

**SECOND AMENDED AND RESTATED COMPREHENSIVE AGREEMENT**

**RELATING TO THE I-95/395 HOV/HOT LANES PROJECT**

**DATED AS OF APRIL 18, 2019**

**BY AND BETWEEN**

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

**AND**

**95 EXPRESS LANES LLC,  
a Delaware limited liability company**

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This SECOND AMENDED AND RESTATED COMPREHENSIVE AGREEMENT RELATING TO THE I-95/395 HOV/HOT LANES PROJECT (as amended, restated, supplemented and otherwise modified from time to time, this “Agreement”) is made and entered into as of April 18, 2019 by and between the VIRGINIA DEPARTMENT OF TRANSPORTATION (the “Department”), an agency of the Commonwealth of Virginia (the “State”), the address of which Department is 1401 East Broad Street, Richmond, Virginia 23219; and 95 EXPRESS LANES LLC, a Delaware limited liability company (the “Concessionaire”), the address of which is 6440 General Green Way, Alexandria, Virginia 22312.

## ARTICLE 1.

### RECITALS

**WHEREAS**, on July 31, 2012, the Department and the Concessionaire entered into the Original Comprehensive Agreement to develop and operate approximately 29 miles of high-occupancy toll lanes in the median of I-95 between one mile north of Route 648 (Edsall Road) and the ramp for the Route 610 interchange (Garrisonville Road);

**WHEREAS**, on May 2, 2016, under the First Amendment the Parties added the Southern Terminus Extension to the Project, which extended the Project approximately 2.2 miles south to about milepost 142.5 on I-95;

**WHEREAS**, on June 8, 2017, the Parties entered into the First ARCA to add the 395 Project, which among other things extended the Project for approximately 8 miles north to the Washington D.C. line;

**WHEREAS**, on November 30, 2017, the Concessionaire submitted to the Department a written proposal to extend the Project approximately 10 miles farther south to Route 17 in Fredericksburg (the “Fred Ex Project”), which proposal the Concessionaire supplemented on January 9, 2018, and the Department accepted on January 11, 2018 for the purposes of proceeding to amend and restate the First ARCA; and

**WHEREAS**, the Parties now desire to amend and restate the First ARCA to set forth their understandings and agreements with respect to the development, design, finance, construction, operation, and maintenance of the Project pursuant to a long-term concession arrangement granted to the Concessionaire by the Department by this Agreement.

## **AGREEMENT**

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

### **ARTICLE 2.**

#### **DEFINITIONS**

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

### **ARTICLE 3.**

#### **BASIC ROLES AND RESPONSIBILITIES**

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

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

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

(c) The Concessionaire will provide appropriate oversight, management, and reporting of all phases of the Project and its Contractors such that the Project is delivered, operated, and maintained in accordance with this Agreement.

(d) The Concessionaire may retain Contractors to perform certain of its responsibilities pursuant to this Agreement, subject to the terms and conditions of this Agreement. Performance of any of the Work by a Contractor will satisfy the obligation of the Concessionaire to perform such Work; *provided* that any such Work performed will be binding on the Concessionaire and the foregoing shall not relieve the obligation of the Concessionaire to manage such Contractor. Except with regard to Limited Notices to Proceed, the 395 LNTP, the Fred Ex LNTP, notices relating to Substantial Completion pursuant to Section 8.08(e), notices relating to Final Acceptance pursuant to Section 8.09(b), notices relating to 395 Final Completion and 395 Early Final Completion pursuant to Section 8.18, notices relating to Fred Ex Final Completion pursuant to Section 8.21, and notices relating to Service Commencement pursuant to Section 9.02(a), (f) and (g), the making of any submittals or the giving of any notices to the Department by the Design-Build Contractor (with respect to the Design-Build Work), the TTMS Contractor (with respect to the TTMS Work) or the O&M Contractor (with respect to the

O&M Work) will satisfy the obligation of the Concessionaire to make such submittal or give such notice; *provided* that any such submittal made or notice given by the Design-Build Contractor (with respect to the Design-Build Work), the TTMS Contractor (with respect to the TTMS Work) or the O&M Contractor (with respect to the O&M Work) will be binding on the Concessionaire and the foregoing shall not relieve the obligation of the Concessionaire to manage the Design-Build Contractor (with respect to the Design-Build Work), the TTMS Contractor (with respect to the TTMS Work) or the O&M Contractor (with respect to the O&M Work). In any such event, the Concessionaire will remain fully and primarily responsible for the performance of the Work, the making of submittals, or the giving of any notices by any Contractors.

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

(f) The Department will use reasonable efforts in performing its rights and duties under this Agreement to minimize any disruption to or impairment of the performance of the Concessionaire's rights and obligations under this Agreement; *provided*, that nothing in this Section 3.01(f) will limit the Department's rights and obligations under this Agreement.

### **Section 3.02 Project Agreements**

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

- (i) Escrow Agreement attached as Exhibit D;
- (ii) Design-Build Contract attached as Exhibit E;
- (iii) Design-Build Work Guarantee attached as Exhibit F;
- (iv) Operations and Maintenance Agreement attached as Exhibit I; and
- (v) Shared Facilities Agreement attached as Exhibit X.

(b) The following Project Agreements relating to the 395 Project (all as more particularly described by this Agreement), will be executed on or before the Amended and Restated Agreement Date, and the Concessionaire will promptly deliver to the Department executed copies of the same:

- (i) 395 Design-Build Contract attached as Exhibit HH; and
- (ii) 395 TTMS Contract attached as Exhibit II.

(c) The following Project Agreements relating to the Fred Ex Project (all as more particularly described by this Agreement), will be executed on or before the Second Amended and Restated Agreement Date, and the Concessionaire will promptly deliver to the Department executed copies of the same:

- (i) Fred Ex Design-Build Contract attached as Exhibit JJ;
- (ii) Fred Ex TTMS Contract attached as Exhibit KK; and
- (iii) Third Amended and Restated Escrow Agreement attached as Exhibit D.

### **Section 3.03 Nature of Parties' Interests Pursuant to This Agreement**

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

(b) The Department and the Concessionaire acknowledge their mutual intent that, despite the Department's retention of fee title to (or other good and valid real property interest in) the Project Assets and the Project Right of Way, as a result of the Concessionaire's rights and interests therein pursuant to the Permit granted to the Concessionaire under this Agreement, to the maximum extent permitted by Law, for federal income tax purposes the Concessionaire will be treated as having acquired the following:

(i) with respect to the Project Assets and the Project Right of Way that are not part of the 395 Project, the Fred Ex Project, and the STE (other than the Department Shared Assets), (A) an ownership interest in those Project Assets that have an expected economic useful life equal to or less than the Term, (B) a leasehold interest in the Project Right of Way and those Project Assets that have an expected economic useful life greater than the Term (with the amount allocable under this clause (B) treated for purposes of section 467 as giving rise to rent that is allocated ratably to each year during the Term) and (C) a franchise and license, permit, or other right within the meaning of Section 197(d)(1)(D) and 197(d)(1)(F) of the Code and in that regard an amount equal to the Concessionaire's cost of development, design, construction, and start-up of the Project represents acquisition cost of such assets (the "Cost"), and no payment by the Department to the Concessionaire pursuant to Section 7.02 will be treated as part of the Cost;

(ii) with respect to the Project Assets and Project Right of Way related to the 395 Project, the Fred Ex Project, and the STE (other than the Department Shared Assets and the 395 Department Assets), (A) an ownership interest in the Project Assets that have an expected economic useful life equal to or less than the Term, (B) a depreciable interest in those Project Assets funded by the Concessionaire either as tenant funded leasehold improvements or owned assets, (C) a leasehold interest in the Project Right of Way and those Project Assets that have an expected economic useful life greater than the Term (with the amount allocable under this clause (C) treated for purposes of section 467 of the Code as giving rise to rent that is allocated ratably to each year during the Term) and (D) a franchise and license, permit, or other right within the meaning of Section

197(d)(1)(D) and 197(d)(1)(F) of the Code of the Project Right of Way within the 395 Corridor, STE Corridor and the Fred Ex Corridor; and

(iii) with respect to the 395 Department Assets, this Agreement provides that Concessionaire is performing Work for the Department under a long-term contract as set forth in Section 460 of the Code.

(c) The Cost and all consideration payable by the Concessionaire to or for the benefit of the Department related to the 395 Concessionaire Assets, the Fred Ex Project, and the STE will be allocated for all income tax purposes in the manner determined by the Concessionaire, which allocation will be consistent with Section 1060 of the Code and the Concessionaire will execute and file all income tax returns with the Internal Revenue Service in a manner consistent with such allocation, including Form 8594. The Department and the Concessionaire do not contemplate that the Department will be required to file any return with the Internal Revenue Service with respect to such allocation, but that if required to do so the Department will file such return in a manner consistent with such allocation.

### **Section 3.04 Quiet Possession and Enjoyment**

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

## **ARTICLE 4.**

### **GRANT OF PERMIT; TERM**

#### **Section 4.01 Grant of Permit**

(a) Pursuant to the Act and subject to the terms and conditions of this Agreement, the Department grants to the Concessionaire the exclusive right, and the Concessionaire accepts (i) the obligation to develop, design, finance, construct, operate, and maintain the Project, including the obligation to operate and maintain the STE following the applicable Service Commencement Date and following handover pursuant to Section 8A.11 and (ii) the right to establish, impose, charge, collect, use, and enforce payment of tolls and related charges (the "Permit"). For the avoidance of doubt, (1) the design, development, and construction of the Project shall not include the design, development, and construction of the STE and (2) the

operations and maintenance of the Project shall not include the operations and maintenance of the 395 Department Assets.

(b) The Department's grant of the Permit and the Concessionaire's obligations, each pursuant to Section 4.01(a), is conditioned on:

(i) Financial Close having occurred in accordance with Section 7.03 (with respect to the Original HOT Lanes);

(ii) 395 Financial Close having occurred in accordance with Section 7.03A (with respect to the 395 HOT Lanes); and

(iii) Fred Ex Financial Close having occurred in accordance with Section 7.03B (with respect to the Fred Ex HOT Lanes);

*provided* however that portions of the Work may be performed by the Concessionaire prior to Financial Close pursuant to Section 8.02 and Section 8.04, prior to 395 Financial Close pursuant to Section 8.17, or prior to Fred Ex Financial Close pursuant to Section 8.20.

(c) In consideration of the Permit granted to the Concessionaire by the Department pursuant to this Section 4.01, the Concessionaire will perform the Work at its own expense except as otherwise provided in this Agreement and pay (to the extent required) to the Department the Gross Toll Share Payment in accordance with the Gross Toll Share Payment calculation attached as Exhibit J-2 and the Annual Transit Investment in accordance with Section 5.11 and the terms as set forth in Exhibit P, which Annual Transit Investment also is in consideration for all the rights granted with respect to the 395 Project.

#### **Section 4.02 Term**

This Agreement will take effect on the Second Amended and Restated Agreement Date and will remain in effect, until the first to occur of (i) December 28, 2087 or (ii) the effective date of the termination of this Agreement pursuant to Article 20 (the "Term").

### **ARTICLE 5.**

#### **TOLLING**

##### **Section 5.01 Tolling of the Project**

(a) Toll Revenues.

(i) From and after the Service Commencement Date and continuing during the Term, the Concessionaire will have the exclusive right to establish, impose, charge, collect, use and enforce the collection and payment of the Toll Revenues, in accordance with the terms of this Agreement. The Concessionaire will have no right to charge or collect the Toll Revenues, except as expressly authorized by this Agreement. Except as otherwise provided in this Agreement, beginning on the Service Commencement Date and through the end of the Term, the Concessionaire will have the exclusive right, title,

entitlement, and interest in and to the Toll Revenues, subject to the provisions of the Electronic Toll Collection Agreement substantially in the form attached as Exhibit K.

(ii) The Concessionaire acknowledges and agrees that it will not be entitled to receive from the Department any compensation, return on investment, or other profit for providing the services contemplated by this Agreement and the other Project Agreements, other than the Public Funds Amount and other payments to the extent and in the manner specified in this Agreement. The foregoing will not affect the Concessionaire's entitlement to Toll Revenues as provided in this Agreement.

(b) Users of the HOT Lanes.

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

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

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

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

(c) Concerning Tolls. The Concessionaire's rights under Section 5.01(a) are limited by, and conditioned on, compliance with Law and all other provisions in this Agreement, including the following provisions.

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

(ii) The Concessionaire may charge, debit, and collect tolls through Open Road Tolling facilities that comply with Section 5.04, or use remote sensing or other technologies (including global positioning system technology) which must be interoperable with E-ZPass (or any successor to E-ZPass utilized on State Highways at that time) to charge, debit, and collect tolls for actual vehicular use of the HOT Lanes.

(d) Incidental Charges. The foregoing authorization to establish, impose, charge, collect, use, and enforce the collection and payment of tolls includes the right, to the extent permitted by Law, and subject to the requirement to be interoperable with E-ZPass (and any successor to E-ZPass utilized on State Highways at that time) as set forth in Section 5.01(e), to



impose, charge, collect, use, and enforce, with respect to electronic tolling accounts managed by or on behalf of the Concessionaire, the following incidental charges:

- (i) except to the extent that such services are provided by the Department pursuant to the Electronic Toll Collection Agreement, reasonable administrative fees for account maintenance, account statements, and customer service;
- (ii) except to the extent that such services are provided by the Department pursuant to the Electronic Toll Collection Agreement, reasonable amounts for the purchase or rental of transponders or other electronic tolling devices;
- (iii) except to the extent that such services are provided by the Department pursuant to the Electronic Toll Collection Agreement, reasonable, refundable security deposits for the distribution of transponders or other electronic toll devices;
- (iv) except to the extent that such services are provided by the Department pursuant to the Electronic Toll Collection Agreement, reasonable video surcharges or other reasonable fees for permitted travel on the Project Assets by vehicles that are not equipped with a transponder or other available equipment allowing the processing of the applicable tolls through E-ZPass (or any successor to E-ZPass utilized on State Highways at that time); and
- (v) reasonable fees, penalties, and interest for toll violations, including costs of collection in accordance with Law; and
- (vi) other incidental fees and charges reasonable and customary in connection with the services being provided at that time by the Concessionaire; *provided*, that the amount of any such other incidental fees and charges will not exceed the amount reasonably necessary for the Concessionaire to recover its Allocable Costs, directly incurred with respect to the items, services, and work for which they are levied.

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

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



State Highways at that time) or with such other system then utilized on other State Highways in accordance with the Technical Requirements.

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

(g) Transaction Costs.

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

(ii) If the Department, or its successors or assigns, ceases to provide all or a material part of the ETC Services and as a result the Concessionaire incurs costs related to self-performing, or engaging a Contractor to perform, the ETC Services no longer provided by the Department, or its successors or assigns, then the Department agrees to pay the Concessionaire the amount of such reasonable costs. If the Concessionaire self-performs or contracts with a Contractor to provide ETC Services, the Department, or its successors or assigns, will provide the same access to customer accounts as if the Department continued to provide the ETC Services, if such access is permitted by Law and if the Concessionaire pays to the Department, or its successors or assigns, the reasonable costs of providing such access.

(h) Violations Processing Services.

(i) The Department has implemented and maintains a processing system for the enforcement of penalties for toll violations in Virginia for electronic toll collection systems on State Highways. The Concessionaire may, but is not obligated to, enter into an agreement with the Department to obtain the benefits of such enforcement system, in accordance with the Violation Processing Services Agreement in the form attached as Exhibit L. In consideration of such services, the Concessionaire will pay the Department its customary charges for such services in effect from time to time. For purposes of identifying and apprehending toll violators of the Project, provided it is authorized under Law, and any applicable agreements or arrangements, the Department will make

available to the Concessionaire the benefits of any agreements or arrangements which the Department has in place with other state authorities or agencies that provide access to records in their possession relating to vehicle and vehicle owner data, and will coordinate with the Virginia State Police in accordance with Section 9.06 with respect to the provision of policing services, emergency services, traffic patrol and traffic law enforcement services on the Project.

(ii) The Concessionaire understands and agrees that, notwithstanding anything to the contrary in this Agreement or any other Project Agreement, the risk of enforcement and collection of tolls and related charges (including user fees and civil penalties and administrative fees) remains with the Concessionaire, and that the Department does not, and will not be deemed to, guarantee collection or collectability of such tolls and related charges to the Concessionaire or any other Person; *provided*, however, that the foregoing will not limit the Department's obligations or duties under the Electronic Toll Collection Agreement or any other Project Agreement with the Concessionaire.

(i) License Plate Look-up Fees. While the parties do not anticipate that the Virginia Department of Motor Vehicles will charge the Concessionaire a fee for license plate identification pursuant to the Concessionaire's violation processing services, in the event that the Virginia Department of Motor Vehicles does charge the Concessionaire a fee for license plate identification pursuant to the Concessionaire's violation processing services, the Concessionaire will promptly notify the Department of any such fee. Upon receipt of such notice, the Department may contact the Virginia Department of Motor Vehicles and attempt to negotiate a lower fee or to eliminate such fee. The Department agrees to pay the Concessionaire the amount of such fees charged to the Concessionaire, if any, by the Department of Motor Vehicles related to the Project. Prior to the payment by the Department of such amounts, the Concessionaire will submit to the Department on a monthly basis an invoice to the Department for such fees paid by the Concessionaire, including supporting documentation.

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

## **Section 5.02 Toll Rates**

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

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

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

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

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

- (i) type, weight and occupancy of the vehicle;
- (ii) number of axles;
- (iii) time of day and/or week;
- (iv) time and location of entry or exit to or from the HOT Lanes;
- (v) traffic volume, vehicle speed, vehicle type; and
- (vi) similar variables or combinations of such variables.

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

### **Section 5.03 Reserved**

### **Section 5.04 User Confidentiality**

The Concessionaire will comply with all Laws related to confidentiality and privacy of users of the HOT Lanes.

### **Section 5.05 Suspension of Tolls**

(a) In addition to its rights under Law and Section 22.02(b) (but without limiting the Concessionaire’s rights in the event of the occurrence of a Department Change or a Compensation Event), the Department will have the right, in its sole discretion, to order immediate suspension of tolling on any or all portions of the HOT Lanes that are designated for immediate use as an emergency mass evacuation route. The Department will have no liability to the Concessionaire for the loss of Toll Revenues or the increase in costs and expenses attributable to any such order issued pursuant to Law by the Department or any other Governmental Authority, *provided* that the Department:

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

(ii) lifts the order on the HOT Lanes before or concurrently with the lifting of the order for all other designated tolled facilities within the area designated for evacuation or facilitation of evacuation.

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

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

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

The Department and the Concessionaire will consult with each other on any such diversion of traffic and any suspension of tolling. The Department will have no liability to the Concessionaire for the loss of Gross Revenues or the increase in costs and expenses attributable to the period that such order is in effect. The Department will lift an order given in accordance with this Section 5.05(b) as soon as the need for such order ceases.

(c) If the Department receives an order, request, notice, or demand from federal authorities, the Department will have the right to close all or a portion of the HOT Lanes to the public for such period of time as may be necessary for secret service, national security and homeland security purposes. The Department will have no liability to the Concessionaire for the loss of Gross Revenues or the increase in costs and expenses attributable to any such event. The Department will lift an order given in accordance with this Section 5.05(c) as soon as the need for such order ceases.

(d) Each party will provide reasonable assistance to the other party in seeking any available reimbursement from Federal sources for lost Toll Revenues and expenses incurred as a result of a suspension pursuant to Section 5.05(a) or (b) or a closure of the HOT Lanes pursuant to Section 5.05(c) and for pursuing insurance coverage related thereto. If either the Concessionaire or the Department receives reimbursement from Federal sources for lost Toll Revenues as a result of actions taken in the preceding sentence, the proceeds of such reimbursement will be applied in the following order of priority: first to repair any uninsured physical damage to the HOT Lanes directly caused by the suspension of tolling or diversion of traffic onto the HOT Lanes pursuant to this Section 5.05; second, pro rata, to pay the Allocable Costs of the Department and the Concessionaire in obtaining reimbursement from Federal sources pursuant to this Section 5.05(d); and third, to the Concessionaire as reimbursement for lost Toll Revenues.

(e) The Department agrees that the minimum average operating speed during periods when the tolling on the HOT Lanes has been suspended or the HOT Lanes have been closed pursuant to this Section 5.05 will be excluded from any calculation of OSPS.

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

### **Section 5.06 Disposition of Gross Revenues**

(a) Gross Revenues will be used first to pay all due and payable Operating Costs, specifically including all amounts due to the Department pursuant to this Agreement (other than the Annual Transit Investment and the Gross Toll Share Payment). Such amounts due to the Department (other than the Annual Transit Investment and the Gross Toll Share Payment) will be paid on a *pari passu* basis with all other operations and maintenance costs, before the Gross Revenues may be used and applied for any other purpose.

(b) The Concessionaire will not use Gross Revenues to make any Distributions (or to pay any amount payable pursuant to an Affiliate Contract subject to approval but not approved by the Department pursuant to Section 24.02(1)), unless and until the Concessionaire first pays the following (listed in no particular order):

(i) any undisputed amounts due to the Department pursuant to the terms of this Agreement;

(ii) current and delinquent operations and maintenance costs (including any payments to Affiliates made solely in accordance with the applicable Affiliate Contracts entered into in accordance with Section 24.02(1));

(iii) current and delinquent debt service and other current and delinquent amounts, due under any Concessionaire Debt;

(iv) all Taxes affecting the Project that are currently due and payable or delinquent;

(v) all current and delinquent deposits to any Major Maintenance Reserve Fund and any other reserve contemplated by this Agreement;

(vi) all current and delinquent costs and expenses for Major Maintenance;

(vii) the Annual Transit Investment that is currently due and payable in accordance with Part B of Exhibit P and any 395 Delayed Annual Transit Investment Amounts pursuant to, and in accordance with, Section 5.11 and Exhibit P; and

(viii) any Gross Toll Share Payment due to the Department under Exhibit J-2.

In the event there are any disputed amounts due to the Department pursuant to the terms of this Agreement, the Concessionaire will maintain a cash reserve for such disputed amounts in accordance with GAAP or any other generally accepted accounting principles which are acceptable to the Department as a condition precedent to making any

Distribution or payment to an Affiliate. If the Concessionaire makes any Distribution or payment to an Affiliate in violation of this Section 5.06(b), the same will be deemed to be held in trust by such Person for the benefit of the Department and the Collateral Agent, and will be payable to the Department or the Collateral Agent on demand. If the Department collects any such amounts held in trust, it will make them available for any of the purposes set forth above and, at the request of the Collateral Agent, deliver them to the Collateral Agent.

(c) The Concessionaire will have no right to use Gross Revenues to pay any debt, obligation, or liability unrelated to this Agreement, the Project, or the Concessionaire's services pursuant to this Agreement, *provided*, that this Section 5.06(c) does not apply to or otherwise affect the Concessionaire's right to make Distributions in accordance with the Concessionaire's governing instruments and this Agreement and the ability of the recipients thereof to apply the same in their sole discretion, subject to compliance with Section 5.06(b) and Exhibit P.

(d) For the avoidance of doubt, any Toll Revenues generated on the Original HOT Lanes, the Fred Ex HOT Lanes and the STE HOT Lanes will not be considered or treated as 395 Revenues (as defined under Exhibit P) for the purposes of the Annual Transit Investment.

(e) In conjunction with the (i) Concessionaire incurring any Concessionaire Debt after the Second Amended and Restated Date for which the Concessionaire intends to seek the consent of Lenders under the Financing Assignments, or (ii) Concessionaire refinancing any Concessionaire Debt after the Second Amended and Restated Date, the Concessionaire shall seek the consent of Lenders that is required to amend the Collateral Agency Agreement (A) to amend the Project Revenues Waterfall to insert the Gross Toll Share Payment immediately below the Annual Transit Investment within the Project Revenues Waterfall and (B) to remove the Permit Fee from the Collateral Agency Agreement (the "Collateral Agency Agreement Amendment"). Prior to effective date of the Collateral Agency Agreement Amendment, in connection with any Concessionaire Debt incurred after the Second Amended and Restated Date that does not require Lender consent under the Financing Assignments, the Concessionaire shall require the Lenders related to such Concessionaire Debt to agree to the Collateral Agency Agreement Amendment taking effect, whether contemporaneously or in the future, as applicable.

## **Section 5.07 Revenue Risk Related to Traffic Volume**

(a) Except for its specific obligations to the Concessionaire under the terms and conditions of this Agreement, the Department will not have any risk or liability related to actual traffic volume and revenue, including but not limited to the risk that actual traffic volume is less than the traffic volume projected in the Base Case Financial Model Update (Fred Ex Final).

(b) (i) From the period beginning on December 28, 2016 to December 31, 2030 (the "First Measurement Period"), the Department will pay to the Concessionaire amounts equal to 70% of the Average Toll for the number of High Occupancy Vehicles exceeding a threshold of (A) 35% of the total flow of all Permitted Vehicles (for the Original HOT Lanes), (B) 60% of the total flow of all Permitted Vehicles (for the 395 HOT Lanes), and (C) 60% of the total flow of all Permitted Vehicles (for the Fred Ex HOT Lanes), in each case in two consecutive Toll Sections that are then using such Toll Sections going in the same direction for any period of 15



consecutive minutes during a day during which the total flow of all Permitted Vehicles not including Permitted Vehicles violating the High Occupancy Requirement on such two consecutive Toll Sections going in the same direction exceeds a rate (the “First Threshold HOV Percentage and Rate”) of (x) 1,450 vehicles per hour per traffic lane (for the Original HOT Lanes), (y) 1,600 vehicles per hour per traffic lane (for the 395 HOT Lanes), or (z) 1,600 vehicles per hour per traffic lane (for the Fred Ex HOT Lanes), as applicable; *provided*, however, that the Department will not be required to make any payment, in question pursuant to this Section 5.07(b)(i) unless the 15 minute period in question and any subsequent consecutive 15 minute periods immediately follows a period of at least 30 consecutive minutes during which the total flow of all Permitted Vehicles for such two consecutive Toll Sections going in the same direction exceeds the First Threshold HOV Percentage and Rate.

(ii) From January 1, 2031 to December 31, 2040 (the “Second Measurement Period”), the Department will pay to the Concessionaire amounts equal to 70% of the Average Toll for the number of High Occupancy Vehicles exceeding a threshold of (A) 37% of the total flow of all Permitted Vehicles (for the Original HOT Lanes), (B) 62% of the total flow of all Permitted Vehicles (for the 395 HOT Lanes), and (C) 62% of the total flow of all Permitted Vehicles (for the Fred Ex HOT Lanes), in each case in two consecutive Toll Sections that are then using such Toll Sections going in the same direction for any period of 15 consecutive minutes during a day during which the total flow of all Permitted Vehicles not including Permitted Vehicles violating the High Occupancy Requirement on such two consecutive Toll Sections going in the same direction exceeds a rate (the “Second Threshold HOV Percentage and Rate”) of (x) 1,550 vehicles per hour per traffic lane (for the Original HOT Lanes), (y) 1,600 vehicles per hour per traffic lane (for the 395 HOT Lanes), or (z) 1,600 vehicles per hour per traffic lane (for the Fred Ex HOT Lanes), as applicable; *provided*, however, that the Department will not be required to make any payment, in question pursuant to this Section 5.07(b)(ii) unless the 15 minute period in question and any subsequent consecutive 15 minute periods immediately follows a period of at least 30 consecutive minutes during which the total flow of all Permitted Vehicles for such two consecutive Toll Sections going in the same direction exceeds the Second Threshold HOV Percentage and Rate.

(iii) From January 1, 2041 to July 31, 2052 (the “Third Measurement Period”), the Department will pay to the Concessionaire amounts equal to 70% of the Average Toll for the number of High Occupancy Vehicles exceeding a threshold of (A) 38% of the total flow of all Permitted Vehicles (for the Original HOT Lanes), (B) 65% of the total flow of all Permitted Vehicles (for the 395 HOT Lanes), and (C) 65% of the total flow of all Permitted Vehicles (for the Fred Ex HOT Lanes), in each case in two consecutive Toll Sections that are then using such Toll Sections going in the same direction for any period of 15 consecutive minutes during a day during which the total flow of all Permitted Vehicles not including Permitted Vehicles violating the High Occupancy Requirement on such two consecutive Toll Sections going in the same direction exceeds a rate (the “Third Threshold HOV Percentage and Rate”) of (x) 1,550 vehicles per hour per traffic lane (for the Original HOT Lanes), (y) 1,600 vehicles per hour per traffic lane (for the 395 HOT Lanes), or (z) 1,600 vehicles per hour per traffic lane (for the Fred Ex HOT Lanes), as applicable; *provided*, however, that the Department will not be required to make any payments pursuant to this Section 5.07(b)(iii) unless the 15 minute period in question and

any subsequent consecutive 15 minute periods immediately follows a period of at least 30 consecutive minutes during which the total flow of all Permitted Vehicles for such two consecutive Toll Sections going in the same direction exceeded the Third Threshold HOV Percentage and Rate.

(iv) For purposes of determining the High Occupancy Vehicles as a percentage of flow, (A) HOV-2 or below vehicles and (B) Permitted Vehicles violating the High Occupancy Requirement will not be counted as High Occupancy Vehicle usage but will be counted as part of total flow.

(v) If the Annual Budget submitted to the Department for any Agreement Year pursuant to Section 9.08 contemplates that the IRR Threshold will be achieved during such Agreement Year, any amounts otherwise payable to the Concessionaire under this Section 5.07(b) for any month occurring during or after the month which the IRR Threshold estimated to be achieved will be deposited by the Department into an escrow account. Within 90 Days following the end of the Agreement Year in which such deposits were made, the Concessionaire and the Department will direct the escrow agent to transfer the moneys in such escrow fund to the Concessionaire to the extent that, upon receipt of the moneys, the IRR Threshold has not been exceeded, and, upon confirmation that such amount has been duly paid and received by the Concessionaire, the Concessionaire and the Department shall direct the escrow agent to transfer any excess remaining after the foregoing transfer to the Department.

(vi) Failure by the Concessionaire to notify the Department in writing of its claim for a payment pursuant to this Section 5.07(b) within 30 Days after the end of each calendar month with respect to which this provision applies will constitute a permanent waiver of any such claim with respect to such month. If the Department disagrees with a claim filed by the Concessionaire, the Department may direct the Concessionaire to provide audited or otherwise independently verified information relevant to its claim for a payment. The Department will have 30 Days upon receipt of this information to review the information and calculations provided and if the Department agrees with the calculation, make the calculated payment, together with interest on such amount, which interest shall commence accruing 30 Days after the month to which the payment relates. To the extent there are amounts on deposit in the Project Enhancement Account, such payments shall be made first from the Project Enhancement Account and the interest due shall be calculated based on the average earnings rate on the Project Enhancement Account, during such period. If there are no amounts on deposit therein then interest shall be based on the average earnings rate on the State's Transportation Trust Fund or any successor thereto, during such period.

(vii) Notwithstanding the foregoing, this Section 5.07(b) will cease to apply on the first to occur of: (A) the date on which the IRR Threshold has been reached and (B) July 31, 2052.



## **Section 5.08 Failure to Meet OSPS**

(a) At any time after the second full month following the applicable Service Commencement Date, the Concessionaire will notify the Department if the Concessionaire's scheduled monthly report identifies an instance of the Project's failure to meet the OSPS (as provided in the Technical Requirements). The notice will describe such failure in reasonable detail. The Department will notify the Concessionaire within 30 Days of its receipt of the Concessionaire's report whether or not it requires an OSPS Improvement Plan (the "OSPS Improvement Plan").

(b) Upon receiving notification from the Department pursuant to Section 5.08(a) that the Project requires an OSPS Improvement Plan, the Concessionaire (at its sole cost and expense) will prepare and submit the OSPS Improvement Plan to the Department for its approval. The OSPS Improvement Plan will not be required to propose a general strategy to improve overall OSPS compliance, but will be required to propose a strategy to address the specific reasons which the Concessionaire reasonably believes caused such failure as described in the Concessionaire's report. The OSPS Improvement Plan will be delivered to the Department within 30 Days of the Department's notice (or longer if mutually agreed to by the parties) and will cover the matters set forth in Section 5.08(a). The Department will review the OSPS Improvement Plan in accordance with the provisions of Section 10.05. The Concessionaire will diligently implement the elements of the approved OSPS Improvement Plan that are within the control of the Concessionaire promptly following the Department's approval thereof and within the schedule set forth in such OSPS Improvement Plan.

