of insurance policies required to be maintained in accordance with this Agreement

*provided* neither compliance with a minimum requirement set forth in any specific standard set forth above, nor achievement of a lowest cost solution, shall be deemed to either excuse compliance

with any more stringent standard set forth above or to comply with the general standards set forth in subsections .4 and .5 above.

.2 Architectural, engineering, and design services shall be procured from licensed professionals retained directly or indirectly by ERC or furnished by licensed employees of ERC to the extent required by Applicable Law.

## **2.3 Comprehensive Agreement.**

.1 **General Terms.** Upon issuance of the Feasibility Determination and in accordance with the schedule set forth in the Work Plan, VDOT and ERC shall negotiate in good faith, pursuant to Section 2.3.2 below, with the objective to execute a CA for the Project consistent with the key risk matrix developed during Phase 1 as set forth in Exhibit B hereto, such risk matrix to be acceptable to both Parties and used in developing the terms and conditions of the CA; *provided* that each Party shall not be obligated to execute a CA. The CA shall be in accordance with Applicable Law, including but not limited to the PPTA, and shall, among other things, provide for the development and operation of the Project. The Parties acknowledge that satisfaction of the conditions described in Section 2.3.3 is an express condition precedent to the execution and enforceability of the CA.

.2 **Negotiations.** If, after a period of good faith negotiations, the duration of which shall not exceed 180 Days from the start of such negotiations pursuant to the schedule set forth in the Work Plan, the Parties have not completed negotiations for a CA, VDOT will issue to ERC a request for proposal which includes, among other things, a CA and a description of the scope of work, and request from ERC a Price Proposal in accordance with the terms and conditions set forth in the request for proposal. ERC may determine, in its sole discretion, whether to submit a Price Proposal to VDOT. If ERC elects to complete a Price Proposal, it shall submit the Price Proposal to VDOT within 90 Days of VDOT's request. Along with its Price Proposal, ERC may submit to VDOT an alternative concept to the terms and conditions of the request for proposal. The Price Proposal and any accompanying alternative concept shall include open book pricing for the work and ERC shall identify any escalation clauses or expiration dates associated with such pricing information. Following ERC's submission a Price Proposal and any accompanying alternative concept, VDOT shall provide responses to the terms thereof within 90 Days after submission. After delivery of such responses, ERC and VDOT shall conduct limited price negotiations in a timely manner.

.3 **Conditions Precedent.** The following shall be conditions precedent to execution of a CA.

.1 Neither Party is in default of this Agreement.

.2 This Agreement has not been terminated in accordance with Article 5.

.3 No court order exists that restrains, enjoins, challenges, or delays performance of the work or consummation of the CA.

.4 All Project Deliverables have been reviewed and approved by VDOT.

.5 ERC has maintained its ERC Qualifications consistent with VDOT's initial determination of the adequacy of ERC's qualifications and experience as approved by the Commissioner on July 23, 2009; *provided*, ERC shall be permitted to modify members of the ERC consortium as proposed in the Conceptual Proposal in accordance with Section 10.27.

.6 If required by Applicable Law, VDOT has completed and ERC has agreed to pay for the statutory audit described in Virginia Code §56-560(E). The cost of such audit shall be eligible for reimbursement from available private funds sourced by ERC on the Financial Closing Date. Prior to the commencement of the statutory audit for the CA, VDOT shall provide ERC with an opportunity to review and comment on the scope and cost of the statutory audit.

**2.4 Term of the Agreement.** Unless such rights and obligations have been terminated earlier in accordance with Article 5, this Agreement will terminate without notice or demand on the earlier of: (a) the execution of a CA by all Parties or (b) 24 months from the Date of Commencement which period may be extended due to the occurrence of a Delay Event pursuant to Article 7 ("Long Stop Date").

**2.5 Compliance with Applicable Law.** In the performance of the work required by this Agreement, ERC shall comply with Applicable Law, including but not limited to all Federal laws and regulations applicable to a transportation project that has received or will receive Federal-aid funds and the Commonwealth's PPTA Implementation Guidelines in effect as of the Agreement Date.

**2.6 Exclusive Right to Develop the Project.** ERC shall have the exclusive right to negotiate a CA and develop the Project pursuant to the terms of this Agreement.

### **ARTICLE 3 SCOPE OF SERVICES**

**3.1. Scope of Services.** .1 Pursuant to the terms of this Agreement, ERC shall develop the Project Deliverables under Phase 1 ("Phase 1 Project Deliverables") and, if VDOT determines the Project is feasible based on the findings set forth in those Project Deliverables, ERC shall commence development of the additional

Project Deliverables under Phase 2 (“Phase 2 Project Deliverables”) and negotiate with VDOT the terms of a CA.

.1 **Phase 1** – Phase 1 shall commence upon execution of this Agreement. ERC shall prepare and deliver the Phase 1 Project Deliverables pursuant to the schedule set forth in Exhibit B. Not later than April 1, 2010, ERC shall have provided to VDOT all completed Phase 1 Project Deliverables for review and approval. Following its approval of all Phase 1 Project Deliverables, but in no event later than July 1, 2010, VDOT shall provide to ERC a Feasibility Determination or a Notice of Project Feasibility Termination pursuant to Section 5.1. If VDOT provides to ERC a Feasibility Determination, ERC shall, within 30 Days of receipt of the Feasibility Determination, confirm in writing to VDOT ERC’s commitment to advance to Phase 2, the date of such written commitment shall be known as the “Date of Commencement.” If ERC does not provide a response or does not confirm in writing its commitment to advance to Phase 2 within 30 Days of receipt of the Feasibility Determination, the Agreement shall be terminated in accordance with Section 5.1. If VDOT provides to ERC a Notice of Project Feasibility Termination, then the provisions of Section 5.1 shall apply. VDOT shall be entitled to deliver a Notice of Project Feasibility Termination not later than July 1, 2010, if ERC has failed to complete all Phase 1 Project Deliverables for VDOT’s review and approval pursuant to this Section 3.1.1.1.

.2 **Phase 2** – On the Date of Commencement, VDOT and ERC shall commence work on the Phase 2 Project Deliverables in accordance with the approved Work Plan.

.2 At VDOT’s request, ERC shall assist VDOT in coordinating and communicating with Governmental Authorities, including but not limited to the Federal Highway Administration (“FHWA”), and other stakeholders regarding Project development efforts. ERC and VDOT shall agree on communications protocols during Phase 1 that shall apply during the term of this Agreement.

.3 The Parties shall establish a Steering Committee to provide executive level business guidance on issues relating to the Project, to develop and issue recommendations to VDOT management regarding issues critical to the success of the Project, and to act as an intermediate level of the dispute resolution process described in Article 9. Each Party shall at all times provide appropriate representation to the Steering Committee, with members from VDOT and members from ERC. The Steering Committee shall meet on a regular basis and in no event less frequently than twice during Phase 1 and thereafter, if applicable, not less frequently than quarterly during Phase 2.

### 3.2 Review and Approval of Project Deliverables

.1 VDOT shall review the Project Deliverables and their component Work Packages for conformance with the requirements of this Agreement, including but not limited to, the requirements set forth in Exhibit B, Exhibit F, and/or the Work Plan, as applicable. Within 21 Days of receipt of a Work Package or completed Project Deliverable, VDOT will notify ERC if VDOT approves the Work Package or completed Project Deliverable. In the event VDOT fails to respond within 21 Days of receipt, such failure to respond shall be deemed approval, except to the extent that a Work Package or completed Project Deliverable deviates from the requirements of this Agreement, Applicable Standards, Regulatory Approvals, or Applicable Law. VDOT shall be deemed to have responded if it has notified ERC within 21 Days of receipt that VDOT requires additional time to obtain information or to perform reviews necessary for an appropriate and complete response. Such additional time shall not exceed 10 Days, except as mutually agreed by the Parties.

.2 As applicable, VDOT shall provide reasonable assistance and cooperation to ERC, as requested by ERC, in obtaining the review or approval of Work Packages or completed Project Deliverables by FHWA or other Governmental Authorities. Notwithstanding the foregoing, VDOT shall not be liable to ERC except as provided in Article 7 if additional reviews or approvals by Governmental Authorities other than VDOT take longer than 21 Days.

.3 VDOT's review and approval of Work Packages and completed Project Deliverables shall not relieve ERC of its responsibility to perform the work in accordance with Section 2.2, nor to transfer any liability from ERC to VDOT.

.4 Quality Assurance and Quality Control (QA/QC) shall be an integral part of each Work Package and completed Project Deliverable. As part of each submission of a Work Package or completed Project Deliverable to VDOT, ERC shall provide the following:

.1 A cover sheet, signed by the Authorized Representative, that includes the following certification:

.1 ERC certifies that [description of Work Package/completed Project Deliverable] was prepared by professionals having the requisite qualifications, skills, and experiences needed to prepare the submittal in accordance with this Agreement.

.2 ERC certifies that the quality control review and the quality assurance review for the Work Package or completed Project Deliverable was performed, that it has reviewed the Work Package/completed Project Deliverable

for completeness, and that the submittal was prepared in accordance to, and otherwise complies with:

- .1 this Agreement;
- .2 Applicable Standards;
- .3 Technical Requirements;
- .4 Exhibit B and/or Work Plan, as applicable;
- .5 Applicable Law; and
- .6 Regulatory Approvals.

.2 Along with the certification described in Section 3.2.4.1 above, ERC also shall include, as part of its submission, documentation from the QA/QC reviewers, including checklists, summary data, high-level comparative analyses or design checks, that the QA/QC reviewers relied on in making a determination that the work is complete and conforms to the requirements of this Agreement.

.5 If VDOT rejects the Work Package or completed Project Deliverable for failure to conform to the requirements of this Agreement, ERC shall be given a reasonable time period to modify the Work Package or completed Project Deliverable and resubmit it to VDOT for review and approval. VDOT shall notify ERC whether it approves the resubmitted Work Package or completed Project Deliverable within 21 Days of VDOT's receipt of the resubmission. ERC shall not be entitled to compensation, other than the compensation described in Article 4, for any such revisions and re-submittals.

.6 If ERC must submit a Work Package or completed Project Deliverable to VDOT for review and approval more than twice due to ERC's failure to conform with the requirements of this Agreement, ERC shall reimburse VDOT for its documented costs and expenses incurred thereafter in reviewing any portions of the Work Package or completed Project Deliverable that were rejected by VDOT in its initial review. If ERC must submit a Work Package or completed Project Deliverable more than twice due to VDOT's failure to conform with the requirements of this Agreement in rejecting such submissions, VDOT shall reimburse ERC for its documented costs and expenses incurred thereafter in preparing or submitting any portions of the Work Packages or completed Project Deliverables. Neither ERC nor VDOT shall be eligible to receive reimbursement of any such payments to the other party on the Financial Closing Date pursuant to Section 4.1.3.

**ARTICLE 4**  
**AGREEMENT PRICE, CHANGES, AND PAYMENT**

**4.1. Agreement Price.** Except as otherwise provided in Article 5, ERC's compensation for the development of Project Deliverables shall be as follows:

.1 **Phase 1.** For Phase 1 Project Deliverables, VDOT and ERC shall each bear their own costs incurred or accrued in developing and reviewing the Phase 1 Project Deliverables, except as provided in Section 4.8 and as applicable, Section 5.1.3.

.2 **Phase 2.** VDOT and ERC agree to bear their own Internal Costs for Phase 2. VDOT and ERC agree to share in the progress payment of the External Costs as follows. For Phase 2 Project Deliverables approved by VDOT, VDOT shall pay to ERC 50 percent of the total External Cost specified in the Work Plan for each such Project Deliverable in a manner set forth in Section 4.5. Except as provided in Section 4.2.4 and Section 7.2.6, the total amount paid by VDOT to ERC for Phase 2 Project Deliverables as progress payments shall not exceed \$10 million.

.3 If the Parties execute a CA, the CA shall specify the amounts that VDOT and ERC shall receive on the Financial Closing Date, from sources identified in the applicable plan of finance, for the costs related to Project development that remain un-reimbursed as of the Financial Closing Date and any amounts for Project development other than the Project Deliverables. In addition to other costs incurred by VDOT, to the extent that VDOT has paid ERC for any costs prior to the Financial Closing Date related to Project development, VDOT shall be entitled to reimbursement for such payments pursuant to this Section 4.1.3.

For the avoidance of doubt, neither VDOT or ERC shall be entitled to any amounts under this Section 4.1.3 prior to the Financial Closing Date.

**4.2. Change Orders.**

.1 VDOT may, at any time and from time to time during the term of this Agreement, authorize and/or require ERC to perform work not identified in Exhibit B or the Work Plan, as applicable, by issuing a Change Order.

.2 VDOT and ERC shall negotiate in good faith and as expeditiously as possible the terms of the Change Order and whether such Change Order constitutes a Delay Event and/or Compensation Event, pursuant to Article 7. Upon reaching an agreement, the Parties shall prepare and execute a Change Order reflecting the agreed-upon terms.

.3 If VDOT and ERC are unable to agree to the terms of a Change Order, VDOT may issue a letter directing ERC to proceed with the work as

described in the directive letter, notwithstanding such disagreement. Upon receipt of the directive letter, ERC shall implement and perform such work and VDOT shall make interim payments to ERC on a monthly basis for the reasonable, documented costs incurred by subcontractors or subconsultants retained by ERC and costs incurred by ERC for internal development and management for such work under directive letters, subject to subsequent payment adjustment as may be determined upon resolution of any disagreement in accordance with the dispute resolution procedures set forth in Article 9. Any such payments made pursuant to this Section 4.2.3 shall not prejudice VDOT's right to argue it has no responsibility to pay for such work or ERC's right to seek additional payments for costs incurred.

.4 Payments made to ERC in accordance with Section 4.2 shall be in addition to any payments required under Section 4.1.2 and shall not be subject to the \$10 million limitation set forth in Section 4.1.2.

**4.3. Schedule of Payments.** The Work Plan developed by ERC during Phase 1, which shall be in accordance with Exhibit G, and approved by VDOT will include among other things: (a) a description of the Work Packages for each of the Phase 2 Project Deliverables; (b) the amounts of External Cost and Internal Cost for all items comprising the services and outputs required for each Work Package; and (c) an anticipated schedule for monthly progress payments to be made by VDOT for Work Packages during Phase 2.

**4.4. Monthly Submittal Package.** During Phase 2, not later than the 10<sup>th</sup> Day of each month, ERC shall submit to VDOT the Monthly Submittal Package which includes, at a minimum, the following: (a) a summary description of the Work Packages currently under development, including the percent complete of the Work Packages and associated Phase 2 Project Deliverables; (b) a progress schedule describing the status of the activities undertaken and to be undertaken by ERC; (c) outstanding issues identified by the Working Groups; (d) items and issues to be presented at upcoming meetings of the Steering Committee; (e) an update on the External Cost and Internal Cost incurred to date for Work Packages under development; and (f) an Application for Payment (as described in Section 4.5 below). The form of the Monthly Submittal Package shall be mutually agreed by the Parties during Phase 1.

**4.5. Monthly Progress Payments.**

.1 As part of its Monthly Submittal Package, ERC shall submit for VDOT's review and approval its Application for Payment requesting progress payments for all Work Packages initiated or approved as of the first day of such month and coinciding with the schedule for monthly progress payments set forth in the Work Plan. The Application for Payment shall include all supporting documentation detailing the services provided, the Work Packages initiated or approved and the External Cost and Internal Cost incurred or accrued for those Work Packages. VDOT shall pay ERC in accordance with the following:

.1 ERC shall earn 20 percent of that 50 percent of External Cost of a Work Package eligible for payment by VDOT pursuant to Section 4.1.2 upon initiation of the Work Package in accordance with Section 4.3 and Section 4.4.

.2 ERC shall earn the remaining 80 percent of that 50 percent of External Cost of the Work Package eligible for payment by VDOT pursuant to Section 4.1.2 upon completion and approval by VDOT of that Work Package.

.2 The Work Plan shall organize the Work Packages in a manner as agreed in Phase 1.

#### **4.6. Payments and Withholdings.**

.1 Subject to Section 10.11, VDOT shall pay to ERC all undisputed amounts included in an Application for Payment no later than 15 Days after VDOT's receipt of that Application for Payment.

.2 If VDOT contends that ERC is not entitled to all or part of an Application for Payment, it shall notify ERC in writing at least seven Days prior to the date on which payment is due. The notice shall describe the specific amounts VDOT intends to withhold, the reasons and contractual basis for the withholding, and the specific measures ERC must take to address VDOT's reasons for withholding payment. ERC and VDOT will attempt to resolve VDOT's reasons for withholding payment prior to the date on which payment is due. If the Parties cannot resolve such reasons for withholding payment, ERC may pursue its rights under Article 9 of this Agreement. Upon resolution of VDOT's reasons for withholding payment, ERC shall be entitled to payment within 30 Days of VDOT's receipt of a revised Application for Payment.

**4.7. Right to Stop Work.** If VDOT fails to pay ERC any undisputed amounts that become due within the timeframes set forth in this Agreement, ERC shall, in addition to all other remedies provided in this Agreement, after seven Days, give VDOT notice of such failure and of its intention to stop advancement of the work hereunder due to such failure. If such failure is not cured within 21 Days with all undisputed amounts due owing paid in full, ERC may stop all work hereunder.

**4.8. Risk Workshop.** During Phase 1 VDOT and ERC shall participate in a joint risk workshop. VDOT shall pay to ERC 50 percent of the total cost of the joint risk workshop, which cost shall be agreed to by both Parties in advance of the expenditure of funds. VDOT and ERC shall work collaboratively to develop the scope and cost estimates for the risk workshop.

**ARTICLE 5  
TERMINATION AND DEFAULT**

**5.1. Termination During Phase 1.** Termination under this Section 5.1 for failure to achieve the Feasibility Determination shall apply during Phase 1 of this Agreement.

.1 In the event that VDOT determines that the Project is not feasible pursuant to Section 3.1.1, VDOT may terminate this Agreement upon 30 Days written notice (“Notice of Project Feasibility Termination”) to ERC. During the 30 Day notice period, ERC may, at its sole discretion and expense, meet and confer with VDOT regarding VDOT’s election to terminate this Agreement pursuant to Section 5.1 and provide VDOT with any information or proposals which ERC seeks VDOT to consider as an alternative to such termination. After consideration of such information or proposals, VDOT, in its sole discretion, may withdraw the Notice of Project Feasibility Termination and issue a Feasibility Determination pursuant to Section 3.1.1.1 or terminate this Agreement at the conclusion of the 30 Day notice period. In addition, if ERC does not provide a response or does not confirm in writing its commitment to advance to Phase 2 within 30 Days of receipt of the Feasibility Determination, this Agreement shall be terminated at the end of such 30 Day period.

.2 In the event of a termination pursuant to this Section 5.1, the Parties shall have no further obligation to each other with respect to the Project or this Agreement.

.3 VDOT, at its sole discretion, may elect to purchase completed or partially completed Phase 1 Project Deliverables. VDOT also may request ERC to finish partially completed Phase 1 Project Deliverables and, provided ERC agrees in its sole discretion to proceed by written acknowledgement to VDOT, ERC will complete the Phase 1 Project Deliverables in accordance with a mutually agreed upon schedule for completion (which shall include payment terms). As compensation for those completed Phase 1 Project Deliverables which VDOT elects to purchase, VDOT shall pay to ERC the External Cost and Internal Cost set forth in Exhibit B. As compensation for those partially completed Phase 1 Project Deliverables VDOT elects to purchase, VDOT and ERC shall agree upon an amount to be paid based on the level of completion of such partially completed Phase 1 Project Deliverables.

**5.2. Termination During Phase 2.** Termination under this Section 5.2 shall apply during Phase 2 of this Agreement.

.1 **Termination for Execution of a CA.** Upon execution of a CA, this Agreement shall terminate, and the payments due to each Party, if any, shall be set forth in the CA.

.2 **Long Stop Date Termination.** If this Agreement is terminated pursuant to Section 2.4(b), VDOT shall, in addition to paying any progress amounts outstanding, pay to ERC: (i) any amounts due pursuant to a Compensation Event and (ii) the amounts set forth below which in the aggregate shall not exceed \$10 million (excluding any amounts due pursuant to a Compensation Event);

.1 for Work Packages completed as of the date of termination and approved by VDOT, that 50 percent portion of External Cost not previously paid to ERC by VDOT pursuant to Section 4.1.2; and

.2 for partially completed Work Packages that VDOT, in its sole discretion, elects to purchase, an amount equal to the total External Cost incurred or accrued by ERC as of the date of termination *minus* the 20 percent progress payment that was made by VDOT for the initiation of such Work Packages pursuant to Section 4.5.1.1. If the External Cost incurred or accrued by ERC is less than the 20 percent progress payment paid by VDOT pursuant to Section 4.5.1.1, VDOT shall subtract the amount of such overpayment from the total amount payable to ERC pursuant to this Section 5.2.2.2.

.3 **Termination for Public Convenience.** VDOT may terminate all of the rights and obligations of ERC under this Agreement if VDOT determines in its sole discretion that such action is in the best interests of the public.