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

(d) The current OSPS requirements will apply for a ten (10) year period from the Initial Service Commencement Date. Prior to the tenth anniversary of the Initial Service Commencement Date, the Concessionaire and the Department will review the current OSPS, as the OSPS requirements may be modified in the most recent OSPS Improvement Plan, to determine the future need for OSPS or an alternative form of performance monitoring. The Concessionaire agrees that the Department has the right to implement a form of OSPS for subsequent ten-year periods throughout the Term of this Agreement. The Department agrees that such subsequent OSPS requirements:

- (i) will not be higher than 55 mph;
- (ii) will not be lower than the FHWA / 23 U.S.C. §166 requirements; and

(iii) will not, on the basis of the Concessionaire's updated traffic modeling and other data, result in a known failure to meet the OSPS requirements.

#### **Section 5.09 23 U.S.C. §166 Compliance**

(a) The Department agrees to provide to FHWA the certifications required of a State agency under 23 U.S.C. §166 and acknowledges that it has entered into the Toll MOU attached as Exhibit M. The delivery of a certification by the Department that the HOT Lanes do not comply with the applicable requirements of 23 U.S.C. §166, or such other federal, rule or regulation will not constitute a default by the Department under this Agreement.

(b) The Concessionaire agrees to maintain and operate the HOT Lanes, at all times, in compliance with the provisions of 23 U.S.C. §166 and 23 U.S.C. §129, successor provisions, all regulations promulgated thereunder, and the Toll MOU. Accordingly, the Concessionaire will be responsible for the satisfaction of the requirements of 23 U.S.C. §166(b)(4), in accordance with the terms of this Agreement, and will otherwise coordinate its compliance efforts with the Department so as to enable the Department to provide the certifications required by Section 5.09(a).

#### **Section 5.10 USDOT Reporting Requirements**

(a) The Concessionaire agrees to collect and provide to the Department data and other information regarding the Project and prepare reports regarding the Project (i) required to be provided by the Department to the USDOT in relation to the TIFIA Credit Assistance, TIGER Credit Assistance, or other financing program or (ii) deemed necessary by the Department to satisfy the Department's reporting obligations under the TIFIA Credit Assistance, TIGER Credit Assistance, FASTLANE grants related to the Department's Atlantic Gateway Project or other financing program.

(b) Upon receiving prior notice from the Department, the Concessionaire will provide the data, information and reports that it is required to provide and prepare pursuant to Section 5.10(a) to the Department at least 30 Days prior to the date on which the Department is required to submit the same to the USDOT.

(c) If the Concessionaire enters into one or more agreements with the USDOT in connection with the TIFIA Credit Assistance, TIGER Credit Assistance, or other financing program, the Concessionaire agrees to provide the Department with executed versions of such agreements together with any agreements or instruments evidencing or securing the Concessionaire's obligations thereunder, including any collateral pledge agreements. In Exhibit G, the Department is providing the Concessionaire with a listing of the reports, notices and other filings, copies of which are to be provided to the Department concurrently with the Concessionaire's delivery (or receipt) thereof. The Concessionaire agrees to provide the Department with copies of such reports, notices and other filings made under such agreements as are requested by the Department pursuant to the preceding sentence; *provided* however, that the Concessionaire, in its reasonable discretion, may determine not to provide the Department with reports, notices, and filings that it believes are not germane to the Project and the Department. The Concessionaire will provide within ten days after its receipt of a request by the Department,

its rationale for not providing a report, notice, or other filing requested by the Department pursuant to this Section 5.10(c).

(d) If the Concessionaire enters into a Project Financing Agreement with the Collateral Agent that provides for the collection and distribution of Gross Revenues, the Concessionaire agrees to provide to the Department, as soon as reasonably practicable after the Concessionaire's actual receipt of the same, a copy of: any written notice of resignation or removal of the Collateral Agent; any written notice of the appointment of a successor Collateral Agent; any written notice of any merger of the Collateral Agent; any written notice of any transfer by the Collateral Agent of its rights under the Project Financing Agreements to an affiliate; and any written notice of any change in any Depository or deposit account bank.

### **Section 5.11 Annual Transit Investment**

(a) The Concessionaire shall provide the Department with the Annual Transit Investment in accordance with the terms set forth in Exhibit P, this Section 5.11 and the most recent Base Case Financial Model Update.

(b) The first Annual Transit Investment will be due on the 395 Service Commencement Date and shall be paid regardless of whether or not the 395 Project reaches 395 Final Completion.

(c) The Annual Transit Investment shall be (i) paid after debt service and any payments to reserve accounts required by Lenders and (ii) subject to the level of lock-up provided for in the lock-up provisions in the 395 Project Financing Agreements or in connection with the TIFIA Loan Documentation.

(d) If funds are insufficient to make a scheduled Annual Transit Investment payment in accordance with Exhibit P at the time it is due, either due to the operating performance of the Project or the requirements in any 395 Project Financing Agreement, such Annual Transit Investment payment, or any unpaid portion thereof will be considered past due and will remain due and payable without interest (unless funds from the 395 Reserve Account are used to pay debt service in accordance with Exhibit P, Part B, Paragraph 3, in which case interest will accrue on the portion of the 395 Delayed Annual Transit Investment that has not been paid due to such debt service payment in accordance with Section 25.22 of this Agreement). Such insufficiency and failure to make such Annual Transit Investment payment will not constitute a Concessionaire Default, except as outlined in Part B of Exhibit P. Any outstanding 395 Delayed Annual Transit Investment Amount must be paid before funds may be used for the Annual Transit Investment payments due in the current Agreement Year. The Annual Transit Investment payment shall be paid in accordance with Part B of Exhibit P.

(e) If the Concessionaire fails to make the Annual Transit Investment payment in the amounts shown in Part A of Exhibit P and the time scheduled for two consecutive years, the Concessionaire must submit to the Department a plan within 45 days of the due date of the second consecutive incomplete Annual Transit Investment, describing the actions to be taken in order to improve the performance of the 395 Project and restore compliance with the payments in Part A of Exhibit P.

## ARTICLE 6.

### **BASE CASE FINANCIAL MODEL**

#### **Section 6.01 Current Base Case Financial Model Update**

(a) As of the Second Amended and Restated Agreement Date, the Base Case Financial Model Update (Fred Ex Draft) dated April 17, 2019 (23:40 EDT) is the most recent undisputed Base Case Financial Model Update. The Base Case Financial Model Update (Fred Ex Draft) will be the basis for the Base Case Financial Model Update (Fred Ex Final), to be delivered to the Department by the Concessionaire prior to Fred Ex Financial Close, in accordance with Section 7.03B(b)(i), and which will become the governing Base Case Financial Model Update upon Fred Ex Financial Close. If the Fred Ex Project alone is terminated for any reason, including because the Concessionaire fails to reach Fred Ex Financial Close, then the Base Case Financial Model Update (95/395 Final) dated July 18, 2017 (18:06 EST) will be reinstated as the most recent undisputed Base Case Financial Model Update, as it may be updated in accordance with Section 6.02 from time to time.

(b) The Concessionaire will not cause (or permit any other Person to cause) any Base Case Financial Model Update to contain any hidden data. The Concessionaire will furnish to the Department any password or other access rights for any Base Case Financial Model Update.

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

(a) Other than in accordance with the terms of this Agreement, in no event will any Base Case Financial Model Update be changed except with the prior written approval of both the Department and the Concessionaire.

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

- (i) upon submission of a notice of a Refinancing under Section 7.05;
- (ii) within 60 Days after the delivery of a Delay Event Notice that extends the Guaranteed Substantial Completion Date, the 395 Guaranteed Final Completion Date, or the Fred Ex Guaranteed Final Completion Date;
- (iii) within 60 Days after the delivery of a Compensation Event Notice;
- (iv) within 60 Days after the delivery of a notice of a Net Cost Savings or positive Net Revenue Impact under Section 14.04;
- (v) within 60 Days after the Concessionaire notifies the Department that it proposes to undertake a Concessionaire Project Enhancement;

(vi) within 60 Days after the parties agree that any amendments to this Agreement have had or will have a material effect on future costs or Gross Revenues;

(vii) within 60 Days after the Department delivers notice of the anticipated STE Final Acceptance Date under Section 8A.06(b); and

(viii) within 60 Days before the date of any Fred Ex Additional Financial Close pursuant to Section 7.03C; provided, that (x) such proposed Base Case Financial Model Update shall be based upon the Base Case Financial Model Update (Fred Ex Final) accepted by the Department as true and complete as of Fred Ex Financial Close, and shall be updated to reflect actuals for the most recently audited fiscal year, changes in projections, changes in the proposed financing structure, and changes in all other inputs since Fred Ex Financial Close, and (y) such proposed Base Case Financial Model Update may be modified in connection with Sections 7.03C(a)(iii) and (v).

(c) Any proposed Base Case Financial Model Update shall become the Base Case Financial Model Update following its approval by the Department.

(d) Within 150 Days following the end of each fiscal year, the most recent undisputed Base Case Financial Model Update will be updated to reflect audited historical cash flows for the most recently audited fiscal year; *provided*, however, such Base Case Financial Model Update will not, except as otherwise agreed in writing by the Parties, include changes in: (i) Financial Model Formulas and (ii) forecast cash flows. Each Base Case Financial Model Update will be deposited with the Escrow Agent as described in Section 18.05. In addition, the Concessionaire will deposit with the Escrow Agent the Fred Ex Project Binding Proposal Base Case Financial Model within 30 days after the Second Amended and Restated Agreement Date.

(e) Commencing on the fiscal year after the occurrence of the Gross Toll Share Payment Trigger, at the end of each of the Concessionaire's second fiscal quarter, the Concessionaire will provide to the Department updates to the Base Case Financial Model Update related to the Gross Toll Revenues and the Gross Toll Share Payment related to such six-month period.

(f) In connection with the Fred Ex Financial Close, the Concessionaire shall prepare and deliver to the Department a Base Case Financial Model Update (the "Base Case Financial Model Update (Fred Ex Final)") in accordance with Section 7.03B(b)(i). The Base Case Financial Model Update (Fred Ex Final) will be inclusive of the Original HOT Lanes, the 395 HOT Lanes, the STE HOT Lanes, and the Fred Ex HOT Lanes.

(g) Upon the Department's approval of the Base Case Financial Model Update (Fred Ex Final) such model shall be the most recent undisputed Base Case Financial Model Update. Thereafter, future Base Case Financial Model Updates will be governed by Sections 6.02(a), (b), (c), (d) and (e), and must be inclusive of the Original HOT Lanes, the 395 HOT Lanes, the Fred Ex HOT Lanes, and any STE HOT Lanes.

### **Section 6.03 Certain Adjustments**

(a) Within five days of its receipt of the Original TIFIA Loan Documentation containing Original TIFIA Commercial Terms (with any changes thereto for which adjustments are made pursuant to Section 7.07(b)) pursuant to Section 7.07(a)(i), the Concessionaire will provide the Department with:

(i) a proposed Adjusted Financial Model Update, modified in accordance with Section 7.07(b) to take into account the new Department TIFIA Protection Amount in the Original TIFIA Loan Documentation; and

(ii) a proposed Base Case Financial Model Update that incorporates the modifications made to the Adjusted Financial Model pursuant to Section 6.03(a)(i).

(b) On the Original TIFIA Closing Date, the Concessionaire will provide the Department with:

(i) the Adjusted Financial Model, modified in accordance with Section 7.07(b) to take into account the Department TIFIA Protection Amount; and

(ii) a Base Case Financial Model Update that incorporates the modifications made to the Adjusted Financial Model pursuant to Section 6.03(b)(i).

(c) The Department will have the right to dispute any proposed Adjusted Financial Model Update or Base Case Financial Model Update provided to the Department pursuant to Sections 6.03(a) and (b). Within 10 Days after receipt, the Department will accept or dispute a proposed Adjusted Financial Model Update or proposed Base Case Financial Model Update (as applicable) and, if it disputes a proposed Adjusted Financial Model Update or Base Case Financial Model Update (as applicable), specifying its reasons for such dispute in sufficient detail to enable the Concessionaire to correct the errors or deficiencies. To the extent that the Concessionaire and the Department cannot agree on the changes within 20 Days of the Concessionaire delivering the proposed Adjusted Financial Model Update or Base Case Financial Model Update (as applicable) to the Department, the Dispute will be resolved in accordance with the dispute resolution procedures described in Article 21.

(d) This Section 6.03 will not apply to the 395 Project, the Fred Ex Project, or the financing of either.

### **Section 6.04 Financial Model Disputes**

(a) Except as provided in Section 6.03(c), the Department will have the right to dispute any proposed Base Case Financial Model or Base Case Financial Model Update. Within 21 Days after receipt, the Department will accept or dispute a proposed Base Case Financial Model or Base Case Financial Model Update (as applicable) and, if it disputes a proposed Base Case Financial Model or Base Case Financial Model Update (as applicable), specifying its reasons for such dispute in sufficient detail to enable the Concessionaire to correct the errors or deficiencies. To the extent that the Concessionaire and the Department cannot agree on the changes within 90 Days of the Concessionaire delivering the proposed Base Case Financial



Model or Base Case Financial Model Update (as applicable) to the Department, the Dispute will be resolved in accordance with the dispute resolution procedures described in Article 21.

(b) In the event of a Dispute, the immediately preceding Base Case Financial Model Update that is not being disputed will remain in effect until such Dispute is resolved or a new Base Case Financial Model Update is issued and not disputed. If a proposed Base Case Financial Model Update has not been disputed, or if any such Dispute has been so resolved, the proposed Base Case Financial Model Update will serve as the Base Case Financial Model Update and will be submitted to the Escrow Agent in accordance with Section 18.05(d).

### **Section 6.05 Audit of Financial Model**

(a) (i) Within 30 Days after any change to the Financial Model Formulas as a result of a proposed Base Case Financial Model Update pursuant to Section 6.02(b)(ii) through (viii), or (ii) within 10 Days after any change to the Financial Model Formulas as a result of adjustments made pursuant to Section 6.03, the Concessionaire will deliver to the Department an audit report and opinion of the Financial Model Auditor to the effect that the Financial Model Formulas reflect the terms of this Agreement and are suitable for use in this Agreement in connection with Compensation Events, Delay Events, the impact of the execution and delivery of proposed Original TIFIA Loan Documentation, and early termination procedures, and covering such other matters as may be reasonably requested by the Department, all in form and substance acceptable to the Department. With respect to any change to Financial Model Formulas as a result of a proposed Base Case Financial Model Update due to a proposed Refinancing or upon the execution and delivery of Original TIFIA Loan Documentation, such audit report and opinion will be delivered to the Department no later than seven Days prior to the proposed date of a Refinancing.

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

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

## **ARTICLE 7.**

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

#### **Section 7.01 Concessionaire Responsibility for Project Financing; No Department Liability for Concessionaire Debt**

(a) The Concessionaire is solely responsible for obtaining and repaying all financing, at its own cost and risk and without recourse to any State Party, necessary to develop, design, construct, maintain, and operate the Project and any Concessionaire Project Enhancement.

(b) Each bond or promissory note evidencing Concessionaire Debt must include a conspicuous recital on its face to the effect that payment of the principal thereof and interest

thereon does not constitute a claim against the Department's fee simple title to or other good and valid real property interest in the Project Assets, the Project Right of Way, the Department's interest hereunder or its interest and estate in and to the Project Assets or any part thereof, is not an obligation of any State Party, moral or otherwise, and neither the full faith and credit nor the taxing power of any State Party is pledged to the payment of the principal thereof and interest thereon.

(c) No State Party will have any liability whatsoever for payment of the principal sum of any Concessionaire Debt, any other obligations issued or incurred by the Concessionaire in connection with this Agreement or the Project, or any interest accrued thereon or any other sum secured by or accruing under any Financing Assignment. The Department's review of any Financing Assignments or other project financing documents is not:

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

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

(d) The Concessionaire will make or cause to be made Equity Contributions (the "Equity Contribution Amount") equal to: (i) an amount equal to the Base Capital Contributions set forth in Section 2.2 of each Equity Funding Agreement (the "Base Equity Contributions"), as adjusted pursuant to this Agreement (the "Initial Equity Commitment Amount"); *provided*, however, that after the Agreement Date, the Concessionaire will not adjust the Initial Equity Commitment Amount without the approval of the Department in its sole discretion, (ii) an amount equal to the Contingent Capital Contributions set forth in Section 2.3 of each Equity Funding Agreement, as required pursuant to such Equity Funding Agreement (the "Contingent Capital Contribution Amount"); (iii) \$108,419,977 (the "Concessionaire TIFIA Protection Amount"), which is subject to adjustment or cancellation pursuant to Section 7.07; (iv) an amount equal to the 395 Equity Commitment Amount in accordance with the 395 Equity Funding Agreements; and (v) an amount equal to the Fred Ex Equity Commitment Amount in accordance with the Fred Ex Equity Funding Agreements.

## **Section 7.02 Public Funds**

(a) The Department will make or cause to be made payments of the Initial Public Funds Amount to the Concessionaire in accordance with the terms set forth in the Public Funds Amount Payment Terms attached as Exhibit N. The Initial Public Funds Amount will be (i) decreased by any amounts paid by the Department to the Concessionaire prior to the Financial Close Date for the performance of Early Work and (ii) adjusted pursuant to Section 7.03(b).



(b) The Department will make or cause to be made a supplemental Public Funds Amount for the Project equal to \$223,950,000 (the “Department TIFIA Protection Amount”), subject to adjustment or cancellation pursuant to Section 7.07.

(c) 395 Public Funds Amount.

(i) In connection with the 395 Project, the Department will make payments of the 395 Public Funds Amount to the Concessionaire in accordance with the terms set forth in the Public Funds Amount Payment Terms attached as Exhibit N.

(ii) The 395 Public Funds Amount will be used by the Concessionaire to pay the costs of the design, development, and construction of the 395 Department Assets.

(d) No Fred Ex Public Funds Amount.

(i) Except for the Fred Ex Financial Protections and the Fred Ex Department Committed Contingency, the Concessionaire will fund fully the design, development, construction, operation and maintenance of the Fred Ex Project, without any contribution of public funds from the Department.

(ii) Under the Southbound RRC Design-Build Contract, the Department procured separately the Rappahannock River Crossing project (the “Southbound RRC Project”) as a design-build project. Certain work relating to the area where the Southbound RRC Project and the Fred Ex Project meet has been included by the Department as part of the Southbound RRC Project (the “Southbound RRC Overlap Work”). The geographic location of the Southbound RRC Overlap Work and a description of the scope of work for the Southbound RRC Overlap Work are set forth in the Southbound RRC Design-Build Contract Documents. As part of the Fred Ex Project, the Concessionaire shall fund the Southbound RRC Overlap Work and shall pay to the Department \$4,000,000 on the Fred Ex Financial Close Date. Subject to Section 8.22(b), compensation for costs and expenses related to any change orders or additional work needed to complete the Southbound RRC Overlap Work will be treated as Fred Ex Pooled Contingency-Covered Costs.

### **Section 7.03 Financial Close**

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

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

parties to Financial Close up and until the Concessionaire has furnished the proposed final drafts pursuant to Section 7.03(a)(ii);

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

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

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

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

(vi) the Concessionaire has provided the Department evidence, satisfactory to the Department, that all conditions precedent required for Financial Close to the availability and utilization of Concessionaire Debt have been satisfied in full;

(vii) if utilized, the Concessionaire has caused the PABs Issuer to issue the PABs as provided by and in accordance with the Initial Project Financing Agreements and has made a Financing Assignment with respect to the PABs as described in the Initial Project Financing Agreements;

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

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

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

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

(C) Direct Agreement, substantially in the form attached as Exhibit R-1;

(x) the Department has received copies of the following executed documents:

(A) Design-Build Contract substantially in the form attached as Exhibit E;

(B) Design-Build Work Guarantee substantially in the form attached as Exhibit F;

(C) Design-Build Letter of Credit;

(D) Shared Facilities Agreement substantially in the form attached as Exhibit X;

(E) Letter Agreement dated July 31, 2012 between CBE and the Department regarding the treatment of the Access Fee (as such term is defined in the Shared Facilities Agreement) as Toll Revenue (as such term is defined in the Capital Beltway Comprehensive Agreement);

(F) Indenture of Trust, dated as of July 1, 2012, between the Virginia Small Business Financing Authority and the Trustee;

(G) Loan Agreement, dated as of July 1, 2012, between the Virginia Small Business Financing Authority and the Concessionaire;

(H) Collateral Agency and Account Agreement, dated as of July 1, 2012, by and among the Concessionaire, the Trustee and the Collateral Agent;

(I) Security Agreement, dated as of July 1, 2012, between the Concessionaire and the Collateral Agent;

(J) Transurban Membership Interest Pledge Agreement, dated as of July 1, 2012 between Transurban Drive USA LLC and the Collateral Agent;

(K) Fluor Membership Interest Pledge Agreement, dated as of July 1, 2012, between Fluor and the Collateral Agent; and

(L) the Equity Funding Agreements; and

(M) the Equity Funding Guaranties.

If the Concessionaire has satisfied all conditions precedent (or the Department, in its sole discretion, has waived any such conditions) identified in this Section 7.03(a), the Department

will issue a certificate on the Financial Close Date confirming that all conditions precedent have been satisfied.

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

(i) Changes in Initial Public Funds Amount Due to Review of Initial Base Case Financial Model. In the event that a review by the Financial Model Auditor of the Initial Base Case Financial Model discloses errors or discrepancies in such financial model that results in an increase to the Initial Equity IRR in excess of 5 bps, the Initial Public Funds Amount will be decreased in an amount so as to return the Base Case Equity IRR to the Initial Equity IRR, and the Initial Base Case Financial Model will be updated to reflect such adjustment. If a review by the Financial Model Auditor of the Initial Base Case Financial Model discloses errors or discrepancies in such financial model that results in a decrease to the Initial Equity IRR in excess of 5 bps, the Department and the Concessionaire will engage in discussions as promptly as reasonably possible and exercise good faith efforts to agree to any adjustments or other resolutions reasonably satisfactory to each party.

(ii) Other Changes to the Initial Public Funds Amount.

(A) The Initial Base Case Financial Model will be updated to reflect mutually agreed changes in the expected Original TIFIA Credit Assistance and the Initial Base Case Financial Model will be updated in accordance with the Financial Close Adjustment Protocol to account for such changes and used to calculate the Initial Public Funds Amount such that the Equity IRR is equal to the Initial Equity IRR.

(B) The Initial Base Case Financial Model will be updated to reflect mutually agreed changes to the Design-Build Contract price, TTMS price, and SPV fixed costs (all as set forth in the Financial Close Adjustment Protocol) and the Initial Base Case Financial Model will be updated in accordance with the Financial Close Adjustment Protocol to account for such changes and used to calculate the Initial Public Funds Amount such that the Equity IRR is equal to the Initial Equity IRR.

(iii) VDOT E-ZPass Fees. The Department will bear the risk of increased operating costs with an equivalent impact of \$1 million per annum (expressed in 2010 dollars), escalated from 2010 at the CPI assumption contained in the Initial Base Case Financial Model. The Initial Base Case Financial Model will be updated in accordance with the Financial Close Adjustment Protocol set forth in Exhibit BB to account for the revised operating costs and used to calculate the Initial Public Funds Amount such that the Equity IRR is equal to the Initial Equity IRR.

(iv) PABs Interest Rate Protection.

(A) (1) The Department will bear the risk and have the benefit of the first 25bps of change in PABs Interest Rate (either positive or negative) from the Benchmark PABs Interest Rate and (2) the Department and the Concessionaire will

equally share the risk and the benefit in any change between 25bps and 100bps in the PABs Interest Rate (either positive or negative) from the Benchmark PABs Interest Rate to the actual PABs Interest Rate applicable to the PABs issued as of the Financial Close Date, and (3) the Concessionaire will bear the risk and have the benefit of any change in excess of 100 bps in PABs Interest Rate (either positive or negative) from the Benchmark PABs Interest Rate.

(B) If the PABs Interest Rate as of the Financial Close Date has changed from the Benchmark PABs Interest Rate, the Initial Base Case Financial Model will be updated in accordance with the Financial Close Adjustment Protocol set forth in Exhibit BB to reflect the PABs Interest Rate and to reflect the risk and benefit allocated to the Department (ignoring for this calculation any change in the Benchmark PABs Interest Rate the risk and benefit of which has been allocated to the Concessionaire) and used to adjust the Initial Public Funds Amount in accordance with the Financial Close Adjustment Protocol such that the Equity IRR is equal to the Initial Equity IRR.

(v) Leverage Ratio. The Department and the Concessionaire acknowledge and agree that, if the Leverage Ratio as of the Financial Close Date is greater than 65%, then the Department and the Concessionaire will share equally in the benefit of such greater Leverage Ratio.

(vi) Other Changes to the Initial Base Case Financial Model. On the Financial Close Date, the Concessionaire will update the Initial Base Case Financial Model to reflect the terms and conditions included in the Initial Project Financing Agreements and Financing Assignments as of the Financial Close Date. For the avoidance of doubt, the Public Funds Amount will not be adjusted upwards or downwards except in accordance with the provisions of Section 7.03(b) and the Initial Base Case Financial Model, as updated, will be the Adjusted Financial Model and the resulting Equity IRR will be the Adjusted Equity IRR.

(vii) Original TIFIA Credit Assistance Availability. The Department and Concessionaire will bear the risk of Original TIFIA Credit Assistance not being available at Financial Close. If the Original TIFIA Credit Assistance is not available at Financial Close, the Adjusted Financial Model will be updated in accordance with the Financial Close Adjustment Protocol to reflect the risk of such change allocated to the Department (while maintaining the quantum of PABs constant) and used to adjust the Department TIFIA Protection Amount and the Concessionaire TIFIA Protection Amount such that the resulting Equity IRR is equal to the Adjusted Equity IRR and the Adjusted Financial Model, as so updated, will be the Base Case Financial Model and the resulting Equity IRR will be the Base Case Equity IRR.

(c) Financial Close Deadline. In the event Financial Close is not achieved by the Financial Close Deadline, either party may terminate this Agreement pursuant to Section 20.04.

(d) Payments at Financial Close.

(i) On the Financial Close Date for the Original Project, the Concessionaire will receive amounts agreed to by the parties, from sources identified in the Base Case Financial Model, for the costs related to project development that have not previously been reimbursed under the terms of the Interim Agreement. Such costs will be specifically itemized and identified in a schedule submitted to the Department at least 7 Days prior to the scheduled Financial Close Date. Such schedule of costs will be updated for approval as a condition precedent to Financial Close. The parties also agree that if the costs related to project development costs in the Initial Base Case Financial Model (\$52,441,000) are in excess of the amounts approved by the Department at Financial Close, such excess amounts will be used to fund all, or a portion of mutually agreed costs in relation to scope improvements to the east-west HOT movement in the Springfield Interchange, closing costs incurred in obtaining Original TIFIA Credit Assistance, and security improvements at the Express Operations Center, relative to the designation of the Express Operations Center as critical infrastructure. If as of the Substantial Completion Date there is any remaining balance of the excess amount, the Concessionaire will cause this balance to be transferred to the Department in a reasonable period of time. The Concessionaire will identify the excess amount within 14 days of the Financial Close Date and will provide updates to the Department of the status of any excess amounts remaining throughout the Construction Period. Such updates will be provided in accordance with the monthly reporting addressed in Section 1.4.3 of the Technical Requirements.

(ii) On the Financial Close Date, the Concessionaire will reimburse the Department for any payments made prior to the Financial Close Date (not to exceed \$42,300,000 in the aggregate) for Early Work performed pursuant to the Second Amendment to the Interim Agreement dated as of March 23, 2012, or pursuant to this Agreement.

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

(f) Reasonable Commercial Efforts; Cooperation. Subject to the termination rights of each party pursuant to Section 20.04, the Department and the Concessionaire each agree to: (i) use reasonable commercial efforts to satisfy the conditions within their control to reach Financial Close on or prior to the Financial Close Deadline; and (ii) use reasonable commercial efforts to cooperate and assist the other party to reach Financial Close by the Financial Close Deadline.

(g) The provisions of this Section 7.03 apply to neither the 395 Financial Close nor the Fred Ex Financial Close.

### **Section 7.03A 395 Financial Close**

(a) Conditions for 395 Financial Close. Except to the extent permitted in writing by the Department, 395 Financial Close will only be achieved once all of the following conditions precedent are satisfied or waived by the Department in its sole discretion:



(i) the Concessionaire has provided the Department: (A) a list of and initial drafts of the 395 Project Financing Agreements and Financing Assignments as set forth in Exhibit O and (B) draft(s) of the Base Case Financial Model Update (95/395 Draft) contemporaneously with the distribution of such drafts to the Lenders and the other parties to 395 Financial Close for the Department's review and comment, and has included the Department on all subsequent distributions of such drafts to the Lenders and the other parties to 395 Financial Close up and until the Concessionaire has furnished the final drafts pursuant to Section 7.03A(a)(iii);

(ii) the Concessionaire has provided to the Department an update of the audit report and opinion delivered pursuant to Section 23.02(m) for such proposed Base Case Financial Model Update (95/395 Draft) at least 10 Days prior to the scheduled 395 Financial Close Date for the Department's review and comment;

(iii) the Concessionaire has provided the Department: (A) final drafts of the 395 Project Financing Agreements and Financing Assignments and (B) a final draft of the Base Case Financial Model Update (95/395 Draft), contemporaneously with the distribution of such final drafts to the Lenders and other parties to 395 Financial Close at least 10 Days prior to the scheduled 395 Financial Close Date for the Department's review and comment, and has included the Department on all subsequent distributions of such final drafts to the Lenders and other parties to 395 Financial Close up and until 395 Financial Close;

(iv) the Concessionaire has provided the Department the true and complete Base Case Financial Model Update (95/395 Final);

(v) the Base Case Financial Model Update (95/395 Final) provides for the Annual Transit Investment in accordance with the terms set forth in Exhibit P;

(vi) the Concessionaire has provided the Department true and complete copies of the executed 395 Project Financing Agreements and Financing Assignments;

(vii) the Concessionaire has provided the Department true and complete executed copies of the 395 Equity Funding Agreements in an aggregate amount at least equal to the 395 Equity Commitment Amount and reflecting the commitment of each Equity Sponsor to provide the 395 Equity Commitment Amount reflected in the Base Case Financial Model Update (95/395 Final) which is required for meeting its obligations related to the 395 Project;

(viii) the Concessionaire has provided the Department a true and complete executed copy of (A) the 395 Equity Letter of Credit in an amount at least equal to the 395 Equity Commitment Amount, which meets the definition of Letter of Credit; and/or (B) the 395 Equity Funding Guaranty in an amount at least equal to the 395 Equity Commitment Amount;

(ix) the Concessionaire has provided the Department evidence, satisfactory to the Department, that all conditions precedent required for 395 Financial Close to the

availability and utilization of Concessionaire Debt have been satisfied in full or waived by the finance parties in whose favor those conditions precedent run;

(x) if utilized, the Concessionaire has caused the PABs Issuer to issue the PABs as provided by and in accordance with the 395 Project Financing Agreements and has made a Financing Assignment with respect to the PABs as described in the 395 Project Financing Agreements;

(xi) if utilized, the Concessionaire has caused the TIFIA Lender to provide the TIFIA Credit Assistance for the 395 Project as provided by and in accordance with the 395 Project Financing Agreements and has made a Financing Assignment with respect to the TIFIA Credit Assistance for the 395 Project as described in the 395 Project Financing Agreements;

(xii) if utilized, the Concessionaire has caused the VTIB Lender to provide VTIB assistance for the 395 Project as provided by and in accordance with the 395 Project Financing Agreements and has made a Financing Assignment with respect to VTIB assistance for the 395 Project as described in the 395 Project Financing Agreements;

(xiii) the Concessionaire has delivered to the Department certificates, as may be reasonably requested by the Department, certifying as to the Concessionaire's compliance with the terms and conditions of this Agreement, the satisfaction of the conditions precedent to 395 Financial Close, and the validity of the Concessionaire's representations and warranties set forth in Section 23.02;

(xiv) the Department has received copies of the following executed documents:

(A) consents from the Project's existing Lenders to the execution of the First ARCA, the 395 Design-Build Contract, the 395 TTMS Contract and other related matters;

(B) the 395 Direct Agreement, substantially in the form attached as Exhibit R-2;

(C) if PABs are utilized, the Indenture of Trust between the Virginia Small Business Financing Authority and the Trustee;

(D) if PABs are utilized, the Loan Agreement between the Virginia Small Business Financing Authority and the Concessionaire;

(E) the Amended and Restated Collateral Agency and Account Agreement by and among the Concessionaire, the Trustee and the Collateral Agent;

(F) if TIFIA is utilized, the Loan Agreement relating to the TIFIA Credit Assistance for the 395 Project;



(G) if VTIB assistance is utilized, the Loan Agreement relating to VTIB assistance for the 395 Project;

(H) the 395 Equity Funding Agreements;

(I) any 395 Equity Letter of Credit or 395 Equity Funding Guaranty or both;

(J) the Amendment to O&M Agreement; and

(K) 395 Payment Bond and 395 Performance Bond in the amounts and satisfying the requirements set forth in Section 17.08(b)(ii); and

(L) 395 TTMS Payment Bond and 395 TTMS Performance Bond or 395 TTMS Letter of Credit, as applicable, in the amounts and satisfying the requirements set forth in Section 17.08(b)(ii).