.1 If VDOT elects to exercise its right to terminate for public convenience, it shall deliver to ERC a notice (“Notice of Termination for Public Convenience”), which shall identify, among other things, the reason(s) for VDOT’s election to terminate for public convenience and the process by which the Parties shall wind down their activities under this Agreement. The effective date of termination shall be the earlier of: (a) 180 Days from the date of the Notice of Termination for Public Convenience; (b) the Long Stop Date; or (c) receipt of ERC’s written notice that ERC elects to waive the 180 Day period described in (a) above, which shall be delivered in accordance with Section 10.3. During the period between the Notice of Termination for Public Convenience and the effective date of termination, the following shall apply:

.1 ERC shall cease development of Work Packages unless ERC is requested by VDOT to continue development of Work Packages pursuant to the Notice of

Termination of Public Convenience and ERC elects to continue development of Work Packages.

.2 ERC may, at its sole cost, meet and confer with VDOT regarding VDOT's election to terminate this Agreement pursuant to Section 5.2.3 and provide VDOT with any information or proposals which ERC seeks VDOT to consider as an alternative to such termination.

.3 After consideration of such information or proposals, VDOT, in its sole discretion, may withdraw the Notice of Termination for Public Convenience, thereby permitting ERC to continue with Project development activities under the terms of this Agreement. ERC shall be eligible for reimbursement of those costs incurred or accrued in providing such additional information or proposal to VDOT at the Financial Closing Date pursuant to Section 4.1.3, but such costs shall not be paid by VDOT under the terms of this Agreement.

.4 If VDOT has not withdrawn the Notice of Termination for Public Convenience by the effective date of termination, this Agreement shall terminate. ERC shall reimburse VDOT for its costs and expenses incurred or accrued in reviewing such additional information or proposals provided by ERC from the date on which VDOT delivered the Notice of Termination for Public Convenience until the effective date of termination and VDOT shall pay to ERC the termination payment described in Section 5.2.3.2 below.

.2 If this Agreement is terminated for public convenience, VDOT shall, in addition to paying progress amounts outstanding, pay to ERC: (i) any amounts due pursuant to a Compensation Event and (ii) the amounts set forth below which in the aggregate shall not exceed \$10 million for External Cost and \$9 million for Internal Cost (excluding any amounts due pursuant to a Compensation Event):

.1 for Work Packages completed as of the date on which VDOT delivers the Notice of Termination for Public Convenience and approved by VDOT, that 50 percent portion of External Cost not previously paid to ERC by VDOT pursuant to Section 4.1.2 *plus* the applicable Internal Cost;

.2 for partially completed Work Packages, an amount equal to the applicable Internal Cost incurred or accrued by ERC, *plus* the total External Cost incurred or accrued by ERC as of the date on which VDOT delivers the Notice of Termination for Public Convenience; *provided* said amount is in excess of the 20 percent progress payment paid by VDOT for initiation of such Work Packages pursuant to Section 4.5.1.1; *provided further* that if the External Cost incurred or accrued by ERC is less than the 20 percent progress payment paid by VDOT pursuant to Section 4.5.1.1, VDOT shall subtract the amount of such overpayment from the total amount payable to ERC pursuant to this Section 5.2.3.2; and

.3 for partially completed Work Packages which VDOT, in its sole discretion, by writing requests ERC to complete prior to the effective date of termination and ERC accepts VDOT's request and agrees to complete the Work Packages, that remaining portion of External Cost and the applicable Internal Cost not previously paid to ERC by VDOT pursuant to Section 5.2.3.2.2 above.

**.4 Termination by Mutual Agreement.** VDOT and ERC may mutually agree in writing to end the contractual relationship established under this Agreement and waive and forego any and all rights, benefits, and obligations between and among them under this Agreement. If this Agreement is terminated for mutual agreement, VDOT shall, in addition to paying any progress amounts outstanding, pay to ERC: (i) any amounts due pursuant to a Compensation Event and (ii) the amounts set forth below which in the aggregate shall not exceed \$10 million for External Cost and \$9 million for Internal Cost (excluding any amounts due pursuant to a Compensation Event):

.1 for Work Packages completed as of the date of termination and approved by VDOT which VDOT, in its sole discretion, elects to purchase, that 50 percent portion of External Cost not previously paid to ERC by VDOT pursuant to Section 4.1.2; and

.2 for partially completed Work Packages which VDOT, in its sole discretion, by writing requests ERC to complete prior to the effective date of termination and ERC accepts VDOT's request and agrees to complete the Work Packages, that remaining portion of External Cost not previously paid to ERC and the applicable Internal Cost.

**.5 Termination by VDOT Arising from Default of ERC.** If there is an Event of Default by ERC under this Agreement, VDOT shall have the right to terminate this Agreement after affording ERC the opportunity to cure the default as provided below.

.1 Events of Default. Each of the following shall constitute an Event of Default by ERC:

.1 failure to perform any material obligations under this Agreement;

.2 abandonment of the Project;

.3 failure to promptly commence performance of services under this Agreement within 30 Days of the Agreement Date;

.4 a material inaccuracy in any representation or warranty made by ERC in this Agreement;

.5 commencement of any insolvency, liquidation, bankruptcy, reorganization, proceeding arising from insolvency, or the appointment of a trustee, receiver or liquidator, or other proceeding of any kind under Applicable Law indicating a substantial risk that ERC is or may be unable to fund and/or perform any and all of the obligations of the Project as contemplated in this Agreement;

.6 assignment or attempted assignment of all or part of its interest in this Agreement without the prior written consent of VDOT;

.7 failure to maintain ERC Qualifications;

.8 failure to maintain the required insurance as set forth herein;

.9 ERC, its Key Members, or any of their respective officers, directors, or Administering Employees having been jointly or individually (a) debarred or prohibited from participating in a federally funded project, (b) debarred by VDOT as a result of a violation of VDOT's debarment policy set forth in Exhibit D (which shall apply to the Project), or (c) debarred by any other agency of the Commonwealth; or

.10 ERC, its Key Members, or any of their respective officers, directors, or Administering Employees having been indicted or convicted of, or pleading guilty or *nolo contendere* to, a violation of Applicable Law involving fraud, conspiracy, collusion, bribery, perjury, or material misrepresentation, as a result in whole or in part of activities relating to any project in the Commonwealth.

.2 Notice of Default and Cure. If VDOT elects to exercise its right to terminate for default by ERC, it shall provide written notice of the default to ERC, including a detailed statement describing the event(s) of the default (“Notice of ERC Default”). ERC shall have a period of 60 Days from receipt of the Notice of ERC Default in which to cure the default; *provided however*, that: (a) with the exception of a default under Section 5.2.5.1.6, if the default is of such a nature that the cure cannot with diligence be completed within such time period and (b) ERC has commenced meaningful steps to cure, as agreed to by VDOT, immediately after receiving the Notice of ERC Default, then ERC may have such additional period of time as reasonably necessary to cure the default not to exceed 180 Days from the Notice of ERC Default.

.3 VDOT Remedies for ERC Default. If the default by ERC has not been fully cured within the applicable cure period, then VDOT shall have the right, in its sole discretion, to terminate this Agreement by issuing a notice of such termination (“Notice of Termination for ERC Default”), whereupon VDOT shall then have the following remedies:

.1 Payment to VDOT for Monies Paid under this Agreement. ERC shall pay to VDOT, within 30 Days after the effective date of termination, its costs and expenses incurred or accrued and documented prior to the date of the Notice of Termination for ERC Default for which VDOT would have been entitled to receive reimbursement pursuant to Section 4.1.3, provided that such payment shall not exceed \$2 million.

.4 ERC Compensation for ERC Default. If this Agreement is terminated by VDOT for ERC Default,

VDOT shall, in addition to paying any progress amounts outstanding, pay to ERC: (i) any amounts due pursuant to a Compensation Event and (ii) the amounts set forth below which in the aggregate shall not exceed \$10 million (excluding any amounts due pursuant to a Compensation Event):

.1 for Work Packages completed as of the date on which VDOT delivers the Notice of Termination for ERC Default and approved by VDOT which include: 10 percent design; traffic studies and reports; asset condition surveys and reports; and completed geotechnical studies and reports, that 50 percent portion of External Cost not previously paid to ERC by VDOT pursuant to Section 4.1.2;

.2 for partially completed Work Packages which include: 10 percent design; traffic studies and reports; asset condition surveys and reports; and completed geotechnical studies and reports, an amount equal to the External Cost incurred or accrued by ERC as of the date on which VDOT delivers the Notice of Termination for ERC Default *minus* the 20 percent progress payment that was made by VDOT for the initiation of such Work Packages pursuant to Section 4.5.1.1; *provided*, that if the External Cost incurred or accrued by ERC is less than the 20 percent progress payment paid by VDOT pursuant to Section 4.5.1.1, VDOT shall subtract the amount of such overpayment from the total amount payable to ERC pursuant to this Section 5.2.5.4.2;

.3 for Work Packages, other than the Work Packages set forth in Section 5.2.5.4.1 above, completed as of the date on which VDOT delivers the Notice of Termination for ERC Default and approved by VDOT, which VDOT, in its sole discretion, elects to purchase, that 50 percent portion of External Cost not previously paid to ERC by VDOT pursuant to Section 4.1.2; and

.4 for partially completed Work Packages, other than the Work Packages set forth in Section 5.2.5.4.2 above, that VDOT, in its sole discretion, elects to purchase, an amount equal to the total

External Cost incurred and accrued by ERC as of the date on which VDOT delivers the Notice of Termination for ERC Default *minus* the 20 percent progress payment that was made by VDOT at the initiation of such Work Packages pursuant to Section 4.1.2; *provided*, that if the External Cost incurred or accrued by ERC is less than the 20 percent progress payment paid by VDOT pursuant to Section 4.5.1.1, VDOT shall subtract the amount of such overpayment from the total amount payable to ERC pursuant to this Section 5.2.5.4.4.

.5 A termination by VDOT pursuant to Section 5.2.5 which is later determined to have constituted a wrongful termination shall be deemed to have been a termination pursuant to Section 5.2.3 for the sole purpose of calculating the compensation owed to ERC by VDOT.

.6 **Termination by ERC Arising from VDOT Default.** If there is an Event of Default by VDOT under this Agreement, ERC shall have the right to terminate this Agreement after affording VDOT the opportunity to cure the default as provided below.

.1 **Events of Default.** Each of the following shall constitute an Event of Default by VDOT:

.1 failure to perform any material obligations under this Agreement;

.2 a material inaccuracy in any representation or warranty made by VDOT in this Agreement; or

.3 the enactment by the General Assembly of a law which: (a) the Commonwealth intends to impact or does in fact impact only this Agreement and (b) materially impairs the rights of ERC under this Agreement.

For the avoidance of doubt, except as provided in Section 5.2.6.3, ERC hereby acknowledges that no act or omission of Governmental Authorities, other than VDOT, shall be construed to constitute an event of default by VDOT.

.2 **Notice of Default and Cure.** If ERC elects to exercise its right to terminate this Agreement for default of VDOT, ERC shall provide written notice of the default to

VDOT, including a detailed statement describing the event(s) of default (“Notice of VDOT Default”). VDOT shall have a period of 60 Days from receipt of the Notice of VDOT Default to cure the default; *provided however*, that if a VDOT default is of such a nature that the cure cannot with diligence be completed within such time period and VDOT has commenced meaningful steps to cure immediately after receiving the Notice of VDOT Default, then VDOT may have such additional period of time as is reasonably necessary to cure the default not to exceed 180 Days from the Notice of VDOT Default.

**.3 ERC Remedies for VDOT Default.** If the default by VDOT has not been cured in accordance with Section 5.2.6.2 above, ERC shall have the right, in its sole discretion, to terminate this Agreement by issuing a notice of termination (“Notice of Termination for VDOT Default”). If ERC terminates this Agreement for VDOT default, VDOT shall, in addition to paying any progress amounts outstanding, pay to ERC on the effective date of termination: (i) any amounts due pursuant to a Compensation Event and (ii) the amounts set forth below which in the aggregate shall not exceed \$10 million for External Cost and \$9 million for Internal Cost (excluding any amounts due pursuant to a Compensation Event):

.1 for Work Packages completed as of the date on which ERC delivers the Notice of Termination for VDOT Default and approved by VDOT, that 50 percent portion of External Cost not previously paid to ERC by VDOT pursuant to Section 4.1.2 *plus* the applicable Internal Cost;

.2 for partially completed Work Packages, an amount equal to the applicable Internal Cost incurred or accrued by ERC, *plus* the total External Cost incurred or accrued by ERC as of the date on which VDOT delivers the Notice of Termination for VDOT Default; *provided* said amount is in excess of the 20 percent progress payment paid by VDOT for initiation of such Work Packages pursuant to Section 4.5.1.1; *provided further* that if the External Cost incurred or accrued by ERC is less than the 20 percent progress payment paid by VDOT pursuant to Section 4.5.1.1, VDOT shall subtract the amount

of such overpayment from the total amount payable to ERC pursuant to this Section 5.2.6.3.2; and

.3 for partially completed Work Packages which VDOT, in its sole discretion, by writing requests ERC to complete prior to the effective date of termination and ERC accepts VDOT's request and agrees to complete the Work Packages, that remaining portion of External Cost and the applicable Internal Cost not previously paid to ERC by VDOT pursuant to Section 5.2.6.3.2 above.

**5.3. Delivery of Project Deliverables on Termination.** On the effective date of termination of this Agreement for any reason, ERC shall have delivered to VDOT a copy of any then outstanding Work Packages, Project Deliverables, any partially completed portions thereof, Work Product, and Proprietary Work Product. Any amounts payable to ERC for such Work Packages, Project Deliverables, any partially completed portions thereof, Work Product, or Proprietary Work Product shall be made in accordance with this Article 5.

**5.4. Liability after Termination.** If this Agreement is terminated by reason other than default, thereafter no Party shall have any further obligation or liability to any other Party other than for performance of their respective obligations expressly stated in this Agreement to survive termination or by their sense and context are intended to survive termination. If this Agreement is terminated for default, such termination shall not excuse the defaulting Party from any continuing obligation or liability arising out of such default as provided in this Agreement.

**5.5. Exclusive Termination Remedies.** This Article 5, together with the express provisions on termination, set forth the entire and exclusive provisions and rights of VDOT and ERC regarding termination of this Agreement and any and all other rights to terminate at law or in equity are hereby waived to the maximum extent permitted by Applicable Law. Notwithstanding any other provision, any amounts payable pursuant to this Article 5 shall be subject to Section 10.11.

**5.6. Payment Upon Termination.** Upon the effective date of termination of this Agreement for any reason, ERC shall submit to VDOT an invoice setting forth the payment due to ERC. VDOT shall make payment to ERC pursuant to Section 4.6.

## **ARTICLE 6 RECORDS AND AUDIT RIGHTS**

### **6.1. Rights to Project Work Product and Other Documents**

.1 All Work Product prepared or procured by or on behalf of VDOT for the development of the Project, excluding Work Packages, Project Deliverables, Work Product, and Proprietary Work Product developed by ERC

pursuant to this Agreement, shall be and remain the exclusive property of VDOT. However, subject to Section 6.2, VDOT shall make available to ERC upon ERC's request, without charge and without representations or warranties of any kind, any publicly available documents in the possession of VDOT relating to the planning, design, engineering and permitting of the Project.

.2 Prior to the expiration or earlier termination of this Agreement, all Work Packages, Project Deliverables, Work Product, and Proprietary Work Product prepared by or on behalf of ERC under the terms of this Agreement shall be and remain the exclusive property of ERC, notwithstanding any delivery of copies thereof to VDOT. Upon ERC's receipt of payment from VDOT, VDOT shall have the full and unencumbered right to use the Work Packages, Project Deliverables, any partially completed portions thereof, and Work Product; *provided however*, VDOT shall not be permitted to disclose publicly any Proprietary Work Product as part of a future solicitation for the development and/or operation of the Project.

.3 Subject to payment by VDOT in accordance with the terms hereof, ERC shall grant to VDOT an irrevocable, non-exclusive, non-transferable, perpetual, royalty-free license to use the Proprietary Work Product incorporated into Work Product; *provided however*, that VDOT shall execute a confidentiality agreement, the terms of which shall be agreed-upon by the Parties.

.4 Except as otherwise provided herein, VDOT's use of Work Product following termination of this Agreement on any subsequent procurement by VDOT for the Project or another project shall be at VDOT's sole risk, and ERC neither warrants nor represents that the Work Product is suitable for use on a project without modification. VDOT waives any rights to seek recovery from ERC and its subcontractors and consultants, and such parties shall have no liability, whether in contract, tort, strict liability, or otherwise, for any claims, damages, liabilities, losses, and expenses arising out of or resulting from VDOT's use of Work Product following termination of this Agreement. If this Agreement is terminated pursuant to Section 5.2.1, the Parties' use of Work Product during the term of a CA shall be in accordance with the terms of the CA.

## **6.2. Public Records**

.1 All Work Packages, Project Deliverables, and Work Product VDOT owns pursuant to this Agreement and any document of which VDOT obtains a copy, as well as any memoranda, staff evaluations, or other records prepared by or for VDOT for the evaluation, development and negotiation of proposals filed under the PPTA (with respect to the Project, such memoranda, evaluations or records, collectively, "PPTA Records"), may be considered public records under the Virginia Public Records Act, Virginia Code §§42.1-76 *et seq.*, as in effect from time to time, or official records under the Virginia Freedom of Information Act, Virginia Code §§2.2-3700 *et seq.*, as in effect from time to time

(the “Virginia Freedom of Information Act”), and as such may be subject to public disclosure.

.2 If ERC believes that any Work Package, Project Deliverables, Work Product, or any document subject to transmittal to VDOT under the terms of this Agreement contains proprietary or confidential information or trade secrets that are exempt or protected from disclosure pursuant to Applicable Law, ERC shall comply with applicable provisions of the Virginia Freedom of Information Act (“FOIA”), including without limitation Virginia Code §2.2-3705.6 or any successor thereto then in effect, in connection with transmittal of such information to VDOT.

.3 Should any Work Package, Project Deliverable, Work Product, or PPTA Records previously determined by VDOT to be exempt become the subject of a request for public disclosure, VDOT shall respond in accordance with Applicable Law and shall involve ERC as follows:

.1 VDOT shall use reasonable efforts to provide timely written notice to ERC of such request and the date by which it anticipates responding.

.2 ERC must then assert in writing to VDOT any claim that such records contain proprietary information that is exempt from disclosure under FOIA, or is subject to protection pursuant to Virginia Code §59.1-339 or other Applicable Law so that VDOT may consider such assertion in responding to the requester, *provided* that if ERC fails to make such assertion within five Days after the date of receipt by ERC of VDOT’s notification referred to above, VDOT shall have the right to make such disclosure.

.3 If ERC makes a timely assertion that the requested records are exempt from disclosure or otherwise protected under Applicable Law, upon consultation with ERC to agree upon reasonable efforts and legal cost, at the sole expense of ERC, VDOT and ERC shall seek judicial declaration of the rights of the Parties. Until such declaration is made, VDOT shall, to the extent permitted by Applicable Law, maintain the confidentiality of such records.

.4 If VDOT’s denial of a request for disclosure of an Work Package, Project Deliverable, Work Product, or PPTA Record is challenged in court, ERC shall assist VDOT in its defense and shall indemnify VDOT for any and all damages assessed and third party costs (including VDOT’s attorney’s fees and related costs) VDOT reasonably incurs in such defense including any attorney’s

fees assessed against VDOT or any such other Commonwealth department or agency.

.5 In no event, however, shall VDOT be liable to ERC as a result of any disclosure of such records by VDOT in compliance with the provisions of this Section 6.2.3 and Applicable Law; *provided however*, that if at any time VDOT in its reasonable discretion determines there to be a conflict between any provision of this Section 6.2.3 and Applicable Law, VDOT shall provide timely notice of such conflict to ERC, and the Parties shall comply with Applicable Law.

**6.3. Records and Audit Rights.** ERC shall file and maintain a complete set of all books and records, which shall include an accounting of External and Internal Cost for each Work Package, prepared or employed by ERC in its management, scheduling, cost accounting, and otherwise with respect to the Project. Upon 48 hours' prior written notice by VDOT, ERC shall allow VDOT access to, and the right to copy, such books and records as VDOT may request, but only as necessary and appropriate in connection with work to be performed pursuant to this Agreement and the resolution of disputes; *provided*, however, that no written notice shall be required by VDOT if VDOT has a good faith suspicion either ERC or its employees, subcontractors, or agents has committed, or is in the process of committing, fraud. FHWA shall have such audit rights, if any, respecting the Parties in the Project as shall be provided in accordance with applicable federal laws and regulations.

## **ARTICLE 7 DELAY AND COMPENSATION EVENTS**

### **7.1. Delay Events.**

.1 If, during Phase 2 of this Agreement, ERC experiences a Delay Event that: (i) is attributable to acts, omissions conditions, events, or circumstances beyond ERC's reasonable control; (ii) is due to no fault of ERC; (iii) causes a delay to the Project Schedule which, despite the exercise of reasonable efforts, could not have been avoided by ERC; and (iv) impacts the critical path of the Project Schedule (as reflected on the most recent monthly Project Schedule update and the Time Impact Analysis), ERC may request an adjustment to the Project Schedule and/or an extension of the Long Stop Date, in accordance with this Section 7.1.

.2 Delays of ERC subcontractors shall be deemed to be within the reasonable control of ERC unless such delays are themselves excusable in accordance with Section 7.1.1.