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

(A) the 395 Design-Build Contract; and

(B) the 395 TTMS Contract.

If the Concessionaire has satisfied all conditions precedent (or the Department, in its sole discretion, has waived any such conditions) identified in this Section 7.03A(a), the Department will issue a certificate on the 395 Financial Close Date confirming that all conditions precedent have been satisfied.

(b) Financing Adjustments. The following adjustments will be made on the 395 Financial Close Date. Such adjustments will be implemented in accordance with the provisions of Exhibit BB.

(i) Changes in 395 Benchmark Interest Rates and 395 Credit Spreads.

(A) Subject to Section 7.03A(b)(i)(B), during the 395 Interest Rate Protection Period, the Concessionaire and the Department will bear the risk and have the benefit of the following: (x) in the case of the Concessionaire, the first 60 Basis Points of aggregate all-in interest rate change for each financing facility (taking into account any impact arising from changes in the 395 Benchmark Interest Rates prior to taking into account any impact arising from the differences in the 395 Credit Spreads) and (y) in the case of the Department, after the incurrence of the risk or benefit of such 60 Basis Points by the Concessionaire, in each case of the aggregate of:

(1) 100% of the impact (either positive or negative) arising from changes in the 395 Benchmark Interest Rates that exceed the first 60 Basis Points during the 395 Interest Rate Protection Period; *provided, however*, that this protection will be extended only to the lesser of (aa) the amount of proceeds of

Concessionaire Debt assumed and indicated in the Base Case Financial Model Update (95/395 Interim), and (bb) the amount of proceeds of Concessionaire Debt issued or incurred at 395 Financial Close; and

(2) 75% of the impact (either positive or negative) arising from changes in the 395 Credit Spreads when the aggregate all-in interest rate changes exceed 60 Basis Points, calculated by taking the change in the aggregate all-in interest rate for each financing facility less the greater of (x) 60 Basis Points or (y) the change in the 395 Benchmark Rate during the 395 Interest Rate Protection Period; *provided, however*, that this protection will be extended only to the lesser of (aa) the amount of proceeds of the approved capital markets financing(s) assumed and indicated in the Base Case Financial Model Update (95/395 Interim), and (bb) the amount of proceeds of the approved capital markets financing(s) issued at 395 Financial Close.

(B) The Department will bear the risk of increases in 395 Benchmark Interest Rates and 395 Credit Spreads pursuant to Section 7.03A(b)(i)(A) up to and in an aggregate amount equal to \$12,500,000. If the aggregate adjustment due to the 395 Benchmark Interest Rates and 395 Credit Spreads (the “395 Market Interest Rate Adjustment”) pursuant to Section 7.03A(b)(i)(A) is greater than zero but does not exceed \$12,500,000, the Concessionaire may, by written notice to the Department, notify the Department at 395 Financial Close of the amount of such 395 Market Interest Rate Adjustment and the Department may elect to deduct or offset such 395 Market Interest Rate Adjustment from amounts due to the Department from the Concessionaire at Financial Close within 30 Days in accordance with Section 25.21(b). For any remaining 395 Market Interest Rate Adjustment, the Concessionaire shall include in Disbursement Requests within the first 90 Days after the 395 Financial Close Date, an amount equal to such 395 Market Interest Rate Adjustment for the 395 Concessionaire Assets in accordance with Exhibit N.

(C) If the aggregate adjustment due to the 395 Benchmark Interest Rates and 395 Credit Spreads pursuant to Section 7.03A(a)(i) results in an adjustment greater than \$12,500,000, the Concessionaire may, by written notice to the Department, elect to assume the cost and expense of the portion of the adjustment greater than \$12,500,000. If the Concessionaire does not elect to assume such cost and expense, but the Concessionaire notifies the Department of its intent to continue to pursue 395 Financial Close, then the Concessionaire shall be granted an additional 90-day period from the 395 Financial Close Deadline to achieve 395 Financial Close, *provided* that the Concessionaire delivers to the Department at least 5 Days prior to the expiration of the then-existing 395 Financial Close Security a new 395 Financial Close Security, or extends the then-existing 395 Financial Close Security, with an expiry date no earlier than 15 Days after the end of the 90-day period. If after such 90-day period, the Concessionaire does not elect to assume such cost and expense, the Department may elect to terminate the 395 Project pursuant to Section 20.04(d).

(D) If the aggregate adjustment due to the 395 Benchmark Interest Rates and 395 Credit Spreads pursuant to Section 7.03A(b)(i)(A) results in an adjustment

in favor of the Department (the “395 Risk Pool Deposit”), the Concessionaire shall pay such 395 Risk Pool Deposit to the Department on the 395 Financial Close Date.

(ii) Changes to Financing Terms. The Concessionaire will bear 100% of the risk with respect to the financing terms of the PABs, the TIFIA Credit Assistance or VTIB assistance for the 395 Project. The Department will not bear any risk of TIFIA Credit Assistance not being available at 395 Financial Close.

(c) 395 Financial Close Deadline.

(i) The Concessionaire must achieve 395 Financial Close by the 395 Financial Close Deadline. In the event 395 Financial Close is not achieved by the 395 Financial Close Deadline, either Party may terminate the 395 Project pursuant to Section 20.04.

(ii) The Concessionaire acknowledges that the time period the Department has provided to the Concessionaire to achieve 395 Financial Close is reasonable, and both the Concessionaire and the Department acknowledge that the 395 Financial Close Security is reasonable in order to compensate the Department for damages it will incur as a result of the lost opportunity to the Department represented by this Agreement.

(d) 395 Financial Close Security.

(i) Concurrent with the execution of the First ARCA, the parties acknowledge that the Concessionaire has delivered to the Department the 395 Financial Close Security with an expiry date of June 29, 2017. The Department will have the right to draw on the 395 Financial Close Security after June 19, 2017, unless on or before June 19, 2017 the Concessionaire delivers to the Department a new 395 Financial Close Security, or extends the already-delivered 395 Financial Close Security, with an expiry date no earlier than September 15, 2017. The Department will return the Final Proposal Security within two Business Days upon receipt of the 395 Financial Close Security.

(ii) In the event that 395 Financial Close is not achieved by the 395 Financial Close Deadline, the Department will have the right to draw on the 395 Financial Close Security; provided, however that the Department will not have the right to draw on the 395 Financial Close Security if 395 Financial Close is not achieved by the 395 Financial Close Deadline directly due to one or more of the following:

(A) the occurrence of a Department Default;

(B) the Department’s failure to deliver closing certificates and opinions related to 395 Financial Close;

(C) despite the Concessionaire having complied with all of the requirements of the VTIB Lender and having satisfied all of the conditions precedent required by the VTIB Lender to receive VTIB assistance, the VTIB Lender does not fund VTIB assistance prior to the 395 Financial Close Deadline; or

(D) as specified in Section 20.04(d).

(iii) Upon 395 Financial Close being successfully achieved in accordance with the terms of this Agreement, the Department will return the 395 Financial Close Security to the Concessionaire within two Business Days of 395 Financial Close.

(e) Closing Transcript. The Concessionaire agrees to provide the Department a complete transcript of all documents executed and delivered in connection with the execution of this Agreement and the 395 Financial Close promptly following the 395 Financial Close Date.

(f) Reasonable Commercial Efforts; Cooperation. Subject to the termination rights of each party pursuant to Section 20.04, the Department and the Concessionaire each agree to: (i) use reasonable commercial efforts to satisfy the conditions within their control to reach 395 Financial Close on or prior to the 395 Financial Close Deadline; and (ii) use reasonable commercial efforts to cooperate and assist the other party to reach 395 Financial Close by the 395 Financial Close Deadline.

(g) Payments at 395 Financial Close.

(i) On the 395 Financial Close Date, the Concessionaire agrees to reimburse the Department for any amounts paid by the Department for 395 Early Work pursuant to Section 8.17 (not to exceed \$7,500,000).

(ii) On the 395 Financial Close Date, the Concessionaire will receive amounts agreed to by the Parties, from sources identified in the Base Case Financial Model (95/395 Final), for the costs related to the development of the 395 Project. Such costs will be specifically itemized and identified in a schedule submitted to the Department at least seven (7) Days prior to the scheduled 395 Financial Close Date. If the aggregate total of such costs (excluding any consent fees paid to the Project's existing Lenders) exceeds \$32,000,000, such schedule of costs will be updated and submitted to the Department for the Department's approval as a condition precedent to 395 Financial Close.

### **Section 7.03B Fred Ex Financial Close**

(a) Concessionaire's Deliverables Leading up to Fred Ex Financial Close. During the period between the Second Amended and Restated Agreement Date and the Fred Ex Financial Close Date, the Concessionaire shall provide to the Department for the Department's review and comment:

(i) at least 60 days prior to the scheduled Fred Ex Financial Close Date a list of and initial drafts of the Fred Ex Project Financing Agreements and Financing Assignments as set forth in Exhibit O-1, and all other documents required for Fred Ex Financial Close other than the documents referenced in Section 7.03B(a)(ii) below;

(ii) at least 30 days prior to the scheduled Fred Ex Financial Close Date initial drafts of:

- Close;
- (A) closing certificates and legal opinions related to Fred Ex Financial
  - (B) the Fred Ex Direct Agreement, if applicable;
  - (C) UCC filings; and,
  - (D) any other ancillary documents and disclosure documents related to Fred Ex Financial Close agreed by the parties at the time.

(iii) at least 10 Days prior to the scheduled Fred Ex Financial Close Date, a draft of the Base Case Financial Model Update (Fred Ex Final);

(iv) all subsequent versions of the drafts enumerated in Section 7.03B(a)(i), and (ii) above, contemporaneously with the distribution of such drafts to the Lenders and other parties related to Fred Ex Financial Close (the Concessionaire shall ensure the Department is on any external distribution list for such drafts) up and until the Concessionaire has furnished the final drafts pursuant to Section 7.03B(a)(vii);

(v) all subsequent versions of the draft of the Base Case Financial Model Update (Fred Ex Final) enumerated in Section 7.03B(a)(iii) above, contemporaneously with the external distribution of such drafts to the Lenders and other parties related to Fred Ex Financial Close up and until the Concessionaire has furnished the final draft pursuant to Section 7.03B(b)(i);

(vi) at least 10 Days prior to the scheduled Fred Ex Financial Close Date, an update of the audit report and opinion delivered pursuant to Section 23.02(m) for the proposed Base Case Financial Model Update (Fred Ex Final); and

(vii) at least 10 Days prior to the scheduled Fred Ex Financial Close Date, final drafts of the Fred Ex Project Financing Agreements and Financing Assignments, and final drafts of those documents listed in Section 7.03B(b)(viii) below.

(b) Conditions for Fred Ex Financial Close. Except to the extent permitted in writing by the Department, Fred Ex Financial Close will only be achieved once all of the following conditions precedent are satisfied or waived by the Department in its sole discretion:

(i) the Concessionaire has provided the Department the true and complete Base Case Financial Model Update (Fred Ex Final);

(ii) the Concessionaire has provided the Department true and complete copies of the executed Fred Ex Project Financing Agreements and Financing Assignments listed in Exhibit O-1;

(iii) the Concessionaire has provided the Department evidence, satisfactory to the Department, that all conditions precedent required for Fred Ex Financial Close to the availability and utilization of Concessionaire Debt (if utilized) have been satisfied in full or waived by the finance parties in whose favor those conditions precedent run;

(iv) if utilized, the Concessionaire has caused the PABs Issuer to issue the PABs as provided by and in accordance with the Fred Ex Project Financing Agreements and has made a Financing Assignment with respect to the PABs as described in the Fred Ex Project Financing Agreements;

(v) if utilized, the Concessionaire has caused the TIFIA Lender to provide the Fred Ex TIFIA Credit Assistance as provided by and in accordance with the Fred Ex Project Financing Agreements and has made a Financing Assignment with respect to the Fred Ex TIFIA Credit Assistance as described in the Fred Ex Project Financing Agreements;

(vi) the Concessionaire has delivered to the Department certificates, as may be reasonably requested by the Department, certifying as to the Concessionaire's compliance with the terms and conditions of this Agreement, the satisfaction of the conditions precedent to Fred Ex Financial Close, and the validity of the Concessionaire's representations and warranties set forth in Section 23.02, and confirming the Fred Ex Design-Build Contract and the Fred Ex TTMS Contract both have been executed and remain in full effect;

(vii) the Department has received the Initial Permit Fee Buyout Payment pursuant to Section 7.03B(i)(v), the ROW deposit pursuant to Section 7.03B(i)(i), and the Southbound RRC Overlap Work funds pursuant to Section 7.03B(i)(vi);

(viii) the Department has received copies of the following executed documents:

(A) any required consents from the Project's existing Lenders, including (as applicable) to the execution of the Second Amended and Restated Comprehensive Agreement, the Fred Ex Design-Build Contract, the Fred Ex TTMS Contract, final investment grade rating letters, and other related matters;

(B) the Fred Ex Direct Agreement, substantially in the form attached as Exhibit R-3;

(C) the updated Electronic Toll Collection Agreement, substantially in the form of Exhibit K;

(D) Fred Ex Payment Bond and Fred Ex Performance Bond in the amounts and satisfying the requirements set forth in Section 17.08(b)(iii)(A); and

(E) Fred Ex TTMS Payment Bond and Fred Ex TTMS Performance Bond or Fred Ex TTMS Letter of Credit, as applicable, in the amounts and satisfying the requirements set forth in Section 17.08(b)(iii)(B); and

(ix) the Concessionaire has resolved to the satisfaction of the Department any (i) model deficiencies that have a direct quantitative impact within the Base Case Financial Model Update (Fred Ex Final) or (ii) inappropriate caveats, as reasonably determined by the Department, in the case of either (i) or (ii), that appear within the draft audit report and opinion delivered under Section 7.03B(a)(vi) above.

If the Concessionaire has satisfied all conditions precedent (or the Department, in its sole discretion, has waived any such conditions) identified in this Section 7.03B(b), the Department will issue a certificate on the Fred Ex Financial Close Date confirming that all applicable conditions precedent have been satisfied.

(c) Fred Ex Financial Protections. The Department will provide the following financial protections and shared financial benefits in relation to the Fred Ex Project (the “Fred Ex Financial Protections”):

(i) Fred Ex Interest Rates and Credit Spreads Protection. During the Fred Ex Interest Rate Protection Period, the Department will provide interest rate protection (the “Fred Ex Interest Rate Protection”) with respect only to debt incurred by the Concessionaire in connection with the Fred Ex Project, in each case as compared to the applicable PABs Interest Rates and/or the interest rates locked by the Concessionaire for any Fred Ex TIFIA Credit Assistance as follows:

(A) PABs.

(1) The Concessionaire will bear 100% of the risk and have the benefit of the first 80 Basis Points of change in the Fred Ex PABs All-In Rates, if applicable;

(2) the Department and the Concessionaire will share equally in the risk and the benefit of any changes in the Fred Ex PABs All-In Rates greater than the first 80 Basis Points up to and including the first 100 Basis Points, if applicable; and

(3) the Department will bear 100% of the risk and have the benefit of any changes in the Fred Ex PABs All-In Rates that exceed such 100 Basis Points, if applicable.

(B) TIFIA Credit Assistance.

(1) The Concessionaire will bear 100% of the risk and have the benefit of the first 80 Basis Points of change in the Fred Ex TIFIA Rates, if applicable;

(2) the Department and the Concessionaire will share equally in the risk and the benefit of any changes in the Fred Ex TIFIA Rates greater than the first 80 Basis Points up to and including the first 100 Basis Points, if applicable; and

(3) the Department will bear 100% of the risk and have the benefit of any changes to the Fred Ex TIFIA Rates that exceed the first 100 Basis Points, if applicable.

(C) With regard to any PABs issued to finance the Fred Ex Project, the applicable Fred Ex Interest Rate Protection will be calculated on the Fred Ex PABs



Interest Rate Protection Calculation Date, which date must occur prior to the Fred Ex Interest Rate Protection Deadline but may occur after the Fred Ex Financial Close Deadline.

(D) With regard to any Fred Ex TIFIA Credit Assistance, the applicable Fred Ex Interest Rate Protection will be calculated on the Fred Ex TIFIA Interest Rate Protection Calculation Date, which date must occur prior to the Fred Ex Interest Rate Protection Deadline but may occur after the Fred Ex Financial Close Deadline.

(E) For the avoidance of doubt, Fred Ex Interest Rate Protection may be applied only once with respect to PABs (which could be applied at Fred Ex Financial Close or Fred Ex Additional Financial Close, but not both) and only once with respect to Fred Ex TIFIA Credit Assistance (which could be applied at Fred Ex Financial Close or Fred Ex Additional Financial Close, but not both).

(ii) Changes to Financing Terms. The Concessionaire will bear 100% of the risk with respect to the financing terms of the PABs for the Fred Ex Project (if any) and the Fred Ex TIFIA Credit Assistance (if any). The Department will not bear any risk of TIFIA Credit Assistance not being available for the Fred Ex Project.

(iii) Design-Build Price Protection. If, on the Fred Ex Design-Build Price Protection Calculation Date, the sum of the Initial Fred Ex Design-Build Contract Price plus the Initial Southbound RRC Overlap Work Price plus the Fred Ex ROW Deposit is greater than the Fred Ex Benchmark Design-Build Price, the Department will be responsible for the amount of such difference (the “Fred Ex Design-Build Price Protection”). If, on the Fred Ex Design-Build Price Protection Calculation Date, the sum of the Initial Fred Ex Design-Build Contract Price plus the Initial Southbound RRC Overlap Work Price plus the Fred Ex ROW Deposit is less than the Fred Ex Benchmark Design-Build Price, the Concessionaire will pay to the Department on the Fred Ex Financial Close Date an amount equal to 75% of the amount of such difference, and the Concessionaire will retain an amount equal to 25% of the amount of such difference. The parties agree that, based on the formula set forth in this Section 7.03B(c)(iii), and based on the Initial Fred Ex Design-Build Contract Price received by the Concessionaire on October 16, 2018, the result of such computation is that the Concessionaire shall pay to the Department (the “Fred Ex Design-Build Price Protection Benefit”) \$54,375,000 on the earlier of (a) the Fred Ex Additional Financial Close Date and (b) October 31, 2019.

(iv) Fred Ex Financial Protections Cap and Termination Right. The total combined amount of the Fred Ex Financial Protections provided by the Department shall not exceed \$50,000,000. Subject to Section 7.03B(c)(vi) below, if on any of the Fred Ex Financial Protections Calculation Dates, the total combined amount of the Fred Ex Financial Protections exceeds \$50,000,000, the Department may terminate the Fred Ex Project and any provisions in and terms of this Agreement and any other Project Agreement to which it is a party that solely relates to the Fred Ex Project.

(v) Payment of Fred Ex Financial Protections. If the Fred Ex Financial Protections are greater than zero but do not exceed \$50,000,000, the Concessionaire may, by written notice to the Department, notify the Department upon the applicable Fred Ex Financial Protections Calculation Date of the then-current total combined amount of the Fred Ex Financial Protections and the Department may elect to deduct or offset such Fred Ex Financial Protections from amounts due to the Department from the Concessionaire at Fred Ex Financial Close (or Fred Ex Additional Financial Close, if applicable) or from amounts due to the Department from the Concessionaire at a future Fred Ex Financial Protections Calculation Date in the Department's sole discretion, in accordance with Section 25.21(b). Thereafter, for any remaining unpaid Fred Ex Financial Protections, the Concessionaire shall include in Disbursement Requests within the first 90 Days after the Fred Ex Financial Close Date (or Fred Ex Additional Financial Close Date, if applicable), an amount equal to such remaining unpaid Fred Ex Financial Protections, of which the Department will pay all undisputed portions within 60 days of receipt.

(vi) Concessionaire's Right to Assume Excess Payment of Fred Ex Financial Protections. If on any of the Fred Ex Financial Protections Calculation Dates the total combined amount of the Fred Ex Financial Protections exceeds \$50,000,000, the Concessionaire may, by written notice to the Department, elect to assume the cost of the portion of the Fred Ex Financial Protections greater than \$50,000,000. For the avoidance of doubt, if and so long as the Concessionaire assumes all such excess Fred Ex Financial Protections greater than \$50,000,000, the Department shall not have the right to terminate the Fred Ex Project pursuant to Section 7.03B(c)(iv).

(A) If, prior to Fred Ex Financial Close, the Concessionaire does not elect to assume such cost, but the Concessionaire notifies the Department of its intent to continue to pursue Fred Ex Financial Close, then the Concessionaire shall be granted an additional 90-day period from the Fred Ex Financial Close Deadline to achieve Fred Ex Financial Close, *provided* that the Concessionaire delivers to the Department at least 15 Days prior to the expiration of the then-existing Fred Ex Financial Close Security a new Fred Ex Financial Close Security, or extends the then-existing Fred Ex Financial Close Security, with an expiry date no earlier than 15 Days after the end of the 90-day period. If after such 90-day period, the Concessionaire does not elect to assume such cost, the Department may elect to terminate the Fred Ex Project pursuant to Section 7.03B(c)(iv) and Section 20.04(d).

(B) If, after Fred Ex Financial Close, the Concessionaire does not elect to assume such cost, but the Concessionaire notifies the Department of its intent to continue to pursue Fred Ex Additional Financial Close, then the Concessionaire shall be granted an additional 90-day period from the Fred Ex Interest Rate Protection Deadline to pursue Fred Ex Additional Financial Close. If after such 90-day period, the Concessionaire does not elect to assume such cost, the Department will have no duty to provide the Fred Ex Interest Rate Protection.

(d) Fred Ex Financial Close Signature Pages. Prior to the Fred Ex Financial Close Date (or Fred Ex Additional Financial Close Date, if applicable), each party may sign the signature pages of the various documents it is required to sign to achieve Fred Ex Financial

Close (or Fred Ex Additional Financial Close, if applicable), and deliver such signature pages to counsel for the other party (or to a designated third party) to be held in escrow and not to be effective until released by an authorized representative of the signing party. The Department will release any signature pages only by written release.

(e) Fred Ex Financial Close Deadline.

(i) The Concessionaire must achieve Fred Ex Financial Close by the Fred Ex Financial Close Deadline. In the event Fred Ex Financial Close is not achieved by the Fred Ex Financial Close Deadline, either party may terminate the Fred Ex Project pursuant to Section 20.04.

(ii) The Concessionaire acknowledges that the time period the Department has provided to the Concessionaire to achieve Fred Ex Financial Close is reasonable, and both the Concessionaire and the Department acknowledge that the Fred Ex Financial Close Security is reasonable to compensate the Department for damages it will incur as a result of the lost opportunity to the Department represented by this Agreement.

(f) Fred Ex Financial Close Security.

(i) At least two Days before the execution of the Second Amended and Restated Comprehensive Agreement, the Concessionaire shall deliver to the Department the Fred Ex Financial Close Security with an expiry date no earlier than 15 Days after the Fred Ex Financial Close Deadline. The Department will have the right to draw on the Fred Ex Financial Close Security after the Fred Ex Financial Close Deadline. However, the parties may mutually agree to extend the Fred Ex Financial Close Deadline, and the Department will not have the right to draw on the Fred Ex Financial Close Security if, at least 5 days before the Fred Ex Financial Close Deadline, the Concessionaire delivers to the Department a new Fred Ex Financial Close Security, or extends the already-delivered Fred Ex Financial Close Security, with an expiry date no earlier than 15 Days after the new Fred Ex Financial Close Deadline. In such case, the Department will return the old Fred Ex Financial Close Security within two Business Days upon receipt of the new Fred Ex Financial Close Security.

(ii) In the event that Fred Ex Financial Close is not achieved by the Fred Ex Financial Close Deadline, the Department will have the right to draw on the Fred Ex Financial Close Security; provided, however that the Department will not have the right to draw on the Fred Ex Financial Close Security if Fred Ex Financial Close is not achieved by the Fred Ex Financial Close Deadline directly due to one or more of the following:

- (A) the occurrence of a Department Default;
- (B) the Department's failure to deliver closing certificates and opinions related to Fred Ex Financial Close; or
- (C) as specified in Section 20.04(d).

(iii) Upon Fred Ex Financial Close being successfully achieved in accordance with the terms of this Agreement, the Department will return the Fred Ex Financial Close Security to the Concessionaire within two Business Days of Fred Ex Financial Close.

(g) Closing Transcript. The Concessionaire agrees to provide the Department a complete transcript of all documents executed and delivered in connection with (i) the execution of this Agreement, (ii) the Fred Ex Financial Close promptly following the Fred Ex Financial Close Date and, (iii) if applicable, the Fred Ex Additional Financial Close promptly following the Fred Ex Additional Financial Close Date.

(h) Reasonable Commercial Efforts; Cooperation. Subject to the termination rights of each party pursuant to Section 20.04, the Department and the Concessionaire each agree to: (i) use reasonable commercial efforts to satisfy the conditions within their control to reach Fred Ex Financial Close on or prior to the Fred Ex Financial Close Deadline; and (ii) use reasonable commercial efforts to cooperate and assist the other party to reach Fred Ex Financial Close by the Fred Ex Financial Close Deadline.

(i) Payments at Fred Ex Financial Close.

(i) Fred Ex ROW Deposit. On the Fred Ex Financial Close Date, the Concessionaire will pay \$2,500,000 to the Department to be deposited by the Department in a segregated account, to be used by the Department to pay (i) ROW Costs associated with the Fred Ex Project, plus (ii) the Department's reasonable and documented internal and external costs associated with ROW acquisition (inclusive of the Department's condemnation costs), plus (iii) the landowner's condemnation costs (collectively, the "Fred Ex ROW Costs"). If the Department reasonably believes the actual Fred Ex ROW Costs will be greater than \$2,500,000 then it will notify the Concessionaire in writing, and the Concessionaire will deposit with the Department additional funds in the amount requested by the Department within thirty (30) days of the written notice. The Concessionaire may request, and the Department shall provide, reasonable documentation to support any additional deposits. The Department may request more than one additional deposit. The Department shall make direct payments to property owners for negotiated settlements and relocation benefits and make deposits with the appropriate court for condemnation cases in accordance with Section 1.6 of Exhibit C-5. The Department will refund to the Concessionaire any remaining, unused balance of deposited funds sixty (60) days following the Fred Ex Final Completion Date; *provided, however*, if the Department anticipates it will incur additional Fred Ex ROW Costs on or after the date that is sixty (60) days following the Fred Ex Final Completion Date, the Department will refund to the Concessionaire any remaining, unused balance at that time, minus 200% of the amount the Department reasonably expects to expend with respect to the additional Fred Ex ROW Costs. After all Fred Ex ROW Costs have been paid, all remaining, unused funds on deposit with the Department with respect to Fred Ex Row Costs shall be refunded to the Concessionaire within sixty (60) days. If at any time the Department incurs Fred Ex ROW Costs in excess of amounts deposited by the Concessionaire with the Department (including after the Department has refunded any remaining, unused balances or portions thereof) the Department will notify the Concessionaire in writing, and the Concessionaire will pay to the Department within

thirty (30) days an amount equal to the Fred Ex ROW Costs incurred by the Department in excess of amounts deposited by the Concessionaire.

(ii) Development Costs. On the Fred Ex Financial Close Date, the Concessionaire will receive amounts agreed to by the parties, from sources identified in the Base Case Financial Model (Fred Ex Final), for the costs related to the development of the Fred Ex Project. Such costs will be specifically itemized and identified in a schedule submitted to the Department at least seven (7) Days prior to the scheduled Fred Ex Financial Close Date. If the aggregate total of such costs (excluding any consent fees paid to the Project's existing Lenders) exceeds \$37,300,000, such schedule of costs will be updated and submitted to the Department for the Department's approval as a condition precedent to Fred Ex Financial Close. In no event shall development costs related to Fred Ex Financial Close be reimbursed by the Concessionaire unless any amounts payable to the Department with respect to the Fred Ex Project at such time are paid prior to or simultaneously with such reimbursement.

(iii) **[RESERVED]**

(iv) **[RESERVED]**

(v) Initial Permit Fee Buyout Payment. The Initial Permit Fee Buyout Payment will be paid no later than the Fred Ex Financial Close Date.

(vi) Southbound RRC Overlap Work Funds. The Concessionaire shall pay to the Department \$4,000,000 on the Fred Ex Financial Close Date to fund the Southbound RRC Overlap Work.

### **Section 7.03C Fred Ex Additional Financial Close**

(a) Concessionaire's Deliverables Leading up to Fred Ex Additional Financial Close Date. If the Concessionaire pursues Fred Ex Additional Financial Close, the Concessionaire shall provide to the Department for the Department's review and comment:

(i) at least 45 days prior to the scheduled Fred Ex Additional Financial Close Date a list of and initial drafts of the Fred Ex Project Financing Agreements and Financing Assignments as set forth in Exhibit O-2, and all other documents required for Fred Ex Additional Financial Close other than the documents referenced in Section 7.03C(a)(ii) below;

(ii) at least 30 days prior to the scheduled Fred Ex Additional Financial Close Date initial drafts of:

(A) closing certificates and legal opinions related to Fred Ex Additional Financial Close;

(B) the Fred Ex Direct Agreement, if applicable;

(C) UCC filings; and,

(D) any other ancillary documents and disclosure documents related to Fred Ex Additional Financial Close agreed by the parties at the time.

(iii) at least 10 Days prior to the scheduled Fred Ex Additional Financial Close Date a draft of an updated version of the contemporaneous Base Case Financial Model Update, which draft must reflect any and all impacts of the Fred Ex Additional Financial Close (the “Base Case Financial Model Update (Fred Ex Final/Additional)”);

(iv) all subsequent versions of the drafts enumerated in Section 7.03C(a)(i) and (ii) above, contemporaneously with the distribution of such drafts to the Lenders and other parties related to Fred Ex Additional Financial Close (the Concessionaire shall ensure Department is on any external distribution list for such drafts) up and until the Concessionaire has furnished the final drafts pursuant to Section 7.03C(a)(vii);

(v) all subsequent versions of the draft of the Base Case Financial Model Update (Fred Ex Final/Additional), contemporaneously with the external distribution of such drafts to the Lenders and other parties related to Fred Ex Additional Financial Close up and until the Concessionaire has furnished the final draft pursuant to Section 7.03C(b)(i);

(vi) at least 10 Days prior to the scheduled Fred Ex Additional Financial Close Date, an update of the audit report and opinion delivered pursuant to Section 23.02(m) for the proposed Base Case Financial Model Update (Fred Ex Final/Additional); and

(vii) at least 10 Days prior to the scheduled Fred Ex Additional Financial Close final drafts of the Fred Ex Project Financing Agreements and Financing Assignments, and final drafts of those documents listed in Section 7.03C(b)(vii) below.