.3 As a condition precedent to ERC receiving an adjustment to the Project Schedule and/or an extension of the Long Stop Date, ERC shall provide written notice to VDOT as soon as practicable, but in any event within 30 Days after the occurrence of the Delay Event, which includes the following in reasonable detail: (i) the Delay Event and its date of occurrence; (ii) the basis of the request for an adjustment to the Project Schedule and/or the extension of the Long Stop Date; and (iii) an estimate of the impact to the Project Schedule and/or the Long Stop Date (“Delay Event Notice”). ERC also shall submit a Time Impact Analysis pursuant to Section 7.3.

.4 If ERC has not provided Delay Event Notice to VDOT pursuant to Section 7.1.3 above, ERC shall be deemed to have forever waived its claim for an adjustment to the Project Schedule and/or an extension of the Long Stop Date with respect to such Delay Event.

## **7.2. Compensation Events.**

.1 If, during Phase 2 of this Agreement, ERC experiences a Compensation Event, ERC may request an appropriate adjustment to its External Cost and Internal Cost in accordance with this Section 7.2.

.2 As a condition precedent to ERC receiving an appropriate adjustment to the amount of External Cost and Internal Cost eligible for payment by VDOT pursuant to Section 7.2.1, ERC shall provide written notice to VDOT as soon as practicable, but in any event within 30 Days after the occurrence of the Compensation Event, which includes the following in reasonable detail: (i) the Compensation Event and its date of occurrence; (ii) the basis of the request for compensation; and (iii) an estimate of the impact to the External Cost and Internal Cost as defined in the Work Plan for those Project Deliverables affected by the Compensation Event (“Compensation Event Notice”).

.3 Within 30 Days of receipt of the Compensation Event Notice, ERC and VDOT shall commence good faith negotiations to determine the amount of the adjustment to ERC’s External Cost and Internal Cost. If after 30 Days of good faith negotiations the Parties are unable to agree upon the amount of the adjustment, either Party may terminate such negotiations and request the dispute be resolved in accordance with Article 9. During the course of the dispute resolution process, VDOT shall make interim payments to ERC on a monthly basis for the reasonable, documented External Cost and Internal Cost for Compensation Events, subject to subsequent payment adjustment as may be determined upon resolution of the dispute.

.4 ERC shall take all steps reasonably necessary to mitigate the impact to its External Cost and Internal Cost attributable to any Compensation Event.

.5 If ERC has not provided Compensation Event Notice to VDOT pursuant to Section 7.2.2 above, ERC shall be deemed to have forever waived its claim for compensation with respect to such Compensation Event.

.6 Payments made to ERC in accordance with Section 7.2 shall be in addition to any payments required Section 4.1.2 and shall not be subject to the \$10 million limitation set forth in Section 4.1.2.

### **7.3. Time Impact Analysis for Proposed Time Extensions.**

.1 If ERC claims that any event justifies an adjustment to the Project Schedule and/or an extension of the Long Stop Date, ERC shall submit to VDOT a written Time Impact Analysis (“TIA”) establishing the influence of the event on the latest approved Project Schedule update. The TIA shall demonstrate: (i) the time impact based on the date the event occurred; (ii) the status of the work at such point in time; and (iii) the time computation of all affected activities. Upon approval by VDOT, the event shall be included in the next Project Schedule update.

.2 Activity delays shall not automatically mean that an adjustment to the Project Schedule and/or an extension of the Long Stop Date is warranted or due ERC. The Parties recognizes that certain events will not affect existing critical activities or cause non-critical activities to become critical, and that such events may result in only absorbing a part of the available total float that may exist within an activity chain of the network, thereby not causing any effect on the Project Schedule. Adjustments to the Project Schedule and/or extensions of the Long Stop Date will be granted only to the extent the equitable time adjustments to the activity or activities affected by the event exceeds the total float of an activity or path and extends the Project Schedule.

.3 Float is not for the exclusive use or benefit of either VDOT or ERC, but rather shall be used for the benefit of the overall Project. Activity splitting or float suppression techniques will not be permitted.

.4 Two copies of each TIA shall be submitted in accordance with this Article 7 along with a written proposal for any requested adjustment to the Project Schedule and/or an extension of the Long Stop Date within 10 days from the original notice as provided in Section 7.1.3 above.

.5 In cases where ERC does not submit a TIA within the time requirements stated above, it shall be considered a waiver of any request for an adjustment to the Project Schedule and/or extension of the Long Stop Date.

.6 Approval or rejection of each TIA by VDOT shall be made within 10 Days after receipt of each TIA, unless subsequent meetings and discussions are necessary and agreed to in writing by the Parties. Upon approval, a copy of the

TIA signed by VDOT shall be returned to ERC, and incorporated into the next Project Schedule update.

**ARTICLE 8**  
**INDEMNIFICATION AND INSURANCE REQUIREMENTS**

**8.1. Indemnification**

.1 **General.** ERC shall indemnify, defend, and hold harmless the Commonwealth, VDOT, its officers, agents and employees from and against any and all damages, claims, suits, judgments, expenses, liability, actions and costs of every name and description for bodily injury (including death) or damages to tangible property caused by (i) any negligent act or omission in the performance of services by ERC, including, without limitation, those which it chooses to deliver through its subcontractors, agents or employees, of the services under this Agreement; or (ii) by the failure of ERC to perform the services with the same degree and standard of care and skill normally expected and provided in the performance of the same or similar service under the same conditions, *provided, however,* that indemnification under this Section 8.1.1 shall be limited to Third Party Claims.

.2 **Violation of Law, Patent or Copyright; Fraud.** ERC shall indemnify, protect, defend, hold harmless and release the Commonwealth and VDOT from and against any and all losses, damages, costs, including reasonable attorneys' fees, from Third Party Claims arising out of the following:

.1 any violation by ERC or its subcontractors, agents or employees of laws, regulations and ordinances in connection with, relating to or otherwise arising out of performance under this Agreement;

.2 infringement by ERC or its subcontractors, agents, or employees (excluding third party equipment and software vendors providing commercially available equipment or software, *provided* that ERC selects such vendors with commercially reasonable care and obtains commercially reasonable licenses and patent indemnification from such vendors that expressly benefit VDOT and *provided further* that such equipment or software has not been modified for use with respect to the Project) of any actually or allegedly patented, copyrighted, trademarked, service-marked or other proprietary materials, equipment, devices or processes (except with respect to any particular design process or the product of a particular manufacturer or manufacturers specified or required by VDOT); and

.3 fraud or intentional misrepresentation by ERC or its subcontractors, agents or employees in connection with or otherwise arising out of its performance under this Agreement.

.3 **Acts by Other Party.** To the fullest extent permitted by Applicable Law, ERC's duty to indemnify and defend excludes any portion of liability on a claim that is attributable to the negligent acts or omissions of or to any failure by the CTB, the Commissioner, the Commonwealth, or VDOT, their respective agents or employees, elected representatives, appointed officials and any authorized agents or representatives thereof (collectively the "State Indemnitees" and each a "State Indemnitee") to comply with this Agreement, NEPA or the PPTA. If the negligent acts or omissions of a State Indemnitee has contributed to a loss (in whole or in part), ERC shall not be obligated to indemnify State Indemnitees for the proportionate share of such claim caused thereby.

.4 **Notice of Claim.** If VDOT receives notice of or otherwise has actual knowledge of a claim which it believes is within the scope of ERC's indemnification obligation under Section 8.1, it shall by writing as soon as practicable (a) inform ERC of such claim; (b) send to ERC a copy of all written materials VDOT has received asserting such claim; and (c) notify ERC that either (i) the defense of such claim is being tendered to ERC or (ii) VDOT has elected to conduct its own defense for a reason set forth in Section 8.1.9.

.5 **Insurance Defense.** If the insurer under any applicable insurance policy accepts tender of defense, ERC and VDOT shall cooperate in the defense as required by the insurance policy. If no defense is provided by insurers under potentially applicable insurance policies, then Sections 8.1.7, 8.1.8, 8.1.9 and 8.1.10 shall apply.

.6 **Notice from ERC.** If the defense is tendered to ERC, it shall within 20 Days of said tender deliver to VDOT a written notice stating that ERC (a) accepts the tender of defense and confirms that the claim is subject to full indemnification hereunder without any "reservation of rights" to deny or disclaim full indemnification thereafter, (b) accepts the tender of defense but with a "reservation of rights" in whole or in part or (c) rejects the tender of defense if it reasonably determines it is not required to indemnify against the claim under Section 8.1. If such notice is not delivered within such 20 Days, the tender of defense shall be deemed rejected.

.7 **Legal Counsel; Defense.** If ERC accepts the tender of defense under Section 8.1.7, ERC shall have the right to select legal counsel for the State Indemnitees, subject to reasonable approval of the Commonwealth's Attorney General, and shall otherwise control the defense of such claim, including settlement, and bear the fees and costs of defending and settling such claim. During such defense: (a) ERC shall at its expense, fully and regularly inform

VDOT of the progress of the defense and of any settlement discussions; and (b) VDOT shall, at ERC's expense for all of VDOT's reasonable out-of-pocket third party expenses, fully cooperate in said defense, provide to ERC all materials and access to personnel it requests as necessary for defense, preparation and trial and which or who are under the control of or reasonably available to VDOT and maintain the confidentiality of all communications between it and ERC concerning such defense to the extent allowed by Applicable Law.

.8 **VDOT Counsel and Defense.** VDOT shall be entitled to select its own legal counsel and otherwise control the defense of such claim if: (a) the defense is tendered to ERC and it refuses the tender of defense, or fails to accept such tender within 20 Days, or reserves any right to deny or disclaim such full indemnification thereafter, or (b) VDOT, at the time it gives notice of the claim or at any time thereafter, reasonably determines that (i) a conflict exists between it and ERC which prevents or potentially prevents ERC from presenting a full and effective defense or (ii) ERC is otherwise not providing an effective defense in connection with the claim and/or ERC lacks the financial capability to satisfy potential liability or to provide an effective defense. VDOT may assume its own defense pursuant to Section 8.1.8(b) by delivering to ERC written notice of such election and the reasons therefore. A refusal of, or failure to accept, a tender of defense may be treated by VDOT as a claim against ERC subject to resolution pursuant to Article 9.

.9 **Reimbursement of Costs.** If VDOT is entitled and elects to conduct its own defense pursuant hereto, all reasonable costs and expenses it incurs in investigating and defending any claim for which it is entitled to indemnification hereunder (and any settlements or judgments resulting therefrom, including any interest thereon) shall be reimbursed by ERC after completion of the proceeding. Notwithstanding the foregoing, if VDOT elects to conduct its own defense and it is later determined that no indemnification obligation existed as to the particular claim, VDOT shall pay its own costs and expenses relating thereto. In addition, if VDOT elects to conduct its own defense because it perceives a conflict of interest, VDOT shall pay its own costs and expenses relating thereto.

.10 **Right to Settle, Etc.** In the event VDOT is entitled to and elects to conduct its own defense, then it shall have the right to settle or compromise the claim with ERC's prior written consent, which shall not be unreasonably withheld or delayed, or with approval of the court, and with the full benefit of ERC's indemnity.

.11 **Acceptance Not a Waiver.** Acceptance by VDOT of services or Project Deliverables hereunder shall not waive any of the rights of VDOT contained in this neither section, nor release or absolve ERC from any liability, responsibility or duty contained in this Section 8.1.

## 8.2. Required Insurance.

.1 **Insurance Coverages Required.** ERC shall provide and maintain, at its own expense, or cause its consultants or contractors to provide and maintain, the insurance coverages specified below, which need not be Project-specific coverages.

.1 **Workers' Compensation and Employer's Liability Insurance** with statutory workers' compensation coverage (Coverage A) limits and employer's liability (Coverage B) limits of \$1 million bodily injury by accident, each accident, and \$1 million bodily injury by disease, each employee. Coverage shall be extended to cover any claims under the United States Longshore and Harbor Workers' Compensation Act and the Jones Act.

.2 **Commercial General Liability Insurance**, including coverage for premises and operations, independent contractors, personal injury, product and completed operations, explosion, collapse and underground, and broad form contractual liability of limits of at least \$2 million per occurrence and \$4 million annual aggregate. VDOT is to be named as an additional insured on a primary, non-contributory basis.

.3 **Automobile Liability Insurance** with a limit of at least \$2 million combined single limit for bodily injury and property damage covering all owned (if any), non-owned, hired, or borrowed vehicles on site or off. VDOT is to be named as an additional insured on a primary, non-contributory basis.

.4 **Umbrella/Excess Liability Insurance** in excess of the underlying limits noted above for employer's liability, commercial general liability, and automobile liability in the amount of \$10 million per occurrence and in the annual aggregate.

.5 **Architects/Engineers Professional Liability Insurance** covering the lead design engineer for acts, errors, or omissions arising in connection with the work for not less than \$5 million any one claim and in the aggregate. Such insurance shall be maintained until the earlier of the execution of a CA by the Parties hereto or three years after the expiration or termination of this Agreement.

.6 **Contractor's Pollution Liability Insurance** to indemnify for bodily injury or property damage or amounts which ERC, its employee, its agents, or its subcontractors are legally obligated to pay for clean up/remediation work arising out of the work performed pursuant to the Interim Agreement, including coverage

for marine operations, and coverage for liabilities under the Oil Pollution Act of 1990 (OPA 90) and the Comprehensive Environmental Response, Liability and Compensation Act (CERCLA) for marine operations. Such insurance shall have minimum limits of \$5 million any one claim and in the aggregate and shall remain in full force and effect until the earlier of the execution of a CA by the Parties hereto or five years after the expiration or termination of this Agreement. VDOT is to be named as an additional insured on a primary, non-contributory basis.

.7 **Marine Protection and Indemnity Insurance** covering ERC and its consultants, contractors, and subcontractors providing protection and indemnity coverage with respect to bodily injury or property damage arising from marine operations including damage to piers, wharves, other fixed or movable structures and loss or damage to an other vessel or craft or property on such other vessel or craft. Such insurance shall have minimum limits of \$5 million (which may be complied with through scheduling this policy under the umbrella/excess liability insurance required above). VDOT is to be named as an additional insured on a primary, non-contributory basis.

.2 **General Requirements Applicable to Insurance.** The insurance which ERC is required to maintain under this Section 8.2:

.1 shall be provided by insurance companies authorized to do business in the Commonwealth with a minimum “*Best Rating*” of “*B+*”;

.2 shall be on terms approved by VDOT and shall not include any extraordinary exclusions, endorsements or alterations that would unnecessarily restrict or narrow coverage, including but not limited to any design-build exclusion or similar exclusion that could compromise coverages because of ERC’s use of the design-build delivery method ;

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

.4 other than for workers’ compensation insurance and automobile liability insurance, have each policy endorsed to the effect that VDOT and the other insureds shall not be prejudiced by an unintended and/or inadvertent error, omission or misdescription of the risk interest in property insured under the policies, incorrect

declaration of values, failure to advise insurers of any change of risk interest or property insured or failure to comply with a statutory requirement.

.3 **Proof of Coverage.** ERC shall provide to VDOT proof of coverage of insurance in the form of a certificate of insurance no later than 30 Days after execution of this Agreement and, if applicable, annually thereafter not later than 30 Days prior to policy renewal or replacement.

.4 **Adequacy of Coverage.** VDOT makes no representation that the limits of liability specified for any insurance policy to be carried pursuant to this Agreement are adequate to protect ERC against its undertakings under this Agreement, to VDOT, or any third party. No such limits of liability shall preclude VDOT from taking any actions as are available to it under this Agreement or Applicable Law.

## **ARTICLE 9 DISPUTE RESOLUTION**

**9.1. Administrative Process.** The Parties shall endeavor to resolve any dispute that may arise between them through good faith negotiations. If the dispute is not resolved to the mutual satisfaction of all Parties within 30 Days after written notification of a problem or claim, or such longer time as is mutually agreed, the dispute shall next be referred to the Steering Committee, as described below. The stated intent of the Steering Committee dispute process is, to the extent possible, resolve all disputes within the context of the Steering Committee, and without reference to litigation.

.1 The Party initiating the dispute shall submit to the Authorized Representative a written claim along with, if applicable, documents reflecting actual costs for material, labor and equipment, which shall set forth all facts, including all pertinent data and correspondence that may substantiate the claim. The Steering Committee shall meet within 30 Days after submission of the claim to review documentation and meet with any individuals who, in the opinion of the Steering Committee, have knowledge of or information regarding the dispute.

.2 If the dispute cannot be resolved by the Steering Committee at its meeting described in Section 9.1.1 above, the Party that initiated the dispute shall notify the Commissioner in writing, within 30 Days from date of the meeting of the Steering Committee, that it desires to appear before him or her, whether in person or through counsel, and present additional facts and arguments regarding the dispute. The Commissioner shall schedule and meet with VDOT and ERC within 30 Days after receiving the request, *provided* that such meeting may occur after 30 Days but not later than 60 Days after receiving the request by mutual agreement between VDOT, ERC, and the Commissioner.

Within 45 Days from the date of the meeting, the Commissioner, or his or designee, shall investigate the claim, including the additional facts presented, and notify VDOT and ERC in writing of the Commissioner's decision, *provided* that such 45 Days may be extended for up to another 30 Days by mutual agreement between VDOT, ERC, and the Commissioner. If the Commissioner deems that all or any portion of a claim is valid, the Commissioner shall have the authority to negotiate a settlement with ERC subject to the provision of Virginia Code §2.2-514.

.3 If ERC is dissatisfied with the decision of the Commissioner, it may institute a civil action as to such portion of the claim as is denied by the Commissioner in accordance with Virginia Code §33.1-387.

**9.2. Litigation.** All litigation between the Parties arising out of or pertaining to this Agreement or its breach shall be filed, heard, and decided in the Circuit Court of the City of Richmond, which shall be the exclusive jurisdiction and venue for any such civil actions brought by any Party against another Party.

**9.3. Attorney's Fees.** Each Party shall bear its own attorney's fees and costs in any dispute or litigation arising out of or pertaining to this Agreement, and no Party shall seek or accept an award of attorney's fees or costs.

**9.4. Declaratory Judgments.** As permitted by Virginia Code §56-568 as it exists on the Agreement Date hereof, the Parties expressly agree to waive and declare inapplicable any requirement under Virginia Code §56-569 that the State Corporation Commission issue a declaratory judgment regarding a material default (as defined in Virginia Code §56-569) as a prerequisite to either Party exercising any remedy available under this Agreement or Applicable Law.

## **ARTICLE 10 MISCELLANEOUS**

### **10.1. Assignment.**

.1 VDOT may transfer and assign its interests in the Project and this Agreement to any other public agency or public entity as permitted by law, *provided* that the successor or assignee has assumed all of VDOT's obligations, duties and liabilities under this Agreement and has provided ERC with reasonable assurance of its legal and financial authority, ability and resources to honor and perform the same.

.2 ERC shall not assign their rights or obligations under this Agreement without the prior written consent of VDOT, which consent shall not be unreasonably withheld.

.3 If any Party changes its name, such Party agrees to promptly furnish each of the other Parties with written notice of change of name and appropriate supporting documentation in accordance with Section 10.3.

**10.2. No Gift or Dedication.** Nothing contained in this Agreement shall be deemed to be a gift or dedication of any portion of the Project, the rights of way, or Project Deliverables to VDOT or the general public or for any public use or purpose whatsoever, or be deemed to create any rights in the Project, rights of way, or Project Deliverable except as expressly set forth herein.

**10.3. Notices.** Whenever under the provisions of this Agreement it shall be necessary or desirable for one Party to serve any notice, request, demand, report or other communication on another Party, the same shall be in writing and shall be effective for any purpose when actually received by the addressee or when served: (a) personally; (b) by independent, reputable, overnight commercial courier; (c) 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 (d) 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 VDOT: Virginia Department of Transportation  
1401 E. Broad Street  
Richmond, VA 23219  
Attn: Chief Engineer  
Facsimile: (804) 786-2940

*With copies to:* Virginia Department of Transportation  
1401 E. Broad Street  
Richmond, VA 23219  
Attn: Director, IPD  
Facsimile: (804) 786-7221

*and*

Virginia Department of Transportation  
Hampton Roads District  
Attn: Project Manager, Downtown  
Tunnel/Midtown Tunnel/MLK Project  
Facsimile: (757) 925-1618

*and*

Office of the Attorney General  
900 E. Main Street  
Richmond, VA 23219  
Attn: Senior Assistant Attorney General /  
Chief  
Transportation Section  
Facsimile: (804) 786-9136

If to ERC:

Elizabeth River Crossings LLC  
99 Canal Center Plaza, Suite 125  
Alexandria, VA 22314  
Attn: Chris Guthkelch

*With a copy to:*

c/o Macquarie Capital (USA) Inc.  
Attn: MacCap Advisors Legal Division  
125 W. 55th St.  
New York, NY 10019  
Attn: Pierre Mordacq

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 address or an additional and/or a different person to whom all such notices, requests, demands, reports and communications are thereafter to be addressed.

**10.4. Authorized Representatives.** Each of the Parties to this Agreement designate the individuals identified in Exhibit A as that Party's Authorized Representative, who shall be authorized to make decisions on behalf of, and to bind that Party, on matters relating to this Agreement, including the amendment, waiver or modification of any of the terms of this Agreement.

**10.5. Organization; Good Standing; Due Authorization; Binding Effect; Etc.**

.1 ERC represents and warrants that it is a limited liability company duly organized under the laws of its jurisdiction of organization, with full corporate power and authority to conduct its business as it is now being conducted, to own or use the properties and assets that it purports to own or use, and to perform all its obligations under the Agreement. ERC is duly qualified to do business as a foreign corporation and is in good standing under the laws of each state or other jurisdiction in which the ownership or use of the properties owned or used by it, or the nature of the activities conducted by it presently or in performance of the Agreement, requires such qualification.

.2 VDOT represents and warrants that it is an agency of the Commonwealth and has full power, right and authority to execute, deliver and perform its obligations under, in accordance with and subject to the terms and conditions of this Agreement.

.3 Each Person executing this Agreement on behalf of a Party represents and warrants that (a) he or she is duly authorized to execute this Agreement on behalf of the Party for whom that Person is executing the Agreement, (b) any requisite approvals for execution of this Agreement and performance of its obligations hereunder have been obtained by such Party, and (c) the Party is authorized and has the power to perform its obligations hereunder.

.4 Each Party represents and warrants that there is no action, suit, proceeding, investigation, indictment, or litigation pending and served on it which challenges its authority to execute, deliver or perform, or the validity or enforceability of, this Agreement, or which challenges the authority of the Party or person executing this Agreement, and that the Party has disclosed to the other Parties any pending and unserved or threatened action, suit, proceeding, investigation, indictment or litigation with respect to such matters of which the Party is aware.

.5 This Agreement shall be binding upon and shall inure to the benefit of the Parties and their respective legal representatives, successors and permitted assigns, and wherever a reference in this Agreement is made to any of the Parties, such reference also shall be deemed to include, wherever applicable, a reference to the legal representatives, successors and permitted assigns of such Party, as if in every case so expressed.

.6 Each Party represents and warrants that it is in material compliance with Applicable Law.

**10.6. Relationship of Parties.** The relationship of ERC to VDOT shall be one of independent contractors, not agents, partners, joint venturers or employees, and VDOT shall have no rights to direct or control the activities of ERC. Officials, employees and agents of VDOT shall in no event be considered employees, agents, partners or representatives of ERC, or vice versa.

**10.7. No Third Party Beneficiaries.** Nothing contained in this Agreement is intended or shall be construed as creating or conferring any rights, benefits or remedies upon, or creating any obligations of the Parties to, any person or entity not a Party.

**10.8. Waiver.** No custom or practice between the Parties in the administration of the terms of this Agreement shall be construed to waive or lessen the right of a Party to insist upon performance by any other Party in strict compliance with any other terms of this Agreement.

**10.9. No Brokers.** 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. To the extent permitted by Applicable Law, each Party agrees 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.

**10.10. Governing Law.** This Agreement shall be governed and construed in accordance with the laws of the Commonwealth.

**10.11. VDOT's Responsibility for Payment.** VDOT's payment of any compensation, monetary damages, award or other amount under this Agreement shall be conditioned upon appropriation by the General Assembly and allocation by CTB of the payment to ERC, as applicable, of such damages, compensation, award or amount. Subject to the provisions of Section 10.12, VDOT may defer any termination payment required under this Agreement for an additional 270 Days if VDOT determines, in its sole discretion, that such additional period is necessary to obtain financing or otherwise to obtain the necessary funds to make such payment.

**10.12. Interest on Payments Due.** Any undisputed amount not paid when due under this Agreement shall bear interest from the date such payment is due until payment is made at a variable rate per annum at all times equal to the Bank Rate in effect on the date such payment is due. Interest will be compounded annually and payable on the date on which the related overdue amount is paid.

**10.13. Use of Police Power.** Nothing in this Agreement limits the authority of VDOT to exercise its regulatory and police powers granted by law, including but not limited to its powers of condemnation with respect to all or any part of the Project, the Project Right of Way and any of the rights of ERC hereunder.

**10.14. Right to Oversee Work.** VDOT shall have the right at all times during the term of this Agreement to oversee the performance of ERC under this Agreement.

**10.15. Obligation to Refrain from Discrimination.** ERC shall conduct its activities in connection with the Project in compliance with all requirements imposed pursuant to: (a) the Fair Employment Contracting Act, Virginia Code §2.2-4200, *et seq.*; (b) any applicable provisions of Federal law and regulations; and (c) all other Applicable Laws, rules and regulations.

**10.16. Reserved Rights.** ERC's rights and interests in the Project and the rights of way shall be specifically limited only to such rights and interests which are necessary and required to perform the services required under this Agreement. ERC's rights and interests specifically exclude all Reserved Rights. All rights to own, lease, sell, assign, transfer, utilize, develop or take advantage of the Reserved Rights are hereby reserved to VDOT; and ERC shall not engage in any activity infringing upon the Reserved Rights. VDOT at any time may devote, use or take advantage of the Reserved Rights for any public purpose without any financial participation whatsoever by ERC. VDOT hereby reserves to itself all ownership, development, maintenance, repair, replacement, operation, use and enjoyment of, and access to, the Reserved Rights. No VDOT activity or improvement respecting Reserved Rights shall materially interfere with ERC's rights and obligations under this Agreement. If an Event of Default by ERC concerns a breach

by ERC of the provisions of this Section 10.14, in addition to any other remedies under this Agreement, VDOT shall be entitled to disgorgement of all profits from the prohibited activity and to sole title to and ownership of the prohibited assets and improvements. Notwithstanding anything contained in this Agreement, VDOT may elect, in its sole discretion, to undertake the development of improvements respecting Reserved Rights.

**10.17. VDOT Findings Under PPTA.** As of the Agreement Date, VDOT, as the responsible public entity with respect to the Project, has made or hereby makes findings and determinations set forth in Exhibit C.

**10.18. Guaranty Requirements.** ERC shall provide parent guarantee(s) to VDOT, in the form of Exhibit E, which will only apply to the obligations of this Agreement. As part of the negotiations of the CA and in addition to any other performance security requirements, parent guarantee(s) may be negotiated and extended as part of the execution of a CA.

**10.19. Waiver of Consequential Damages.** In no event shall the Parties be liable to one another for, and they each waive, any and all claims for indirect, incidental or consequential damages of any nature, whether in contract, tort (including negligence) or other legal theory; *provided, however*, that the foregoing shall not apply to or affect the liability of ERC or any of their directors, officers, employees or agents, arising out of fraud or intentional misrepresentation or any liability under Section 8.1.

**10.20. Survival.** All representations and warranties made in or pursuant to this Agreement shall be deemed continuing and made at and as of the Agreement Date and at and as of all other applicable times during the performance of any work services related to this Agreement. All representations and warranties made in or pursuant to this Agreement, unless provided otherwise, shall survive for 10 years beyond the expiration or earlier termination of this Agreement; *provided, however*, that the 10 year limitation on survival shall not apply in the event of fraud or a material misrepresentation with respect to a particular representation or warranty.

**10.21. Subpoena.** Except as provided for in Virginia Code §33.1-4, ERC may subpoena any VDOT personnel; *provided, however*, that ERC shall pay for such personnel's time at his/her fully burdened rate (including overhead and fringe benefits), together with all out-of-pocket expenses incurred, no later than 30 Days after receipt by ERC of an invoice reasonably documenting the amount of such time provided and expenses. If VDOT subpoenas personnel of ERC in connection with any litigation, VDOT shall pay for such personnel's time at his/her fully burdened rate together with all out-of-pocket expenses incurred determined in accordance with VDOT's Guidelines for the Procurement and Management of Professional Services in effect on the date hereof, no later than 30 Days after VDOT's receipt of an invoice reasonably documenting the amount of such time provided and expenses, subject to Section 10.11.

## **10.22. Construction and Interpretation of Agreement.**

.1 This Agreement was carefully negotiated by the Parties, each with adequate representation by counsel, and shall not be interpreted or construed against the Party preparing it, and instead other rules of interpretation and construction shall be used.

.2 If any term or provision of this Agreement shall be held by a court of competent jurisdiction to be invalid or unenforceable, the remainder of this Agreement shall not be affected thereby and each other term and provision of this Agreement shall be valid and enforceable to the fullest extent permitted by law, *provided* that the deletion of the unenforceable provisions would not adversely affect the receipt of any material benefit by either Party hereunder.

## **10.23. Entire Agreement; Severability.**

.1 This Agreement (including exhibits hereto) constitutes the entire and exclusive agreement between the Parties relating to the specific matters covered herein and therein. All prior or contemporaneous verbal or written agreements, understandings, representations and/or practices relative to the foregoing are hereby superseded, revoked and rendered ineffective for any purpose. No verbal agreement or implied covenant shall be held to vary the terms hereof, any statute, law or custom to the contrary notwithstanding.

.2 If any provisions of this Agreement are rendered obsolete or ineffective in serving their purpose by changes in applicable law, passage of time, financing requirements or other future events or circumstances, the Parties agree to negotiate in good faith appropriate amendments to or replacements of such provisions in order to restore and carry out the original purposes thereof to the extent practicable; *provided however*, that no Party is obligated to agree to any amendment or replacement which would reduce its rights or enlarge its responsibilities under this Agreement in any material respect.

**10.24. Amendment.** This Agreement and any rights and obligations of the Parties thereto may be altered, amended or revoked only by an instrument in writing signed by the Authorized Representatives of each Party, or their respective successors or permitted assignees.

**10.25. Headings.** The Article and Section headings and the use of terms “Article” and “Section” in this Agreement are for convenience of reference only and shall not be deemed to alter or affect the meaning or interpretation of any provisions hereof.

**10.26. Counterparts.** This Agreement may be executed in two or more counterparts, each of which shall be deemed an original, but all of which together shall constitute one and the same instrument.

**10.27. Key Personnel and Key Members.**

.1 **Key Members and Key Personnel Identified.** The Key Members and Key Personnel are those identified in Exhibit A. ERC acknowledges that it was selected by VDOT to perform the services set forth in the Solicitation for Proposal and this Agreement in furtherance of ERC potentially developing and operating the Project based in part because of the experience, skill and qualifications of the Key Members and Key Personnel, respectively.

.2 **Addition, Substitution or Replacement of Key Members.** Key Members or Key Personnel may not be added, replaced or reassigned by ERC without prior written consent of VDOT, said consent which shall be based on a good faith consideration of all relevant circumstances and which shall not be unreasonably withheld. In the event that a Key Member or Key Personnel leaves the Project, or is required to be removed or replaced by ERC, then ERC shall promptly propose a substitute of comparable experience, skill and qualifications, which substitute shall be subject to the VDOT’s written approval, which approval shall be based on a good faith consideration of all relevant circumstances and which shall not be unreasonably withheld. In the event ERC proposes adding a Key Member or Key Personnel, it shall propose said Key Member or Key Personnel with its qualifications to VDOT. Following submission of the ERC proposed Key Member or Key Personnel, VDOT shall have 21 Days to object to newly proposed Key Member or Key Personnel. Any objection to the proposed Key Member or Key Personnel by VDOT shall be stated in writing with all reasons for the objection included as part of the notice to ERC. If VDOT does not object to the proposed Key Member or Key Personnel within the period set forth herein, the proposed Key Member or Key Personnel shall be deemed accepted by VDOT.

**10.28. Suspension and Debarment, Lobbying, and Anti-Collusion Certifications.**

.1 ERC and its Key Members shall provide the suspension and debarment certification required pursuant to 23 CFR 635.112(g), in the form attached hereto as Exhibit H, within 30 Days from the date hereof.

.2 ERC shall provide the lobbying certification required pursuant to 23 CFR 635.112(g) and the anti-collusion certification required pursuant to 23 CFR 635.112(f), in the form attached hereto as Exhibit H, within 30 Days from the date hereof.

.3 If a subcontractor or subconsultant to ERC is required to execute any of the certifications identified in this Section 10.28 pursuant to Applicable Law, ERC shall deliver to VDOT the executed certifications 10 Days prior to the commencement of work on the Project by such subcontractor or subconsultant.

*[Signatures on following pages]*

**IN WITNESS WHEREOF**, the Parties, intending to be legally bound, have executed this Agreement as of the date first written above.

**VIRGINIA DEPARTMENT OF TRANSPORTATION**,  
an agency of the Commonwealth of Virginia

By: \_\_\_\_\_  
David S. Ekern, P.E.  
Commonwealth Transportation Commissioner

Original with signatures on file in the  
Innovative Project Delivery Division

**ELIZABETH RIVER CROSSINGS LLC**, a Delaware  
limited liability company

By: \_\_\_\_\_

Name:

Title:

By: \_\_\_\_\_

Name:

Title:

Original with signatures on file in the Innovative  
Project Delivery Division

## **Exhibit A**

***Administering Employee*** means employees of ERC and the Key Members involved in the administration of Federal or Commonwealth funds.

***Agreement*** means the Interim Agreement executed by the Parties and dated January 7, 2010, including Exhibit A (“Definitions”), Exhibit B (“Phase One Project Deliverables”), Exhibit C (“Findings of Public Interest”), Exhibit D (“Department Debarment Policy”), Exhibit E (“Parent Guaranty”), Exhibit F (“Applicable Standards”), Exhibit G (“Budget”); and Exhibit H (“Form of Certifications”).

***Agreement Date*** means the date written on the cover page of the Agreement.

***Agreement Price*** means the compensation paid by VDOT to ERC for the development of Project Deliverables, as described in Section 4.1.

***Applicable Law*** means all laws, treaties, ordinances, judgments, decrees, injunctions, writs, and orders of any Governmental Authority, and all rules, the Commonwealth’s PPTA Implementation Guidelines in effect as of the Agreement Date, regulations, orders, and permits of any Governmental Authority having jurisdiction over the development of the Project, performance of the work, or the health, safety and environmental condition of the Project as the same may be in effect from time to time. Applicable Laws include, but are not limited to, the *Code of Virginia*, 1950, as amended, and the Uniform Relocation Assistance and Real Property Policies Act of 1970.

***Applicable Standards*** means the codes and standards as listed in Exhibit F.

***Application for Payment*** means the request for payment from ERC to VDOT as further described in Section 4.5

***Authorized Representative*** means: (i) for VDOT, the Chief Engineer; and (ii) for ERC, Chris Guthkelch and Pierre Mordacq.

***Bank Rate*** means the prime rate of interest announced publicly by *The Wall Street Journal* (or its successors) as the so-called “prime rate.”

***Change Order*** means a written instrument on VDOT Form C-10, issued after the Agreement Date, signed by VDOT, ERC, and, if applicable, FHWA stating the agreement of the Parties on the following:

- (a) the scope of the change in the work;
- (b) the amount of adjustment to the Internal Cost and External Cost; and
- (c) the extent of the adjustment to the Project Schedule.

**Commissioner** means the Commonwealth Transportation Commissioner or any successor in function.

**Commonwealth** means the Commonwealth of Virginia.

**Comprehensive Agreement (“CA”)** means a Comprehensive Agreement pursuant to the PPTA to develop and/or operate the Project among VDOT, and ERC as described in Section 2.3, and all exhibits thereto.

**Compensation Event** means any of the following events which cause an increase in the External Cost and the Internal Cost of a Work Package as shown in Exhibit B or the Work Plan, as applicable, in excess of \$1,000.00:

- (a) wrongful or negligent acts or omissions of VDOT, or anyone under VDOT’s control (including VDOT’s separate contractors); or
- (b) Change Orders which are requested by VDOT or a directive letter issued by VDOT.

**Compensation Event Notice** means the notice submitted by ERC pursuant to Section 7.2.2.

**Conceptual Proposal** means ERC’s Response to Solicitation for Conceptual Proposals, Downtown Tunnel/Midtown Tunnel/MLK Extension Project dated September 29, 2008.

**CTB** means the Commonwealth Transportation Board.

**Date of Commencement** is as defined in Section 3.1.1.1.

**Day(s)** mean calendar days, unless otherwise designated.

**Delay Event** means an event which delays performance of the work, including but not limited to the following:

- (a) acts or omissions of VDOT, or anyone under VDOT’s control (including VDOT’s separate contractors);
- (b) a Change Order caused by or requested by VDOT or a directive letter issued by VDOT;
- (c) suspension of the work by ERC pursuant to Section 4.7 of this Agreement;
- (d) wars; floods in excess of the base flood (meaning a flood or tide having a one percent chance of being exceeded in any given year); hurricane force winds; tornados; labor disputes; and earthquakes that cause ground accelerations in excess of AASHTO bridge design standards for the site; *provided*, that other than

floods in excess of the base flood, hurricane force winds, and tornados, any and all other weather or conditions resulting from weather shall not be considered Delay Events;

(e) a change in Applicable Law occurring after the Agreement Date that imposes additional requirements that directly and materially adversely impact performance of ERC's obligations and that could not have reasonably been anticipated by ERC; *provided*, that a change in any Federal or Commonwealth tax law shall not be considered a Delay Event; or

(f) a failure in obtaining, or a delay in obtaining, any Regulatory Approval or other authorization from a Governmental Authority, *provided*, that such failure to delay could not have been reasonably prevented by ERC.

***Delay Event Notice*** means the notice submitted by ERC pursuant to Section 7.1.3.

***ERC*** means Elizabeth River Crossings LLC, a limited liability company, and any successors and assigns permitted hereunder.

***ERC Qualifications*** means those technical and financial qualifications identified in the Solicitation for Conceptual Proposals, Downtown Tunnel/Midtown Tunnel/MLK Extension Project, through the Public-Private Transportation Act, dated May 20, 2008, issued by VDOT and amended on August 28, 2008, and ERC's Response to Solicitation for Conceptual Proposals, Downtown Tunnel/Midtown Tunnel/MLK Extension Project dated September 29, 2008, used for VDOT's evaluation of ERC's qualifications, which was the basis for the decision to advance ERC to Phase 5 of the VDOT PPTA procurement process pursuant to the Commonwealth's PPTA Implementation Guidelines. The qualification basis shall consist of (i) Key Personnel, (ii) Key Members, and (iii) the financial condition of ERC and its Key Members.

***External Cost*** means costs that are incurred by subcontractors or subconsultants retained by ERC for the development of Phase 2 Project Deliverables as identified in Exhibit B and/or the Work Plan. For purposes of this definition, ERC's member firms, including Macquarie Financial Holdings Limited and Skanska Infrastructure Development, Inc. and any of their respective affiliates, and SKW Constructors shall not be considered subcontractors or subconsultants retained by ERC.

***Feasibility Determination*** means the written determination by VDOT regarding the feasibility of the Project.

***Federal*** means of or relating to the central government of the United States of America.

***FHWA*** means the Federal Highway Administration of the United States Department of Transportation.

**Financial Closing Date** means the date on which documentation for the issuance of tax-exempt and/or taxable bonds and/or bank or other debt, payment of equity and the documents for the TIFIA Loan have been executed and delivered, and all conditions to the initial disbursement of funds and/or the issuance of bonds thereunder have been satisfied.

**Finding of Public Interest** means the finding(s) of the public's interest to enter into this Agreement, as further described in Exhibit C.

**General Assembly** means the General Assembly of the Commonwealth.

**Governmental Authority** means court, Federal, state, regional, and local government, department, commission, board, bureau, agency or other regulatory or governmental authority.

**Intellectual Property** means the books, records, algorithms and Software, and associated documentation used in connection with the Project, copyrights (including moral rights), trade marks (registered and unregistered), designs (registered, including applications, and unregistered), patents (including applications), circuit layouts, plant varieties, business and domain names, inventions, trade secrets, proposals, copyrightable works, customer and supplier lists and information, and other results of intellectual activity, copies and tangible embodiments of all of the foregoing (in whatever form or medium) and licenses granting any rights with respect to any of the foregoing (to the extent assignable), in each case, relating to the Project.

**Internal Cost** means costs expended or incurred by ERC, its member firms, including Macquarie Financial Holdings Limited and Skanska Infrastructure Development Inc. and any of their respective affiliates, or SKW Constructors, for internal development and management of the Project, specifically excluding External Cost, as identified in Exhibit B and/or the Work Plan.

**Key Member** means the following: (a) Skanska Infrastructure Development Inc.; (b) Macquarie Financial Holding Limited; (c) Skanska USA Civil Southeast, Inc.; (d) Kiewit Construction Co.; (e) Weeks Marine, Inc.; (f) Parsons Brinckerhoff; and (g) operator. In addition to the foregoing, by mutual agreement the Parties may also add Key members during the course of performance of this Agreement.

**Key Personnel** means the individual(s) identified as key personnel in the Conceptual Proposal.

**Long Stop Date** means the date on which the term of the Agreement expires as further described in Section 2.4(b).

**Monthly Submittal Package** means the package of documentation to be submitted by ERC to VDOT as further described in Section 4.4.

**NEPA** means the National Environmental Policy Act, 42 U.S.C. §§4321 *et seq.*, as amended and as it may be amended from time to time.

**Parties** mean VDOT or ERC, as signatories to this Agreement, each of whom is a “Party”.

**Person** means any individual (including the heirs, beneficiaries, executors, legal representatives, or administrators thereof), corporation, partnership, joint venture, trust, limited liability company, limited partnership, joint stock company, unincorporated association or other entity or a Governmental Authority.

**Phase 1** means the phase described in Section 3.1.1.1.

**Phase 1 Project Deliverables** means the deliverables required to be submitted to VDOT under Phase 1, in accordance with Exhibit B.