(b) Conditions for Fred Ex Additional Financial Close. Except to the extent permitted in writing by the Department, Fred Ex Additional Financial Close will only be achieved once all of the following conditions precedent are satisfied or waived by the Department in its sole discretion:

(i) the Concessionaire has provided the Department the true and complete Base Case Financial Model Update (Fred Ex Final/Additional);

(ii) the Concessionaire has provided the Department true and complete copies of the executed Fred Ex Project Financing Agreements and Financing Assignments listed in Exhibit O-2;

(iii) the Concessionaire has provided the Department evidence, satisfactory to the Department, that all conditions precedent required for Fred Ex Additional Financial Close to the availability and utilization of Concessionaire Debt have been satisfied in full or waived by the finance parties in whose favor those conditions precedent run;

(iv) if utilized, the Concessionaire has caused the PABs Issuer to issue the PABs as provided by and in accordance with the Fred Ex Project Financing Agreements

and has made a Financing Assignment with respect to the PABs as described in the Fred Ex Project Financing Agreements;

(v) if utilized, the Concessionaire has caused the TIFIA Lender to provide the Fred Ex TIFIA Credit Assistance as provided by and in accordance with the Fred Ex Project Financing Agreements and has made a Financing Assignment with respect to the Fred Ex TIFIA Credit Assistance as described in the Fred Ex Project Financing Agreements;

(vi) the Concessionaire has delivered to the Department certificates, as may be reasonably requested by the Department, certifying as to the Concessionaire's compliance with the terms and conditions of this Agreement, the satisfaction of the conditions precedent to Fred Ex Additional Financial Close, and the validity of the Concessionaire's representations and warranties set forth in Section 23.02, and confirming the Fred Ex Design-Build Contract and the Fred Ex TTMS Contract both have been executed and remain in full effect;

(vii) the Department has received copies of the following executed documents, or amendments to such documents updating them for Fred Ex Additional Financial Close:

(A) any required consents from the Project's existing Lenders to the Fred Ex Additional Financial Close and other related matters, if not previously executed and delivered and rating letters;

(B) the Fred Ex Direct Agreement, substantially in the form attached as Exhibit R-3;

(C) the Collateral Agency Agreement; and

(D) the Concessionaire has resolved to the satisfaction of the Department any (i) model deficiencies that have a direct quantitative impact within the Base Case Financial Model Update (Fred Ex Final/Additional) or (ii) inappropriate caveats, as reasonably determined by the Department, in the case of either (i) or (ii), that appear within the draft audit report and opinion delivered under Section 7.03C(a)(vi) above; and

(viii) the Department has received all payments relating to Fred Ex Additional Financial Close, including those applicable payments set forth in Section 7.03C(d); provided that in the case of a Fred Ex TIFIA Financial Close this condition shall be satisfied upon in advance of actual receipt of the Fred Ex TIFIA which shall be paid pursuant to Section 7.03C(d)(i)(C).

If the Concessionaire has satisfied all conditions precedent (or the Department, in its sole discretion, has waived any such conditions) identified in this Section 7.03C(b), the Department will issue a certificate on the Fred Ex Additional Financial Close Date confirming that all applicable conditions precedent have been satisfied.



(c) Development Costs Related to Fred Ex Additional Financial Close. On the Fred Ex Additional Financial Close Date, the Concessionaire will receive amounts agreed to by the parties, from sources identified in the Base Case Financial Model (Fred Ex Final/Additional), for the costs related to Fred Ex Additional Financial Close. Such costs will be specifically itemized and identified in a schedule submitted to the Department at least seven (7) Days prior to the scheduled Fred Ex Additional Financial Close Date. If the aggregate total of such costs (excluding any consent fees paid to the Project's existing Lenders) exceeds \$49,800,000, such schedule of costs will be updated and submitted to the Department for the Department's approval as a condition precedent to Fred Ex Additional Financial Close. In no event shall development costs related to Fred Ex Additional Financial Close be reimbursed by the Concessionaire unless any amounts payable to the Department with respect to the Fred Ex Project at such time are paid prior to or simultaneously with such reimbursement.

(d) Payments at or Subsequent to Fred Ex Additional Financial Close.

(i) Fred Ex TIFIA Credit Assistance Benefit.

(A) The parties agree that if the Concessionaire achieves Fred Ex TIFIA Financial Close then the Concessionaire will pay the Department an amount equal to \$44,000,000 (the "Fixed Fred Ex TIFIA Credit Assistance Benefit").

(B) Notwithstanding Section 7.03C(d)(i)(A) above, under the following two scenarios the Concessionaire will not pay the Department the Fixed Fred Ex TIFIA Credit Assistance Benefit, but instead will pay to the Department the greater of: (i) 16.42% of the Fred Ex TIFIA Credit Assistance or (ii) \$33,000,000:

(1) the anticipated Fred Ex TIFIA Credit Assistance is reduced below the Fred Ex TIFIA Credit Assistance Base Amount because the Concessionaire reasonably determines, in consultation with its financial advisors, that the Fred Ex TIFIA Credit Assistance should be reduced to an amount that prevents the TIFIA Lender from becoming the Project's majority lender with respect to the calculation of voting rights; or

(2) the Concessionaire successfully secures Fred Ex TIFIA Credit Assistance in an amount greater than the Fred Ex TIFIA Credit Assistance Base Amount.

(C) The Concessionaire shall make any payment due under Section 7.03C(d)(i)(A) or Section 7.03C(d)(i)(B) within the earlier of: (1) 30 days after the Fred Ex TIFIA Financial Close Date and (2) one day after receiving the proceeds from the Fred Ex TIFIA Credit Assistance.

(ii) Fred Ex Design-Build Price Protection Benefit. The Concessionaire shall pay to the Department the Fred Ex Design-Build Price Protection Benefit on or before the earlier of (a) the Fred Ex Additional Financial Close Date and (b) October 31, 2019.

(iii) Fred Ex PABs Payment. If the Concessionaire achieves Fred Ex Additional Financial Close utilizing PABs on or before October 31, 2019, then the

Concessionaire shall pay to the Department an amount equal to \$11,500,000 on the Fred Ex Additional Financial Close Date. If the Concessionaire does not achieve Fred Ex Additional Financial Close utilizing PABs by October 31, 2019, then the Concessionaire shall pay to the Department an amount equal to \$6,000,000 on such date and \$5,500,000 on the date of any subsequent Fred Ex Additional Financial Close utilizing PABs.

(iv) Fred Ex Interest Rate Protection. Subject to Section 7.03B(c), the Fred Ex Interest Rate Protection will be paid in conjunction with Fred Ex Additional Financial Close according to the following timing:

(A) with regard to any PABs issued to finance the Fred Ex Project, the corresponding Fred Ex Interest Rate Protections will be calculated on the Fred Ex PABs Interest Rate Protection Calculation Date and payable on the Fred Ex Additional Financial Close Date, as applicable; and

(B) with regard to any Fred Ex TIFIA Credit Assistance, the corresponding Fred Ex Interest Rate Protections will be calculated on the Fred Ex TIFIA Interest Rate Protection Calculation Date and payable on the Fred Ex TIFIA Financial Close Date.

#### **Section 7.04 Project Financing Agreements; Department's Rights and Protections**

(a) From time to time during the Term, the Concessionaire has the right, at its sole cost and expense, to pledge, hypothecate, or assign the Gross Revenues and the Concessionaire's Interest as security for any Concessionaire Debt, such debt to be issued on such terms and conditions as may be acceptable to any Lender and the Concessionaire, subject to the following terms and conditions (such pledge, hypothecation, assignment, or other security instrument, including the Initial Project Financing Agreements, the 395 Project Financing Agreements, and the Fred Ex Project Financing Agreements being referred to in this Agreement as a "Financing Assignment"):

(i) no Person other than an Institutional Lender (other than with respect to indemnification and similar provisions provided for the benefit of the Collateral Agent and the agents, officers, representatives, and/or employees of an Institutional Lender or the Collateral Agent) is entitled to the benefits and protections afforded by a Financing Assignment, except that Lenders of Concessionaire Debt may be Persons other than Institutional Lenders so long as any Financing Assignment securing such Concessionaire Debt made by such Person is held by an Institutional Lender acting as Collateral Agent, and PABs may be issued, acquired and held by parties other than Institutional Lenders so long as an Institutional Lender acts as indenture trustee for the PABs and any VTIB assistance;

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

(iii) the Concessionaire is strictly prohibited from pledging or encumbering the Concessionaire's Interest, or any portion thereof, to secure any indebtedness, and no

Financing Assignment will secure any indebtedness, (A) that is issued by any Person other than the Concessionaire, any special purpose company that directly or indirectly owns the Concessionaire and has no assets except as are directly related to the Project, or any special purpose subsidiary wholly owned by such company, or the PABs Issuer or (B) the proceeds of which are used in whole or in part for any purpose other than the Project Purposes or any other purpose permitted in Section 7.04(a)(xiv);

(iv) no Financing Assignment or other instrument purporting to mortgage, pledge, encumber, or create a Lien on or against the Concessionaire's Interest will extend to or affect the Department's fee simple title to or other property interest and estate in and to the Project, the Project Right of Way or any interest of the Department hereunder or any part thereof;

(v) any number of permitted Financing Assignments may be outstanding at any one time, and any Financing Assignment permitted hereunder may secure two or more separate loans from two or more separate Lenders; *provided*, that each such loan and the Financing Assignment securing the same complies with the provisions of this Article 7;

(vi) the Department will not have any obligation to any Lender or Collateral Agent pursuant hereto, except as expressly set forth in this Article 7 or in any other instrument or agreement signed by the Department in favor of such Lender or Collateral Agent and unless the Concessionaire and/or the Collateral Agent have notified the Department of the existence of such Financing Assignment;

(vii) each Financing Assignment will require that if the Concessionaire is in default under the Concessionaire Debt secured by the Financing Assignment or under the Financing Assignment and the Lender or Collateral Agent gives notice of such default to the Concessionaire, then the Collateral Agent will also give concurrent notice of such default to the Department. Each Financing Assignment also will require that the Collateral Agent deliver to the Department, concurrently with delivery to the Concessionaire or any other Person, every notice of election to sell, notice of sale or other notice required by Law or by the Financing Assignment in connection with the exercise of remedies under the Financing Assignment;

(viii) no Financing Assignment will grant to a Lender any right to apply funds deposited with the Depository in accordance with Section 17.07, except for the express purposes for which the reserve or deposit is established;

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

(x) each Financing Assignment will expressly state that the Collateral Agent and the Lenders will not name or join any State Party or any officer thereof in any legal proceeding seeking collection of the related debt or other obligations secured thereby or the foreclosure or other enforcement of the Financing Assignment except to the extent (A) joining the Department as a necessary party is required to give the court jurisdiction over the dispute with the Concessionaire and to enforce any Lender's remedies against the Concessionaire and (B) the complaint against the Department states no Claim against the Department for a Lien or security interest on, or to foreclose against, the Department's fee simple title to or other property interest and estate in and to the Project, the Project Right of Way or any interest of the Department hereunder, or any part thereof, or for any liability of the Department;

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

(xii) each Financing Assignment will expressly state that the Lenders and the Collateral Agent will respond to any request from the Department or the Concessionaire for consent to a modification or amendment of this Agreement within a reasonable period of time;

(xiii) no Financing Assignment may secure Concessionaire Debt that prohibits prepayment or defeasance; *provided*, that the foregoing does not preclude imposition of Breakage Costs in order to prepay or defease or any requirement that a prepayment or defeasance be made on the next succeeding payment date; and

(xiv) each Financing Assignment may only secure Concessionaire Debt that satisfies the requirements set forth in Section 7.01 and the proceeds of which are used exclusively for the purpose of (A) developing, designing, permitting, constructing, financing, maintaining, repairing, rehabilitating, renewing or operating the Project or any Project Enhancements or establishing or maintaining reserves in connection therewith, (B) paying reasonable fees, development costs and expenses incurred by the Concessionaire in connection with the execution of this Agreement and the Initial Project Financing Agreements, the 395 Project Financing Agreements, or the Fred Ex Project Financing Agreements, as applicable, and not otherwise paid, (C) making Distributions, but only from the proceeds of any Refinancing permitted pursuant to Section 7.05, (D) any Refinancing of pre-existing Concessionaire Debt that conforms to the provisions of this Section 7.04(a), including use of proceeds to pay the reasonable costs of closing the Refinancing (including Lender's fees, but excluding any amounts paid to Affiliates) and (E) paying the Annual Transit Investment.

(b) The Department will have no obligation to join in, execute or guarantee any Financing Assignment.

(c) Notwithstanding the enforcement of any security interest created by a Financing Assignment, the Concessionaire will remain liable to the Department for the payment of all sums owing to the Department pursuant to this Agreement and the performance and observance of all of the Concessionaire's covenants and obligations pursuant to this Agreement.

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

(e) All rights acquired by the Lenders or the Collateral Agent under any Financing Assignment will be subject to the provisions of this Agreement and any Development Contract and to the rights of the Department hereunder and thereunder.

(f) No Financing Assignment will be binding upon the Department in the enforcement of its rights and remedies as provided in this Agreement and by Law, unless and until the Department has received a copy (certified as true and correct by the Collateral Agent or by the administrative agent identified in the Initial Project Financing Agreements, the 395 Project Financing Agreements, or the Fred Ex Project Financing Agreements) of the original thereof and a copy of a specimen bond, promissory note or other evidence of indebtedness (certified as true and correct by the Collateral Agent or by the administrative agent identified in the Initial Project Financing Agreements, the 395 Project Financing Agreements, or the Fred Ex Project Financing Agreements) secured by such Financing Assignment, together with written notice of the address of the Collateral Agent to which notices may be sent. If applicable, after the recordation or filing thereof, the Collateral Agent will provide to the Department a copy of the Financing Assignment bearing the date and instrument number or book and page of such recordation or filing. In the event of an assignment of any such Financing Assignment by the Collateral Agent, such assignment will not be binding upon the Department unless and until the Department has received a certified copy thereof, together with written notice of the assignee thereof to which notices may be sent (and the assignee will, if such assignment is required to be recorded, after such recordation deliver to the Department a copy thereof bearing the date and instrument number or book and page of such recordation).

(g) No Financing Assignment, including relating to any Refinancing, will be valid or effective, and no Lender will be entitled to the rights, benefits, and protections of this Article 7, unless the Financing Assignment complies with this Section 7.04. If the Department has actual knowledge that any Financing Assignment or amendment thereto has been entered into and does not comply with this Section 7.04, then the Department will deliver a notice to the Collateral Agent, with a copy to the Concessionaire. Unless and until such non-compliance is remedied, the Financing Assignment will be neither valid nor effective, and the Lenders thereunder will be entitled to none of the rights, benefits, and protections of this Article 7.

(h) Each Financing Assignment will make the Department a third-party beneficiary to any provision thereof that creates or protects the rights and priorities of the Department to receive payments thereunder as provided for in this Agreement, including Section 5.06.

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

### **Section 7.05 Refinancing Requirements**

(a) Notice of Refinancing. The Concessionaire will provide the Department written notice of a Refinancing 75 Days before the date of such Refinancing (or, if such advance notice is not reasonably possible under the circumstances, such notice as is possible and in any event with reasonable time for the Department to review and, if applicable, provide its consent for such Refinancing as contemplated below). At the Department’s request, the Concessionaire will provide to the Department available details of the proposed Refinancing, including (i) details of the changes, if any, proposed to the Financial Model Formulas, (ii) the proposed Base Case Financial Model Update, (iii) any material changes in the Concessionaire’s obligations (including contingent obligations) to the Project Lenders, (iv) an outline detailing the changes and/or replacements, as the case may be, to the Project Financing Agreements then in effect and the Financing Assignments contemplated by the Refinancing, (v) any other details concerning the Refinancing that the Department may reasonably require to determine whether the Refinancing would, or could reasonably be expected to, have a material adverse effect on the Department, the Project or the ability of the Concessionaire to perform its obligations pursuant to this Agreement or any other Project Agreement, *provided* that, with respect to any refinancing meeting the requirements of clauses (i), (ii), or (iii) of Section 7.05(c), the Concessionaire will provide to the Department details to the extent reasonably required to establish that such proposed Refinancing satisfies the requirements of clauses (i), (ii) or (iii) of Section 7.05(c).

(b) Project Financing Agreements Related to Refinancings.

(i) The Concessionaire will deliver to the Department for access and review, initial and subsequent drafts of all proposed Project Financing Agreements contemporaneously with the distribution of such drafts by and between the Concessionaire and the Lenders. The Department’s consent, when applicable, will be given not less than 15 Business Days prior to the proposed date of the Refinancing, *provided*, however, that there are no material changes in the terms of the relevant Project Financing Agreements provided to the Department and that the Department has been given reasonable time to provide its review and/or approval in the event that written notice was not provided to Department 75 Days before the date of the Refinancing.

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

(c) Department’s Right to Approve Refinancing. Any Refinancing of Concessionaire Debt will be subject to the Department’s prior approval, which approval will not be unreasonably



withheld or delayed; provided, that no such approval will be required if the Concessionaire first demonstrates to the Department that:

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

(ii) the proposed Refinancing has been assigned a rating (which may include a non-public rating) by a Rating Agency (without regard to bond insurance, if any) which is no lower than BBB minus or Baa3 or equivalent rating; or

(iii) no portion of the proceeds of the Refinancing will be used to make Distributions or to pay non-capital costs and expenses (other than related costs of issuance and any required reserves).

With respect to any proposed Refinancing for which the Department's approval is required, the Department shall not unreasonably withhold or delay its consent. Without limiting other reasonable grounds for withholding consent, the Department may withhold consent if it reasonably determines that:

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

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

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

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

Section 7.07(e) sets forth additional restrictions on Refinancings and on the incurrence of Concessionaire Debt.

(d) Payment of Department Expenses.

(i) In connection with any Refinancing, the Concessionaire will pay the Department for the Department's Allocable Costs incurred related to the Refinancing at the time of the closing of the Refinancing. The Department will provide the Concessionaire with an estimate of its expected costs related to such Refinancing; if there



is a change in circumstances relating to the Refinancing following the submission of the Department's initial estimate that is expected to result in higher expenses, then the Department will provide a revised estimate. For any Refinancings that do not close, the Department will be paid for its documented expenses for such Refinancings from and at the time of (or, at the Concessionaire's option, at any time prior to) any subsequent successful Refinancings, and will be entitled to payment of interest on such expenses based on the Bank Rate calculated from the date on which such expenses were due and payable according to the first invoice issued by the Department for such expenses until paid by the Concessionaire.

(ii) The Department will provide the Concessionaire with an estimate of the expenses to be incurred by the Department related to the Refinancing, no later than 30 Days after the Department has provided its consent to such Refinancing pursuant to Section 7.05(b)(i), and a final estimate not less than five Days prior to the proposed date of the Refinancing.

(e) Other Requirements.

(i) Every Refinancing will be subject to the provisions of Section 7.01 and Sections 7.02(c), 7.03, 7.03A, 7.03B or 7.03C, as applicable, and the other provisions of this Agreement pertaining to Concessionaire Debt and Financing Assignments.

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

(iii) In connection with the consummation of any proposed Refinancing, the Department will, promptly upon the reasonable request of the Concessionaire or the Collateral Agent or any Lender and such requesting party's agreement to cover any costs incurred by the Department in connection with the requested action, review the Concessionaire's written analysis of whether the Department is required to approve such Refinancing pursuant to Section 7.05(c) and confirm whether the Department believes its approval is required for such Refinancing.

(iv) In connection with any Refinancing, the Department will, promptly upon the request of the Concessionaire or the Collateral Agent, execute, acknowledge and deliver to the Concessionaire, or any of the parties specified by the Concessionaire, standard consents or certificates with respect to the Agreement, which may be qualified by materiality and/or to the best of the knowledge and belief of a designated representative of the Department; *provided*, however, that such consents or certificates do not limit, restrict or prejudice the Department's rights under this Agreement or any other Project Agreement.

## **Section 7.06 Collateral Agent's Rights**

The Collateral Agent's rights are set forth in the Direct Agreement, the 395 Direct Agreement, and the Fred Ex Direct Agreement.

## **Section 7.07 Original TIFIA Credit Assistance Protection**

### **(a) Concessionaire Obligation to Execute and Deliver Original TIFIA Loan Documentation.**

(i) The Concessionaire agrees to (A) exercise commercially reasonable efforts to reach financial close on any Original TIFIA Loan Documentation containing Original TIFIA Commercial Terms (with any changes thereto for which adjustments are made pursuant to Section 7.07(b)), and (B) execute and deliver any Original TIFIA Loan Documentation containing Original TIFIA Commercial Terms (with any changes thereto for which adjustments are made pursuant to Section 7.07(b)) that the Concessionaire receives on or prior to March 31, 2013 within 45 days following its receipt thereof together with confirmation from the TIFIA Lender that it is ready to execute and deliver the Original TIFIA Loan Documentation. If the Concessionaire fails to execute and deliver, prior to March 31, 2013 (or any later date ending on the last day of the 45-day period described in Section 7.07(a)(i)) (x) any Original TIFIA Loan Documentation containing Original TIFIA Commercial Terms (with any changes thereto for which adjustments are made pursuant to Section 7.07(b)) or (y) any Original TIFIA Loan Documentation containing terms consistent with the terms described in Exhibit H, but containing other terms and conditions that are inconsistent with the terms and conditions contained in TIFIA loan agreements and intercreditor agreements for Relevant Precedent, which inconsistent terms and conditions are reasonably expected to have a material adverse effect on the Concessionaire's financial profile, its ability to perform its obligations and enjoy its rights and benefits under this Agreement or its risk profile, and the Department has agreed to perform or cause to be performed such term or condition or otherwise resolve such inconsistent terms or conditions to the mutual satisfaction of the Concessionaire and the Department, each acting reasonably, in each case, within 45 days following its receipt by the Concessionaire, then such failure shall constitute a failure by the Concessionaire to comply with a material obligation of this Agreement and shall entitle the Department to exercise its rights and remedies hereunder relating thereto; provided, that in the event the Department exercises its right to terminate this Agreement, notwithstanding anything to the contrary set forth in Section 20.05(c) or any other provision of this Agreement, the Department will pay to the Concessionaire, subject to Section 25.19, an amount equal to the aggregate of the following: (i) 100% of Concessionaire Debt then outstanding, plus (ii) all Demobilization Costs, less (iii) Credit Balances.

(ii) If the Concessionaire fails to execute and deliver, prior to March 31, 2013 (or any later date ending on the last day of the 45-day period described in Section 7.07(a)(i)) (A) any Original TIFIA Loan Documentation containing Original TIFIA Commercial Terms (with any changes thereto for which adjustments are made pursuant to Section 7.07(b)) or (B) any Original TIFIA Loan Documentation containing terms

consistent with the terms described in Exhibit H, but containing other terms and conditions that are inconsistent with the terms and conditions contained in the TIFIA loan agreements and intercreditor agreements for Relevant Precedent, which inconsistent terms and conditions are reasonably expected to have a material adverse effect on the Concessionaire's financial profile, its ability to perform its obligations and enjoy its rights and benefits under this Agreement or its risk profile, and the Department has not agreed to perform or cause to be performed such term or condition or otherwise resolve such inconsistent terms or conditions to the mutual satisfaction of the Concessionaire and the Department, each acting reasonably, then in each case, the Department TIFIA Protection Amount will be decreased by an amount equal to \$30,000,000 and the Concessionaire TIFIA Protection Amount will be increased by \$30,000,000. For the avoidance of doubt, the Concessionaire may choose to execute and deliver the Original TIFIA Loan Documentation described in clause (B), in which case no adjustment to the Department TIFIA Protection Amount or the Concessionaire TIFIA Protection Amount will be made. The failure of the Concessionaire to enter into the Original TIFIA Loan Documentation pursuant to this Section 7.07(a)(ii)(B) will not be a Concessionaire Default and the Department will have no right to terminate this Agreement or exercise any other rights or remedies that may be available to the Department hereunder as a result thereof (other than as specifically provided in this Section 7.07(a)(ii)).

(iii) If the Concessionaire executes and delivers the Original TIFIA Loan Documentation containing Original TIFIA Commercial Terms (with any changes thereto for which adjustments are made pursuant to Section 7.07(a) and Section 7.07(b)) on or before November 30, 2012, the Department TIFIA Protection Amount will be increased by an amount equal to \$15,000,000 and the Concessionaire TIFIA Protection Amount will be decreased by \$15,000,000; provided, however that any adjustments pursuant to this subsection (iii) shall occur only after adjustments are made pursuant to Section 7.07(b), if any.

(iv) If the Concessionaire executes and delivers the Original TIFIA Loan Documentation containing Original TIFIA Commercial Terms (with any changes thereto for which adjustments are made pursuant to Section 7.07(a) and Section 7.07(b)) after November 30, 2012 and on or before March 31, 2013, the Department TIFIA Protection Amount will be increased by an amount equal to \$5,000,000 and the Concessionaire TIFIA Protection Amount will be decreased by \$5,000,000; provided, however that any adjustments pursuant to this subsection (iv) shall occur only after adjustments are made pursuant to Section 7.07(b), if any.

(v) Notwithstanding the Concessionaire's obligation to execute and deliver the Original TIFIA Loan Documentation containing Original TIFIA Commercial Terms within 45 Days following its receipt pursuant to Section 7.07(a)(i), if the Original TIFIA Loan Documentation containing Original TIFIA Commercial Terms has not been made available to the Concessionaire on or before March 31, 2013, the Concessionaire will have no further obligation to seek Original TIFIA Credit Assistance.

(b) Funding Adjustments at Original TIFIA Closing Date. If the Concessionaire enters into the Original TIFIA Loan Documentation on or before March 31, 2013, the Adjusted

Financial Model will be updated to calculate a further change, positive or negative, in the Department TIFIA Protection Amount and the Concessionaire TIFIA Protection Amount using the following protocol (ignoring for these calculations any adjustments to the Department TIFIA Protection Amount and the Concessionaire TIFIA Protection Amount pursuant to Section 7.07(a)):

(i) first, if any change necessary to ensure compliance with the PABs Issuer's terms to entering into the Original TIFIA Credit Assistance set forth in Section 6.30(d)(2) of the Senior Loan Agreement, resulted in a need to reduce the principal amount of the Original TIFIA Credit Assistance, the Adjusted Financial Model will be adjusted by updating for the amount of such reduction (and ignoring for this calculation the adjustments to any further reduction in the Original TIFIA Credit Assistance) and calculating an adjustment to each of the Department TIFIA Protection Amount and the Concessionaire TIFIA Protection Amount such that the Second Funding Closing Amount is \$300,000,000 and the Equity IRR is equal to the Adjusted Equity IRR;

(ii) then, if the Original TIFIA Credit Assistance requires a change to:

(A) the amortization profile (whether mandatory or scheduled);

(B) the revenue sharing / prepayment clauses; or

(C) the funding of the Debt Service Reserve Account or the Ramp-up Reserve Account, or the use or release requirements or required balance requirements thereof,

in each case, from the terms described in Exhibit H, and the cumulative effect of such changes is less favorable to the Concessionaire, the Adjusted Financial Model will be adjusted by updating for the actual Original TIFIA Credit Assistance repayment terms and calculating a further adjustment to each of the Department TIFIA Protection Amount and the Concessionaire TIFIA Protection Amount such that the Second Funding Closing Amount is \$300,000,000 and the Equity IRR is equal to the Adjusted Equity IRR;

(iii) then, the Adjusted Financial Model will be adjusted by updating for the actual Original TIFIA Interest Rate and calculating a further adjustment to each of the Department TIFIA Protection Amount and the Concessionaire TIFIA Protection Amount such that the Second Funding Closing Amount is equal to \$300,000,000 and the resulting Base Case Equity IRR is equal to the Adjusted Equity IRR; and

(iv) then, if the amount of the Original TIFIA Credit Assistance is less than the Benchmark TIFIA Credit Assistance Amount, the Adjusted Financial Model will be further adjusted by calculating adjustments to each of the Department TIFIA Protection Amount and the Concessionaire TIFIA Protection Amount such that the Second Funding Closing Amount is \$300,000,000 and the Equity IRR is equal to the Adjusted Equity IRR and will become the Adjusted Financial Model Update in accordance with Section 6.04.

(c) Department Participation and Assistance. The Concessionaire acknowledges that the Department will actively participate in negotiating the terms of the Original TIFIA Loan

Documentation that would reasonably be expected to contain terms and conditions that are inconsistent with the terms described in Exhibit H and other terms and conditions contained in the Original TIFIA Loan Documentation that are materially inconsistent with Relevant Precedent, or such inconsistent terms and conditions could be reasonably expected to have a material adverse effect on the Department's financial profile, its ability to perform its obligations and enjoy its rights and benefits under this Agreement or its risk profile. The Concessionaire will use reasonable commercial efforts to coordinate documentation development and meetings regarding the terms of the Original TIFIA Credit Assistance with the Department in a manner that allows the Department to be aware of and actively involved in the content and commercial terms of the Original TIFIA Loan Documentation. The Department acknowledges that such involvement will not cause a delay of the Second Funding Closing Date. The Department also acknowledges that on occasion, impromptu and/or "one-on-one" discussions between the Concessionaire and the TIFIA Lender may be required to advance the negotiation of the Original TIFIA Credit Assistance in a timely manner, and the Concessionaire acknowledges that the outcome of any such discussions will be promptly relayed to the Department. The Concessionaire will deliver copies of all documents and materials it receives from, and sends to, the TIFIA Lender in connection with the negotiation, execution and delivery of any Original TIFIA Loan Documentation promptly after the receipt or transmission thereof by the Concessionaire. If the TIFIA Lender proposes terms and conditions for the Original TIFIA Credit Assistance that are more burdensome than corresponding terms and conditions described in Exhibit H that could be reasonably expected to have a material adverse effect on the Concessionaire's financial profile, its ability to perform its obligations and enjoy its rights and benefits under this Agreement or its risk profile, the Department will use reasonable commercial efforts to assist the Concessionaire's efforts to improve such terms and conditions.

(d) TIFIA Protection Amount Funding.

(i) The Department TIFIA Protection Amount and the Concessionaire TIFIA Protection Amount, as adjusted in accordance with the foregoing terms, will become non-contingent and unconditionally payable upon the earlier to occur of (A) the closing date for the Original TIFIA Credit Assistance and (B) March 31, 2013 (or any later date ending on the last day of the 45-day period described in Section 7.07(a)(i) (the "Second Funding Closing Date"). Subject to the following sentence, the Department TIFIA Protection Amount shall be deposited in immediately available funds to the VDOT Funding Account as soon as practicable on or after the Second Funding Closing Date, but in no event later than 90 days following the Second Funding Closing Date, and the Concessionaire TIFIA Protection Amount will be paid by the Equity Sponsors pursuant to the Equity Funding Agreements effective as of the Second Funding Closing Date, and the parties will provide prompt written notice to the Trustee of such increase. If the Department TIFIA Protection Amount is not deposited to the VDOT Funding Account on the Second Funding Closing Date, the Department will deposit additional amounts necessary to reimburse the Concessionaire for all costs incurred with respect to the Project as a result of the delay in funding.

(ii) If the Department TIFIA Protection Amount is a negative amount (the "Department Credit Amount") as a result of the adjustments pursuant to this Section 7.07, the Department will not be required to make the Department TIFIA Protection

Amount, the Public Funds Amount will be decreased by an amount equal to the Department Credit Amount, and the parties will provide written notice to the GARVEE Trustee or the Trustee, as relevant, to transfer an amount equal to the Department Credit Amount to or to the order of the Department within 10 days after the later of (A) the giving of such notice to the GARVEE Trustee or the Trustee, as relevant, or (B) the Second Funding Closing Date. If the Concessionaire TIFIA Protection Amount is a negative amount as a result of the adjustments pursuant to this Section 7.07, the Concessionaire TIFIA Protection Amount will be zero, the Equity Contribution Amount payable by the Equity Sponsors under the Equity Funding Agreements will be automatically reduced by such amount effective as of the Second Funding Closing Date, and the parties will provide prompt written notice to the Trustee of such reduction.

(e) Restriction on Refinancing. In the event that the Concessionaire fails to enter into the Original TIFIA Loan Documentation on or before March 31, 2013 (or any later date ending on the last day of the 45-day period described in Section 7.07(a)(i)), during the period ending on the tenth (10<sup>th</sup>) anniversary of the Financial Close Date, the Concessionaire will not incur any Concessionaire Debt or refinance, replace or refund all or any part of the outstanding PABs, that results in an increase to the principal amount of Concessionaire Debt then outstanding without the Department's prior approval, such approval to be given in the Department's sole discretion; provided that such restriction shall not apply to (A) purchase money obligations incurred to finance discrete items of equipment used in connection with the Project that are not integral to the Project, (B) current accounts payable arising, and accrued expenses incurred, in the ordinary course of business which are payable in accordance with customary practices that are not overdue by more than ninety (90) days (unless subject to a good faith contest), and (C) the incurrence of Concessionaire Debt for the purposes described in clauses (i) through (iii) of Section 6.30(b)(1) of the Senior Loan Agreement, or for the purposes described in clause (iv) of Section 6.30(b)(1) of the Senior Loan Agreement so long as such incurrence does not result in the Concessionaire Debt in an amount greater than the principal amount of the then existing Concessionaire Debt (net of any deposits required to satisfy any increased reserve requirements with respect to the Concessionaire Debt being incurred, any payments to the Department required under this Agreement, and costs of issuance not to exceed 3% of the principal amount of such indebtedness).