**Phase 2** means the phase described in Section 3.1.1.2.

**Phase 2 Project Deliverables** means the deliverables required to be submitted to VDOT under Phase 2, in accordance with Exhibit B and the Work Plan.

**PPTA** means the Public-Private Transportation Act of 1995, which is codified as Title 56, Chapter 22, §§56-556 *et seq.*, of the Virginia Code, as amended from time to time.

**PPTA Records** means the memoranda, evaluations and records identified in Section 6.2.1.

**Price Proposal** means, a proposal submitted by ERC to VDOT in response to a request for proposal issued pursuant to Section 2.3.2 which may include, among other things as specified in the request for proposal, the following:

- (a) pricing for the design-build and operations and maintenance of the Project;
- (b) a concept of operations;
- (c) a quality management systems plan;
- (d) a plan of finance; and
- (e) a financial model.

**Project** means the project described in Section 2.1.

**Project Deliverable(s)** means any deliverable, including Work Packages, required to be submitted to VDOT under Phases 1 and 2, as identified in Exhibit B and/or Work Plan, as applicable.

**Project Schedule** means a schedule developed and submitted by ERC to VDOT as part of the Work Plan for VDOT’s review, and if applicable, approval, detailing the performance of the work in accordance with this Agreement.

***Proprietary Intellectual Property*** means any Intellectual Property that is patented or copyrighted by ERC, VDOT or any other Person, as applicable, or any of its respective contractors or subcontractors, or, if not patented or copyrighted, is created, held and managed as a trade secret or confidential information by ERC, VDOT or any other Person, as applicable, or any of its respective contractors or subcontractors, but excludes any item of Intellectual Property that is produced for multiple purposes and is not unique to the technology that is being applied to or for the Projects.

***Proprietary Software*** means all Software and associated documentation patented or copyrighted by ERC, VDOT or any other Person, as applicable, or any of its respective contractors or subcontractors, or, if not patented or copyrighted, is created, held and managed as a trade secret or confidential information by ERC, VDOT or any such other Person, as applicable, or any of its respective contractors or subcontractors, but excludes any item of Software that is produced for multiple purposes and is not unique to the technology that is being applied to or for the Projects (e.g. “shrink-wrap” software).

***Proprietary Work Product*** means any Work Product that consists of, incorporates or discloses Proprietary Intellectual Property or Proprietary Software.

***Quality Assurance/Quality Control (QA/QC)*** means the quality assurance and quality control oversight and review provided by ERC for all Work Packages and Project Deliverables to ensure the work conforms to the requirements of this Agreement.

***Regulatory Approval(s)*** means local, regional, state, or Federal agreements, studies, findings, permits, approvals, authorizations, certifications, consents, decisions, exemptions, filings, leases, licenses, registrations, rulings and other governmental authorizations required to be obtained or completed under Applicable Law prior to or while undertaking any particular activity contemplated by this Agreement.

***Reserved Rights*** means all of the following:

(a) subject to Section 10.14, the Commonwealth’s right to use, possess and enjoy any real and personal property over, on, under or adjacent to the Project Right of Way for other transportation and transit facilities, including but not limited to tunnels, flyovers, interchanges and fixed guideways; and

(b) all right to use, and use of:

(1) all electrical, fiber optic and wireless conduit, cable, capacity, towers, antennas and associated equipment or other telecommunications equipment, hardware and capacity existing over, on, under or adjacent to any Project Right of Way installed by anyone, whether before or after the Agreement Date, and all software which executes such equipment and hardware and related documentation, in all cases to the extent not necessary and required for traffic management for the Project or for other Project purposes;

(2) any area or space over, on, under or adjacent to the Project Right of Way for development and operation of any office, commercial, industrial or mixed use real estate project, such as but not limited to revenue-generating service or rest areas;

(3) any equipment, facilities or capabilities for intelligent transportation system studies or applications installed by VDOT and the right to install any such equipment, facilities or capabilities; and

(4) any area or space over, on, under or adjacent to the Project Right of Way for any other commercial or non-commercial development or use.

***Scope of Work*** means the Phase 1 Project Deliverable as described in Exhibit B.

***Secretary*** means the Commonwealth Secretary of Transportation.

***Software*** means (a) computer instructions, including programs, routines and databases and applications supplied, procured or developed by ERC or its subcontractors or consultants in connection with the Project and (b) all modifications, updates and revisions made to the matter described in clause (a) above, including those made to correct errors or to support new models of computer equipment and/or new releases of operating systems.

***Solicitation for Proposal*** means Solicitation for Conceptual Proposals, Downtown Tunnel, Midtown Tunnel/MLK Extension Project, through the Public-Private Transportation Act, dated May 20, 2008, issued by VDOT and amended on August 28, 2008.

***State Corporation Commission*** means the State Corporation Commission of the Commonwealth.

***State Indemnitee*** is as defined in Section 8.1.3 of this Agreement.

***Steering Committee*** means the committee established by the Parties pursuant to Section 3.1.3 of this Agreement.

***Technical Requirements*** means the technical specifications used by ERC in the development of the Project Deliverables, which detail requirements elements of project management, design, construction, operations and tolling, and maintenance.

***Time Impact Analysis (TIA)*** means the written justification establishing the influence of a Delay Event on the Project Schedule, as described in Section 7.3.

***Third Party Claims*** means, any person other than a State Indemnitee or ERC, except that a third party includes any Commonwealth employee, agent, contractor, or his or her heir or representative who asserts a claim arising out of death, bodily injury or property damage against a State Indemnitee or ERC and which is not covered by the

Commonwealth's workers' compensation program. Notwithstanding the foregoing, Third Party Claims include claims by any Commonwealth agency, agent, contractor, or his or her heir or representative.

**VDOT** means the Virginia Department of Transportation, an agency of the Commonwealth, and any other Commonwealth agency succeeding to the powers, authorities and responsibilities of VDOT under this Agreement.

**VDOT Remedies for ERC Default** means VDOT remedies for ERC Default, as described in Section 5.2.5.3.

**Virginia Code** means the Code of Virginia of 1950, as amended.

**Work Break Down Structure (WBS)** means a hierarchy-structured grouping of each Work Package that comprises a Phase 2 Project Deliverable. Each descending level is an increasingly detailed definition of a Work Package. Work Packages may be products-oriented or task-oriented.

**Work Package** means a subcomponent of a Phase 2 Project Deliverable identified in the Work Plan, which is at the lowest level of the WBS

**Work Plan** means the Phase 1 Project Deliverable as described in Exhibit B.

**Work Product** means the Project Deliverables and all other data, information, documentation produced, prepared, or obtained by or on behalf of ERC or VDOT for the Project, including but not limited to drawings; plans; specifications; engineering documents; geotechnical soils and soil borings data, analyses, reports and records; utility relocation plans; right of way record maps and surveys; traffic and revenue studies; other feasibility data; environmental studies, reviews, and reports; correspondence and agreements relating to regulatory approvals; and any other documents which can reasonably be described as technical or engineering documents. Work Product shall not include the software or systems used in the preparation of the Work Product.

**Working Group(s)** means the group(s) responsible for evaluating financial and technical scope issues for the Project.

**Exhibit B**

<b>Project Deliverable</b>	<b>Description</b>	<b>Completion Date</b>	<b>Developer External Cost</b>	<b>Developer Internal Cost</b>	<b>CJV External Cost</b>	<b>CJV Internal Cost</b>
Project Feasibility Assessment	A project feasibility assessment report utilizing data and information collected over the procurement process, which will be used by the Parties in making the Feasibility Determination.	TBD	\$0	\$200,000	\$0	\$127,920
Risk Matrix	Outcome of joint risk workshops shall be a Risk Matrix mutually agreed by the Parties to develop the terms and conditions to be the basis of CA.	TBD	\$0	\$79,500	\$15,000	\$68,880
Scope of Work	A narrative that encompasses but is not limited to the elements detailed in Section 3.0 below.	TBD	\$0	\$53,000	\$30,000	\$117,480
Work Plan	A plan that includes a Work Breakdown Structure (WBS), Project Schedule conforming to the WBS, and ERC's External Cost and Internal Cost associated for each Work Package identified in the WBS. The Work Plan will specify Phase 2 Project Deliverables and be used to plan and control the scheduling of work during Phase 2 of the Interim Agreement.	TBD	\$0	\$115,500	\$45,000	\$137,060
<b>TOTAL</b>			\$0	\$448,000	\$90,000	\$451,340

The Phase 1 Project Deliverables shall conform to the minimum requirements set forth below.

## 1.0 PROJECT FEASIBILITY ASSESSMENT

The project feasibility assessment shall assess and describe project feasibility and the major underlying technical, operational, financial, market, organizational, and support aspects contributing to the assessment feasibility. The inputs that should be used should include but are not limited to the following:

### .1 **Financial.**

- .1 Project Costs, to include construction, operations, and maintenance (regular and extraordinary)
- .2 Concession Term
- .3 Description of the sources and uses of funds

- .4 Preliminary target range of Equity Internal Rate of Return (indicate whether pre-tax or after-tax or provide both pre-and post-tax rates)
- .5 Type of Debt Financing assumed
- .6 Debt Service Coverage Ratio(s)
- .7 Ramp-up Traffic Volume
- .8 Ramp-up Reserve
- .9 Tax Rates
- .10 Assumed Inflation Rate (specify index whether CPI or GDP)
- .11 Traffic Projections
- .12 Revenue Projections
- .13 The results of the scenarios provided by VDOT as set forth in Attachment 1 to this Exhibit B, in addition to any other scenarios ERC elects to provide with the inclusion of identified toll reduction levers. For each scenario, indicate the traffic and revenue assumptions made, any funding shortfalls/surpluses, and whether the scenario is feasible.
- .14 ERC may present other scenarios, based on the scenarios provided by VDOT as set forth in Attachment 1 to this Exhibit B, with the inclusion of identified toll reduction levers and indicate whether those scenarios are feasible.

\*provide all figures in US \$2008, and indicate conversion factors to US \$2010 as appropriate.

- .2 **Risk.** The risks assumptions, assignments, and mitigation strategies.
- .3 **Scope of Work.** The Scope of Work as described in Section 3.0 below.
- .4 **Other.** Significant assumptions (commercial, financial, and technical) made by ERC which materially affect Project feasibility.

## 2.0 RISK MATRIX

The Parties will meet and participate in good faith in risk workshops. The goal of those workshops is for each Party to understand the other Party's position on high level risk assignment and mitigation strategies for a selected number of

key risks. The Parties shall create a risk matrix acceptable to both Parties that will be used in developing the terms and conditions of the CA.

### 3.0 SCOPE OF WORK

The Scope of Work shall be developed by ERC in coordination with the Working Groups and approved by VDOT. The scope of work shall define the scope of services and duties to be provided by ERC for the financing, development, planning, designing, acquiring, construction, operations, and maintenance of the Project. The Scope of Work shall include, among other things, the documents attached to any (a) design-build contract that contemplates all of the duties and services to be furnished and provided by the design-build contractor; (b) agreement or long term concession providing for the long term operations and/or maintenance of the Project; and (c) any Project development plan required by this Agreement. The Scope of Work also shall include an annotated location plan showing proposed work limits and major work elements and a narrative consisting of a description of the Project limits and elements needed to effectively and efficiently develop and operate the Project over the term of the proposed concession. The Scope of Work shall include the following Project components:

.1 **Right of Way.** Includes services related to the acquisition of all required right of way including all easements (permanent, temporary, and utility), buildings and other improvements, damages, administrative settlements, condemnation increases, administrative costs and incidental expenses, demolition contracts, hazardous material removal, property management and all relocation services.

.2 **Utilities.** Includes services associated with the relocation of all public and private utilities in conflict with the Project.

.3 **Environmental.** Includes services associated with updating the NEPA documents to accommodate the envisioned construction limits and methods, as well as developing and applying for permits, including pre-permit meetings, investigations, and follow-up meetings.

#### .4 **Design and Construction.**

##### .1 **Roadway.**

.1 **MLK Freeway Extension.** Includes services to complete roadway design and construction related to the MLK Freeway Extension to the interchange with I-264, including mobilization, clearing, grading, demolition, earthwork, pavement, drainage systems, noise barriers, traffic control/signal systems, lighting, pavement marking, intelligent transportation systems, signing,

landscaping, maintenance of traffic, and any other item required for the construction and full use of this roadway. For estimating purposes, the limits of the MLK Freeway Extension shall be from the London Boulevard/Existing MLK Freeway interchange to the CSX railroad crossing.

.2 **I-264 Interchange.** Includes services to complete the roadway design and construction related to the MLK Freeway/I-264 interchange, including loops, ramps and collector distributor lanes; including mobilization, clearing, grading, demolition, earthwork, pavement, drainage systems, noise barriers, traffic control/signal systems, lighting, pavement marking, intelligent transportation systems, signing, landscaping, maintenance of traffic, and any other item required for the construction and full use of this roadway. For estimating purposes, the limits of the I-264 Interchange shall include all improvements along the MLK Freeway south of the CSX railroad crossing and any new interchange ramps/loops/C-D roads at and/or along existing I-264.

.3 **Brambleton Interchange/Tunnel Approaches.** Includes services to complete roadway design and construction associated with the approaches to the new tunnel facility on the Norfolk and Portsmouth side, as well as any construction associated with approach work within the Brambleton Interchange; including mobilization, clearing, grading, demolition, earthwork, pavement, drainage systems and flood control measures, noise barriers, traffic control/signal systems, lighting, pavement marking, intelligent transportation systems, signing, landscaping, maintenance of traffic, and any other item required for the construction and full use of these roadways. The limits of the Tunnel Approaches include the following:

- .1 Norfolk Approach - any work within the limits of the retaining walls for the tunnel portal entrance (not including portal retaining wall).
- .2 Portsmouth Approach – any work within the limits of the retaining walls to the tunnel portal entrance (not including portal retaining wall) and any additional roadway work south of the tunnel approach retaining wall system coming from Pinners Point.

The limits of the Brambleton Interchange include any improvements on the Norfolk side of the tunnel, outside of the tunnel portal entrance.

**.2 Bridges.**

.1 **MLK Freeway Extension.** Includes services to complete the design and construction of bridges and retaining structures associated with MLK Freeway Extension to the interchange with I-264; including bridge substructure and superstructure elements, retaining walls and foundation systems, and any other item required for the construction and full use of bridges and/or retaining walls. The limits of the MLK Freeway Extension shall be from the London Boulevard/Existing MLK Freeway interchange to the CSX railroad crossing.

.2 **I-264 Interchange.** Includes services to complete the design and construction of bridges and retaining structures associated with the MLK Freeway /I-264 interchange, including loops, ramps and collector distributor lanes; including bridge substructure and superstructure elements, retaining walls and foundation systems, and any other item required for the construction and full use of bridges and/or retaining walls. The limits of the I-264 Interchange shall include all improvements along the MLK Freeway south of the CSX railroad crossing and any new interchange ramps/loops/C-D roads at and/or along existing I-264.

.3 **Brambleton Interchange/Tunnel approach.** Includes services to complete the design and construction of any bridges and/or retaining structures associated with the Norfolk tunnel approach to the new tunnel facility on the Norfolk and Portsmouth side, as well as any likely design and construction associated with approach work within the Brambleton Interchange. The limits of the tunnel approaches include the following:

.1 Norfolk Approach - any work within the limits of the retaining walls for the tunnel portal entrance (not including portal retaining wall).

.2 Portsmouth Approach – any work within the limits of the retaining walls to the tunnel portal entrance (not including portal retaining wall) and any additional roadway work south of the tunnel approach retaining wall system coming from Pinners Point.

The limits of the Brambleton Interchange includes any improvements on the Norfolk side of the tunnel, outside of the tunnel portal entrance.

**.3 Tunnels.**

- .1 **Midtown Tunnel.** Includes services to design and construct a new proposed parallel tube to the Midtown Tunnel and improvements to existing tunnel facilities at the Midtown and Downtown Tunnels; including mobilization, dredging, treatment of dredge materials, disposal/placement of dredge materials, construction of new tunnel sections and portals, tunnel foundation systems, retaining walls for portal approaches, earthwork, maintenance and support buildings (including any support buildings outside of the physical limits of the tunnel), site development work, fire detection and suppression systems, ventilation and carbon monoxide monitoring systems, power supply and distribution, water supply, lighting, tunnel drainage, communication and security systems, intelligent transportations systems, truck over-height protection systems, and NFPA 502 upgrades to the existing Midtown Tunnel.
- .2 **Downtown Tunnel.** Includes services for refurbishing the Downtown Tunnel to current NFPA 502 standard; including upgrading the ventilation, fire detection and suppression, electrical, emergency response systems.
- .4 **Toll Facilities.** Includes services for design and construction of the toll facilities, including gantries/collection booths, administrative and support buildings, any roadway/bridge infrastructure requirements specific to facilitation of manual toll collection and separate from the tunnel approaches such as collector distributor roads, barriers and retaining walls. Include cost for electronic toll collection software systems and hardware to process the collection of tolls. Options may be considered for traditional cash toll collection methods; but must be specifically identified. The ETC system shall be compatible with the E-ZPass system and otherwise comply with FHWA's final rule entitled, Interoperability Requirements, Standards, or Performance Specifications for Automated Toll Collection Systems, 74 Fed. Reg. 51,762 (October 8, 2009) (to be codified at 23 C.F.R. pt. 950).
- .5 **Operation and Maintenance.** Includes the operation and maintenance of a new parallel tube to the Midtown tunnel and improved existing tunnel facilities at the Midtown and Downtown Tunnels, and operations and maintenance road network along MLK Freeway shown in Attachment A, such services contemplate routine maintenance and minor repair, operating the tunnel facilities and roadway, including lighting, police patrols, ventilation, cleaning, and management and operation of new and existing tunnel facilities and roadway, including any renewal and replacement costs that may occur at cyclical points within the lifetime of system components.

#### 4.0 WORK PLAN

The Work Plan shall include but not be limited to the following:

.1 **Project Schedule.** All work under the Agreement for Phase 2 shall be included in the Project Schedule and organized by a WBS, including an activity for good faith negotiations between the Parties for a CA. VDOT and ERC will coordinate during Phase 1 to determine the top levels of the WBS (e.g., the Phase 2 Project Deliverables). ERC shall complete the WBS down to the Work Package level and shall include the complete WBS in their Work Plan submittal.

**.2 Schedule Requirements.**

1. ERC shall be responsible for development of a Project Schedule identifying all Work Packages and Project Deliverables that will be submitted to VDOT for approval and are necessary to achieve execution of the Comprehensive Agreement;

2. The approved Project Schedule shall be used to measure the progress of the work. The schedule will allow for the accurate planning of resources by identifying submittal dates and activities for reviews required by VDOT or other agencies in accordance with the Agreement; and

3. The Project Schedule shall aid in evaluating time extensions, enable Parties to assess responsibility and quantify duration of Delay Events caused by ERC or VDOT in the form of a Time Impact Analysis.

**.3 Submittal Requirements.** The submittals shall include

.1 A transmittal letter to VDOT identifying the date of submittal and which Project Schedule is being submitted for review.

.2 One (1) set of paper copies of the following schedule reports:

.1 A legible copy of the Project Schedule depicting the order, interdependence of activities, and sequence in which the work will be accomplished.

.2 Show for each activity: the activity ID, activity name, original duration, remaining duration, start and finish dates, activity percent complete, and total float. The bar-chart plot shall identify the critical path (longest path).

.3 One (1) set of electronic file copies on data compact disks (“CD”) containing:

.1 The electronic working file of the Project Schedule in file format that is compatible with VDOT’s existing computer infrastructure, such as Microsoft Project or Primavera P6 Version 6.2. Each CD shall be labeled to indicate the Agreement ID, type of submission, filename, and data date.

.2 Electronic PDF copy of the monthly progress narrative.

This process shall continue until the anticipated date for the execution of the Comprehensive Agreement.

**5.0 SECURITY**

ERC shall adhere to VDOT's policies on critical infrastructure information and sensitive security information to the extent such policies apply to the development of the Phase 1 Project Deliverables and Phase 2 Project Deliverables.

**Attachment 1 to Exhibit B**

<b>Construction Costs (2008 \$)</b>					
Midtown Tunnel					
Downtown Tunnel					
MLK					
<b>Operations and Maintenance Costs (2008 \$)</b>					
Midtown Tunnel					
Downtown Tunnel					
MLK					
<b>Traffic Projections</b>					
Midtown Tunnel					
Downtown Tunnel					
MLK					
<b>Scenario 1 - Base Project Cost - (Needs to include all costs as well as financing)</b>					
<b>Construction Tolling</b>	<b>Tolling During Operations</b>	<b>Surplus/Shortfall</b>	<b>IRR (pre-tax)</b>	<b>IRR (after-tax)</b>	<b>Inflation Rate</b>
No tolling	Toll Amount with no Subsidy - Peak, Mid-day and Night Time				
	Time of Day tolling - Tunnels - \$1.25 (Peak), \$1.00(Off-Peak); MLK: \$0.65 (Peak), \$0.50(MD, NT)				
	Time of Day tolling - Tunnels - \$1.75 (Peak), \$1.50(Off-Peak); MLK: \$0.65 (Peak), \$0.50(MD, NT)				
	Time of Day tolling - Tunnels - \$2.00 (Peak), \$1.60(Off-Peak); MLK: \$0.65 (Peak), \$0.50(MD, NT)				
\$0.75 (Peak) and \$0.50 (Off-Peak)	Toll Amount with no Subsidy - Peak, Mid-day and Night Time				
	Time of Day tolling - Tunnels - \$1.25 (Peak), \$1.00(Off-Peak); MLK: \$0.65 (Peak), \$0.50(MD, NT)				
	Time of Day tolling - Tunnels - \$1.75 (Peak), \$1.50(Off-Peak); MLK: \$0.65 (Peak), \$0.50(MD, NT)				
	Time of Day tolling - Tunnels - \$2.00 (Peak), \$1.60(Off-Peak); MLK: \$0.65 (Peak), \$0.50(MD, NT)				
\$1.00 (Peak) and \$0.75 (Off-Peak)	Toll Amount with no Subsidy - Peak, Mid-day and Night Time				
	Time of Day tolling - Tunnels - \$1.25 (Peak), \$1.00(Off-Peak); MLK: \$0.65 (Peak), \$0.50(MD, NT)				
	Time of Day tolling - Tunnels - \$1.75 (Peak), \$1.50(Off-Peak); MLK: \$0.65 (Peak), \$0.50(MD, NT)				
	Time of Day tolling - Tunnels - \$2.00 (Peak), \$1.60(Off-Peak); MLK: \$0.65 (Peak), \$0.50(MD, NT)				

**Attachment 1 to Exhibit B**

<b>Scenario 2 - Base Project Cost less 10%</b>					
<b>Construction Tolling</b>	<b>Tolling During Operations</b>	<b>Surplus/Shortfall</b>	<b>IRR (pre-tax)</b>	<b>IRR (after-tax)</b>	<b>Inflation Rate</b>
No tolling	Toll Amount with no Subsidy - Peak, Mid-day and Night Time				
	Time of Day tolling - Tunnels - \$1.25 (Peak), \$1.00(Off-Peak); MLK: \$0.65 (Peak), \$0.50(MD, NT)				
	Time of Day tolling - Tunnels - \$1.75 (Peak), \$1.50(Off-Peak); MLK: \$0.65 (Peak), \$0.50(MD, NT)				
	Time of Day tolling - Tunnels - \$2.00 (Peak), \$1.60(Off-Peak); MLK: \$0.65 (Peak), \$0.50(MD, NT)				
\$0.75 (Peak) and \$0.50 (Off-Peak)	Toll Amount with no Subsidy - Peak, Mid-day and Night Time				
	Time of Day tolling - Tunnels - \$1.25 (Peak), \$1.00(Off-Peak); MLK: \$0.65 (Peak), \$0.50(MD, NT)				
	Time of Day tolling - Tunnels - \$1.75 (Peak), \$1.50(Off-Peak); MLK: \$0.65 (Peak), \$0.50(MD, NT)				
	Time of Day tolling - Tunnels - \$2.00 (Peak), \$1.60(Off-Peak); MLK: \$0.65 (Peak), \$0.50(MD, NT)				
\$1.00 (Peak) and \$0.75 (Off-Peak)	Toll Amount with no Subsidy - Peak, Mid-day and Night Time				
	Time of Day tolling - Tunnels - \$1.25 (Peak), \$1.00(Off-Peak); MLK: \$0.65 (Peak), \$0.50(MD, NT)				
	Time of Day tolling - Tunnels - \$1.75 (Peak), \$1.50(Off-Peak); MLK: \$0.65 (Peak), \$0.50(MD, NT)				
	Time of Day tolling - Tunnels - \$2.00 (Peak), \$1.60(Off-Peak); MLK: \$0.65 (Peak), \$0.50(MD, NT)				

**Attachment 1 to Exhibit B**

<b>Scenario 3 - Base Project Cost plus 25%</b>					
<b>Construction Tolling</b>	<b>Tolling During Operations</b>	<b>Surplus/Shortfall</b>	<b>IRR (pre-tax)</b>	<b>IRR (after-tax)</b>	<b>Inflation Rate</b>
No tolling	Toll Amount with no Subsidy - Peak, Mid-day and Night Time				
	Time of Day tolling - Tunnels - \$1.25 (Peak), \$1.00(Off-Peak); MLK: \$0.65 (Peak), \$0.50(MD, NT)				
	Time of Day tolling - Tunnels - \$1.75 (Peak), \$1.50(Off-Peak); MLK: \$0.65 (Peak), \$0.50(MD, NT)				
	Time of Day tolling - Tunnels - \$2.00 (Peak), \$1.60(Off-Peak); MLK: \$0.65 (Peak), \$0.50(MD, NT)				
\$0.75 (Peak) and \$0.50 (Off-Peak)	Toll Amount with no Subsidy - Peak, Mid-day and Night Time				
	Time of Day tolling - Tunnels - \$1.25 (Peak), \$1.00(Off-Peak); MLK: \$0.65 (Peak), \$0.50(MD, NT)				
	Time of Day tolling - Tunnels - \$1.75 (Peak), \$1.50(Off-Peak); MLK: \$0.65 (Peak), \$0.50(MD, NT)				
	Time of Day tolling - Tunnels - \$2.00 (Peak), \$1.60(Off-Peak); MLK: \$0.65 (Peak), \$0.50(MD, NT)				
\$1.00 (Peak) and \$0.75 (Off-Peak)	Toll Amount with no Subsidy - Peak, Mid-day and Night Time				
	Time of Day tolling - Tunnels - \$1.25 (Peak), \$1.00(Off-Peak); MLK: \$0.65 (Peak), \$0.50(MD, NT)				
	Time of Day tolling - Tunnels - \$1.75 (Peak), \$1.50(Off-Peak); MLK: \$0.65 (Peak), \$0.50(MD, NT)				
	Time of Day tolling - Tunnels - \$2.00 (Peak), \$1.60(Off-Peak); MLK: \$0.65 (Peak), \$0.50(MD, NT)				

## **Exhibit C**

### **FINDINGS OF PUBLIC INTEREST**

- 1.1 On April 5, 2005, Commonwealth Transportation Commissioner Shucet recommended VDOT pursue the procurement of the Downtown Tunnel/Midtown Tunnel/Martin Luther King Extension Project (the “Project”) under the Public-Private Transportation Act of 1995 (the “PPTA”).
- 1.2 Pursuant to the PPTA, on May 30, 2008, the Virginia Department of Transportation (VDOT) issued a Solicitation for Conceptual Proposals (SFP) to request receipt of conceptual proposals to enable VDOT to identify and shortlist Offerors qualified to submit Detailed Proposals to finance, design, construct, operate, and maintain the Project.
- 1.3 In accordance with VDOT’s Implementation Guidelines, as revised October 31, 2005 (the “Guidelines”), adopted in furtherance of the PPTA, VDOT duly posted and published notice of the SFP. During the posting period ending September 29, 2008, VDOT 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.
- 1.4 Following a quality control review of the Conceptual Proposal to ensure its compliance with the Guidelines and the solicitation criteria, on October 29, 2008, Commonwealth Transportation Commissioner Ekern accepted the Conceptual Proposal for further consideration.
- 1.5 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 VDOT.
- 1.6 Following five public meetings wherein the IRP considered public comments, recommendations and comments from impacted jurisdictions, presentations provided by ERC and VDOT 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.
- 1.7 Based on such evaluation, on July 16, 2009, the IRP recommended to the CTB that the Conceptual Proposal be further developed pursuant to the PPTA and among other recommendations, recommended accelerating the project procurement process (i.e. via an Interim Agreement) to further determine the Project’s feasibility. Further, on July 16, 2009, the CTB adopted a resolution consistent with the IRP’s findings.

- 1.8 Thereafter, Commonwealth Transportation Commissioner Ekern directed VDOT to negotiate an Interim Agreement, with respect to the Project, with ERC based on the SFP, the Conceptual Proposal, and recommendations of the CTB.
- 1.9 The proposed Project is described in Section 2.1 of the Interim Agreement.
- 1.10 VDOT has conducted environmental review of the Project elements in accordance with the National Environmental Policy Act in the following areas:
  1. Martin Luther King Extension - An Interstate Justification Report (IJR) was conditionally approved by FHWA in June 2007. VDOT initiated a new Environmental Assessment for the MLK Extension project in March 2007 and FHWA issued a Finding of No Significant Impact on February 16, 2009.
  2. Midtown Tunnel – New parallel immersed tube - VDOT completed a re-evaluation of the US Route 58/Midtown Tunnel 1996 EIS and FHWA issued a revised Record of Decision on the Midtown Tunnel on July 9, 2007.
  3. Existing Midtown Tunnel and Brambleton Avenue Interchange - VDOT completed a Programmatic Categorical Exclusion (PCE) for the existing Midtown Tunnel for fire, life and safety upgrades on May 13, 2009; and a PCE for the Brambleton Avenue Interchange on May 22, 2009.
  4. Downtown Tunnel - VDOT completed a PCE for the existing Downtown Tunnel for fire, life and safety upgrades on May 13, 2009.
- 1.11 The parties to the Interim Agreement acknowledge that financing sufficient to construct the Project has not been obtained as of the date of the Interim Agreement, and that it is the responsibility of ERC to propose to VDOT an acceptable plan of finance. ERC has preliminarily identified alternative financial structures that shall be evaluated based on more definitive traffic and revenue projections as the Project's feasibility is further determined.
- 1.12 VDOT, as the responsible public entity with respect to the Project, has determined that:
  - (a) the development and operation of the Project as contemplated by the Conceptual Proposal and by the Interim Agreement serves the public purpose of the PPTA, on the basis that:
    1. there is a public need for a transportation facility of the type contemplated by the Project,
    2. the improvements contemplated by the Project, and the proposed interconnections with existing transportation facilities are, in the opinion of VDOT, reasonable and shall address objectives identified in

the SFP and the needs identified in the appropriate local and regional transportation plans or in the Commonwealth's Statewide Transportation Improvement Program approved by FHWA to:

- i. secure private sector funds and offset the need for public allocation to fund the Project;
  - ii. increase capacity, reduce congestion and provide safe and efficient operations;
  - iii. develop a multi-modal transportation facility that may be integrated into the operations of a regional transportation network and that serves as an emergency evacuation route;
  - iv. develop a Project that reduces and mitigates its impacts to the environment and surrounding communities while supporting the movement of commercial traffic; and
  - v. develop a Project that is coordinated with adjacent land uses and supports the anticipated growth in personal and commercial traffic.
3. the estimated cost of the Project, as reflected in the Conceptual Proposal, is reasonable in relation to similar facilities, and
  4. ERC's plans contemplate the timely development of the Project and its more efficient operation; and

(b) it is in the public's interest to enter into the Interim Agreement with a private entity.

**Exhibit D****COMMONWEALTH OF VIRGINIA, DEPARTMENT OF TRANSPORTATION****DEBARMENT AND/OR SUSPENSION POLICY****I. Purpose**

Section 33.1-187 of the Code of Virginia ensures that all contracts for the construction, improvement, and maintenance of roads be awarded to the lowest responsible bidder. These contract awards will be the result of open competitive bidding, impartial selection of contracts, honest business practices, and skillful execution of public contracts. The Commonwealth Transportation Board, as the governing body of public agency, has wide discretion in determining the responsibility of the contractor, particularly regarding their moral and ethical judgment. The Board will consider debarment a contractor under the circumstances and by the procedures outlined in this document.

**II. Definitions**

Affiliate - Any business entity that controls or can be controlled by another corporation. An affiliate could also be any entity which has been so closely allied with another by lending financial assistance or participating in joint ventures that the relationship has created the public perception that the two firms are a single entity.

Bidding Crime - Any act in violation of state or federal law including, but not limited to, fraud, conspiracy, collusion, perjury or material misrepresentation.

Board - The Commonwealth Transportation Board. A sixteen member body appointed by the Governor of Virginia to make decisions on transportation related issues.

Contractor - Any prequalified person, partnership, corporation or other business entity seeking to bid on any contract let by the Department. A contractor could also function or seek to function as a subcontractor, materials supplier, or equipment supplier for any contract used in the construction or maintenance of the transportation system. This firm must be legally authorized, as stated in Section 13.1 of the Code of Virginia, to conduct business in the Commonwealth.

Debar - To disqualify from contracting with the Department due to perceived irresponsibility of the contractor.

Department - The Virginia Department of Transportation.

Enjoin - To impose bidding restrictions on a contractor.

MBE - Minority Business Enterprise. A small business entity, as defined pursuant to Section 3 of the Small Business Act and related regulations, that is owned and controlled by one or more minorities. This term shall also include Disadvantaged Business Enterprises (DBEs) and Women Business Enterprises (WBEs).

Reinstate - To modify or suspend debarment.

Subcontractor - An individual, partnership, corporation, or other business entity to which the prime contractor sublets or proposes to sublet any portion of a contract.

### **III. Enjoinment**

The Department may enjoin a contractor from bidding *in accordance with Section 102.01* of the Road and Bridge Specifications. The enjoinment of a contractor will result in the enjoinment of any affiliate that has essentially the same operational management or draws from the same labor resource pool. Enjoined contractors and their affiliates will be disqualified from performing work as subcontractors if the Construction Engineer determines that such work could adversely affect other work under contract to the Department. Enjoinment of a contractor by the Department is based on the contracting power of the Department and the discretionary power of the Department. Enjoinment will be issued when, in the opinion of the Department, the contractor has failed to fulfill its obligations under a past contract or in the performance of a current contract.

A. Section 110.04 establishes the guidelines for the use of MBE firms for subcontracting. If the contractor fails to submit the required information as described in this section within the specified time frame, he and his affiliates may be enjoined until the submissions are received by the Department.

Enjoinment may be imposed for up to 60 days if a contractor fails to meet his MBE participation goals for each quarter of the contract as shown on the progress schedule. Upon conformance with the schedule, enjoinment may be lifted.

Enjoinment may be avoided if either of the following occurs:

- the MBE is unable or unwilling to complete his portion of the work, and the prime contractor shows reasonable effort to fulfill the MBE requirement otherwise.
- the Department has eliminated or delayed work which the contractor, as shown on the progress schedule, had planned to sublet to an MBE firm.

If the contractor fails to meet the MBE participation requirements upon completion of the project, the contractor and any affiliates may be enjoined for 90 days. Prior to enjoinment, the contractor may submit documentation to the Construction Engineer indicating the reasons for failure to comply with the requirements. If the failure to comply was due solely to quantity under-runs or elimination of items subcontracted to MBEs, the contractor must show that all feasible means were used to obtain the required participation. The Construction Engineer will determine if the contractor has met the contract requirements.

If the Construction Engineer determines that the contract requirements were not met, the contractor may request an appearance before a panel appointed by the Commissioner. The contractor must explain to the panel how all feasible means were used to meet the MBE participation requirements. Enjoinment will begin upon the contractor's failure to request a hearing or upon the panel's final decision.

*The Department will not enjoin a firm that has complied with the contract requirements on all issues but failed to meet the MBE goals of the project, when the contractor has achieved a*

*level that is at least equal to the current federal requirements placed on the Commonwealth.*

B. Section 102.01 requires all contracted work to be completed as scheduled. If a contractor is delinquent in excess of ten (10) percent either on the basis of time or money, injunction may be imposed. A contractor's delinquency will be determined by comparing the monthly progress estimate to the latest approved project schedule. If the contractor does not complete the necessary work to eliminate the discrepancy within thirty (30) calendar days, or he does not establish that the delinquency was attributable to conditions beyond his control, he may be removed from the list of prequalified bidders until final acceptance of the project.

#### **IV. Debarment**

The Commissioner, in his sole discretion, may debar a contractor or his affiliates for any of the following reasons:

A. Proof of involvement in a bidding crime, including

1. conviction,
2. a plea of guilty or nolo contendere,
3. a public admission by a co-conspirator, or
4. contractor testimony protected by a grant of immunity in any jurisdiction;

B. Conviction of an offense that shows a lack of moral or ethical integrity by the company;

C. Debarment by some other state or federal agency for any reason.

According to Board policy, the contractor will be given an opportunity for an informal hearing before the Commissioner. At the sole discretion of the Commissioner, the hearing could be held before or after debarment is imposed. If the Commissioner determines that the hearing may be held prior to debarment, he shall send written notice by mail to the affected contractor or his agent stating the following:

- debarment is being considered;
- general reasons for the debarment;
- the contractor will be granted a hearing, if it is requested within ten (10) working days of having received the Commissioner's notice.

Unless mutually agreed upon otherwise, the hearing will be held no later than ten (10) working days after the Department has received the contractor's request. The Commissioner's decision concerning debarment will be reviewed by the Board and executed within thirty (30) calendar days following the next regularly scheduled Board meeting.

If the Commissioner determines that debarment is appropriate prior to the hearing, he shall send a written notice by registered mail stating the following:

- the affected contractor has been debarred;
- general reasons for the debarment;
- the contractor will be granted a hearing, if it is requested within ten (10) working days of having received notice of debarment.

If the contractor notifies the Commissioner that he desires a hearing, it will be held within ten (10) working days of the contractor's request, unless mutually postponed. The Commissioner's decision whether to reinstate the contractor will be reviewed by the Board and executed no later than thirty (30) calendar days following the next regularly scheduled Board meeting.

#### **V. Rules Applicable to Debarment**

A. The illegal or improper conduct of an individual may be fully imputed to the firm with which they are, or were, employed when the conduct in question occurred. Furthermore, the illegal or improper conduct of a firm may be fully imputed to an individual or individuals having control over the affairs of the firm.

B. Debarment of a contractor in no way affects his obligations to the Commonwealth for any services already under contract.

C. The debarment may be imposed for any length of time.

D. If the Board finds that debarment proceedings would not be in the public's best interest because they may hinder federal/state investigations into a bidding crime, the proceedings may be delayed until those investigations are concluded. Any delay of the proceedings shall be made after written notice and an opportunity for a hearing are given to the contractor.

E. Any contractor currently prequalified to bid on Department contracts shall notify the Commissioner within thirty (30) calendar days of being convicted of any bidding crime. The same applies to any contractor who has previously bid or performed business as a material or equipment supplier. Failure to do so is a serious and compelling offense which alone could result in debarment.

F. Debarment of a contractor applies to any successor company formed with the same resources, owners or stockholders as the debarred entity.

#### **VI. Reinstatement**

The Board may suspend debarment at any time if the suspension is in the public's best interest. Mitigating circumstances may be considered in the decision to reinstate a contractor. These circumstances may include the following:

A. The degree of culpability of the contractor;

B. Whether a lengthy debarment will protect the Commonwealth;

C. Restitution by the debarred contractor to the Commonwealth for any perceived overcharges or other damages resulting from a bidding crime. The Board believes restitution may indicate an acknowledgment by the contractor of the wrongfulness of his acts and may indicate a sincere desire to improve future conduct;

D. Cooperation by the debarred contractor with the Commonwealth, the United States and/or other sovereign bodies in the investigation of bidding crimes, including a full and complete account of the contractor's involvement;

E. Disassociation with the individuals and firms that have been involved in a bidding crime.

The Board may request that the Commissioner hold a hearing to consider reinstatement. This hearing will take place no later than fifteen (15) working days prior to the last day of the debarment. After receiving the Commissioner's report, the Board may determine that the contractor has not acted as a responsible bidder and decide to continue the debarment period indefinitely. At any time during the debarment period the contractor may justify why the penalty should be lifted. The debarment may be lifted once the Board has determined that the contractor qualifies as a responsible bidder.

## **VII. Supplier**

The Debarment and/or Suspension Policy shall be fully applicable to all contractors eligible to do business with the Department's Administrative Services Division. When possible, these contractors will receive a notice regarding the applicability of this policy to their situation.

The Department is empowered to set those terms, conditions or specifications in its contracts that are necessary to preclude a contractor's participation as a supplier when he is not prequalified.

## **VIII. Notice to Contractor**

A copy of these guidelines shall be distributed to each prequalified contractor.

*Amended:*  
*September 15, 1983*  
*July 1, 1985*  
*September 5, 1991*  
*June 16, 1993*  
*March 23, 1995*  
*August 2, 1995*

## **Exhibit E**

### **FORM OF GUARANTY OF PERFORMANCE**

This Guaranty of Performance (the "Guaranty") is made as of the \_\_\_ day of \_\_\_\_\_, 2010 by Skanska AB, a Corporation duly organized under the laws of Sweden ("Skanska") and Macquarie Financial Holdings Limited, a company duly organized under the laws of Australia ("Macquarie", and collectively with Skanska, the "Guarantors") in favor of the Virginia Department of Transportation, an agency of the Commonwealth of Virginia ("VDOT"). Capitalized terms used herein without definition shall have the meaning given such terms in the Interim Agreement (as defined below).