(f) This Section 7.07 shall apply neither to the financing for the 395 Project nor the financing for the Fred Ex Project.

## ARTICLE 8.

### DESIGN AND CONSTRUCTION OF THE PROJECT

#### **Section 8.01 General Obligations of the Concessionaire**

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



(b) Except as otherwise expressly provided in this Agreement, the Department makes no warranties or representations as to any surveys, data, reports or other information provided by the Department or other Persons, including the data and other information set forth in Exhibit S (Known Geotechnical Conditions) and Exhibit T (Known Pre-Existing Hazardous Substances), concerning surface or subsurface conditions, the existing condition of the roadway and other Assets, drainage, the presence of Utilities, Hazardous Substances, contaminated ground water, archeological, paleontological and cultural resources, and endangered and threatened species, affecting the Project Right of Way or surrounding locations. The Concessionaire acknowledges that such information is for the Concessionaire's reference only and has not been verified by the Department, and that the Concessionaire will be responsible for conducting all surveys, studies and assessments as it deems appropriate for the Project; *provided*, that subject to Section 8.17, the foregoing will not limit the Concessionaire's rights with respect to Compensation Events and Delay Events.

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

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

*provided*, that subject to Section 8.17, the foregoing will not limit the Concessionaire's rights with respect to Compensation Events and Delay Events.

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

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



(f) Prior to and during the construction, the Concessionaire will provide information to the public concerning the Project, any Project Enhancements or any other construction activities in accordance with the Technical Requirements.

(g) The Concessionaire will prepare and submit to the Department for its review and approval the Project Development Plans in accordance with the requirements and times set forth in the Technical Requirements.

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

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

(j) The provisions of Article 8 shall not apply to the design, development and construction of the STE.

### **Section 8.02 Limited Notices to Proceed to Perform Certain Work**

(a) The Concessionaire may request that the Department issue one or more Limited Notices to Proceed (“LNTP”) authorizing the Concessionaire to commence certain portions of the Work as set forth in this Section 8.02. Prior to issuance of a LNTP, the parties will agree upon the conditions to the issuance of such LNTP, as well as the scope, schedule, and payment terms (if applicable) for such portion of the Work.

(b) The Concessionaire will deliver notice to the Department upon the satisfaction of the agreed conditions to the issuance of any LNTP and request that the Department issue such LNTP for the applicable portion of the Work. The Department will endeavor to respond to such request, within 21 Days following receipt of such request by the Department, by delivery to the Concessionaire of the applicable LNTP or notice of the conditions that the Department believes, in its reasonable discretion, to have not been satisfied. The Concessionaire will have a reasonable opportunity to address those deficiencies and re-submit a notice to the Department or, if the Concessionaire does not agree with the Department's assessment, to refer the matter to the dispute resolution procedures pursuant to Article 21. If the Concessionaire has not received a response within such 21-Day period, such failure by the Department to respond will be deemed

approval, but will not be deemed a waiver of the Department's other rights or the Concessionaire's other obligations, including compliance with Good Industry Practice, the Technical Requirements, Governmental Approvals, and Law. This Section 8.02(b) shall not apply to the 395 Project.

(c) With respect to the Original Project, to the extent any elements of the Early Work or payment therefor have not been completed or paid in full by the Department prior to the Agreement Date, the Concessionaire is authorized to complete such Early Work in accordance with this Agreement and payment therefor will be made under this Agreement (including for any such Early Work performed by the Concessionaire but not paid by the Department prior to the Agreement Date). Any Early Work performed and/or approved prior to the Agreement Date shall, upon execution of this Agreement, be deemed to have been performed by the Concessionaire and/or approved pursuant to, and subject to the terms and conditions of, this Agreement.

(d) With respect to the 395 Project, to the extent any elements of the 395 Early Work or payment therefor have not been completed or paid in full by the Department prior to the Amended and Restated Agreement Date, the Concessionaire is authorized to complete such 395 Early Work in accordance with this Agreement and payment therefor will be made pursuant to Section 8.17 (including for any such 395 Early Work performed by the Concessionaire but not paid by the Department prior to the Amended and Restated Agreement Date). Any 395 Early Work performed and/or approved prior to the Amended and Restated Agreement Date shall, upon execution of the First ARCA, be deemed to have been performed by the Concessionaire and/or approved pursuant to, and subject to the terms and conditions of, this Agreement.

(e) With respect to the Fred Ex Project, the Concessionaire may perform Fred Ex Early Work at its own cost and expense.

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

(a) Notice to Proceed with Design Work. For the purposes of this Section 8.03(a), the parties will manage as independent projects the Original Project, the 395 Project, and the Fred Ex Project, and each requirement listed below will apply independently to each of the Original Project, the 395 Project, and the Fred Ex Project, respectively. Except with respect to (i) Early Work approved and undertaken pursuant to Section 8.02(c), (ii) 395 Early Work approved and undertaken pursuant to Section 8.17, (iii) Fred Ex Early Work approved and undertaken pursuant to Section 8.20, and (iv) except as may be authorized in a LNTP, the Concessionaire will not commence any design Work unless and until the following conditions have been satisfied (or the Department has advised that it will waive such conditions) and the Department has delivered notice to that effect to the Concessionaire (such notice being referred to as the "Design Work Notice to Proceed"):

(i) the Concessionaire will have delivered to the Department and obtained its approval of the schedule of submissions described in Section 8.04(b);

(ii) the Department has approved the following Project Development Plans:  
(A) Concessionaire Management Plan; (B) Document Management Plan; (C) Quality

Management System Plan; (D) Design Quality Management Plan; (E) Public Information and Communications Plan; (F) DBE/SWaM Plan and (G) Hiring Development Plan; *provided*, however, that this Section 8.03(a)(ii) does not apply for the 395 Project or the Fred Ex Project.

(iii) there exists no court order which restrains, enjoins, or delays performance of the Work;

(iv) the Concessionaire certifies to the Department that all representations and warranties of the Concessionaire set forth in Section 23.02 remain true in all material respects;

(v) the Concessionaire certifies to the Department that all insurance policies required under Section 17.01 specified in the Design Work Notice to Proceed for the Work, except with respect to the builder's risk insurance and the cyber/network insurance required under Section 2 of Exhibit Y-2, have been obtained and will be in full force and effect, and in the case of Project-specific policies, the Concessionaire has delivered to the Department duplicate originals or copies thereof certified by the Concessionaire's insurance broker to be true and correct copies of the originals; and

(vi) there exists no Concessionaire Default, 395 Concessionaire Breach, or Fred Ex Concessionaire Breach for which the Concessionaire has received notice from the Department, and the Concessionaire certifies to the Department that, to the best of its knowledge after diligent inquiry, there exists no condition, which with the lapse of time or delivery of notice to the Concessionaire, or both, would constitute a Concessionaire Default, 395 Concessionaire Breach, or Fred Ex Concessionaire Breach.

The delivery of the Design Work Notice to Proceed will not constitute authorization to commence construction activities.

(b) Notice to Proceed for Construction. For the purposes of this Section 8.03(b), the parties will manage as independent projects the Original Project, the 395 Project, and the Fred Ex Project, and each requirement listed below will apply independently to each of the Original Project, the 395 Project, and the Fred Ex Project, respectively. In addition to the conditions set forth in Section 8.03(a), the Concessionaire will not commence construction of the Project Assets unless and until the following conditions have been satisfied (or the Department, in its discretion, waives such conditions) and the Department has delivered notice to that effect to the Concessionaire (such notice being referred to as the "Construction Notice to Proceed"):

(i) the Concessionaire has delivered to the Department correct and complete copies of all Design Public Hearing Documentation (except for Design Public Hearing Documentation related to the 395 Project and the Fred Ex Project) and Construction Documentation required for the commencement of construction in accordance with this Agreement and the Technical Requirements, and the Concessionaire has received from the Department any prior written approvals thereof required by this Agreement and Federal Requirements;

(ii) all Governmental Approvals (including any applicable Department approvals and Federal approvals and agreements) necessary for the commencement of construction have been acquired (and copies provided to the Department), and the Concessionaire has satisfied all applicable pre-construction requirements of the Governmental Approvals;

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

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

(v) the builder's risk insurance policy required under Section 17.01(a) has been obtained and will be in full force and effect, and the Concessionaire has delivered to the Department a duplicate original or copy thereof certified by the Concessionaire's insurance broker to be a true and correct copy of the original.

(c) The Concessionaire will deliver notice to the Department upon the satisfaction of the applicable conditions set forth in this Section 8.03 and request that the Department issue a Design Work Notice to Proceed or a Construction Notice to Proceed. The parties will comply with the submittal and review procedures set forth in Section 10.05 for the issuance of a Design Work Notice to Proceed or a Construction Notice to Proceed; *provided* that the deemed approval provisions of Section 10.05(e) will not apply to the issuance of a Design Work Notice to Proceed or a Construction Notice to Proceed.

(d) The Department may waive any condition precedent set forth in Section 8.03(a) and Section 8.03(b); *provided*, that no person or entity will be entitled to assume that the Department will waive or refuse to waive any condition precedent in the absence of strict compliance therewith. Unless the Department waives in writing (as distinguished from a deemed waiver) a condition precedent that requires action by the Concessionaire to be satisfied, the Concessionaire will remain bound to use diligent efforts to satisfy the condition precedent.

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

(a) For the purposes of this Section 8.04, the parties will manage as independent projects the Original Project, the 395 Project, and the Fred Ex Project, and each requirement listed below will apply independently to each of the Original Project, the 395 Project, and the Fred Ex Project, respectively. Except as provided in Section 8.02(c), (d), or (e) with respect to the Early Work, 395 Early Work, or Fred Ex Early Work, the Concessionaire will submit to the Department accurate and complete copies of all Design Documentation and Construction Documentation relating to the Work, which is required to be submitted, within three Days after such documentation is delivered to the Concessionaire by the Design-Build Contractor under the Design-Build Contract. Each submittal will comply with the applicable requirements of the Technical Requirements. The Department's review of any submittal shall comply with the submittal and review procedures set forth in Section 10.05.

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

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

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

(e) The Department's review, comment, and/or approval of interim design submissions and the Construction Documentation are for the purpose of evaluating the Concessionaire's compliance with the requirements of this Agreement and will be performed in accordance with the terms of this Agreement.

(f) Following the Department's initial approval pursuant to this Section 8.04, the Concessionaire will have the right to amend, supplement or otherwise modify the Design Public Hearing Documentation, Design Documentation or the Construction Documentation or any part thereof, without the further approval of the Department; *provided*, that the Department's approval will be required with respect to amendments, supplements or modifications that (i) constitute a material change in the scope of the Work or Deviations from any of the Technical Requirements, (ii) result in increases in the time to achieve (A) Substantial Completion beyond the Guaranteed Substantial Completion Date (B) 395 Final Completion beyond the 395 Guaranteed Final Completion Date or (C) Fred Ex Final Completion beyond the Fred Ex Final Completion Date, or (iii) except to the extent directly attributable to a Compensation Event, impose on the Department any new or increased costs, liabilities or obligations; *provided*, further, that the Concessionaire will provide the Department notice of all such proposed amendments, supplements and modifications regardless of whether the Department's consent is required and will pay the Department, upon demand, for all the Allocable Costs it incurs to review and consider such proposed amendments, supplements or modifications that are subject to the Department's approval.

(g) In the event the Concessionaire's design differs from the schematic upon which the NEPA Documents were based, as between the Department and the Concessionaire, the

Concessionaire will be fully responsible for all necessary actions, and will bear all risk of delay (except to the extent resulting from Delay Events) and all risk of increased cost (except to the extent resulting from Compensation Events), resulting from or arising out of any associated change in the Project Assets location and design, including (i) conducting all necessary environmental studies and preparing all necessary environmental documents in compliance with applicable Environmental Laws, (ii) obtaining and complying with all necessary new Governmental Approvals (including any modifications, renewals and extensions of the NEPA Documents and other existing Governmental Approvals) or third party approvals or agreements, and (iii) bearing all risk and cost of litigation. The Department and FHWA will independently evaluate all environmental studies and documents and fulfill the other responsibilities assigned to them by 23 CFR Part 771; *provided*, that the Concessionaire will fully pay the Department for the Allocable Costs it incurs to conduct further or supplemental environmental studies and to fulfill any other responsibilities assigned to it pursuant to 23 CFR Part 771.

(h) The design and construction of the Project Assets will accommodate certain improvements, projects and plans, all as set forth in the Technical Requirements.

#### **Section 8.05 Acquisition of Project Right of Way; Utility Relocations; Railroad Easements**

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

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

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

(iii) the Concessionaire will submit a ROW Acquisition and Relocation Plan to the Department for its approval. Unless otherwise permitted in the Technical Requirements, the ROW Acquisition and Relocation Plan will not include parcels considered to be solely for the convenience of the Concessionaire, including those necessary to accommodate laydown, staging, temporary drainage and other construction methods in connection with the construction of the Project Assets. The ROW Acquisition and Relocation Plan will identify a schedule of right of way activities including the specific parcels to be acquired and all relocations. The ROW Acquisition and Relocation Plan will allow for the orderly relocation of displaced persons based on time frames not less than those provided by the Uniform Act. The parties will comply with the submittal and review procedures set forth in Section 10.05 with regards to the Department's approval of the ROW Acquisition and Relocation Plan; *provided* that the deemed approval provisions of Section 10.05(e) will not apply to the approval of the



ROW Acquisition and Relocation Plan. The ROW Acquisition and Relocation Plan will be updated as necessary during the Term;

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

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

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

(b) Condemnation. The Concessionaire will use its best efforts (as such term is defined for this purpose in the Technical Requirements) (i) to acquire the Project Right of Way and any other real property or real property rights outside the Project Right of Way necessary for the construction and operation of the Project that are set forth in the ROW Acquisition and Relocation Plan by making *bona fide* efforts to purchase the Project Right of Way or such other real property or real property rights from the owners of such real property or real property rights for amounts not to exceed just compensation therefore and (ii) to settle claims with landowners amicably, each in accordance with Law. If, despite the Concessionaire's best efforts, it is unable to reach a settlement with landowners within 30 Days, the Department will handle any necessary condemnation proceedings in accordance with the provisions of the Technical Requirements. Prior to the Department filing a condemnation proceeding, the Concessionaire will prepare all necessary paperwork and supporting documentation required for the proceeding and it will deliver that documentation to the Department. The Department then will file the condemnation proceeding(s) and handle such proceeding(s) in accordance with the Technical Requirements.

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

(d) ROW Costs.

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



(ii) 395 Project ROW Costs. On the 395 Financial Close Date, the Concessionaire will pay \$350,000 to the Department to be deposited by the Department in a segregated account. Except as noted in the prior sentence, the Concessionaire will not be responsible for the payment of any ROW Costs for the 395 Project. The Department shall use such funds to pay ROW Costs (including the Department's and the landowner's condemnation costs) associated with the 395 Concessionaire Assets. The Department will be responsible for all ROW Costs (including the Department's and the landowner's condemnation costs) associated with the 395 Department Assets.

(iii) Fred Ex ROW Acquisition and Costs. The Concessionaire will perform all activities and services that are necessary for the acquisition of all right of way necessary for the Fred Ex Project consistent with applicable Law (including right of way needed for soundwalls and other noise barriers), which includes, but is not limited to, all appraisals, appraisal reviews, negotiations with landowners and Utility Owners, relocation assistance and advisory services, and legal services. Notwithstanding the prior sentence, as needed and in accordance with the Technical Requirements, the Department will exercise its rights under Law to initiate condemnation proceedings to assist the Concessionaire to acquire the right of way necessary for the Fred Ex Project. Fred Ex ROW Costs are governed by Section 7.03B(i)(i).

(e) Utility Relocations.

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

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

(f) Acquisition of Railroad Easements. The Department will obtain, at the Department's sole cost and expense, any easements and other property rights necessary for the Work located on property owned by Norfolk Southern Corporation, and facilitate the negotiation of a construction agreement between the Concessionaire and Norfolk Southern Corporation (the "Railroad Easement"). Notwithstanding the foregoing, (i) the Concessionaire will pay the Department for Allocable Costs incurred by the Department in the Department's efforts to obtain the Railroad Easement, to the extent such Allocable Costs are incurred by the Department as a result of any Concessionaire Party's misconduct, negligence or other culpable act, error or omission and (ii) the Concessionaire will pay the costs of any Work performed on the Railroad Easement and reimburse Norfolk Southern Corporation any of its costs in connection therewith, all as provided in the Technical Requirements. This Section 8.05(a)(f) does not apply for the Fred Ex Project.

## Section 8.06 Governmental Approvals

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

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

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

(d) The Concessionaire will at all times and at its sole cost and expense comply with the NEPA Documents, including, without limitation, compliance necessitated by a change in the base design of the Project. If supplements to the NEPA Documents or additional NEPA Documents are needed following the Agreement Date, the Department will prepare the necessary documentation using data and other information provided by the Concessionaire, and the Concessionaire will pay the Department for its Allocable Costs incurred in the preparation of such documentation; *provided*, that the Department will pay for supplements to the existing NEPA Documents or additional NEPA Documents necessitated by a Compensation Event or Department Project and for the Allocable Costs incurred by the Concessionaire in providing data and information relating to such supplements.

(e) 395 Project. The Department has obtained the following Governmental Approvals or will obtain the following Governmental Approvals by the date set forth next to such Governmental Approval, all of which are or will be in the Department's name, in accordance with the Technical Requirements:

| Governmental Approval   | Date                                       |
|---|--|
| 395 NEPA Approval   | April 30, 2017                             |
| Required Governmental Approvals from the CTB necessary for NTP for the 395 Project  | Amended and Restated Agreement Date        |
| Required Governmental Approvals from the FHWA necessary for NTP for the 395 Project, except those required for financing the 395 Project in accordance with <u>Section 7.03A(b)(ii)</u> | Amended and Restated Agreement Date        |
| Required Governmental Approvals from the  | The date that is four (4) months after the |

|   |  |
|---|--|
| <p>Pentagon necessary for the Pentagon Improvements and any part of the Eads Street Component located on the Pentagon Reservation</p> | <p>Concessionaire delivers to the Department the information required and the related permit applications for approval of the necessary permit forms all in accordance with the Technical Requirements, which date shall not be prior to the 395 Financial Close Date.</p> |
|---|--|

The Department will also be responsible for including the 395 Project in the CLRP, the STIP and the TIP. The Concessionaire will be responsible for obtaining all other Governmental Approvals for the 395 Project.

(f) Fred Ex Project Government Approvals. With respect to the Fred Ex Project, the Department has obtained the required NEPA Approvals, CTB approvals, and approvals by the FHWA of the Interchange Justification Reports, this Agreement, and project management plan for the Fred Ex Project, as necessary. The Department will also be responsible for including the Fred Ex Project in the LRTP, the STIP, and the TIP. The Concessionaire will be responsible for obtaining all other Government Approvals relating to the Fred Ex Project.

**Section 8.07 Construction Work and Project Schedule**

(a) The Initial Baseline Schedule will be the basis for monitoring the Concessionaire’s performance of the Work until such time as a Baseline Schedule has been approved by the Department in accordance with the Technical Requirements. The 395 Baseline Schedule will be the basis for monitoring the Concessionaire’s performance of the Work for the 395 Project. The Fred Ex Baseline Schedule will be the basis for monitoring the Concessionaire’s performance of the Work for the Fred Ex Project.

(b) The Concessionaire and the Department will conduct monthly progress meetings in accordance with the Technical Requirements. As part of, and in conjunction with, such meetings, the Concessionaire will provide the Department with any proposed update of the Applicable Baseline Schedule in accordance with the Technical Requirements. The parties further agree to abide by the terms and procedures set forth in the Technical Requirements pertaining to project management and coordination matters.

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

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

Concessionaire will not alter the Applicable Baseline Schedule except as permitted in the Technical Requirements.

(e) If any alteration (i) affects the Critical Path, (ii) adversely and materially affects the Department's oversight resources or the Department's separate contractors, or (iii) deviates from the Technical Requirements, the Concessionaire will not make such alteration without the prior approval of the Department.

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

### **Section 8.08 Substantial Completion**

(a) The Concessionaire will achieve Substantial Completion on or before the Guaranteed Substantial Completion Date, subject to adjustment in accordance with this Agreement; *provided* that failure to achieve Substantial Completion by the Guaranteed Substantial Completion Date, in and of itself, will not result in a default under Section 19.01, except as set forth in Section 19.01(e).

(b) The Department will issue a written certificate of Substantial Completion at such time as Substantial Completion occurs. If the Department approves the issuance of a Substantial Completion Certificate, the Department will provide with its Substantial Completion Certificate a Punch List of items to be completed to achieve Final Acceptance.

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

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

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

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

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

(v) the need for temporary traffic controls or for lane closures at any time has ceased (except for any then required for routine maintenance, and except for temporary lane closures in accordance with and as permitted by a Department-approved traffic management plan solely in order to complete Punch List items);

(vi) the Concessionaire has completed the toll commissioning process described in the Technical Requirements, and the ETTM System is completed, has passed all demonstration and performance testing in accordance with the Construction Documentation and the Technical Requirements, including demonstration of interoperability with E-ZPass or any successor to E-ZPass then utilized on State Highways, and is ready for normal operation unless the foregoing conditions have been previously satisfied under Section 9.02(a)(viii);

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

(viii) the Concessionaire has otherwise completed the Work in accordance with this Agreement, including the Technical Requirements, and with the Construction Documentation, such that the Project Assets are in a physical condition that it can be used for normal and safe vehicular travel in all lanes and at all points of entry and exit, subject only to Punch List items.

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

(e) The Concessionaire will provide the Department with written notice of anticipated Substantial Completion at least 21 Days prior to the anticipated Substantial Completion Date. The parties will comply with the submittal and review procedures set forth in Section 10.05 in the determination of whether Substantial Completion has been achieved; *provided* that the deemed approval provisions of Section 10.05(e) will not apply to the determination of whether Substantial Completion has been achieved. During such 21-Day period, the Concessionaire and the Department will meet, confer and exchange information on a regular basis with the goal being the Department's orderly, timely inspection of the Project Assets and review of the final Construction Documentation and the Department's issuance of a Substantial Completion Certificate. In addition, the Department will conduct an inspection of the Project Assets and review of the final Construction Documentation, and such other matters as may be necessary to determine whether Substantial Completion is achieved and, not later than the expiration of such 21-Day period, will deliver a written report of findings and recommendations to the Concessionaire. The Department will provide the Concessionaire with a determination of whether or not Substantial Completion has been achieved (and if not, an explanation with reasonable specificity as to the reasons therefor) within such 21-Day period.

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

(g) This Section 8.08 shall apply neither to the 395 Project nor to the Fred Ex Project.

## Section 8.09 Final Acceptance

(a) The Concessionaire will achieve Final Acceptance of the Project on or before the Final Acceptance Deadline, subject to adjustment in accordance with this Agreement.

(b) The Concessionaire will provide the Department with written notification when it has determined that the following conditions to Final Acceptance of the Project have been satisfied:

(i) Substantial Completion has occurred;

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

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

(iv) all Project Documentation, including as built drawings of the Project Assets, to be submitted on or before Final Acceptance have been submitted and approved (to the extent approval is required) by the Department;

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

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

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

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

(c) The parties will comply with the submittal and review procedures set forth in Section 10.05 in the determination of whether Final Acceptance has been achieved *provided* that the deemed approval provisions of Section 10.05(e) will not apply to the determination of whether Final Acceptance has been achieved. During the 21-Day period following delivery of the Concessionaire's written notification, the Concessionaire and the Department will meet, confer and exchange information with the goal being the Department's orderly, timely inspection of the Project Assets and the Department's issuance of a Final Acceptance Certificate, and the Department will conduct an inspection of the Punch List items, a review of the final drawings and such other investigation as may be necessary to evaluate whether the conditions to Final Acceptance have been satisfied. The Department will provide the Concessionaire with a determination of whether or not Final Acceptance has been achieved (and if not, an explanation with reasonable specificity as to the reasons therefor) within such 21-Day period.



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

(e) This Section 8.09 shall apply neither to the 395 Project nor to the Fred Ex Project.

### **Section 8.10 Liquidated Damages for Delayed Completion**

(a) Liquidated Damages Related to Substantial Completion – Original Project. In connection to the Original Project, if the Concessionaire does not achieve Substantial Completion by the Guaranteed Substantial Completion Date, the Department will be entitled to assess \$14,000 as liquidated damages for each Day that Substantial Completion of the Project remains to be achieved beyond the Guaranteed Substantial Completion Date. The Concessionaire will cause any related liquidated damages payable by the Design-Build Contractor under the Design-Build Contract to be paid to the Department; *provided* that the Concessionaire's overall liability for liquidated damages relating to Section 8.10(a) and (b) shall in no event exceed \$5,110,000. This Section 8.10(a) shall not apply to the 395 Project.

(b) Liquidated Damages Related to Final Acceptance – Original Project. In connection to the Original Project, if the Concessionaire does not achieve Final Acceptance by the Final Acceptance Deadline, the Department will be entitled to assess \$5,000 as liquidated damages for each Day that Final Acceptance of the Project remains to be achieved following the expiration of the Final Acceptance Deadline, and the Concessionaire will cause any related liquidated damages payable by the Design-Build Contractor under the Design-Build Contract. This Section 8.10(b) shall not apply to the 395 Project.

(c) Liquidated Damages Related to 395 Final Completion.

(i) In connection with the 395 Project, if the Concessionaire does not achieve 395 Final Completion pursuant to Section 8.18 by the 395 Guaranteed Final Completion Date, the Department will be entitled to assess \$14,000 as liquidated damages for each Day that 395 Final Completion remains to be achieved beyond the 395 Guaranteed Final Completion Date.

(ii) If the Concessionaire does not achieve 395 Final Completion by the 395 Long Stop Date, the Department will be entitled to assess \$60,000 as liquidated damages for each Day that 395 Final Completion remains to be achieved beyond the 395 Long Stop Date.

(iii) The Concessionaire's overall liability for liquidated damages relating to Section 8.10(c) shall in no event exceed \$20,000,000; *provided* that any liquidated damages in excess of \$10,000,000 shall be due to the Department only if 395 Final Completion has not been achieved because of a failure to complete the 395 Department Assets pursuant to the terms of the 395 Design-Build Contract.

(d) Liquidated Damages Related to Fred Ex Final Completion.



(i) In connection with the Fred Ex Project, if the Concessionaire does not achieve Fred Ex Final Completion pursuant to Section 8.21 by the Fred Ex Guaranteed Final Completion Date, the Department will be entitled to assess \$14,000 as liquidated damages for each Day that Fred Ex Final Completion remains to be achieved beyond the Fred Ex Guaranteed Final Completion Date.

(ii) If the Concessionaire does not achieve Fred Ex Final Completion by the Fred Ex Long Stop Date, the Department will be entitled to assess \$60,000 as liquidated damages for each Day that Fred Ex Final Completion remains to be achieved beyond the Fred Ex Long Stop Date.

(iii) The Concessionaire's overall liability for liquidated damages relating to Section 8.10(d) shall in no event exceed \$10,000,000.

(e) Liquidated Damages Related to Fred Ex Route 17 GP Exit Ramp Completion. If the Concessionaire does not achieve Fred Ex Route 17 GP Exit Ramp Completion pursuant to Section 8.22(d) by the Fred Ex Guaranteed Route 17 GP Exit Ramp Completion Date, the Department will be entitled to assess \$2,500 as liquidated damages for each Day that Fred Ex Route 17 GP Exit Ramp Completion remains to be achieved beyond the Fred Ex Guaranteed Route 17 GP Exit Ramp Completion Date.

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

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

(ii) that any sums assessed under this Section 8.10 and Section 8.14 are in the nature of liquidated damages, and not a penalty, and are fair and reasonable and such payment represents a reasonable estimate of fair compensation for the additional Oversight Services that may reasonably be anticipated from such failure;

(iii) that any sums assessed under this Section 8.10 and Section 8.14 will be in lieu of all liability of the Concessionaire and its Contractors for any and all Losses, whether direct, special, or consequential, and of any nature whatsoever incurred by the Department, which are caused by the Concessionaire's failure to timely complete the construction Work, including failure to achieve Substantial Completion, Final Acceptance, 395 Final Completion, Fred Ex Final Completion and Fred Ex Route 17 GP Exit Ramp Completion by the applicable deadlines and its actions causing Non-Permitted Lane Closures as described in Section 8.14;

(iv) that any sums assessed under this Section 8.10 and Section 8.14 will be due and owing to the Department upon assessment of such damages, subject to the dispute resolution procedures of Article 21; and

(v) notwithstanding the above, liquidated damages are not intended to excuse Concessionaire or any of its Contractors from liability for any other breach of its

obligations under the Project Agreements, or limit the Department's recourse to other remedies hereunder such as termination pursuant to Article 19 and Article 20; *provided*, that no Concessionaire Default will occur solely as a result of a delay in achieving Substantial Completion by the Guaranteed Substantial Completion Date, except as set forth in Section 19.01(e), no 395 Concessionaire Breach or Concessionaire Default will occur solely as a result of a delay in achieving 395 Final Completion by the 395 Guaranteed Final Completion Date, except as set forth in Section 19.06(d), and no Fred Ex Concessionaire Breach or Concessionaire Default will occur solely as a result of a delay in achieving Fred Ex Final Completion by the Fred Ex Guaranteed Final Completion Date or in achieving Fred Ex Route 17 GP Exit Ramp Completion by the Fred Ex Guaranteed Route 17 GP Exit Ramp Completion Date, except as set forth in Section 19.09(d).

(g) Payment of Liquidated Damages. The Concessionaire will pay all undisputed liquidated damages under this Section 8.10 monthly in arrears not later than 30 Days after the end of each calendar month, and in accordance with the requirements set forth in Section 5.06(b).

### **Section 8.11 Warranties; Defective Design and Construction**

(a) Warranties.

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

(ii) The warranties in Section 8.11(a) are exclusive and are in lieu of all other warranties by contract. No implied or statutory warranties will apply. Subject to Section 8.11(a)(iii) below and to such limitations on coverage including aggregate caps specified in the Design-Build Contract and the TTMS Contract, the foregoing warranties for Work relating to the Project Assets will be effective for a period of, with respect to the Design-Build Work and the TTMS Work, as applicable, (A) 60 months beginning on the date on which Substantial Completion of the Design-Build Work is achieved as such date is defined in the Design-Build Contract for the Original HOT Lanes, (B) 24 months beginning on the date on which 395 Early Final Completion or 395 Final Completion is achieved, and (C) 24 months beginning on the date on which Fred Ex Final Completion is achieved (the "Warranty Period"). Such warranties will survive termination of this Agreement for Work that was in place prior to termination.

(iii) With respect to the warranties furnished by the Design-Build Contractor and the TTMS Contractor pursuant to Section 8.11(a)(i) and if and to the extent the Concessionaire obtains general or limited warranties from any Contractor in favor of the Concessionaire with respect to design, materials, workmanship, construction, equipment, tools, supplies, software or services, the Concessionaire will cause such warranties to be expressly extended to the Department; *provided*, that the foregoing requirement will not

apply to standard, pre-specified manufacturer warranties of mass-marketed materials, products (including software products), equipment or supplies where the warranty cannot be extended to the Department using commercially reasonable efforts. The Department will only have the right to exercise remedies under any such warranty so long as the Concessionaire or a Lender is not pursuing remedies thereunder. To the extent that any Contractor warranty would be voided by reason of the Concessionaire's negligence or failure to properly incorporate material or equipment into the Work, the Concessionaire will be responsible for correcting such defect.