### **RECITALS**

**WHEREAS**, VDOT and Elizabeth River Crossings LLC, a Delaware limited liability company ("ERC") have entered into that certain Interim Agreement, as of even date herewith (the "Interim Agreement"), pursuant to which ERC has agreed to provide certain services and Work Product related to the development of the Project; and

**WHEREAS**, to induce VDOT to enter into the Interim Agreement and consummate the transactions contemplated thereby, the Guarantors have agreed to enter into this Guaranty; and

**WHEREAS**, Skanska Infrastructure Development Inc., a 50% member of ERC is an indirect, wholly owned subsidiary of Skanska AB and ERC Holdco, LLC a 50% member of ERC is an indirect, wholly owned subsidiary of Macquarie Financial Holdings Limited and the execution of the Interim Agreement by VDOT and the consummation of the transactions contemplated thereby will materially benefit each of the Guarantors, and such benefits constitute adequate consideration for entry into this Guaranty; and

**NOW THEREFORE**, in consideration of the foregoing and of the mutual agreements and covenants set forth herein, and other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the Guarantors agree as follows:

### **I. GUARANTY**

#### **1.01 Guaranty.**

(a) Subject to Section 4.06 below, Guarantors jointly and severally guarantee to VDOT, absolutely, unconditionally and irrevocably, that each and every obligation of ERC to VDOT now or hereafter arising under the Interim Agreement will be promptly performed, paid and satisfied in full when due and without offset (the "Guaranteed Obligations").

(b) Nothing herein shall expand the obligations of the Guarantors hereunder beyond those of ERC pursuant to the Interim Agreement.

**1.02 Obligations Unconditional.** The obligations of the Guarantors hereunder are unconditional, continuing and independent of the obligations of ERC and shall not be impaired, modified, released or limited by any occurrence or condition whatsoever and shall remain in full

force and effect until the earlier to occur of (i) all of the Guaranteed Obligations have been paid, performed and completed in full or (ii) the execution of a Comprehensive Agreement.

**1.03 Enforcement of Interim Agreement and Guaranteed Obligations.**

(a) Nothing contained herein shall prevent or limit VDOT from pursuing any of its rights and remedies under the Interim Agreement.

(b) Subject to Section 4.06 below, the Guarantors shall be obligated to undertake all curative action which may be agreed upon between VDOT and ERC to cure a breach or default by ERC under the Interim Agreement.

(c) VDOT may bring and prosecute a separate action or actions against the Guarantors to enforce its liabilities hereunder, regardless of whether any action is brought against ERC and regardless of whether any other person is joined in any such action or actions.

**II. REPRESENTATIONS AND WARRANTIES**

**2.01 Representations and Warranties.** Each of Skanska and Macquarie hereby represent and warrant, solely with regard to themselves, that as of the date hereof:

(a) in the case of Skanska, it is a Corporation duly organized, validly existing and in good standing under the laws of Sweden, and in the case of Macquarie, it is a company duly organized and validly existing under the laws of Australia;

(b) Guarantors have the full power and authority to execute, deliver and perform this Guaranty;

(c) this Guaranty has been duly authorized, executed and delivered by the Guarantors and constitutes the legal, valid and binding obligation of the Guarantors, enforceable against it in accordance with the terms hereof, subject as to enforceability of remedies to limitations imposed by bankruptcy, insolvency, reorganization, moratorium or other similar laws relating to or affecting the enforcement of creditors' rights generally, as applicable to the Guarantors, and to general principles of equity;

(d) no authorization, consent or approval of, notice to or filing with, any governmental authority is required for the execution, delivery and performance by the Guarantors of this Guaranty;

(e) neither the execution, delivery or performance by the Guarantors of this Guaranty, nor compliance with the terms and provisions hereof, conflicts or will conflict with or will result in a breach or violation of any material terms, conditions, or provisions of any laws applicable to the Guarantors or the charter documents, as amended, or bylaws, as amended, of the Guarantors, or any indenture, mortgage or contract or other agreement or instrument to which either of the Guarantors is a party or by which it or any of its properties is bound, or constitutes or will constitute a default thereunder or will result in the imposition of any lien upon any of its properties;

(f) there is no action, suit, proceeding, investigation, indictment or litigation pending and served on the Guarantors which challenges either of the Guarantors' authority to execute, deliver or perform, or the validity or enforceability of, this Guaranty and the Guarantors have disclosed to VDOT any pending and unserved or threatened action, suit, proceeding, investigation, indictment or litigation with respect to such matters of which the Guarantors are aware; and

(g) the Guarantors are fully aware of and consent to the terms and conditions of the Interim Agreement.

### **III. WAIVERS, SUBROGATION AND SUBORDINATION**

#### **3.01 Waivers.**

(a) The Guarantors hereby unconditionally waive (i) notice of acceptance of this Guaranty; (ii) demand for performance, payment, presentment, protest and notice of nonpayment respecting any Guaranteed Obligation; (iii) any demand for performance or payment hereunder except demand as set forth in Section 4.06 below; (iv) notice of the incurring, contracting, amendment, alteration, acceleration, extension, waiver, retirement, suspension, surrender, compromise, settlement, release, revocation or termination of, or of the failure to assert, any Guaranteed Obligation or the Interim Agreement; (v) demand on the Guarantor in the event of default except demand as set forth in Section 4.06 below; (vi) any invalidity of the Interim Agreement due to lack of proper authorization of or a defect in execution thereof by ERC, its purported representatives or agents; (vii) all other notices to which the Guarantor might otherwise be entitled except notice as set forth in Section 4.06 below; (viii) the provisions of Sections 49-25 and 49-26 of the Code of Virginia of 1950, as amended; and (ix) any duty on the part of VDOT to disclose to the Guarantor any facts VDOT now or hereafter knows with regard to ERC.

(b) The Guarantors hereby waive, as against VDOT, all rights and benefits which might accrue to the Guarantors by reason of any of bankruptcy, arrangement, reorganization or similar proceedings by or against ERC.

(c) Until ERC shall have fully and satisfactorily paid, performed, completed and discharged all of the Guaranteed Obligations, the Guarantors hereby agree not to file, or solicit the filing by others of, any involuntary petition in bankruptcy against ERC.

**3.02 Subrogation and Subordination.** Until ERC shall have fully and satisfactorily paid, performed, completed and discharged all of the Guaranteed Obligations, the Guarantors shall not claim or enforce any right of subrogation, reimbursement or indemnity against ERC, or any other right or remedy which might otherwise arise on account of any payment made by the Guarantors or any act or thing done by the Guarantors on account of or in accordance with this Guaranty. All existing or future indebtedness of ERC to the Guarantors is subordinated to all of the Guaranteed Obligations.

### **IV. MISCELLANEOUS**

#### **4.01 Enforcement of Guaranty.**

(a) This Guaranty shall be governed and construed in accordance with the laws of the Commonwealth of Virginia. All disputes between VDOT and the Guarantors arising under or relating to this Guaranty or its breach shall be filed, heard and decided in the Circuit Court for the City of Richmond, Virginia, Division I, which shall have non-exclusive jurisdiction and venue. The rights of VDOT hereunder are cumulative and shall not be exhausted by any one or more exercises of said rights against the Guarantors or by any number of successive actions until and unless the Guaranteed Obligations have been fully satisfied. The Guarantors shall pay to VDOT all reasonable out-of-pocket legal fees and other reasonable out-of-pocket costs and expenses (including fees and costs on appeal) VDOT incurs by reason of any permitted enforcement by VDOT of its rights hereunder, provided that VDOT is the prevailing party with respect to a substantial portion of its claim.

(b) THE PARTIES HEREBY KNOWINGLY, VOLUNTARILY AND INTENTIONALLY WAIVE ANY RIGHTS THEY MAY HAVE TO A TRIAL BY JURY IN ANY LITIGATION OR CLAIM WHICH IS BASED ON, OR ARISES OUT OF, UNDER OR IN CONNECTION WITH, THIS GUARANTY OR THE TRANSACTIONS CONTEMPLATED BY THIS GUARANTY.

**4.02 Notices.** Any notice required to be given or otherwise given pursuant to this Guaranty shall be in writing and shall be hand delivered, mailed by certified mail, return receipt requested or sent by recognized overnight courier service as follows:

If to VDOT:

Virginia Department of Transportation  
1401 East Broad Street  
Richmond, Virginia 23219  
Attn: Chief Engineer  
Facsimile: (804) 786-2940

with copies to:

Virginia Department of Transportation  
1401 East Broad Street  
Richmond, Virginia 23219  
Attn: IPD Director  
Facsimile: (804) 786-7221

Office of the Attorney General  
900 E. Main Street  
Richmond, Virginia 23219  
Attn: Sr. Asst Attorney General/ Transportation Chief  
Facsimile: (804) 786-9136

If to the Guarantors:

Macquarie Financial Holdings Limited  
c/o Macquarie Capital (USA) Inc.  
Attn: MacCap Advisors Legal Division  
125 West 55th Street  
New York, NY 10019  
Fax: 212-231-1718

Skanska AB  
c/o Skanska Financial Services  
Attn: Per Åke Wallerstedt and Therese Tegner  
Råsundavägen 2  
SE – 169 83 Solna  
Sweden  
Facsimile: + 46 10 448 20 48

**4.03 Severability.** If any provision of this Guaranty is determined to be unenforceable for any reason by a court of competent jurisdiction, it will be adjusted rather than voided, to achieve the intent of the parties and all the provisions not deemed unenforceable will be deemed valid and enforceable to the greatest extent possible.

**4.04 Assignment.** Neither this Guaranty nor any of the rights, interest or obligations hereunder shall be assigned or delegated, or transferred through merger by either of the Guarantors without the prior written consent of VDOT. This Guaranty and all of the provisions hereof shall be binding upon the Guarantors and each of their respective successors and permitted assigns and shall inure to the benefit of VDOT and its respective successors and assigns.

**4.05 No Third Party Beneficiaries.** Nothing in this Guaranty shall entitle any person other than VDOT and its respective successors and assigns to any claim, cause or action, remedy or right of any kind.

**4.06 Certain Rights, Duties, Obligations and Defenses.** Notwithstanding Sections 1.02 and 3.01 above, the Guarantors shall have all rights, duties, obligations and defenses available to ERC under the Interim Agreement except those expressly waived in this Guaranty. Action against the Guarantors under this Guaranty shall be subject to no prior notice or demand except for 14 days' prior written notice to the Guarantors setting forth the default or breach of the Guaranteed Obligations on the part of ERC and demand for performance and payment of such Guaranteed Obligations, provided that (i) if such breach or default is incapable of cure within 14 days despite the Guarantors' exercise of commercially reasonable efforts, such 14 day cure period shall be extended for such additional time as may be reasonably required to effect such cure, and (ii) immediate action after written notice may be required of the Guarantors in the case of emergency conditions.

**4.07 Survival.** The obligations and liabilities of the Guarantor hereunder shall survive termination of the Interim Agreement or ERC's rights thereunder due to default by ERC thereunder.

**4.08 Counterparts.** This Guaranty may be executed in one or more counterparts, all of which shall constitute one and the same instrument.

**4.09 Entire Agreement.** This Guaranty constitutes the entire agreement of the parties hereto with respect to the subject matter hereof. The Guarantors agree to execute, have acknowledged and delivered to VDOT such other and further instruments as may be reasonably required by VDOT to effectuate the intent and purpose hereof.

*[Signatures on following pages]*

**IN WITNESS WHEREOF**, the parties have executed this Guaranty as of the date set forth above.

Original with signatures on file in the  
Innovative Project Delivery Division

**Skanska AB,**  
a Corporation organized under the Laws of Sweden

By: \_\_\_\_\_  
Name:  
Title:

By: \_\_\_\_\_  
Name:  
Title:

**Macquarie Financial Holdings Limited**  
a Company organized under the Laws of Australia

By: \_\_\_\_\_  
Name:  
Title:

By: \_\_\_\_\_  
Name:  
Title:

Receipt of this Guaranty is hereby acknowledged  
and accepted effective as of the \_\_\_\_ day of \_\_\_\_\_, \_\_\_\_.

**Virginia Department of Transportation,**  
an agency of the Commonwealth of Virginia

By: \_\_\_\_\_  
Name:  
Title:

**Exhibit F**  
**Applicable Standards**

The standards, special provisions and reference guides applicable for the development of Project Deliverables, Work Packages and Work Product shall be the version of those documents in effect as of the Agreement Date, including all supplements, errata, revisions and interims.

Groupings of standards are for ease of reference only and it is the responsibility of ERC to ensure that all relevant standards and specifications have been applied.

In accordance with Section 2.2.2.1.1 of this Agreement, the Applicable Standards may be further refined during Phase 1 and changed from time to time during the term of this Agreement as mutually agreed by the Parties.

**General**

VDOT Construction Manual (2005)

VDOT Post Construction Manual (Updated July 2009)

VDOT Construction Inspection Manual (April 2008)

VDOT's Minimum Quality Control & Quality Assurance Requirements for Design-Build & Public-Private Transportation Act Projects August 2008

VDOT Traffic Engineering Design Manual

VDOT Right of Way and Utilities Division Manuals, Vol. I (July 1999) and II (November 2003)

VDOT Land Use Permit Manual

VDOT Policy Manual for Public Participation in Transportation Projects (updated January 2009)

VDOT Instructional & Information Memorandums (I&IM) All Divisions as of August 1, 2008

VDOT Traffic Engineering Memoranda, as of August 1, 2007

VDOT Road and Bridge Standards, Vol. 1 and Vol. 2 (2008)

VDOT Road and Bridge Specifications (2007), including the Revisions to the Road and Bridge Specifications, including all revisions

VDOT 2005 Virginia Work Area Protection Manual

VDOT Mobility Management Division Memoranda

Americans with Disabilities Act Accessibility Guidelines for State and Local Government Facilities

Americans with Disabilities Act (ADA) and Architectural Barriers Act (ABA) Accessibility Guidelines for Buildings and Facilities dated July 23, 2004 and amended August 5, 2005.

Transportation Research Board Highway Capacity Manual (2000)

Virginia Construction Code, 2003

VDOT Manual of Instruction for Material Division to include all associated memorandum included on VDOT Materials website.

VDOT CADD Manual (Version 2008)

VDOT State Noise Abatement Policy

ISO 9001 Quality Management Systems 2000

AASHTO Guide for Park-and-Ride Facilities, 2nd Edition

Virginia Uniform Statewide Building Code

CSX Transportation Design and Construction Standard Specifications, General and Special Conditions, June 1, 2002

CSX Transportation Public Project Information for Construction and Improvement Projects that may involve the Railroad, May 08, 2009

Title 49 Code of Federal Regulations - Part 24 – Uniform Relocation Assistance and Real Property Acquisition Policies Act.

### **Roadway Design**

VDOT 2003 Minimum Standards of Entrances to State Highways

VDOT Policy for Integrating Bicycle and Pedestrian Accommodations

VDOT Road Design Manual (all revisions as of August 2009)

AASHTO A Policy on Geometric Design of Highways and Streets (2004)

AASHTO Roadside Design Guide, Third Edition, 2006 (updated chapter 6)

AASHTO: A Policy on Design Standards Interstate System, Jan 2005

AASHTO – Guide for High Occupancy Vehicles, October 2004.

Access Board's Revised Draft Guidelines for Accessible Public Rights of Way dated November 23, 2005

### **Pavement Design**

VDOT Guidelines for 1993 AASHTO Pavement Design, Revised – May 2003

AASHTO Guide for Design of Pavement Structures (Rigid Pavement and Flexible Pavement) (1993 Edition)

### **Demolition, Renovation, and Site Clearance**

VDOT Asbestos Project Monitoring and Clearance Air Monitoring Procedures, dated September 16, 2003

VDOT Special Provision for Inspection of Structures for Asbestos Containing Materials (ACM) on Design-Build Projects, June 22, 2009

Virginia Department of Transportation Special Provision for Asbestos Removal for Road Construction Demolition Projects, April 25, 2001

VDOT Special Provision for Asbestos Removal and NESHAP Related Demolition Requirements for Structures on Design-Build Projects, June 22, 2009

VDOT Specifications for Asbestos Removal in Occupied Buildings

VDOT Special Provision Copied Note for Demolition of Structures not Requiring Asbestos Removal, June 25, 2009

### **Geotechnical**

VDOT Requirements for the Preparation of Alternate Retaining Wall Plans (03-06-08)

VDOT Requirements for General Notes for Alternate Retaining Wall Plans (03-06-08)

AASHTO LRFD Bridge Construction Specifications, 2<sup>nd</sup> Edition (2004, including the 2006, 2007 and 2008 Interims)

Duncan, J.M. (April 2000) Factor of Safety and Reliability In Geotechnical Engineering, Journal of Geotechnical and Geoenvironmental Engineering, ASCE, Discussion and Closure August 2001

### **Structures**

AASHTO LRFD Bridge Design Specifications, 4<sup>th</sup> Edition, 2007; 2008 and 2009 Interim Specifications; and VDOT Modifications (VDOT IIM-S&B-80)

AASHTO LRFD Movable Highway Bridge Design Specifications, 2<sup>nd</sup> Edition, 2007; 2008 Interim Specifications

AASHTO LRFD Bridge Construction Specifications, 2<sup>nd</sup> Edition, 2004; 2006, 2007, 2008, and 2009 Interim Specifications

Guide Specifications for LRFD Seismic Bridge Design, 1<sup>st</sup> Edition

Guide Specifications and Commentary for Vessel Collision Design of Highway Bridges, 2<sup>nd</sup> Edition

Guide Specifications for Bridges Vulnerable to Coastal Storms

Guide Specifications for Design of FRP Pedestrian Bridges, 1<sup>st</sup> Edition, 2008

Guide Specifications for Seismic Isolation Design, 2<sup>nd</sup> Edition and 2000 Interim

Guide Specifications for Design and Construction of Segmental Concrete Bridges, 2<sup>nd</sup> Edition, 2003 Revisions

Guide Specifications for Design of Pedestrian Bridges, 1<sup>st</sup> Edition, 1997

AASHTO Guide for Protective Screening of Overpass Structures, 1990

Guide Specifications for Structural Design of Sound Barriers, 1989; 1992 and 2002 Interims

Guide Specifications for Highway Bridge Fabrication with HPS 70W Steel, 2000

AASHTO Guide Specifications - Thermal Effects in Concrete Bridge Superstructures, 1<sup>st</sup> Edition, 1989

AASHTO Standard Specifications for Structural Supports for Highway Signs, Luminaries, and Traffic Signals, 1994 Edition

AASHTO Standard Specifications for Structural Supports for Highway Signs, Luminaries, and Traffic Signals, 4th Edition, 2001 (to be used for the design of dynamic message sign supports only)

AASHTO Fracture Critical Non-Redundant Steel Bridge Members Current Spec. with all Interim Specifications

AASHTO/AWS D1.5M/D1.5:2008 Bridge Welding Code, with 2009 AASHTO Interim

AASHTO Manual for Bridge Evaluation, 1<sup>st</sup> Edition, 2008

AASHTO Movable Bridge Inspection, Evaluation, and Maintenance Manual, 1<sup>st</sup> Edition

Construction Handbook for Bridge Temporary Works, 1<sup>st</sup> Edition, 1995; 2008 Interim Revisions

Guide Design Specifications for Bridge Temporary Works, 1<sup>st</sup> Edition, 1995; 2008 Interim Revisions

VDOT Manual of Structure and Bridge Division, Vol. V

Technical Manual for Design and Construction of Road Tunnels – Civil Elements

FHWA Road Tunnel Design Guidelines

Highway and Rail Transit Tunnel Inspection Manual, 2005 Edition

Highway & Rail Transit Tunnel Maintenance & Rehabilitation Manual, 2005 Edition

Best Practices for Implementing Quality Control and Quality Assurance for Tunnel Inspection, Prepared for T-20, October 2009

**For culverts and rehabilitation and/or widening of existing structures:**

AASHTO Standard Specifications for Highway Bridges, 16<sup>th</sup> Edition, 1996; 1997 and 1998 Interim Specifications; and VDOT Modifications

AASHTO Guide Specifications for Horizontally Curved Steel Girder Highway Bridges with Design Examples for I-Girder and Box-Girder Bridges, 2003

Standard Specifications for Movable Highway Bridges, 1988; 1992, 1993, and 1995 Interims

Technical Manual for Design and Construction of Road Tunnels - Civil Elements

FHWA Road Tunnel Design Guidelines

Highway and Rail Transit Tunnel Inspection Manual 2005 Edition

Highway & Rail Transit Tunnel Maintenance & Rehabilitation Manual 2005 Edition

**Drainage**

VDOT 2002 Drainage Manual (including current Errata Sheets) and revisions

VDOT Hydraulic Design Advisories as of August 1, 2007

Virginia Erosion and Sediment Control Handbook (Third Edition – 1992), Department of Conservation and Recreation

Virginia Stormwater Management Handbook, Vol. I and II (First Edition – 1999), Department of Conservation and Recreation

US Army COE, Hydrologic Modeling System (HEC HMS)

Virginia, Erosion and Sediment Control Law and Regulations, FY 2009

Virginia Storm Water Management Law and Regulations,

FEMA National Flood Insurance Program Regulations

US Army COE, River Analysis System (HEC RAS)

General Permit for Discharges of Stormwater from Construction Activities, General Permit No. VAR10

### **Traffic Control Devices and Lighting**

USDOT FHWA Standard Highway Signs

Manual of Uniform Traffic Control Devices (MUTCD), 2009 and Virginia Supplement to MUTCD, 2003

AASHTO Guide for Roadway Lighting Design (2005)

National Fire Protection Association NEC Standards, 2008

VDOT Traffic Calming Guide for Local Residential Streets, 2002

VDOT Calculation of Clearance Intervals (08-19-03)

VDOT Detector Placement (01-13-05)

VDOT Double Left-turn Lane Diagram (08-18-03)

VDOT General Guidelines for Signal Design (08-18-03)

VDOT Left Turn Phasing Guide (08-18-03)

VDOT Light Emitting Diode Module (08-18-03)

VDOT Mast Arm Signage (08-18-03)

VDOT Mast Arm Design Notes (0-8-18-03)

VDOT Mast Arm Traffic Signal Pole Guide (08-18-03)

\* Traffic control devices and lighting not owned and operated/maintained by VDOT Hampton Roads District may be subject to additional standards/specifications. Additional jurisdictions include but are not limited to:

- i. City of Portsmouth
- ii. City of Norfolk

### **Miscellaneous**

VDOT Survey Manual (2002 Edition)

VDOT Guardrail Installation Training Manual (GRIT) February 2006

U.S. Green Building Council's Leadership in Energy and Environmental Design

- i. Green Building Design and Construction Reference Guide, 2009 Edition
- ii. Green Interior Design and Construction Reference Guide, 2009 Edition
- iii. Green Building Operations and Maintenance Reference Guide, 2009 Edition
- iv. United States Environmental Protection Agency/Department of Energy's "Energy Star" rating

### **Tunnel Operations Standards**

National Fire Protection Association (NFPA) Standards

- NFPA 10 – Portable Fire Extinguishers, 2008
- NFPA 14 – Standpipe and Hose Systems, 2007
- NFPA 70 – National Electric Code, 2008
- NFPA 72 – National Fire Alarm and Signaling Code, 2010
- NFPA 101 – Life Safety Code, 2009
- NFPA 502 – Road Tunnels, Bridges and Other Limited Access Highways, 2008

ANSI/IESNA RP-8-2000 – Practice for Roadway Lighting

- National Electrical Safety Code (NESC), 2008
- ASHRAE 90.1-2004/2006 IECC or equivalent

### **ITS**

Institute of Electrical and Electronics Engineer (IEEE) 802.3 Local and Metropolitan Area Networks

National Electric Manufacturers Association (NEMA) TS-4 Hardware Standards for Dynamic Message Signs (DMS) with NTCIP Requirements

IEEE 1512-2006 - IEEE Standard for Common Incident Management Message Sets for Use by Emergency Management Centers, IEEE 1512.1-2006 – IEEE Standard for Common Traffic Incident Management Message Sets for Use by Emergency Management Centers

National Transportation Communications for ITS Protocol (NTCIP)

Hampton Roads Region Operations ITS Architecture ([www.vdot-itsarch.com](http://www.vdot-itsarch.com))

Hampton Roads Region Operations Incident Management Plan

Hampton Roads Region Operations Telecommunications Plan

## Special Provisions

### General

Virginia Department of Transportation Special Provision for Elastic Inclusion, June 24, 2007.

Virginia Department of Transportation Special Provision for Quality Assurance/Quality Control for the Construction of Deep Foundation Systems for Design-Build and PPTA Contracts, November 10, 2009

Virginia Department of Transportation Guide Special Provision for Drilled Shafts for Design-Build and PPTA Contracts, November 18, 2009

Virginia Department of Transportation Special Provision for Reinforced Earth Walls, July 5, 2007

Virginia Department of Transportation Special Provision for Density Control of Embankments and Backfill, Revised – November 26, 2006

Virginia Department of Transportation Special Provision for Wave Equation Analysis for LRFD for Design-Build and PPTA Contracts, November 18, 2009

Virginia Department of Transportation Special Provision for T-Wall Retaining Wall System for Design-Build and PPTA Contracts, November 18, 2009

Virginia Department of Transportation Special Provision for Mechanically Stabilized Earth Walls (Concrete Panel Facing) for Design-Build and PPTA Contracts, November 18, 2009

Virginia Department of Transportation Special Provision for Mechanically Stabilized Earth Walls (Modular Cantilever Facing) for Design-Build and PPTA Contracts, November 18, 2009

Virginia Department of Transportation Special Provision for Mechanically Stabilized Earth Walls (Segmental Block Facing) for Design-Build and PPTA Contracts, November 18, 2009

Virginia Department of Transportation Special Provision for Dynamic Pile Testing for Friction Piles *for LRFD* for Design-Build and PPTA Contracts, November 18, 2009

Virginia Department of Transportation Special Provision for Dynamic Pile Testing for Friction Piles for Design-Build and PPTA Contracts, November 18, 2009

Virginia Department of Transportation Special Provision for Dynamic Pile Testing for End Bearing Piles *for LRFD* for Design-Build and PPTA Contracts, November 18, 2009

Virginia Department of Transportation Special Provision for Dynamic Pile Testing for End Bearing Piles for Design-Build and PPTA Contracts, November 18, 2009

Hampton Roads Region Special Provisions for Traffic Signal Construction revised 09/07

Virginia Department of Transportation Special Provision for Design-Build Tracking (DBT) Numbers – February 8, 2008

Virginia Department of Transportation Special Provision for Reflection Cracking Retardant Material (English Units) (June 9, 1998)

Virginia Department of Transportation Special Provision for Sealing Cracks in Asphalt Concrete Pavement or Hydraulic Cement Concrete Pavements (Prior to Overlay) (June 10, 1998)

Virginia Department of Transportation Special Provision for Undersealing Portland Cement Concrete Pavement (January 3, 1995)

**100**

Virginia Department of Transportation Special Provision for Use of Domestic Material, July 9 2002 (S102C0B)

Virginia Department of Transportation Special Provision for Section 1051.10 Construction Stakes, Lines and Grades, July 9 2002 (S105A0B)

Virginia Department of Transportation Special Provision for Section 107.19 Railway-Highway Provisions, January 14, 2008 (S107I00-0708)

Virginia Department of Transportation Supplemental Division 1 General Provisions, September 9, 2009 (SS1D006-0909)

Virginia Department of Transportation Special Provision for Section 107. – Legal Responsibilities, 2007

**200**

Virginia Department of Transportation Special Provision for Low Permeability Concretes, December 2, 2002 (S217A0B)

**300**

Virginia Department of Transportation Special Provision for Flowable Backfill, July 9, 2002 (S302A0B)

Virginia Department of Transportation Special Provisions for Section 301 – Clearing & Grubbing (November 15, 2006)

**500**

Virginia Department of Transportation Special Provision for Removal or Connection of Asbestos Cement Pipe, November 7, 2005 (S500A1B)

Virginia Department of Transportation Special Provision Copied Notes c504b0b – Section 504 – Sidewalks, Steps, and Handrailings, January 12, 2005

Virginia Department of Transportation Special Provision for Micro Tunneling for DB Projects dated September 14, 2009

Virginia Department of Transportation Special Provision for Jack and Bore for DB Projects dated October 13, 2009

**Special Provision Copied Notes (“SPCN”):**

SPCN c100ai02-0609 General Project Requirements, Supplemental Specifications (“SSs”), Special Provisions (“SPs”) and Special Provision Copied Notes (“SPCNs”) (available on VDOT’s web site)

SPCN c100b01-0908 Labor (available on VDOT’s web site)

SPCN c105hf1-0309 Section 105.06 Subcontracting (available on VDOT’s web site)

SPCN c211gg0-0609 Warm Mix Asphalt Pavement (available on VDOT's web site)

SPCN c223ag1-0309 Section 223 Steel Reinforcement (available on VDOT's web site)

SPCN c315gg0-0609 Warm Mix Asphalt Pavement (available on VDOT's web site)

SPCN for PG 76-22 Asphalt Cement Adjustment – Design-Build Projects (Included in RFP Information Package – CD-ROM), dated October 7, 2009

**Supplemental Specifications:**

SS1D005-0909 Supplemental Division 1 – General Provisions

SS21101-0609 Supplemental Section 211 – Asphalt Concrete

SS21402-0908 Supplemental Section 214 – Hydraulic Cement

SS21501-0908 Supplemental Section 215 – Hydraulic Cement Concrete Admixtures

SS21701-0609 Supplemental Section 217 – Hydraulic Cement Concrete

SS22401-0908 Supplemental Section 224 – Castings

SS22601-0609 Supplemental Section 226 – Structural Steel

SS31502-0609 Supplemental Section 315 – Asphalt Concrete Pavement

SS40501-0609 Supplemental Section 405 – Prestressed Concrete

SS51202-0909 Supplemental Section 512 – Maintaining Traffic

SS51401-0609 Supplemental Section 514 – Field Office

**Reference Documents**

FHWA-IF-99-025 Drilled Shafts – Construction Procedures and Design Methods, August 1999

FHWA Geotechnical Engineering Circular No. 2 - Earth Retaining Systems, FHWA-SA-96-038, 1996

FHWA Geotechnical Engineering Circular No. 4 - Ground Anchors and Anchored Systems, FHWA-IF-99-015, 1999

FHWA Geotechnical Engineering Circular No. 5, Evaluation of Soil and Rock Properties dated April 2002

FHWA Geotechnical Engineering Circular No. 7 - Soil Nail Walls, FHWA-IF-03-017, 2003

FHWA Permanent Ground Anchors, Volume 1, Final Report, FHWA-DP-90-068, 1991

FHWA Permanent Ground Anchors, Volume 2, Field Demonstration Project Summaries, FHWA-DP-90-068, 1991

FHWA Manual for Design & Construction of Soil Nail Walls, FHWA-SA-96-069R, 1999

FHWA Soil Nailing Field Inspectors Manual-Soil Nail Walls, FHWA-SA-93-068, 1993

FHWA The Osterberg Cell for Load Testing Drilled Shafts And Driven Piles, FHWA-SA-94-035, 1994

ASSHTO (1988) Manual on Subsurface Investigation

Load and Resistance Factor Design (LRFD) For Highway Bridge Superstructures (April 2007), FHWA-NHI-08-048

Load and Resistance Factor Design (LRFD) for Highway Bridge Substructures (April 2007), FHWA-NHI-08-036

Load and Resistance Factor Design (LRFD) For Highway Bridge Superstructures (April 2007) Examples, FHWA-NHI-08-049

LFRD for Highway Bridge Substructures and Earth Retaining Structures (Jan 2007), FHWA-NHI-05-095

Ground Improvements Reference Manual Volume I, FHWA-NHI-06-019

Ground Improvements Reference Manual Volume II, FHWA-NHI-06-020

Earth Retaining Structures (RM), FHWA-NHI-07-071

Micropile Design and Construction Reference Manual (December 2005), FHWA-NHI-05-039

Mechanically Stabilized Earth Walls And Reinforced Soil Slopes - Design And Construction Guidelines (March 2001), FHWA-NHI-00-043

VDOT Clearance Chart (08-18-03)

VDOT Conductor Cable and Conduit Sizes (08-18-03)

VDOT Preliminary Sub Example

VDOT Rest in Walk pedestrian phasing (01-13-05)

VDOT Right Turn overlap phasing (01-13-05)

VDOT Right-of-way Diagrams (01-13-05)

VDOT Side street split phasing (01-13-05)

VDOT Signal Control Justification (08-18-013)

VDOT Signal Plan Update (01-13-05)

VDOT Hampton Roads Signal Symbols (08-18-03)

VDOT Signal Timing Submission Process (08-18-03)

VDOT Span Wire Design Notes (08-18-03)

VDOT Telespar Sign Supports (01-13-05)

VDOT Hampton Roads Timing Template-170 format (01-3-05)

VDOT Design Notes (08-18-03)

American Water Works Association Standards

FHWA Hydraulic Design Series No. 1, Hydraulics of Bridge Waterways, 1978

FHWA Hydraulic Design Series No. 2, Highway Hydrology, 2002

FHWA Hydraulic Design Series No. 3, Design Charts for Open Channel Flow, 1961

FHWA Hydraulic Design Series No. 4, Introduction of Highway Hydraulics, 2001

FHWA Hydraulic Design Series No. 5, Hydraulic Design of Highway Culverts 2005

FHWA Hydraulic Design Series No. 11, Design of Riprap Revetment, 1989

USDA, NRCS, Urban Hydrology for Small Watersheds, TR-55, June 1986

VDOT Stormwater Management Handbook

ITE TMDD - Traffic Management Data Dictionary and Message Sets for External TMC  
Communication (TMDD and MS/ETMCC)

Communications & Outreach Protocol, January 2011 – VDOT / ERC (under development)

VDOT DBE Program, March 15, 2007

Virginia Department of Transportation critical infrastructure information and sensitive security  
information (CII/SSI) policy, [February 3, 2006 \(Version 6\)](#)

Virginia Department of Transportation Department Policy Memorandum Manual, DPM 1-25  
January 1, 2009

<b>Midtown Tunnel / Downtown Tunnel / MLK Extension Project Development Budget to be attached to the Interim Agreement</b>		
The following budget reflects a representation of the Project development categories, along with associated costs. The details of the Project Deliverables and Work Packages for Phase 2, along with the associated costs and final distribution thereof per development category, will be agreed to amongst the parties in Phase I. The dollar amounts set forth below are in thousands.		
<b>Commercial Close (Phase 2)</b>		
<b>CJV</b>		
Design	Internal Cost	322.5
	External Design Costs	9,127.0
	External Studies	4,544.0
	<u>Total Costs</u>	13,993.5
Construction: Means & Methods	Internal Cost	2,255.6
	External Costs	-
	<u>Total Costs</u>	2,255.6
Construction: Cost Estimate	Internal Cost	2,570.6
	External Costs	-
	<u>Total Costs</u>	2,570.6
Permitting & Environmental	Internal Cost	151.3
	External Costs (1)	2,576.8
	<u>Total Costs</u>	2,728.1
<b>Total CJV</b>	<b>Internal Cost</b>	<b>5,300.0</b>
	<b>External Costs</b>	<b>16,247.8</b>
	<b>Total Costs</b>	<b>21,547.8</b>
<b>Developers</b>		
Traffic & Revenue Forecasts	Internal Cost	730.3
	External Costs	863.9
	<u>Total Costs</u>	1,594.3
Operations & Maintenance	Internal Cost	1,460.7
	External Costs	2,255.4
	<u>Total Costs</u>	3,716.1
Tolling Operations	Internal Cost	486.9
	External Costs	224.8
	<u>Total Costs</u>	711.7
Community Outreach (2)	Internal Cost	973.8
	External Costs	70.2
	<u>Total Costs</u>	1,044.0
Finance	Internal Cost	1,217.2
	External Costs	1,163.7
	<u>Total Costs</u>	2,380.9
Comprehensive Agreement (2)	Internal Cost	973.8
	External Costs	876.3
	<u>Total Costs</u>	1,850.1
<b>Total Developers</b>	<b>Internal Cost</b>	<b>5,842.7</b>
	<b>External Costs</b>	<b>5,454.2</b>
	<b>Total Costs</b>	<b>11,297.0</b>
<b>GRAND TOTAL</b>		
	<b>Internal Cost</b>	<b>11,142.7</b>
	<b>External Costs</b>	<b>21,702.0</b>
<b>Total</b>	<b>Total Costs</b>	<b>32,844.8</b>
Notes:		
- Development activities from execution of a Comprehensive Agreement to the Financial Closing Date and expenses up to the date of execution of the Interim Agreement are outside the scope of the Interim Agreement and will be negotiated in the development of the Comprehensive Agreement.		
- (1) \$164,800 of the environmental external costs are parts of the Developers' budget. The remaining are part of the CJV's budget		
- (2) VDOT will not share in Community Outreach and Comprehensive Agreement discussions costs above under the Interim Agreement		

**Exhibit H**

**Form of Certifications**

**Certification Regarding Debarment,  
Suspension, and other Responsibility Matters**

**Primary Covered Transactions**

Project: Downtown Tunnel/Midtown Tunnel/MLK Extension Project

1) The prospective primary participant certifies to the best of its knowledge and belief, that it and its principals:

a) Are not presently debarred, suspended, proposed for debarment, declared ineligible, or voluntarily excluded from covered transactions by any Federal department or agency.

b) Have not within a three-year period preceding this Agreement been convicted of or had a civil judgment rendered against them for commission of fraud or a criminal offense in connection with obtaining, attempting to obtain, or performing a public (Federal, State or local) transaction or contract under a public transaction; and have not been convicted of any violations of Federal or State antitrust statutes or commission of embezzlement, theft, forgery, bribery, falsification, or destruction of records, making false statements, or receiving stolen property;

c) Are not presently indicted for or otherwise criminally or civilly charged by a governmental entity (Federal, State or local) with commission of any of the offenses enumerated in paragraph 1) b) of this certification; and

d) Have not within a three-year period preceding this Agreement had one or more public transactions (Federal, State or local) terminated for cause or default.

2) Where the prospective primary participant is unable to certify to any of the statements in this certification, such prospective participant shall attach an explanation to this certification.

\_\_\_\_\_  
Signature

\_\_\_\_\_  
Date

\_\_\_\_\_  
Title

\_\_\_\_\_  
Typed Name and Title

\_\_\_\_\_  
Name of Firm

**Certification Regarding Debarment,  
Suspension, Ineligibility, and Voluntary Exclusion**

**Lower Tier Covered Transactions**

Project: Downtown Tunnel/Midtown Tunnel/MLK Extension Project

- 1) The lower tier participant certifies that neither it nor its principals is presently debarred, suspended, proposed for debarment, declared ineligible, or voluntarily excluded from participation in this transaction by any Federal department or agency.
- 2) Where the lower tier participant is unable to certify to any of the statements in this certification, such prospective participant shall attach an explanation to this certification.

\_\_\_\_\_  
Signature

\_\_\_\_\_  
Date

\_\_\_\_\_  
Title

\_\_\_\_\_  
Typed Name and Title

\_\_\_\_\_  
Name of Firm

## USE OF CONTRACT FUNDS FOR LOBBYING CERTIFICATION

*[To be executed by ERC, Key Members, and Contractors to be paid in excess of \$100,000]*

1. The undersigned certifies that, to the best of its knowledge and belief:
  - a. No federal appropriated funds have been paid or will be paid, by or on behalf of the undersigned, to any person for influencing or attempting to influence an officer or employee of any federal agency, a member of Congress, an officer or employee of Congress, or an employee of a member of Congress in connection with the awarding of any federal contract, the making of any federal grant, the making of any federal loan, the entering into of any cooperative agreement, and the extension, continuation, renewal, amendment, or modification of any federal contract, grant, loan, or cooperative agreement.
  - b. If any funds other than federal appropriated funds have been paid or will be paid to any person for influencing or attempting to influence an officer or employee of any federal agency, a member of Congress, an officer or employee of Congress, or an employee of a member of Congress in connection with any federal contract, grant, loan, or cooperative agreement, the undersigned shall complete and submit Standard Form-LLL, "Disclosure Form to Report Lobbying," in accordance with its instructions, and shall include a copy of said form in its proposal or bid, or submit it with the executed Agreement or subcontract.
2. This certification is a material representation of fact upon which reliance was placed when this transaction was made or entered into. Submission of this certification is a prerequisite for making or entering into this transaction imposed by 31 U.S.C. §1352. Any person who fails to file the required certification shall be subject to a civil penalty of not less than \$10,000 and not more than \$100,000 for each such failure.
3. ERC shall require that the language of this certification be included in all lower tier subcontracts which exceed \$100,000 and that all such recipients shall certify and disclose accordingly.
4. The undersigned certifies or affirms the truthfulness and accuracy of each statement of its certification and disclosure, if any. In addition, the undersigned understands and agrees that the provisions of 31 U.S.C. §3801, *et seq.*, apply to this certification and disclosure, if any.

[Note: Pursuant to 31 U.S.C. §1352(c)(1)-(2)(A), any person who makes a prohibited expenditure or fails to file or amend a required certification or disclosure form shall be subject to a civil penalty of not less than \$10,000 and not more than \$100,000 for each expenditure or failure.]

Signature: \_\_\_\_\_

Name: \_\_\_\_\_

Title: \_\_\_\_\_

Entity Making Certification: \_\_\_\_\_

Date: \_\_\_\_\_

ANTI-COLLUSION AFFIDAVIT

Each of the undersigned, being first duly sworn, deposes and says that:

- A. \_\_\_\_\_ is the \_\_\_\_\_ of \_\_\_\_\_ and \_\_\_\_\_ is the \_\_\_\_\_ of \_\_\_\_\_, which entity(ies) are the \_\_\_\_\_ of \_\_\_\_\_, the entity making the foregoing Interim Agreement.
- B. I, the firm, corporation or officers, agents or employees thereof have neither directly nor indirectly entered into any combination or arrangement with any person, firm or corporation or entered into any agreement, participated in any collusion, or otherwise taken any action in restraint of free competitive bidding in connection with such contract, the effect of which is to prevent competition or increase the cost of construction or maintenance of the Project.

Signed at \_\_\_\_\_, this \_\_\_\_\_ day of \_\_\_\_\_, 2010  
County (City), State

\_\_\_\_\_  
(Name of Firm) By: \_\_\_\_\_ (Signature) \_\_\_\_\_ Title (print)

STATE of \_\_\_\_\_ COUNTY (CITY) of \_\_\_\_\_

I \_\_\_\_\_, a Notary Public in and for the State and County(City) aforesaid, hereby certify that this day \_\_\_\_\_

personally appeared before me and made oath that he/she is duly authorized to make the above statements and that such statements are true and correct.

Subscribed and sworn to before me this \_\_\_\_\_ day of \_\_\_\_\_, 2010

\_\_\_\_\_  
Notary Public My Commission expires: \_\_\_\_\_