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

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

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

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

(iii) to rectify such Defects itself and to obtain payment of its Allocable Costs from the Concessionaire or, where the Contractor providing such Performance Security is liable for such Work from a draw on any Performance Security furnished pursuant to this Agreement (and the Concessionaire agrees to make such drawing upon the request of the Department); *provided*, that (A) the Department will not rectify such Defects itself or seek payment from the Concessionaire or such Performance Security unless it has requested rectification of, and the Concessionaire and the Contractor have failed to promptly rectify the Defects and (B) the Concessionaire will be permitted to draw on the Performance Security provided by any Contractor liable for such Work to the extent of any amounts paid by the Concessionaire; or

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

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

## **Section 8.12 Transportation Management Plan.**

(a) The Department will develop, fund and implement a regional transportation management plan (“Transportation Management Plan” or “TMP”), which will be undertaken in coordination with the Concessionaire’s Maintenance of Traffic Plan and Sequence of Construction Plan. The Department will provide the Concessionaire with a reasonable opportunity to comment on the TMP. The TMP will set forth the program for traffic management and related activities to ensure safety and mobility for the travelling public throughout the Original Corridor, the 395 Corridor, and the Fred Ex Corridor, as applicable, for the duration of the Construction Period. The Concessionaire’s Maintenance of Traffic Plan (as described further in the Technical Requirements) will be consistent with, and included as part of, the TMP for the Construction Period.

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

(c) The Department will be responsible for the regional TMP for the 395 Project as set forth in subsection (a). The Concessionaire will be responsible for the TMP related to the construction of the 395 Project in accordance with the Technical Requirements. The Concessionaire will also be responsible for incident management and safety service patrols on the HOV Lanes in the 395 Corridor during the construction of the 395 Project.

(d) The Department will be responsible for the regional TMP for the Fred Ex Project as set forth in subsection (a). The Concessionaire will be responsible for the TMP related to the construction of the Fred Ex Project in accordance with Exhibit C.

## **Section 8.13 Substantial Completion of Segments of the Project.**

In the Department’s sole discretion, it may issue a Substantial Completion Certificate and an authorization to commence Service Commencement with respect to certain Segments of the Project to be identified by the Concessionaire and approved by the Department, prior to issuing a Substantial Completion Certificate and authorization to commence Service Commencement for the balance of the Project. In such case, solely for the purpose of processing such early acceptance, the Department and the Concessionaire will develop a set of requirements that must be satisfied and other conforming changes to this Agreement, so that such Segments of the Project may be accepted early by the Department, in its sole discretion, pursuant to this Section 8.13. This Section 8.13 shall apply neither to the 395 Project nor the Fred Ex Project.

## **Section 8.14 Lane Closure Damages.**

In its performance of the Work during the Construction Period, the Concessionaire may temporarily close existing lanes on the Project Right of Way only in accordance with the Technical Requirements. Any such closure that exceeds the time period permitted therefor in the Technical Requirements is a “Non-Permitted Closure”. If a Non-Permitted Closure occurs, the Department will notify the Concessionaire thereof and of the associated Lane Closure Damages,

in writing, within 48 hours. Pursuant to Section 25.21, the Concessionaire will pay to the Department the liquidated damages set forth below (the “Lane Closure Damages”) at the time and in the manner set forth in the Technical Requirements. The Lane Closure Damages for any Non-Permitted Closure will not exceed \$200,000 per incident. The Lane Closure Damages for any Non-Permitted Closure for the 395 Project will not exceed \$100,000 per incident. The Lane Closure Damages for any Non-Permitted Closure for the Fred Ex Project will not exceed \$100,000 per incident.

| <b>Liquidated Damages for Lane Closures for the Original HOT Lanes</b>                  |   |   |   |
|---|---|---|---|
|   | Liquidated damage (\$ per minute)               |   |   |
| <u>Elapsed Time (min)</u>   | <u>I-95, I-395, I-495 and all ramps</u>         | <u>Major Arterials</u>                          | <u>All other roads</u>                      |
| 1-5, or any portion thereof   | \$0   | \$0   | \$0   |
| Every additional minute or portion thereof after the initial five minutes stated above. | \$1,000 plus \$2,500 per each additional minute | \$1,000 plus \$1,500 per each additional minute | \$500 plus \$500 per each additional minute |

| <b>Liquidated Damages for Lane Closures for the 395 Project</b>                         |  |  |  |
|---|--|--|--|
|   | Liquidated damage (\$ per minute)                                    |  |  |
| <u>Elapsed Time (min)</u>   | <u>I-95, I-395, I-495 and all ramps</u>                              | <u>Major Arterials</u>   | <u>All other roads</u>   |
| 1-5, or any portion thereof   | \$0  | \$0  | \$0  |
| Every additional minute or portion thereof after the initial five minutes stated above. | \$1,000 for the sixth minute plus \$1,000 per each additional minute | \$1,000 for the sixth minute plus \$500 per each additional minute | \$500 for the sixth minute plus \$500 per each additional minute |

| <b>Liquidated Damages for Lane Closures for the Fred Ex Project</b>                     |  |  |  |
|---|--|--|--|
|   | Liquidated damage (\$ per minute)                                    |  |  |
| <u>Elapsed Time (min)</u>   | <u>I-95 and all ramps</u>  | <u>Major Arterials</u>   | <u>All other roads</u>   |
| 1-5, or any portion thereof   | \$0  | \$0  | \$0  |
| Every additional minute or portion thereof after the initial five minutes stated above. | \$1,000 for the sixth minute plus \$1,000 per each additional minute | \$1,000 for the sixth minute plus \$500 per each additional minute | \$500 for the sixth minute plus \$500 per each additional minute |

**Section 8.15 Failure to Achieve Substantial Completion, 395 Final Completion and Fred Ex Final Completion by applicable Long Stop Date; Substantial Completion Recovery Plan, 395 Final Completion Recovery Plan and Fred Ex Final Completion Recovery Plan**

(a) The Concessionaire will achieve Substantial Completion of the Project by the Long Stop Date.

(b) The Long Stop Date will be extended one time if (i) the Concessionaire submits to the Department for the Department's review and approval a written recovery plan (the "Substantial Completion Recovery Plan") not later than 90 Days prior to the Long Stop Date; (ii) the Substantial Completion Recovery Plan outlines the actions the Concessionaire proposes to take in order to cause Substantial Completion to occur as promptly as reasonably possible, which plan may include increasing work hours to the extent permitted under applicable Law and utilizing additional labor and equipment and other appropriate acceleration techniques to improve schedule progress and will set forth a proposed new Long Stop Date; (iii) such Substantial Completion Recovery Plan and new Long Stop Date is approved by the Department within 30 Days in its reasonable discretion, and (iv) the Concessionaire diligently implements the Substantial Completion Recovery Plan. In addition, the Department may, in its sole discretion, consent to a second Substantial Completion Recovery Plan upon such terms and conditions as it may establish in its sole discretion.

(c) The Concessionaire will achieve 395 Final Completion of the 395 Project by the 395 Long Stop Date.

(d) The 395 Long Stop Date will be extended one time if (i) the Concessionaire submits to the Department for the Department's review and approval a written recovery plan (the "395 Final Completion Recovery Plan") not later than 90 Days prior to the 395 Long Stop Date; (ii) the 395 Final Completion Recovery Plan outlines the actions the Concessionaire proposes to take in order to cause 395 Final Completion to occur as promptly as reasonably possible, which plan may include increasing work hours to the extent permitted under applicable Law and utilizing additional labor and equipment and other appropriate acceleration techniques to improve schedule progress and will set forth a proposed new 395 Long Stop Date; (iii) such 395 Final Completion Recovery Plan and new 395 Long Stop Date is approved by the Department within 30 Days in its reasonable discretion, and (iv) the Concessionaire diligently implements the 395 Final Completion Recovery Plan. In addition, the Department may, in its sole discretion, consent to a second 395 Final Completion Recovery Plan upon such terms and conditions as it may establish in its sole discretion.

(e) The Concessionaire will achieve Fred Ex Final Completion of the Fred Ex Project by the Fred Ex Long Stop Date.

(f) The Fred Ex Long Stop Date will be extended one time if (i) the Concessionaire submits to the Department for the Department's review and approval a written recovery plan (the "Fred Ex Final Completion Recovery Plan") not later than 90 Days prior to the Fred Ex Long Stop Date; (ii) the Fred Ex Final Completion Recovery Plan outlines the actions the Concessionaire proposes to take in order to cause Fred Ex Final Completion to occur as promptly as reasonably possible, which plan may include increasing work hours to the extent permitted



under applicable Law and utilizing additional labor and equipment and other appropriate acceleration techniques to improve schedule progress and will set forth a proposed new Fred Ex Long Stop Date; (iii) such Fred Ex Final Completion Recovery Plan and new Fred Ex Long Stop Date is approved by the Department within 30 Days in its reasonable discretion, and (iv) the Concessionaire diligently implements the Fred Ex Final Completion Recovery Plan. In addition, the Department may, in its sole discretion, consent to a second Fred Ex Final Completion Recovery Plan upon such terms and conditions as it may establish in its sole discretion.

#### **Section 8.16 Department Allowances and Commercial Commitments for Design-Build Work.**

(a) The Parties acknowledge that the contract price for the Design-Build Work in the Design-Build Contract includes certain agreed quantities set forth in the Technical Requirements (the “Baseline Quantities”) and associated unit prices and markups for concrete sign foundations, electric service panel feeds, and undercut excavation (the “Allowance Items”) as set forth in the Technical Requirements. If the actual quantities of the Allowance Items in the Design-Build Work exceed the Baseline Quantities, the Design-Build Contractor will be entitled to payment by the Concessionaire of an amount equal to the agreed unit price and markup multiplied by the actual quantities which exceed the Baseline Quantities; *provided* however, that such payment by the Concessionaire to the Design-Build Contractor will not exceed \$15,000,000. The Department will pay the Concessionaire for any such amount that the Concessionaire pays to the Design-Build Contractor; *provided* however, that the maximum such amount payable by the Department to the Concessionaire pursuant to this Section 8.16(a) will not exceed \$15,000,000. For the avoidance of doubt, the provisions of this Section 8.16(a) will apply neither to the 395 Project nor to the Fred Ex Project.

(b) The Concessionaire will perform landscaping work only if and to the extent directed or approved by the Department, and all such landscaping work performed by the Concessionaire will be treated as a Department Change, as more fully set forth in the Technical Requirements; *provided* however, that the maximum amount of landscaping Work to be performed by the Concessionaire will not exceed \$2,000,000, unless otherwise directed by the Department.

(c) The Department will pay the Concessionaire for any amounts paid by the Concessionaire to the Design-Build Contractor for fuel price adjustments and asphalt price adjustments for paving operations as set forth in the Technical Requirements.

(d) The Department will pay for the acquisition of stream and wetland credits in accordance with the Technical Requirements. The Concessionaire will perform stream restoration construction activities in accordance with the Technical Requirements.

(e) The allowances set forth in this Section 8.16(a) through (d) shall apply neither to the 395 Project nor the Fred Ex Project; provided, however that the Department has purchased certain nutrient credits for the 395 HOT Lanes as set forth in Section 3.6W of the Technical Requirements and the Concessionaire will reimburse the Department for such credits on the 395 Financial Close Date.



(f) The Concessionaire will perform landscaping work for the 395 Project only if and to the extent directed or approved by the Department, and all such landscaping work performed by the Concessionaire will be treated as a Department Change, as more fully set forth in the Technical Requirements; *provided* however, that the maximum amount of landscaping Work for the 395 Project to be performed by the Concessionaire will not exceed \$1,000,000, unless otherwise directed by the Department. This Section 8.16(f) shall not apply to the Fred Ex Project.

### **Section 8.17 395 Early Work**

(a) Authorization and Access Relating to the 395 Early Work.

(i) The Department authorizes the Concessionaire to undertake and cause the 395 Design-Build Contractor or the TTMS Contractor to undertake the 395 Early Work for the 395 Project pursuant to this Section 8.17, and the Concessionaire agrees to cause the 395 Design-Build Contractor or the TTMS Contractor to undertake the 395 Early Work in accordance with this Agreement.

(ii) The Department agrees the Concessionaire and the 395 Design-Build Contractor may access the 395 Corridor and the Pentagon Reservation as reasonably necessary for the performance of the 395 Early Work, upon request by either the Concessionaire or the 395 Design-Build Contractor in accordance with the Technical Requirements.

(b) 395 Early Work Process. The Parties agree that the 395 Early Work will be accomplished as follows:

(i) The Concessionaire has entered into the 395 Design-Build Contract with the 395 Design-Build Contractor promptly following the execution of the Second Amendment by the Parties. The Concessionaire will not materially amend the 395 Design-Build Contract without notice to and consent of the Department, which consent will not be unreasonably withheld or delayed.

(ii) After the execution of the 395 Design-Build Contract by all parties thereto, the Concessionaire will (A) deliver the 395 LNTP to the 395 Design-Build Contractor under the 395 Design-Build Contract and (B) cause the 395 Design-Build Contractor to commence the 395 Early Work promptly following the delivery of the 395 LNTP. The 395 Scope Validation Work will be completed within 120 days of the 395 Early Work Commencement Date (the “395 Scope Validation Work Completion Date”) except as provided in Section 8.17(b)(iii). The 395 Early Work other than the 395 Scope Validation Work will continue after the 395 Scope Validation Work Completion Date and will terminate upon the first to occur of (x) the 395 Financial Close Date and (y) the Department providing written notice to the Concessionaire that it does not intend to execute the First ARCA.

(iii) The Concessionaire agrees to provide the Department with written notice of each Scope Issue within three Business Days of receipt of such Scope Issue by the Concessionaire from the 395 Design-Build Contractor. All Scope Issues must be

provided by the Concessionaire to the Department prior to the 395 Scope Validation Work Completion Date. The Concessionaire agrees to provide the Department with Supporting Documentation within three Business Days of receipt of such Supporting Documentation by the Concessionaire from the 395 Design-Build Contractor, and the Concessionaire shall provide reasonable advance notice and invite the Department to any meetings and conferences with the 395 Design-Build Contractor to resolve Scope Issues. The Department will have the right to review, comment, and approve or reject the relief requested in any Scope Issue; provided that the Department will provide any such comments, approval or rejection in writing within five Business Days of receiving written notice of such Scope Issue. The Concessionaire and the Department each acknowledge that the identification of all Scope Issues shall start on the 395 Early Work Commencement Date and end on the 395 Scope Validation Work Completion Date. The Concessionaire and the Department each acknowledge that the review, comment, and resolution of any Scope Issues shall start on the 395 Early Work Commencement Date. The Concessionaire and the Department will use their best efforts to resolve all Scope Issues with the 395 Design-Build Contractor prior to the 395 Scope Validation Work Completion Date. In the event that the Concessionaire and the Department do not resolve outstanding Scope Issues with the 395 Design-Build Contractor prior to the 395 Scope Validation Work Completion Date, the Concessionaire and the Department will agree upon and reflect the maximum adjustment related to each remaining Scope Issue on or before the 395 Scope Validation Work Completion Date in the Base Case Financial Model Update (95/395 Early Work Completion). The Concessionaire and the Department shall continue to resolve any outstanding Scope Issues identified prior to the 395 Scope Validation Work Completion Date with the 395 Design-Build Contractor following the 395 Scope Validation Work Completion Date.

(iv) The purpose of the 395 Scope Validation Work is to enable the Concessionaire and the 395 Design-Build Contractor to identify those Scope Issues that could not reasonably be identified prior to the 395 Design-Build Contract Proposal Submission Date. Following the 395 Scope Validation Work Completion Date, with the exception of (A) those Scope Issues identified prior to the 395 Scope Validation Work Completion Date, (B) any Late Scope Issues arising from Department Generated Documents (but only to the extent the 395 Design-Build Contractor, notwithstanding the fact that it is prohibited from asserting Scope Issues after the 395 Scope Validation Work Completion Date under the 395 Design-Build Contract, successfully asserts a Late Scope Issue against the Concessionaire, which Late Scope Issue arises solely from Department Generated Documents) and (C) any Scope Issues in respect of which 395 Risk Pool Costs arise, the Concessionaire assumes and accepts all risks, costs, and responsibilities of any Late Scope Issue, without an increase to the 395 Public Funds Amount set forth in the Base Case Financial Model Update (95/395 Early Work Resolution). The Parties acknowledge that as between the Concessionaire and the Department, subject to Section 8.17(b)(vi), the Concessionaire bears the risk and financial responsibility for any Scope Issues with respect to the 395 Concessionaire Assets and the Department bears the risk and financial responsibility for any Scope Issues with respect to the 395 Department Assets in each case, as specified further in this Agreement.

(v) Within 30 days after the 395 LNTP, the Concessionaire must notify the Department in writing (an “Inaccessibility Notice”) of any area(s) of the 395 Corridor to which the 395 Design-Build Contractor cannot gain access to perform the 395 Scope Validation Work. If the Department disputes an Inaccessibility Notice, or any portion thereof, then the Department will provide the Concessionaire written notice of its position within five days of receipt of the Inaccessibility Notice. If the Department and the Concessionaire cannot agree on the areas in dispute in an Inaccessibility Notice within 20 days of such Inaccessibility Notice, the dispute will be resolved in accordance with the dispute resolution procedures described in Article 21.

(vi) For any areas covered by a timely Inaccessibility Notice, the Parties have established the a risk pool under Section 8.19(a), pursuant to which additional costs arising in relation to Differing Site Conditions, Unknown Geotechnical Conditions, Unknown Utilities and latent defects discovered after the 395 Scope Validation Work Completion Date will be funded. For any areas not covered by a timely Inaccessibility Notice, the Department will have no financial responsibility for any claims, issues, or additional costs that reasonably should have been discovered as part of the 395 Scope Validation Work, and such claims, issues, or additional costs shall not be funded from the risk pool established by the Parties to cover Differing Site Conditions, Unknown Geotechnical Conditions, Unknown Utilities, and latent defects discovered after the 395 Scope Validation Work Completion Date.

(vii) If the Department does not provide the Governmental Approvals required for the 395 Design-Build Contractor to access the Pentagon Reservation to perform the 395 Scope Validation Work at least 75 days prior to the 395 Scope Validation Work Completion Date, the Department will bear the risk and financial responsibility for any claims, issues, or additional costs arising from Differing Site Conditions, Unknown Geotechnical Conditions, Unknown Utilities, and latent defects with respect to the Pentagon Improvements discovered on the Pentagon Reservation; provided that the Department agrees that the total amount of Work performed by the Concessionaire through the 395 Final Completion Date on the Pentagon Reservation will not exceed \$10,000,000 and, if necessary, the Department agrees to follow the procedures set forth in Section 14.02 with a view to reduce the Work accordingly. For the avoidance of doubt, the Concessionaire shall not be responsible for amounts due for Work on the Pentagon Reservation. The Concessionaire shall provide all necessary information within three Days after the execution of the Second Amendment for the Department to obtain the permit for the Scope Validation Work from the United States Department of Defense.

(viii) Within ten days after the 395 Scope Validation Work Completion Date, the Concessionaire will submit to the Department for the Department’s review and approval either:

(A) a revised Base Case Financial Model Update (95/395 Draft) which reflects (x) any agreed-upon adjustments to the 395 Design-Build Contract price arising from any Scope Issues approved by: (1) both the Concessionaire and the Department (with respect to the 395 Concessionaire Assets) or (2) only the Department (with respect

to the 395 Department Assets), and (y) the maximum adjustments in the 395 Design-Build Contract price agreed to by the Parties for any unresolved Scope Issues pursuant to Section 8.17(b)(iii); or

(B) written notice that there are no adjustments resulting from the Scope Validation Work to the Base Case Financial Model Update (95/395 Interim) or Base Case Financial Model Update (95/395 Draft), as applicable.

Upon approval by the Department of either (A) or (B) above, such Base Case Financial Model Update will become the “Base Case Financial Model Update (95/395 Early Work Completion).”

(ix) As part of the Base Case Financial Model Update (95/395 Final), the Concessionaire will reflect any agreed-upon adjustments in the 395 Design-Build Contract price after the submission of the Base Case Financial Model Update (95/395 Early Work Completion) arising from any additional Scope Issues approved by: (1) both the Concessionaire and the Department (with respect to the 395 Concessionaire Assets) or (2) only the Department (with respect to the 395 Department Assets).

(x) Within ten days after the resolution of all Scope Issues, the Concessionaire will (A) revise the Base Case Financial Model Update (95/395 Final), if any, reflecting any final adjustments to the 395 Design-Build Contract price and deliver such Base Case Financial Model Update (95/395 Final) to the Department for the Department’s review and approval or rejection or (B) provide written notice that there are no updates to the Base Case Financial Model Update (95/395 Final), and upon approval by the Department, such Base Case Financial Model Update will become the “Base Case Financial Model Update (95/395 Early Work Resolution).”

(c) Payments for the 395 Early Work.

(i) The Parties agree to pay for the 395 Early Work as follows:

(A) the Department will be responsible for the first \$5,000,000 of costs for 395 Eligible Work;

(B) the Department and the Concessionaire will each be responsible for 50% of the next \$5,000,000 of costs for 395 Eligible Work; and

(C) in addition to the costs provided for in subsections (A) and (B) above, the Concessionaire may pay for any 395 Sponsor Funded Early Work.

(ii) The Department agrees to pay to the Concessionaire for the performance of the 395 Early Work that is 395 Eligible Work in an aggregate amount not to exceed the Department 395 Early Work Funding Commitment so long as:

(A) the Concessionaire complies with the provisions of this Section 8.17; and

(B) on a monthly basis, the Concessionaire submits to the Department the Application for Payment (as defined in the 395 Design-Build Contract) that has been agreed to by the Concessionaire and the 395 Design-Build Contractor along with any supporting documentation associated with such Application for Payment.

(iii) Once the Department reviews the Application for Payment and agrees to the amounts and activities set forth in the Application for Payment, the Department will pay such amounts within 30 days of the Department's approval of the Application for Payment. The Department will review a complete Application for Payment and either agree or provide comments on the same within five Business Days of receipt from the Concessionaire.

(iv) The Concessionaire agrees to reimburse the Department in accordance with Section 7.03A(g) for any amounts paid by the Department pursuant to this Section 8.17.

(v) Notwithstanding Section 18.03, upon payment by the Department as set forth in this subsection (c), the Department will own all Work Product only associated with the 395 Eligible Work.

(d) Conditions Precedent for the 395 Early Work.

(i) Conditions Precedent for the 395 Early Work. The Concessionaire will not commence the 395 Early Work unless and until all of the following conditions have been satisfied:

(A) the Concessionaire certifies that there exists no court order which restrains, enjoins or delays performance of the 395 Early Work;

(B) the Concessionaire delivers to the Department certificates of insurance evidencing that it has procured the insurance coverage types and amounts specified in Section 4 of the Insurance Requirements attached as Exhibit Y-1 and, in the case of Project-specific policies, the Concessionaire has delivered to the Department duplicate originals or copies thereof certified by the Concessionaire's insurance broker to be true and correct copies of the originals;

(C) all Governmental Approvals necessary for the commencement of the 395 Early Work have been acquired other than any Governmental Approvals related to access to the Pentagon Reservation (and copies provided to the Department);

(D) the Department has provided written approval for all 395 Early Work attached as Exhibit B-5; and

(E) there exists no Event of Default under this Agreement.

(ii) The Department may waive, by written waiver only, any condition precedent set forth in this subsection (d); provided, that no person or entity will be

entitled to assume that the Department will waive or refuse to waive any condition precedent in the absence of strict compliance therewith.

(e) The 395 Early Work and failure by the Department to procure any Governmental Approvals related to access to the Pentagon Reservation will not constitute a Delay Event, a Compensation Event, a Department Change, or any other action which would entitle the Concessionaire to the payment of Concessionaire Damages or any other amounts under this Agreement.

(f) The Parties agree that any failure by the Concessionaire to comply with or perform any obligation, covenant, agreement, term or condition in this Agreement insofar as it may apply to the 395 Early Work shall not constitute a Concessionaire Default or a 395 Concessionaire Breach.

### **Section 8.18 395 Final Completion**

(a) The Concessionaire will achieve 395 Final Completion on or before the 395 Guaranteed Final Completion Date, subject to adjustment in accordance with this Agreement; *provided* that failure to achieve 395 Final Completion by the 395 Guaranteed Final Completion Date will not result in a 395 Concessionaire Breach under Section 19.06, except as set forth in Section 19.06(d) and failure to achieve 395 Final Completion by the 395 Guaranteed Final Completion Date or the 395 Long Stop Date will not result in a Concessionaire Default under Section 19.01.

(b) The Department will issue a written certificate of 395 Final Completion at such time as 395 Final Completion occurs.

(c) 395 Final Completion will have been achieved when each of the following conditions has occurred for the 395 Project:

(i) all lanes of traffic (including ramps, interchanges, overpasses, underpasses, and other crossings) set forth in the Construction Documentation for the 395 Project are in their final configuration and open for normal and safe use and operation by the travelling public;

(ii) all safety features are installed and functional, including, as required, shoulders, guard rails, striping and delineations, concrete traffic barriers, bridge railings, cable safety systems, metal beam guard fences, safety end treatments, terminal anchor sections and crash attenuators, in each case, for the 395 Project;

(iii) all required illumination for normal and safe use and operation for the 395 Project by the travelling public is installed and functional in accordance with the Technical Requirements;

(iv) all required signs and signals for normal and safe use and operation for the 395 Project by the travelling public are installed and functional in accordance with the Technical Requirements;



(v) the need for temporary traffic controls or for lane closures at any time has ceased (except for any then required for routine maintenance) and all temporary traffic barriers or lane shifts have been removed, except for temporary lane closures in accordance with and as permitted by the Department-approved TMP, in each case, for the 395 Project;

(vi) the TMS (if any) and safety features for TMS components for the 395 Project are installed and functional;

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

(viii) all Project Documentation, including as built drawings of the 395 Project, to be submitted on or before 395 Final Completion have been submitted and approved (to the extent approval is required) by the Department;

(ix) the Concessionaire has paid for all Design-Build Work, TTMS Work and other Work required to achieve 395 Final Completion by third parties that the Concessionaire is obligated to pay (other than disputed amounts and amounts that are not yet due and payable);

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

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

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

(xiii) the Concessionaire has completed the Work in accordance with this Agreement, including the Technical Requirements;

(xiv) the Concessionaire has completed the Work associated with the Pentagon Improvements in accordance with this Agreement in order for the Department to close the Governmental Approvals for the Pentagon Improvements; and

(xv) the Concessionaire has completed the Work associated with the 395 Project in accordance with this Agreement in order for the Concessionaire to close any permits required for the 395 Project.

(d) The Concessionaire will provide the Department with written notice of anticipated 395 Final Completion at least 21 Days prior to the anticipated 395 Final Completion Date. The parties will comply with the submittal and review procedures set forth in Section 10.05 in the determination of whether 395 Final Completion has been achieved; *provided* that the deemed



approval provisions of Section 10.05(e) will not apply to the determination of whether 395 Final Completion has been achieved. During such 21-Day period, the Concessionaire and the Department will meet, confer and exchange information on a regular basis with the goal being the Department's orderly, timely inspection of the Project Assets and review of the final Construction Documentation and the Department's issuance of a 395 Final Completion Certificate. In addition, the Department will conduct an inspection of the Project Assets and review of the final Construction Documentation, and such other matters as may be necessary to determine whether 395 Final Completion is achieved and, not later than the expiration of such 21-Day period, will deliver a written report of findings and recommendations to the Concessionaire. The Department will provide the Concessionaire with a determination of whether or not 395 Final Completion has been achieved (and if not, an explanation with reasonable specificity as to the reasons therefor) within such 21-Day period.

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

(f) 395 Early Final Completion.

(i) In the Department's sole discretion, the Department may issue a 395 Early Final Completion Certificate with respect to one or more 395 Department Assets identified by the Concessionaire and approved by the Department, prior to issuing a 395 Final Completion Certificate for the balance of the 395 Project.

(ii) In order to achieve 395 Early Final Completion for a 395 Department Asset, the 395 Department Asset must be fully completed with no outstanding Work for such 395 Department Asset and the Concessionaire must meet all of the applicable requirements for 395 Final Completion set forth in this Section 8.18 with respect to that specific 395 Department Asset.

(iii) In addition to the requirements above, in order for 395 Early Final Completion to be achieved for the GP Bridges Component, the Concessionaire must complete all of the Work for all bridges and the roadway surfaces on such bridges must be completed, included milling and overlay on the approach roadways.

(iv) In addition to the requirements above, in order for 395 Early Final Completion to be achieved for the DEW Component, the Concessionaire must complete all Work associated with the DEW Component set forth in the Technical Requirements.

(v) The Parties will follow the processes set forth in subsections (c), (d) and (e) with respect to the process to reach 395 Early Final Completion.

## Section 8.19 Provisions Specific to the 395 Project

### (a) 395 Risk Pool.

(i) If the Concessionaire has submitted an Inaccessibility Notice pursuant to Section 8.17(b)(v), and the Department has agreed in writing to the areas submitted in such Inaccessibility Notice, and additional costs arise due to Differing Site Conditions, Unknown Geotechnical Conditions, Unknown Utilities, and latent defects discovered after the 395 Scope Validation Work Completion Date in such areas (“395 Risk Pool Costs”), then (A) the Concessionaire shall be responsible for the first \$5,000,000 in additional costs of 395 Risk Pool Costs, (B) the Department and the Concessionaire shall share equally in the next \$5,000,000 in additional costs of 395 Risk Pool Costs and (C) the Department shall be solely responsible for any additional costs of 395 Risk Pool Costs above \$10,000,000. If the Department owes moneys to the Concessionaire pursuant to this Section 8.19(a)(i), the Department will make payments to the Concessionaire on a monthly basis for the 395 Risk Pool Costs in question.

(ii) If the Concessionaire contends that any 395 Risk Pools Costs arise, it must notify the Department in writing prior to incurring the 395 Risk Pool Costs, and shall provide sufficient supporting documentation for the Department to determine whether the claimed 395 Risk Pool Costs are genuine and appropriate, and the Department will have the right to approve or reject the classification of any additional costs as 395 Risk Pool Costs. Within 15 days of receipt of any written notice from Concessionaire, along with sufficient documentation to analyze claimed 395 Risk Pool Costs, the Department will respond in writing (a “395 Risk Pool Eligibility Determination”) stating whether the claimed costs are eligible to be paid as 395 Risk Pool Costs under Section 8.19(a)(i). Within an additional 15 days after the Department delivers an assenting 395 Risk Pool Eligibility Determination, the Department will respond in writing stating the approved costs that may be counted as 395 Risk Pool Costs. At any time during the Department’s analysis of a claim for 395 Risk Pool Costs, the Concessionaire shall provide to the Department any additional supporting documentation reasonably requested by the Department to analyze the claim. In the event of a dispute over whether additional costs should be classified as 395 Risk Pool Costs, or over the cost impacts arising from genuine 395 Risk Pools Costs, either party will be entitled to refer the matter to the dispute resolution procedures in Article 21.

(b) 395 Gate Control System. The Parties acknowledge that the Letter Agreement dated November 17, 2014 (the “395 Letter Agreement”) between the Parties is hereby terminated. The Concessionaire will continue to operate and maintain the I-395 gate control system during the construction of the 395 Project. The Department’s payments to the Concessionaire will continue under this Agreement in the amounts set forth in the 395 Letter Agreement until the 395 Service Commencement Date. The Department will only pay the lump sum payments set forth in the 395 Letter Agreement through December 2018. The Department will pay the Concessionaire a lump sum payment for the operation and maintenance of the I-395 gate control system on the 395 Service Commencement Date equal to the pro rata share of \$581,233 from January 2019 to the 395 Service Commencement Date. The Concessionaire will be responsible for all costs of repair for any damage to the gate control system caused during the

Construction Period for the 395 Project. After the 395 Service Commencement Date, the Concessionaire will be responsible for all costs related to the gate control system.

(c) Sound Walls. For the 395 Department Assets, the Department will bear the cost risk and receive the cost benefit of any increases or decreases in the actual square footage of all sound walls from the Base Noise Wall Quantity as included in the Technical Requirements. For the 395 Concessionaire Assets, the Department will bear the cost risk of any increase and the Concessionaire shall receive the cost benefit of any decrease in the actual square footage of all sound walls from the Base Noise Wall Quantity as included in the Technical Requirements.

(d) Pentagon Reservation MOA. Regarding the work on or near the Pentagon Reservation, the Concessionaire agrees to comply with the requirements of the Pentagon Reservation MOA, a form of which is attached as Exhibit Z hereto.

(e) Confidential Department of Defense Information. The Department, through the United States Department of Defense, will provide information regarding the location of utilities and other underground assets in and around the Pentagon Reservation for use in connection with the 395 Project. The Concessionaire will protect and keep confidential any documents marked by the United States Department of Defense “for official use only” as required by United States government policy, specifically 32 CFR Part 2001 and Department of Defense Manual Number 5200.01, Volume 4, and will not share such documents with any individuals or entities not directly involved in the 395 Project. Further, documents marked ‘for official use only’ must be destroyed or returned to the United States Department of Defense, Washington Headquarters Services after 395 Final Completion. DOCUMENTS MARKED FOR OFFICIAL USE ONLY MAY BE EXEMPT FROM PRODUCTION UNDER THE FEDERAL FREEDOM OF INFORMATION ACT (5 U.S.C. 552, as amended) AND THE VIRGINIA FREEDOM OF INFORMATION ACT (Code of Virginia (1950) § 2.2-3700 et seq., as amended) AND SHALL BE LABELED AS SUCH. The Concessionaire agrees to include in all its contracts and subcontracts for construction related to the Pentagon Improvements a substantially similar provision to this Section 8.19(e).

(f) No Compensation Event. The Parties agree that full and complete compensation for the 395 Project is included within this Agreement as of the Amended and Restated Agreement Date, and the 395 Project itself does not give rise to a Compensation Event. During the Construction Period for the 395 Project and after 395 Final Completion, the Concessionaire is prohibited from asserting a Claim that the 395 Project itself, or any portion thereof, is a Compensation Event. Notwithstanding the foregoing, if a Compensation Event (based on an event or occurrence beyond the scope of the 395 Project) occurs during the Construction Period for the 395 Project or following 395 Final Completion, the Concessionaire will be entitled to seek relief in accordance with this Agreement.

## **Section 8.20 Fred Ex Early Work**

Any Fred Ex Early Work will be at the Concessionaire’s sole cost and expense. The scope of Fred Ex Early Work is defined in Exhibit B-6 and is subject to the LNTP procedure set forth in Section 8.02(a).

## Section 8.21 Fred Ex Final Completion

(a) The Concessionaire will achieve Fred Ex Final Completion on or before the Fred Ex Guaranteed Final Completion Date, subject to adjustment in accordance with this Agreement; *provided* that failure to achieve Fred Ex Final Completion by the Fred Ex Guaranteed Final Completion Date will not result in a Fred Ex Concessionaire Breach under Section 19.09, except as set forth in Section 19.09(d) and failure to achieve Fred Ex Final Completion by the Fred Ex Guaranteed Final Completion Date or the Fred Ex Long Stop Date will not result in a Concessionaire Default under Section 19.01.

(b) The Department will issue a written certificate (the “Fred Ex Final Completion Certificate”) of Fred Ex Final Completion at such time as Fred Ex Final Completion occurs.

(c) Fred Ex Final Completion will have been achieved when each of the following conditions has occurred for the Fred Ex Project:

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

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

(iii) all required illumination for normal and safe use and operation for the Fred Ex Project by the travelling public is installed and functional in accordance with the Technical Requirements;

(iv) all required signs and signals for normal and safe use and operation for the Fred Ex Project by the travelling public are installed and functional in accordance with the Technical Requirements;

(v) the need for temporary traffic controls or for lane closures at any time has ceased (except for any then required for routine maintenance) and all temporary traffic barriers or lane shifts have been removed, except for temporary lane closures in accordance with and as permitted by the Department-approved TMP, in each case, for the Fred Ex Project;

(vi) the TMS (if any) and safety features for TMS components for the Fred Ex Project are installed and functional;

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

(viii) all Project Documentation, including as built drawings of the Fred Ex Project, to be submitted on or before Fred Ex Final Completion have been submitted and approved (to the extent approval is required) by the Department;

(ix) the Concessionaire has paid for all Fred Ex Design-Build Work, Fred Ex TTMS Work, and other Work required to achieve Fred Ex Final Completion by third parties that the Concessionaire is obligated to pay (other than disputed amounts and amounts that are not yet due and payable);

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

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

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

(xiii) the Concessionaire has completed the Work in accordance with this Agreement, including the Technical Requirements; and

(xiv) the Concessionaire has completed the Work associated with the Fred Ex Project in accordance with this Agreement in order for the Concessionaire to close any permits required for the Fred Ex Project.

(d) The Concessionaire will provide the Department with written notice of anticipated Fred Ex Final Completion at least 21 Days prior to the anticipated Fred Ex Final Completion Date. The parties will comply with the submittal and review procedures set forth in Section 10.05 in the determination of whether Fred Ex Final Completion has been achieved; *provided* that the deemed approval provisions of Section 10.05(e) will not apply to the determination of whether Fred Ex Final Completion has been achieved. During such 21-Day period, the Concessionaire and the Department will meet, confer and exchange information on a regular basis with the goal being the Department's orderly, timely inspection of the Project Assets and review of the final Construction Documentation and the Department's issuance of a Fred Ex Final Completion Certificate. In addition, the Department will conduct an inspection of the Project Assets and review of the final Construction Documentation, and such other matters as may be necessary to determine whether Fred Ex Final Completion is achieved and, not later than the expiration of such 21-Day period, will deliver a written report of findings and recommendations to the Concessionaire. The Department will provide the Concessionaire with a determination of whether or not Fred Ex Final Completion has been achieved (and if not, an explanation with reasonable specificity as to the reasons therefor) within such 21-Day period.

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

## **Section 8.22 Provisions Specific to the Fred Ex Project**

(a) Strategic Fred Ex Corridor Review. At least once every three years following the Second Amended and Restated Agreement Date, the Department and the Concessionaire shall meet to explore collaborative solutions to challenges in the Fred Ex Corridor related to capacity, mobility, safety, optimization of existing assets (including bi-directional options), and any potential Project Enhancements.

(b) Fred Ex Pooled Contingency Fund.

(i) On or before the date the Department issues a Construction Notice to Proceed for the Fred Ex Project, the parties will make available a pooled contingency fund (the "Fred Ex Pooled Contingency Fund") in the following amounts:

(A) \$21,250,000 plus any Fred Ex Pooled Contingency Deductive Credits made available by the Concessionaire ("Fred Ex Concessionaire Committed Contingency"), and

(B) \$10,000,000 made available by the Department, or \$5,000,000 in the event the Concessionaire achieves Fred Ex Additional Financial Close utilizing PABs ("Fred Ex Department Committed Contingency").

(ii) Priority of Use of Fred Ex Pooled Contingency Fund.

(A) The parties shall use funds from the Fred Ex Pooled Contingency Fund to pay for or reimburse Fred Ex Pooled Contingency-Covered Costs. Funds shall be drawn from the Fred Ex Pooled Contingency Fund in the following order of priority:

(1) First, from the Fred Ex Concessionaire Committed Contingency; and

(2) If the Fred Ex Concessionaire Committed Contingency is totally depleted, then from the Fred Ex Department Committed Contingency.

(B) If both the Fred Ex Concessionaire Committed Contingency and the Fred Ex Department Committed Contingency are totally depleted, then the parties will split any additional Fred Ex Pooled Contingency-Covered Costs one-third (1/3) paid by the Department and two-thirds (2/3) paid by the Concessionaire.

(C) Upon final completion of the Fred Ex Design-Build Work, any unused portion of the Fred Ex Pooled Contingency Fund will be released and promptly transferred to the party that supplied it, without conditions.

(iii) Notice of Fred Ex Pooled Contingency-Covered Costs. If a Fred Ex Pooled Contingency Approval is required pursuant to Section 8.22(b)(iv) below, then a Fred Ex Pooled Contingency-Covered Cost Notice is also required. For all other Fred Ex Pooled Contingency-Covered Costs, prior approval or notice is not required and the parties will report such expenditures in accordance with Section 8.22(b)(vi) below.

(iv) Fred Ex Pooled Contingency Approval. The requesting party shall seek the approval (a “Fred Ex Pooled Contingency Approval”) of the non-requesting party (such approval not to be unreasonably delayed or withheld) to classify any cost as a Fred Ex Pooled Contingency-Covered Cost under the following circumstances:

(A) in the case of the Concessionaire as the requesting party:

(1) if any proposed use exceeds \$500,000 (individually or in the aggregate invoiced on any work order); or

(2) if more than \$14,000,000 of the Fred Ex Pooled Contingency Fund has been expended, then if any proposed use exceeds \$300,000 (individually or in the aggregate invoiced on any work order); and,

(B) in the case of the Department as the requesting party, if any proposed use exceeds \$300,000 (individually or in the aggregate invoiced on any work order).

(v) Fred Ex Pooled Contingency Fund Dispute Right.

(A) Whenever a party has the right to dispute a proposed (or classified) Fred Ex Pooled Contingency-Covered Cost, such party may dispute the proposed classification (or classification) only if the disputing party reasonably believes that the cost does or does not, as applicable, satisfy the definition of Fred Ex Pooled Contingency-Covered Costs.

(B) The Department will have the right to dispute any proposed (or classified) Fred Ex Pooled Contingency-Covered Cost only: (i) if the proposed use exceeds \$500,000 (individually or in the aggregate invoiced on any work order), or (ii) without regard to the amount of the use if more than \$14,000,000 of the Fred Ex Pooled Contingency Fund has been expended.

(C) The Concessionaire will have the right to dispute any proposed (or classified) Fred Ex Pooled Contingency-Covered Cost.

(D) When a Fred Ex Pooled Contingency Approval is required, the non-requesting party will have 14 Business Days from receipt of the corresponding Fred Ex Pooled Contingency-Covered Cost Notice to dispute the proposed classification in writing. Otherwise, the proposed classification will be deemed approved. Following any approval (or deemed approval) of a proposed Fred Ex Pooled Contingency-Covered Cost, the non-requesting party will have no further right to dispute the classification of such Fred Ex Pooled Contingency-Covered Cost, except that the non-requesting party may dispute the classification if it subsequently receives new information unknown to it at the time of the approval (or deemed approval) that, if known at the time, reasonably would have caused the relevant cost to fall outside of the definition of a Fred Ex Pooled Contingency-Covered Cost.



(E) If no Fred Ex Pooled Contingency Approval is required with respect to a use, a dispute may be initiated by the non-requesting party if permitted under Section 8.22(b)(v)(B) or (C) no later than 60 days following delivery of the quarterly or monthly report delivered in accordance with Section 8.22(b)(vi) below that first presents such classification or use. If the non-requesting party does not dispute the use in writing within such 60 day period, the use will be deemed undisputed and the non-requesting party will have no further right to dispute the use, except that the non-requesting party may dispute the use if it subsequently receives new information unknown to it at the time of the deemed undisputed use that, if known at the time, reasonably would have caused the relevant cost to fall outside of the definition of a Fred Ex Pooled Contingency-Covered Cost..

(F) Either party may refer a dispute over a Fred Ex Pooled Contingency-Covered Cost to the dispute resolution procedures pursuant to Article 21. If a Fred Ex Pooled Contingency Approval is requested but not obtained, then during the pendency of any corresponding dispute, the disputed costs shall be presumed to not be rightful Fred Ex Pooled Contingency-Covered Costs, and the requesting Party may apply its own funds towards such costs.

(G) As a result of any settlement or dispute process, the Fred Ex Pooled Contingency Fund will reimburse the amount of costs expended directly by the requesting Party and subsequently classified as or found to be rightful Fred Ex Pooled Contingency-Covered Costs, or the Fred Ex Pooled Contingency Fund will be reimbursed by the Party for whose account amounts determined not to be rightful Fred Ex Pooled Contingency-Covered Costs had been expended.

(vi) Fred Ex Pooled Contingency Fund Reporting.

(A) The Department will provide to the Concessionaire monthly reports regarding any uses of the Fred Ex Pooled Contingency Fund for the Southbound RRC Overlap Work. Subject to the Concessionaire's right to dispute the classification of any expenditure as a Fred Ex Pooled Contingency-Covered Cost pursuant to Section 8.22(b)(v), the Concessionaire will make any corresponding payments to the Department within 30 days of receipt of any such report.

(B) The Concessionaire shall provide the Department Fred Ex Pooled Contingency Fund Reports as follows:

(1) if less than \$14,000,000 of the Fred Ex Pooled Contingency Fund has been expended, the Concessionaire shall provide the Department quarterly Fred Ex Pooled Contingency Fund Reports;

(2) if more than \$14,000,000 but less than \$21,250,000 of the Fred Ex Pooled Contingency Fund has been expended, the Concessionaire shall provide the Department quarterly Fred Ex Pooled Contingency Fund Reports including a list of all charges against the Fred Ex Pooled Contingency Fund, and the Department may request, and the Concessionaire shall provide, reasonable

additional information to aid the Department in understanding any reported uses of the Fred Ex Pooled Contingency Fund, and the Department may review the details of amounts classified as Fred Ex Pooled Contingency-Covered Costs beyond \$14,000,000; and,

(3) after \$21,250,000 of the Fred Ex Pooled Contingency Fund has been expended, the Concessionaire shall provide the Department monthly Fred Ex Pooled Contingency Fund Reports including a list of all charges against the Fred Ex Pooled Contingency Fund, and the Department may request, and the Concessionaire shall provide, reasonable additional information to aid the Department in understanding any reported uses of the Fred Ex Pooled Contingency Fund, and the Department may review the details of amounts classified as Fred Ex Pooled Contingency-Covered Costs beyond \$21,250,000.

(vii) Department Funding of Fred Ex Department Committed Contingency; Netting. The Department will make available to the Concessionaire the Fred Ex Department Committed Contingency in accordance with Exhibit N. Upon the mutual agreement of the parties, the Fred Ex Department Committed Contingency and any other payments to be paid by the Department with respect to the Fred Ex Pooled Contingency Fund may be netted by the Concessionaire as a deduction from the Final Permit Fee Buyout Payment.

(viii) Concessionaire Oversight and Management Reconciliation. The Concessionaire shall fully reconcile its oversight and management costs no later than the Fred Ex Final Completion Date, unless otherwise agreed by the parties, and unplanned cost overruns and other eligible costs not previously classified may be classified as Fred Ex Pooled Contingency Covered Costs at that time. However, oversight or management costs associated with any Fred Ex Betterment shall not be charged to the Fred Ex Pooled Contingency Fund. For the avoidance of doubt, such reconciliation is subject to the Department's dispute rights set forth in Section 8.22(b)(v) above.

(c) Permit Fee Buyout Payment.

(i) In exchange for the elimination of the Permit Fee structure set forth in Exhibit J-2, the Concessionaire shall cause the Equity Sponsors to pay to the Department \$277,000,000 (the "Permit Fee Buyout Payment"). The Permit Fee Buyout Payment will be paid by the Equity Sponsors directly to the Department.

(ii) The Initial Permit Fee Buyout Payment will be paid no later than the Fred Ex Financial Close Date. The Final Permit Fee Buyout Payment will be paid no later than the Fred Ex Service Commencement Date. The Permit Fee Buyout Payment shall be included within the Fred Ex Equity Commitment Amount and shall be secured in accordance with Section 17.08(a)(iii).

(iii) If, prior to the Fred Ex Final Completion Date, the Department terminates the Fred Ex Project for any reason, the Department may, in its sole discretion, reinstate the Permit Fee structure set forth in the First ARCA and all related provisions in this

Agreement related to the Permit Fee, including Exhibit J-1. In the event that the Department reinstates the Permit Fee structure, the Department will pay to the Concessionaire any amounts of the Permit Fee Buyout Payment already paid by the Equity Sponsors to the Department.

(d) Fred Ex Route 17 GP Exit Ramp Completion.

(i) The Concessionaire will achieve Fred Ex Route 17 GP Exit Ramp Completion of the Fred Ex Route 17 GP Exit Ramp on or before the Fred Ex Guaranteed Route 17 GP Exit Ramp Completion Date, subject to adjustment in accordance with this Agreement; *provided* that failure to achieve Fred Ex Route 17 GP Exit Ramp Completion by the Fred Ex Guaranteed Route 17 GP Exit Ramp Completion Date will not result in a Fred Ex Concessionaire Breach under Section 19.09, and failure to achieve Fred Ex Route 17 GP Exit Ramp Completion by the Fred Ex Guaranteed Route 17 GP Exit Ramp Completion Date will not result in a Concessionaire Default under Section 19.01. For the avoidance of doubt, the Concessionaire will maintain and operate the Fred Ex Route 17 GP Exit Ramp until the Fred Ex Final Completion Date, after which time the Department will maintain and operate it.

(ii) The Concessionaire will provide the Department with written notice of anticipated Fred Ex Route 17 GP Exit Ramp Completion at least 21 Days prior to the anticipated Fred Ex Route 17 GP Exit Ramp Completion Date. The parties will comply with the submittal and review procedures set forth in Section 10.05 in the determination of whether Fred Ex Route 17 GP Exit Ramp Completion has been achieved; *provided* that the deemed approval provisions of Section 10.05(e) will not apply to the determination of whether Fred Ex Route 17 GP Exit Ramp Completion has been achieved. During such 21-Day period, the Concessionaire and the Department will meet, confer and exchange information on a regular basis with the goal being the Department's orderly, timely inspection of the Project Assets and review of the final Construction Documentation and the Department's issuance of a Fred Ex Route 17 GP Exit Ramp Completion Certificate. In addition, the Department will conduct an inspection of the Project Assets and review of the final Construction Documentation, and such other matters as may be necessary to determine whether Fred Ex Route 17 GP Exit Ramp Completion is achieved and, not later than the expiration of such 21-Day period, will deliver a written report of findings and recommendations to the Concessionaire. The Department will provide the Concessionaire with a determination of whether or not Fred Ex Route 17 GP Exit Ramp Completion has been achieved (and if not, an explanation with reasonable specificity as to the reasons therefor) within such 21-Day period. The process will be repeated until the Department issues in writing a Fred Ex Route 17 GP Exit Ramp Completion Certificate. Notwithstanding the Department's issuance of a Fred Ex Route 17 GP Exit Ramp Completion Certificate, the Assets that are the subject of the Fred Ex Route 17 GP Exit Ramp will remain under the care, custody, and control of the Concessionaire until the Fred Ex Final Completion Date.

(e) Fred Ex Service Commencement and Southbound RRC Project Completion. If by May 1, 2022, the Southbound RRC Project is not yet open to traffic and it appears the Fred Ex Project may achieve Service Commencement before the Southbound RRC Project is open to

traffic, then the parties will meet to explore mutually-satisfactory technical solutions relating to the potential of opening the Fred Ex Project to traffic (whether in whole or in part) prior to the Southbound RRC Project being opened to traffic.

(f) Use of Fiber for Redundant Fiber Ring.

(i) The Department will make available to the Concessionaire its rights to certain fiber optic line(s) that the Department has access to under the Fiber MOA, which the Concessionaire may use to complete the redundant fiber ring for the Fred Ex Project. The Department does not guarantee the use, condition, or function of the fiber optic line(s), and any failure of such line(s) will not give rise to a Compensation Event.

(ii) The Concessionaire shall be responsible for paying any splicing fees due under the Fiber MOA related to the use of the fiber optic line(s).

(iii) In the event that the Fiber MOA expires or is terminated during the Term, the Concessionaire shall, at its own cost and expense, remain in compliance with the Technical Requirements requiring such redundant fiber ring.

(g) The Concessionaire shall provide to the Department proof that the cyber/network insurance required under Section 2 of Exhibit Y-2 has been obtained prior to the start of any of the testing required under Section 9.02(g), and prior to connecting to the existing ETTM system.

**ARTICLE 8A  
DESIGN, DEVELOPMENT AND CONSTRUCTION OF  
THE SOUTHERN TERMINUS EXTENSION**

**Section 8A.01 General Obligations of the Department.**

(a) Other than as set forth in this Article, the Department shall be responsible for the design, development and construction of the STE and the installation and testing of the ETTM System for the STE (as required in the STE Technical Requirements). The Department agrees to design the STE in all material respects according to the scope and configuration provided in the 30% design for the STE developed by the Concessionaire and delivered to the Department on January 14, 2016.

(b) The design, development and construction of the STE will not constitute a Delay Event, a Compensation Event, a Department Change, or any other action which would entitle the Concessionaire to the payment of Concessionaire Damages under this Agreement. The parties agree that the First Amendment fully resolves and settles all claims or demands for damages or compensation of any kind related to the design, development and construction of STE, including, but not limited to all labor, equipment, material, time, engineering, incidentals, quality control, overhead, profit, interest, time extensions, delays, and schedule impact.

(c) The parties agree that the provisions of this Article 8A shall apply to the design, development and construction of the STE.

(d) For the avoidance of doubt, in addition to the 95 Express Funding Commitment, the Concessionaire shall be responsible for all Concessionaire costs and expenses related to the design, development, construction, inspection and design review of the STE. The Concessionaire shall also be responsible for the operation and maintenance of the STE following the applicable Service Commencement Date and thereafter during the Term in accordance with the STE Technical Requirements and this Agreement.

(e) The Concessionaire shall make, or cause to be made by the Equity Sponsors or the Transurban Guarantor in accordance with the Equity Funding Agreement or Equity Funding Guaranty, respectively, the 95 Express Funding Commitment as described in the Cost Sharing Agreement.

(f) For the avoidance of doubt, other than obligations of the Concessionaire set forth in this Agreement, the Concessionaire shall have no obligations related to the design, development or construction of the STE.

**Section 8A.02 STE Design-Build Contract.** The Department shall enter into the STE Design-Build Contract with the STE Design-Build Contractor.

**Section 8A.03 Design Documentation and Construction Documentation.** The Department shall submit or shall cause the STE Design-Build Contractor to submit to the Concessionaire accurate and complete copies of the Design Documentation and Construction Documentation relating to the STE listed in Exhibit FF to this Agreement, within three calendar days after such documentation is delivered to the Department by the STE Design-Build Contractor under the STE Design-Build Contract. The Concessionaire may provide comments to such Design Documentation and Construction Documentation. The Department shall review and address any Concessionaire comments that relate to compliance with the STE Design-Build Contract and the STE Technical Requirements. If the Department does not address a comment from the Concessionaire, it shall provide a written response to the Concessionaire identifying the reason for not addressing any such comment. The Concessionaire's review of such Design Documentation and Construction Documentation are for the purpose of evaluating the Department's compliance with the requirements of the STE Design-Build Contract and shall be at its own cost and expense. The Concessionaire's review of any submittal pursuant to this section shall comply with the submittal and review procedures set forth in Section 8A.07.

**Section 8A.04 Construction Standards, ETTM System and Progress Meetings.**

(a) The Department shall cause the STE Design-Build Contractor to construct the STE, including the ETTM System for the STE, in accordance with the STE Technical Requirements and the parties acknowledge that the provisions of the Technical Requirements related to design, development and construction of the Original HOT Lanes shall not apply to the design, development and construction of the STE. The Concessionaire acknowledges that it has reviewed the STE RFP, the form of STE Design-Build Contract (attached as Exhibit GG) and the STE Technical Requirements.

(b) The Concessionaire has provided to the Department specifications relating to the ETTM System, ITS equipment, gate equipment and the testing and integration procedures related

thereto for inclusion in the STE Technical Requirements. The ETTM System for the STE shall be consistent and compatible with the ETTM System for the Original HOT Lanes. The Concessionaire shall coordinate and be present during all required infrastructure and communication testing performed by the STE Design-Build Contractor in accordance with the STE Design-Build Contract.

(c) The Concessionaire shall, at its own cost and expense, be permitted to conduct its own quality reviews and independently verify that the STE has been completed in accordance with the STE Technical Requirements and the STE Design-Build Contract. The Concessionaire's review pursuant to this section shall comply with the submittal and review procedures set forth in Section 8A.07.

(d) Other than as set forth Section 8A.01(a), the Concessionaire shall be responsible for the STE Integration Work, at the Department's cost and expense in accordance with a mutually-agreed upon budget. The Concessionaire shall perform the STE Integration Work during the burn period (as defined in the STE Technical Requirements), identify any failures during the burn period, and provide a certificate of acceptance to the Department at the conclusion of the burn period.

(e) The Department and the Concessionaire will coordinate with respect to maintenance of traffic, signage and work hour/lane closure restrictions and plans affecting the normal operation of the Original HOT Lanes in accordance with any existing work authorization protocols. The Concessionaire has provided to the Department updated copies of the lane closure protocols and coordination requirements for inclusion in the STE Design-Build Contract.

(f) The Concessionaire shall provide the Concept of Operations for the STE to the Department by June 30, 2017. The Department and the Concessionaire shall finalize the Joint Operating and Maintenance Protocols for the STE by March 31, 2018.

(g) The Concessionaire and the Department will conduct regular progress meetings as needed to advance the STE.

**Section 8A.05 Changes During Construction.** The Department shall submit to the Concessionaire accurate and complete copies of any field design changes, notices of design changes, non-conformance reports and variances relating to the design, development and construction of the STE (collectively, "STE Changes" and each, an "STE Change") prior to delivering any final approvals relating to an STE Change to the STE Design-Build Contract. The Concessionaire shall have the right to approve an STE Change only if such STE Change materially and adversely affects the operations and maintenance of the STE during the Term. The Concessionaire's review of any submittal pursuant to this section shall comply with the submittal and review procedures set forth in Section 8A.07.

**Section 8A.06 Southbound Opening Date and STE Final Acceptance Date.**

(a) The Department will provide the Concessionaire with written notice of the anticipated Southbound Opening Date at least 90 calendar days prior to the anticipated Southbound Opening Date. During such 90-day period, the Concessionaire shall integrate the

ETTM System for the southbound portion of the STE into the ETTM System for the Original HOT Lanes at the Department's cost and expense and in accordance with Section 8A.04.

(b) The Department will provide the Concessionaire with written notice of the anticipated STE Final Acceptance Date at least 90 calendar days prior to the anticipated STE Final Acceptance Date. During such 90-day period, the Concessionaire shall integrate the ETTM System for the northbound portion of the STE into the ETTM System for the Original HOT Lanes at the Department's cost and expense and in accordance with Section 8A.04.

(c) In addition, during such 90-day periods, the Concessionaire and the Department will meet, confer and exchange information on a regular basis in order to allow for the Concessionaire's orderly, timely inspection of the applicable portion of the STE. In addition, the Concessionaire will conduct an inspection of the applicable portion of the STE, quality assurance activities and such other matters as may be necessary to determine whether the Southbound Opening Date or the STE Final Acceptance Date, as applicable, is achieved and, not later than the expiration of such 90-day periods will deliver written comments to the Department. Any inspections by the Concessionaire pursuant to this section shall be limited to the provisions of the STE Technical Requirements and shall be at its own cost and expense.

#### **Section 8A.07 Concessionaire Responses.**

(a) This section sets forth the procedures governing certain submittals or requests by the Department to the Concessionaire (including, but not limited to, schedules, Design Documentation and Construction Documentation) which require an approval, review, comment, consent, notification, determination, decision or other response from the Concessionaire (collectively, a "Concessionaire Response") pursuant to this Agreement. In all cases where Concessionaire Responses are required to be provided hereunder, such Concessionaire Responses will not be withheld or delayed unreasonably and such Concessionaire Responses will be made reasonably except in cases where a different standard is specified.

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

(c) In any case in which a submittal or request is or has been deemed to be complete under subsection (b), the Concessionaire will review and respond to such submittal or request as promptly as reasonably possible, and no later than fourteen calendar days after the date on which the Department has delivered or has caused the STE Design-Build Contractor to deliver such submittal or request to the Concessionaire. The Concessionaire will respond within such fourteen calendar day period by (i) approving, certifying or taking other appropriate action with respect to, the submittal or request, as applicable or (ii) disapproving such submittal or request and providing written notice to the Department specifying in reasonable detail the reasons for which it has disapproved the submittal or request. If the Concessionaire objects or disapproves any submittal or request in accordance with clause (ii) of the preceding sentence, the Department



will resubmit the submittal or request as promptly as reasonably possible, and the Concessionaire will resume its review and respond to such submittal or request by approving or disapproving the submittal or request within five calendar days following its receipt of a resubmittal or request. The Concessionaire's review of a resubmittal or request will be limited to the issue, condition or deficiency which gave rise to the Concessionaire's disapproval and will not extend to other aspects for which a notice of disapproval was not previously provided to the Department unless the issue, condition or deficiency which gave rise to the Concessionaire's disapproval reasonably relates to the Concessionaire's disapproval for which notice was previously provided. The Department shall review and address any Concessionaire comments that relate to compliance with the STE Design-Build Contract and the STE Technical Requirements. If the Department does not address a comment from the Concessionaire, it shall provide a written response to the Concessionaire identifying the reason for not addressing any such comment.

(d) If the Concessionaire fails to respond to a complete submittal or request which has been timely submitted or resubmitted, as the case may be within the applicable time periods, as provided in this Article 8A, the Concessionaire will be deemed to have approved, certified or taken other similar action with respect to, such submittal or request. If the Concessionaire fails to provide written comments within the applicable time periods set forth in this Article 8A, the Concessionaire will be deemed to have no comments to the applicable request.

#### **Section 8A.08 Warranties.**

(a) The Department will require the STE Design-Build Contractor to warrant that the work under the STE Design-Build Contract, including all materials and equipment furnished as part of the work, shall be new unless otherwise specified in the STE Technical Requirements or the STE Design-Build Contract, of good quality and free of defects in materials and workmanship. The Department shall assign the warranties it receives from the STE Design-Build Contractor pursuant to the STE Design-Build Contract with respect to the design, development and construction of the STE to the Concessionaire. Subject to subsection (c) below and to such limitations on coverage including aggregate caps specified in the STE Design-Build Contract, the foregoing warranties relating to the STE will be effective for a warranty period of 365 days beginning on the STE Final Acceptance Date.

(b) The warranties in subsection (a) above are exclusive and are in lieu of all other warranties by contract. No implied or statutory warranties will apply.

(c) The Concessionaire will only have the right to exercise remedies under any such warranties so long as the Department is not pursuing remedies thereunder.

#### **Section 8A.09 Governmental Approvals, Community Outreach.**

(a) The Department, at its own cost, agrees to obtain any modifications, renewals and/or extensions of any Governmental Approvals (including the NEPA Documents) required to undertake the STE. The Concessionaire agrees to provide reasonable support, at its own cost, to the Department in obtaining any such modifications, renewals and/or extensions of any Governmental Approvals required to undertake the STE.

(b) The Department agrees to coordinate any community outreach necessary for the development of the STE. The Concessionaire agrees to be responsible for any community outreach with respect to the Original HOT Lanes and the STE during the Operating Period.

**Section 8A.10 Right of Way Acquisition.** The Department will be responsible for the acquisition of any right of way that the Department determines is necessary for the design, development and construction of the STE.

**Section 8A.11 Handover of STE.**

(a) On the Southbound Opening Date, the Department shall hand over the southbound portion of the STE to the Concessionaire in accordance with the provisions of Section 9.02. From and after the Southbound Opening Date, the Concessionaire shall operate and maintain the southbound portion of the STE as part of the Project pursuant to and in accordance with the provisions of this Agreement.

(b) On the STE Final Acceptance Date, the Department shall hand over the northbound portion of the STE to the Concessionaire in accordance with the provisions of Section 9.02. From and after the STE Final Acceptance Date, the Concessionaire shall operate and maintain the northbound portion of the STE as part of the Project pursuant to and in accordance with the provisions of this Agreement. After the Southbound Opening Date, the Concessionaire agrees to cooperate with the Department and the STE Design-Build Contractor with respect to the design, development and construction of the northbound portion of the STE in accordance with the STE Technical Requirements.

**ARTICLE 9.**

**PROJECT MANAGEMENT; OPERATIONS AND MAINTENANCE**

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

(a) Care, Custody, and Control.

(i) Except as otherwise specifically provided for in a LNTP, after the Financial Close Date, the 395 Financial Close Date, or the Fred Ex Financial Close Date, as applicable, and prior to the Substantial Completion Date, the 395 Final Completion Date, or the Fred Ex Final Completion Date, as applicable, the Concessionaire will (A) have care, custody, and control of the Design-Build Right of Way for the Project Assets and (B) be responsible for the security and protection of active construction areas on the Project Assets and the Project Right of Way and (1) all materials, equipment, supplies and any other property of any Concessionaire Party and (2) all materials, equipment, supplies and any other property of the Department being held in a secure location at or on the Project Assets or otherwise being used or procured in connection with the Work, whether or not on the Project Right of Way.

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

(iii) On and after the Substantial Completion Date, the 395 Early Final Completion Date, the 395 Final Completion Date, or the Fred Ex Final Completion Date, as applicable, to the end of the Term, the Concessionaire will have care, custody, and control of the Project Assets (other than the Department Shared Assets and the 395 Department Assets). For the avoidance of doubt, except as set forth in subsection (a)(i) above, the Department will have care, custody, and control of the 395 Department Assets.

(iv) Prior to the Southbound Opening Date, the Department will have care, custody and control of the Project Assets within the southbound portion of the STE Corridor. After the Southbound Opening Date, the Concessionaire will have care, custody and control of the Project Assets within the southbound portion of the STE Corridor. Prior to the STE Final Acceptance Date, the Department will have care, custody and control of the Project Assets within the northbound portion of the STE Corridor. After the STE Final Acceptance Date, the Concessionaire will have care, custody and control of the Project Assets within the northbound portion of the STE Corridor.

(b) Turnover Process. The Concessionaire will implement and comply with the Turnover Plan to ensure the timely and orderly transition of operations and maintenance of the Project from the Department to the Concessionaire. The parties will cooperate and coordinate with each other with respect to activities undertaken pursuant to the Turnover Plan attached as Exhibit V.

## **Section 9.02 Conditions Precedent to Service Commencement of the Project**

(a) Regarding the Original Project, the Concessionaire will not initiate Service Commencement until the following conditions have been satisfied (or the Department, in its sole discretion, waives any such condition) and the Department has delivered notice to that effect to the Concessionaire (the “Service Commencement Notice to Proceed”):

(i) the Department has issued the Substantial Completion Certificate, or it has been determined pursuant to the dispute resolution procedures set forth in this Agreement that the Department should have issued such certificate;

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

(iii) the Concessionaire has received and delivered to the Department copies of all Governmental Approvals necessary to operate the Project and has satisfied all conditions and requirements thereof which must be satisfied before the Project can be lawfully opened for regular public use, all such Governmental Approvals remain in full force and effect, and there exists no uncured material violation of the terms and conditions of any such Governmental Approval;

(iv) all insurance policies required under Section 17.01 for the Operating Period have been obtained and will be in full force and effect, and the Concessionaire has

delivered to the Department duplicate originals or copies thereof (or endorsements reasonably acceptable to the Department extending coverage to the Project), certified by the Concessionaire's insurance broker to be true and correct copies of the originals;

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

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

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

(viii) to the extent not previously completed pursuant to Section 8.08, the Concessionaire has completed the toll commissioning process described in the Technical Requirements, and the ETTM System is completed, has passed all demonstration and performance testing in accordance with the Construction Documentation and the Technical Requirements, including demonstration of interoperability with E-ZPass or any successor to E-ZPass then utilized on State Highways, and is ready for normal operation unless previously completed pursuant to Section 8.08;

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

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

(xi) the Concessionaire has paid or caused to be paid to the Department all amounts due and payable from the Concessionaire to the Department, including, but not limited to, Lane Closure Damages, in connection with this Agreement, including any applicable interest thereon (except such amounts subject to dispute in accordance with the dispute resolution procedures);

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

(xiii) the Concessionaire has submitted to the Department an Annual Budget for the remainder of the Agreement Year in which the Substantial Completion Date occurs (or, if the remainder of such year is shorter than 90 Days, an Annual Budget that conforms with the requirements specified in Section 9.08, for the remainder of such Agreement Year and for the following Agreement Year); and

(xiv) the Concessionaire has certified to the Department in writing that the conditions set forth in this subsection (a) have been satisfied as of the date of such certification.

(b) The parties will comply with the submittal and review procedures set forth in Section 10.05 in the Department's determination of whether the Concessionaire has satisfied the conditions precedent for achieving Service Commencement.

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

(d) Regarding the southbound portion of the STE, the Concessionaire will not initiate Service Commencement on the southbound portion of the STE until the following conditions have been achieved to the satisfaction of the Department in consultation with the Concessionaire (or the Department, in its sole discretion, waives any such condition), which shall in any event be completed by the Concessionaire within the 90 day timeframe set forth in Section 8A.06(a):

(i) the design-build work, including construction, on the southbound portion of the STE has been completed by the STE Design-Build Contractor under and in accordance with the terms of the STE Design-Build Contract;

(ii) the Concessionaire has provided to the Department and the Department has approved an updated Operations and Maintenance Plan, updated Performance Requirements Baseline Tables, and updated versions of all other relevant Project Documentation;

(iii) other than as set forth in clause (iv) below, the Concessionaire has received and delivered to the Department copies of all Governmental Approvals necessary to operate the southbound portion of the STE and has satisfied all conditions and requirements thereof which must be satisfied before the southbound portion of the STE can be lawfully opened for regular public use, all such Governmental Approvals remain in full force and effect, and there exists no uncured material violation of the terms and conditions of any such Governmental Approval;

(iv) the Department has received all Governmental Approvals from the CTB and FHWA necessary to operate the southbound portion of the STE;

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

(vi) all Operations and Maintenance Agreements and agreements relating to toll collection and violation enforcement, if any, have been amended to include the southbound portion of the STE and are in full force and effect;

(vii) the Concessionaire has amended the Maintenance Management System in accordance with the Technical Requirements;

(viii) the Concessionaire has completed the testing, commissioning and integration of the ETTM System for the STE into the ETTM System for the Original HOT Lanes;

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

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

(xi) the Concessionaire has paid to the Department all amounts due and payable from the Concessionaire to the Department under the Cost Sharing Agreement; and

(xii) the Concessionaire has certified to the Department in writing that the conditions set forth in this subsection have been satisfied as of the date of such certification.

(e) Regarding the northbound portion of the STE, the Concessionaire will not initiate Service Commencement on the northbound portion of the STE until the following conditions have been achieved to the satisfaction of the Department in consultation with the Concessionaire (or the Department, in its sole discretion, waives any such condition), which shall in any event be completed by the Concessionaire within the 90 day timeframe set forth in Section 8A.06(b):

(i) the design-build work, including construction, on the northbound portion of the STE has been completed by the STE Design-Build Contractor under and in accordance with the terms of the STE Design-Build Contract;

(ii) the Concessionaire has provided to the Department and the Department has approved an updated Operations and Maintenance Plan, updated Performance Requirements Baseline Tables, and updated versions of all other relevant Project Documentation;

(iii) other than as set forth in clause (iv) below, the Concessionaire has received and delivered to the Department copies of all Governmental Approvals necessary to operate the northbound portion of the STE and has satisfied all conditions and requirements thereof which must be satisfied before the northbound portion of the STE can be lawfully opened for regular public use, all such Governmental Approvals remain in full force and effect, and there exists no uncured material violation of the terms and conditions of any such Governmental Approval;

(iv) the Department has received all Governmental Approvals from the CTB and FHWA necessary to operate the northbound portion of the STE;

(v) all insurance policies required under Section 17.01 for the Operating Period have been amended to include the STE and obtained and will be in full force and effect, and the Concessionaire has delivered to the Department duplicate originals or copies thereof (or endorsements reasonably acceptable to the Department extending

coverage to the Project), certified by the Concessionaire's insurance broker to be true and correct copies of the originals;

(vi) all Operations and Maintenance Agreements and agreements relating to toll collection and violation enforcement, if any, have been amended to include the northbound portion of the STE and are in full force and effect;

(vii) the Concessionaire has amended the Maintenance Management System in accordance with the Technical Requirements;

(viii) the Concessionaire has completed the testing, commissioning and integration of the ETTM System for the STE into the ETTM System for the Original HOT Lanes;

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

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

(xi) the Concessionaire has paid to the Department all amounts due and payable from the Concessionaire to the Department under the Cost Sharing Agreement;

(xii) the Concessionaire certifies to the Department in writing that all other conditions set forth in this subsection have been satisfied; and

(xiii) the Department has assigned the warranties under the STE Design-Build Contract in accordance with Section 8A.08(a).

(f) Regarding the 395 Project, the Concessionaire will not initiate Service Commencement on the 395 HOT Lanes until the following conditions have been satisfied (or the Department, in its sole discretion, waives any such condition) and the Department has delivered notice to that effect to the Concessionaire (the "395 Service Commencement Notice to Proceed"):

(i) the Concessionaire determines that the Design-Build Work and the TTMS Work, including construction, on the 395 HOT Lanes (except for the sound walls along the 395 HOT Lanes) has been completed by the 395 Design-Build Contractor and the TTMS Contractor, respectively, under and in accordance with the terms of the 395 Design-Build Contract, the 395 TTMS Contract and this Agreement, as applicable, and the Concessionaire has otherwise completed the Work in accordance with this Agreement, including the Technical Requirements, and with the Construction Documentation, such that the Project Assets are in a physical condition that they can be used for normal and safe vehicular travel in all lanes and at all points of entry and exit;

(ii) the Department has approved the Operations and Maintenance Plan, the updated Performance Requirements Baseline Tables, all other Project Documentation and all other Project Development Plans required by the Technical Requirements to be submitted on or before the 395 Service Commencement Date;



(iii) other than as set forth in clause (iv) below, the Concessionaire has received and delivered to the Department copies of all Governmental Approvals necessary to operate the 395 HOT Lanes and has satisfied all conditions and requirements thereof which must be satisfied before the 395 HOT Lanes can be lawfully opened for regular public use, all such Governmental Approvals remain in full force and effect, and there exists no uncured material violation of the terms and conditions of any such Governmental Approval;

(iv) the Department has received all Governmental Approvals from the CTB and FHWA necessary to operate the 395 HOT Lanes;

(v) all insurance policies required under Section 17.01 for the Operating Period have been obtained (or existing policies for the Original HOT Lanes have been amended to include the 395 Concessionaire Assets) and will be in full force and effect, and the Concessionaire has delivered to the Department duplicate originals or copies thereof (or endorsements reasonably acceptable to the Department extending coverage to the Project), certified by the Concessionaire's insurance broker to be true and correct copies of the originals;

(vi) there exists no Concessionaire Default or 395 Concessionaire Breach for which the Concessionaire has received notice from the Department, except as to any Concessionaire Default or 395 Concessionaire Breach that has been cured or for which Service Commencement will effect its cure, and there exists no event or condition that, with notice or lapse of time, would constitute a Concessionaire Default or a 395 Concessionaire Breach;

(vii) all Operations and Maintenance Agreements and agreements relating to toll collection and violation enforcement, including the Electronic Toll Collection Agreement and the Violation Processing Services Agreement, have been obtained or amended to include the 395 Concessionaire Assets and are in full force and effect;

(viii) the Concessionaire has implemented the Maintenance Management System for the 395 Concessionaire Assets in accordance with the Technical Requirements;

(ix) the Concessionaire has completed the testing, commissioning and integration of the ETTM System for the 395 HOT Lanes into the ETTM System for the Original HOT Lanes and the 395 HOT Lanes and the ETTM System is completed, has passed all demonstration and performance testing in accordance with the Construction Documentation and the Technical Requirements, including demonstration of interoperability with E-ZPass or any successor to E-ZPass then utilized on State Highways, and is ready for normal operation unless the foregoing conditions have been previously satisfied under Section 9.02(a)(viii);

(x) the Concessionaire has deposited the Source Code Documentation with the Escrow Agent in accordance with Section 18.06;

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

(xii) the Concessionaire has paid or caused to be paid to the Department all amounts due and payable from the Concessionaire to the Department, including, but not limited to, Lane Closure Damages, in connection with this Agreement, including any applicable interest thereon (except such amounts subject to dispute in accordance with the dispute resolution procedures);

(xiii) the Concessionaire has certified to the Department in writing that the conditions set forth in this subsection (f) have been satisfied as of the date of such certification;

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

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

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

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

(xviii) the need for temporary traffic controls or for lane closures at any time has ceased (except for any then required for routine maintenance) and except for temporary lane closures in accordance with and as permitted by the Department-approved TMP; and

(xix) the TMS (if any) and safety features for TMS components are installed and functional.

(g) Regarding the Fred Ex Project, the Concessionaire will not initiate Service Commencement on the Fred Ex HOT Lanes until the following conditions have been satisfied (or the Department, in its sole discretion, waives any such condition) and the Department has delivered notice to that effect to the Concessionaire (the "Fred Ex Service Commencement Notice to Proceed"):

(i) the Concessionaire determines that the Fred Ex Design-Build Work and the Fred Ex TTMS Work, including construction, on the Fred Ex HOT Lanes has been completed by the Fred Ex Design-Build Contractor and the TTMS Contractor, respectively, under and in accordance with the terms of the Fred Ex Design-Build Contract, the Fred Ex TTMS Contract and this Agreement, as applicable, and the Concessionaire has otherwise completed the Work in accordance with this Agreement, including the Technical Requirements, and with the Construction Documentation, such that the Project Assets are in a physical condition that they can be used for normal and safe vehicular travel in all lanes and at all points of entry and exit;

(ii) the Department has approved the Operations and Maintenance Plan, the updated Performance Requirements Baseline Tables, all other Project Documentation and all other Project Development Plans required by the Technical Requirements to be submitted on or before the Fred Ex Service Commencement Date;

(iii) other than as set forth in clause (iv) below, the Concessionaire has received and delivered to the Department copies of all Governmental Approvals necessary to operate the Fred Ex HOT Lanes and has satisfied all conditions and requirements thereof which must be satisfied before the Fred Ex HOT Lanes can be lawfully opened for regular public use, all such Governmental Approvals remain in full force and effect, and there exists no uncured material violation of the terms and conditions of any such Governmental Approval;

(iv) the Department has received all Governmental Approvals from the CTB and FHWA necessary to operate the Fred Ex HOT Lanes;

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

(vi) there exists no Concessionaire Default or Fred Ex Concessionaire Breach for which the Concessionaire has received notice from the Department, except as to any Concessionaire Default or Fred Ex Concessionaire Breach that has been cured or for which Service Commencement will effect its cure, and there exists no event or condition that, with notice or lapse of time, would constitute a Concessionaire Default or a Fred Ex Concessionaire Breach;

(vii) all Operations and Maintenance Agreements and agreements relating to toll collection and violation enforcement, including the Electronic Toll Collection Agreement and the Violation Processing Services Agreement, have been obtained or amended to include the Fred Ex HOT Lanes and are in full force and effect;

(viii) the Concessionaire has implemented the Maintenance Management System for the Fred Ex HOT Lanes in accordance with the Technical Requirements;

(ix) the Concessionaire has completed the testing, commissioning, and integration of the ETTM System for the Fred Ex HOT Lanes into the ETTM System for the Original HOT Lanes and the ETTM System is completed, has passed all demonstration and performance testing in accordance with the Construction Documentation and the Technical Requirements, including demonstration of interoperability with E-ZPass or any successor to E-ZPass then utilized on State Highways, and is ready for normal operation;

(x) the Concessionaire has deposited the Source Code Documentation with the Escrow Agent in accordance with Section 18.06;

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

(xii) the Concessionaire has paid, or has caused the Equity Sponsors to pay, to the Department all amounts due and payable from the Concessionaire to the Department in connection with this Agreement, including, but not limited to, Lane Closure Damages and the full Permit Fee Buyout Payment (and receipt of such Permit Fee Buyout payment has been confirmed in writing by the Department), and including any applicable interest thereon (except such amounts subject to dispute in accordance with the dispute resolution procedures);

(xiii) the Concessionaire has certified to the Department in writing that the conditions set forth in this subsection (g) have been satisfied as of the date of such certification;

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

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

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

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

(xviii) the need for temporary traffic controls or for lane closures at any time has ceased (except for any then required for routine maintenance) and except for temporary lane closures in accordance with and as permitted by the Department-approved TMP; and

(xix) the TMS (if any) and safety features for TMS components are installed and functional.

### **Section 9.03 Concessionaire Obligation to Manage and Operate**

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

for the following, at its sole cost and expense at all times following the respective Service Commencement Date for the Project:

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

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

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

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

(v) traffic management, and maintenance and repair responsibilities under Section 9.04(a) in accordance with the Technical Requirements; and

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

(b) Snow and Ice Removal.

(i) Prior to the applicable Service Commencement Date, the Department will, at its own cost, remove snow and ice from the HOV Lanes that are open to traffic.

(ii) Subject to Section 9.03(b)(iv), the Department will provide snow and ice removal services on the HOT Lanes at a comparable level of service to that it provides on the GP Lanes. The Concessionaire will provide access to the HOT Lanes to the Department or its contractors to provide snow and ice removal services. If the Concessionaire does not provide access to the HOT Lanes to the Department or its contractors, then the Department will not be required to provide snow and ice removal services on the applicable HOT Lanes during the pendency of such denial of access.

(iii) Other than as provided in Section 9.03(b)(iv), the Department will have no liability to the Concessionaire arising out of its snow and ice removal services. If the Department's contractors for snow and ice removal damage the Project Assets, the Department will provide to the Concessionaire any amounts that the Department has received in respect of such damage from such contractor or its insurer. Subject to Section 9.03(b)(i) and Section 9.03(b)(ii), the Department will have full discretion to establish

priorities for its contractors regarding timing and location of services, materials and equipment, without liability to the Concessionaire, other than as provided in clause (iv) below.

(iv) The Concessionaire may notify the Department if the Department fails at any time to provide snow and ice removal to the HOT Lanes at a level of service comparable to that it provides on the GP Lanes. Such notice will be given verbally, to be immediately followed up in writing, to the Department's District Administrator and Assistant District Administrator for Maintenance or its designee (i.e. Duty Officer) for the Northern Virginia District and/or the Fredericksburg District, as applicable, for the applicable section of the HOT Lanes. If the Department fails to respond affirmatively within two hours of the written notice from the Concessionaire or if the Department does not begin snow and ice removal services within four hours of such written notice, except if the Concessionaire does not provide access to the HOT Lanes to the Department, then the Concessionaire may arrange for other contractors to provide such service and the Department will pay the Concessionaire for such contractors' reasonable documented cost of snow and ice removal services; *provided* that such contractors will not in any way hinder the removal of snow and ice from the GP Lanes.

(v) The Concessionaire may arrange for a contractor to provide snow and ice removal services to the HOT Lanes, at the Concessionaire's sole cost and expense, even if the Department is providing such services at a level of service comparable to that it provides on the GP Lanes, with prior written notice to the Department; *provided* that any such contractor will not in any way hinder the removal of snow and ice from the GP Lanes. Such notice will be given verbally, to be immediately followed up in writing, to the Department's District Administrator and Assistant District Administrator for Maintenance or its designee (i.e. Duty Officer) for the Northern Virginia District and/or the Fredericksburg District, as applicable, for the applicable section of the HOT Lanes.

(c) Drainage. The Concessionaire will be responsible, at its own cost and expense, for the maintenance, repair and replacement of the existing drainage system located within and outside of the Project Right of Way in accordance with the Technical Requirements, except to the extent such responsibility is allocated to the Department in accordance with the Technical Requirements. The Concessionaire will be solely responsible, at its own cost and expense, for the maintenance, repair and replacement of any drainage and stormwater management features that are constructed by the Concessionaire as part of the Fred Ex Project, without regard to whether such drainage or stormwater management features are categorized as a "Department Shared Asset" in the Technical Requirements.

(d) Operating Costs. At the request of either party from time to time (but not more than once per year), the Concessionaire and the Department will discuss in good faith possible adjustments to the Operating Costs, using the federal Contract Cost Principles and Procedures, 48 C.F.R. 31.205, as non-binding guidance to ensure that only reasonable and customary costs are included as Operating Costs.



#### **Section 9.04 Procedures Relating to Maintenance Work**

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

(b) Life Cycle Maintenance Plan. No later than 90 Days before the beginning of each Agreement Year after the applicable Service Commencement Date, the Concessionaire will prepare and deliver to the Department a full five-year period maintenance plan on a rolling basis that describes life cycle asset maintenance for the Project (each, a “Life Cycle Maintenance Plan”) in accordance with this Agreement, including the Technical Requirements. The Life Cycle Maintenance Plan will include a description of all Major Maintenance to be undertaken during such five-year period, by Agreement Year, by component, item or discrete project (each, a “Task”), the estimated costs and timing relating to each Task, the underlying assumptions used to develop such plan, including assumptions arising from the re-evaluations of the physical condition of the Assets conducted pursuant to Section 9.04(d); the calculation of the required deposit to the Major Maintenance Reserve Fund; and such other information as may be reasonably requested by the Department.

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

(i) The Department will review and approve the Life Cycle Maintenance Plan and components thereof, including, but not limited to, the proposed scope of work, timing and estimated costs for the Major Maintenance. The Department will deliver its comments, approval or disapproval to the Concessionaire within 45 Days after the Concessionaire has delivered each proposed Life Cycle Maintenance Plan to the Department in accordance with Section 9.04(b).

(ii) The Concessionaire will reasonably consider any changes or additions proposed by the Department to the proposed Life Cycle Maintenance Plan and will modify the Life Cycle Maintenance Plan to reflect those changes and additions which are consistent with the standards and requirements of this Agreement. The Concessionaire shall deliver any required modified Life Cycle Maintenance Plan to the Department for its approval.

(iii) In the event of any Dispute relating to a Life Cycle Maintenance Plan, the Department and the Concessionaire will endeavor in good faith to resolve any such Dispute within 60 Days after it is provided to the Department. Any Disputes raised by the Department with respect to the Life Cycle Maintenance Plan must be based on whether it and the underlying assumptions are reasonable, realistic and consistent with Good Industry Practice, the Technical Requirements and Law. If no agreement is reached within such 60-Day period as to any such matter, either party may submit the Dispute to the dispute resolution procedures set forth in Article 21. Until resolution of any Dispute relating to a Life Cycle Maintenance Plan, the treatment of the disputed Tasks in the most recently-approved Life Cycle Maintenance Plan will remain in effect and govern the requirements relating to such Tasks. If there is no approved Life Cycle Maintenance Plan then in effect, the Concessionaire will proceed as directed by the Department until resolution of such Dispute.



(iv) The Concessionaire may reasonably request changes or additions to the approved Life Cycle Maintenance Plan prior to the delivery of the next Life Cycle Maintenance Plan in accordance with Section 9.04(b). The Department shall review such request within 30 Days and will deliver its comments, approval or disapproval to the Concessionaire within 45 Days. Until such request is approved, the most recently-approved Life Cycle Maintenance will remain in effect, including the amount deposited to the Major Maintenance Reserve Account.

(d) Inspection and Implementation.

(i) After the applicable Service Commencement Date, the Concessionaire will conduct inspections of the physical condition of the Project Assets pursuant to the Technical Requirements. Every five years after the applicable Service Commencement Date, the Concessionaire will conduct an assessment of the physical condition of the Project Assets pursuant to the Technical Requirements, and will prepare a comparative analysis of such conditions to the conditions as previously reported (or, with respect to any Project Enhancements, their condition upon completion thereof), such analysis to take into account any changes in Federal Requirements and changes to safety standards. The condition of each Asset will be assessed using the Department's Maintenance Rating Program in accordance with the Technical Requirements. If any Asset is determined by the Concessionaire or the Department to fall below the applicable level or rating specified in the Technical Requirements for such Asset, the Concessionaire will, within 90 Days of such assessment, develop and submit to the Department a plan to restore such Asset to a condition that will enable the Asset to meet all applicable Performance Requirements, and such plan will also include a budget, timeline and identification of the funding sources (if known at the time) that will be utilized to restore such Asset.

(ii) The Department will be responsible at its sole cost and expense for inspection of bridges and structures on the Project Right of Way in accordance with the Technical Requirements. The Concessionaire will cooperate with the Department in its conduct of inspections and will use reasonable efforts to minimize any disruption to the Department's conduct of such inspections. The Department and the Concessionaire will use reasonable efforts to minimize any disruption to or impairment of the Work, the Project and the Department's inspection activities.

(iii) If the Concessionaire fails to complete any of the Tasks in accordance with this Agreement and the applicable Life Cycle Maintenance Plan, the Department may demand by notice in writing that such Tasks be completed by the Concessionaire. If the Concessionaire has failed to commence and diligently continue to perform such Tasks within 30 Days after the Department delivers such notice, the Department may, at its option, but is not obligated to, either (A) carry out such Task or correct such defective work using Department personnel, materials and equipment or (B) procure the services for such Task or corrective work by one or more contractors. If the Concessionaire fails to commence and diligently continue to perform such Tasks within 30 Days after the Department delivers notice pursuant to this Section 9.04(d)(iii) and the Department elects to pursue its rights pursuant to Section 9.04(d)(iii)(A) or (B), then the Concessionaire will

pay the Department's Allocable Costs it incurs to complete such Task or corrective work, and its third-party costs to procure such contract(s).

(iv) Notwithstanding anything to the contrary in Section 9.04(d)(iii), the Concessionaire may, by written notice delivered to the Department within 30 Days of receipt of the Department's notice of demand described in Section 9.04(d)(iii), object to any such demand by the Department on the basis that the Concessionaire has completed the Task(s) specified in the Department's demand in accordance with this Agreement and the applicable Life Cycle Maintenance Plan or that such Task(s) are not then required in accordance with this Agreement or the applicable Life Cycle Maintenance Plan, which notice will give details of the grounds for such objection. Upon the giving of any such notice, the parties will endeavor to reach agreement as to any matters referred to in the notice. If no agreement is reached as to any such matter within 30 Days after the giving of such notice, either party may refer the Dispute to the dispute resolution procedures set forth in Article 21. Notwithstanding the foregoing, the Concessionaire will perform the Task as directed by the Department and the Department will be entitled to exercise its remedies for the Concessionaire's failure to comply with such directive in accordance with this Agreement. If it is determined in accordance with the dispute resolution procedures in Article 21 that the Concessionaire was in compliance with its obligations under this Agreement, then such directive and any additional Work required by the Department will be treated as a Department Change pursuant to Section 14.02.

#### **Section 9.05 Major Maintenance Reserve Fund**

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

#### **Section 9.06 Police and Enforcement Services**

(a) Other than with respect to the 395 HOT Lanes and the Fred Ex HOT Lanes, the Department will coordinate with the Virginia State Police to provide policing services, and to provide emergency services (fire and rescue), including traffic patrol and traffic law enforcement services, to be provided on the Project at a level of service equivalent to that provided on comparable State Highways from time to time. All such foregoing services will be provided without any charge to the Concessionaire or the Project (other than with respect to the 395 HOT Lanes and Fred Ex HOT Lanes). For the avoidance of doubt, such services will not include any enforcement of HOV compliance. In addition, if reasonably requested by the Concessionaire, the Department will assist the Concessionaire in obtaining enhanced levels of police services for the control of traffic for construction or maintenance activities or as otherwise needed (and in each case, at the Concessionaire's sole cost and expense). Notwithstanding such assistance, the Concessionaire will be solely responsible for obtaining such enhanced services and the Department does not guarantee that such services can be obtained.

(b) The Concessionaire may, at its sole cost and expense, engage the Virginia State Police to provide toll enforcement and HOV enforcement services (including the identification and apprehension of toll violators), and the Department will assist the Concessionaire in obtaining such services if so requested by the Concessionaire. The Concessionaire will not

engage or permit the engagement of private security services to provide traffic patrol or traffic law enforcement services on the Project; *provided*, that the foregoing does not preclude the Concessionaire from engaging private security firms or employing other appropriate security devices, vehicle occupancy detection equipment or other automated technology to protect, collect and enforce the payment of Toll Revenues and to identify toll and/or HOV violators, subject to Law, and to enforce any private rights and civil remedies available to it respecting toll and/or HOV violations.

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

(d) The Department will not have any responsibility or liability to the Concessionaire resulting from or otherwise relating to the failure of the Virginia State Police or any other public agencies to provide policing services contemplated by this Section 9.06 or any of the acts or omissions of the Virginia State Police or such agencies with respect to such services.

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

(f) For the avoidance of doubt, the Concessionaire will be responsible for any coordination with the Virginia State Police and any costs owed to the Virginia State Police relating to law enforcement and any other work performed by the Virginia State Police on the 395 HOT Lanes and Fred Ex HOT Lanes.

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

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

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

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

(d) Activities undertaken by the Department pursuant to this Section 9.07 will not constitute a Compensation Event, unless they meet the criteria as provided in this Agreement.

### **Section 9.08 Annual Budget**

(a) For each Agreement Year and partial Fiscal Year from and after the Final Acceptance Date, the Concessionaire will file with the Department an operating plan and annual budget for the Project on a cash flow basis at least 60 Days prior to the start thereof (an “Annual Budget”). Each Annual Budget will be in a form reasonably acceptable to the Department and show in reasonable detail in respect of such full or partial Agreement Year:

- (i) projected traffic;
- (ii) projected Gross Revenues and Gross Toll Revenues, including Toll Revenues;
- (iii) projected Operating Costs broken down in accordance with the definition of Operating Costs;
- (iv) projected costs of Major Maintenance pursuant to the approved Life Cycle Maintenance Plan in accordance with Section 9.04;
- (v) projected debt service and other amounts payable with respect to Concessionaire Debt, including Senior Concessionaire Debt, TIFIA debt service, VTIB debt service, Subordinate Debt, TIFIA Revenue Sharing Amount, required deposits to each reserve funds held for benefit of the Project Lenders;
- (vi) projected Major Maintenance Reserve Fund deposits and withdrawals;
- (vii) the Annual Transit Investment payments; and
- (viii) projected Distributions

(b) The Concessionaire shall provide to the Department an updated version of the contemporaneous Annual Budget to include the following Assets within 60 days of the following events: (i) the STE HOT Lanes upon the STE Final Acceptance Date; (ii) the 395 HOT Lanes upon the 395 Service Commencement Date; and (iii) the Fred Ex HOT Lanes upon the Fred Ex Service Commencement Date. After each update required by (i), (ii), and (iii) above, the Concessionaire shall include the applicable Assets within each future Annual Budget.

(c) The Concessionaire will provide within 30 days of such request, any other information as the Department may reasonably require in connection with its review of the

Annual Budget, including: (i) any amendments to operating budgets pursuant to the O&M Agreement; and (ii) any budgets related to the Shared Facilities Agreement.

(d) The Department's Authorized Representative shall notify the Concessionaire in writing that the Annual Budget is in a form reasonably acceptable to the Department and shows in reasonable detail the information required in this Section 9.08. For each Annual Budget submitted to the Department after the Gross Toll Revenue Payment Trigger, the Department will review and approve or reject the Annual Budget within 60 days of receipt; the Department may reasonably request additional information relating to its review of the Annual Budget, and may withhold approval if the Concessionaire does not provide information responsive to the Department's request. If an Annual Budget is rejected, the Department will state the reasons in writing and the Concessionaire shall resubmit the Annual Budget, addressing the reasons for rejection, for the Department's review and approval. The process will be repeated until the Department approves an Annual Budget for the relevant Agreement Year. Until the Annual Budget has been approved, the Concessionaire shall operate the Project consistent with the Annual Budget for the immediately preceding Agreement Year.

### **Section 9.09 Signage**

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

(b) The Concessionaire agrees that it shall, at its sole cost, install, operate and maintain on connecting State Highways such signs solely notifying motorists of the access to the HOT Lanes, the amount of tolls and fines for toll violations, the applicable High Occupancy Requirement, and other relevant information, in accordance with applicable Law and the Technical Requirements.

(c) The Department will remain responsible, at its cost, for general directional signs on State Highways informing the public of the direction and distance to the HOT Lanes and other State Highways. During the Term, the Department will also cooperate with, and use its commercially reasonable efforts to cause other public agencies or entities to cooperate with, the Concessionaire to install, at the Concessionaire's cost, additional signs along State Highways notifying motorists of the access to the HOT Lanes and any other communications relating to the HOT Lanes as are reasonably requested by the Concessionaire, subject to any obligation to obtain any necessary authorizations of any other Governmental Authority and in accordance with applicable Law. In connection with any such request, the Concessionaire will submit the proposed layout, location, type, size, color and content of all such traffic signs or other signs.

## ARTICLE 10.

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

#### **Section 10.01 Project and Quality Management**

The Concessionaire will provide oversight and management of the Project to control the scope, quality, cost, and on-time delivery of the Work. If the Concessionaire is required to rectify any Non-Conforming Work in accordance with Section 8.11(b), the parties will review the Quality Management System Plan to assess and determine whether changes, including increased management and oversight efforts by the Concessionaire, to such plan are necessary to prevent such further Non-Conforming Work. This Section 10.01 shall not apply to the design, development, and construction of the STE.

#### **Section 10.02 Right to Oversee Work**

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

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

#### **Section 10.03 Department Access and Inspection**

The Department, the FHWA, and their respective authorized agents will have unrestricted access at all times to enter upon, inspect, sample, measure, and physically test any part of the Project Assets or the Project Right of Way, as well as any materials, supplies, machinery, and equipment to be incorporated into or used in construction, operation, or maintenance of the Project. The Department will also have the right, upon reasonable advance written notice (except as provided in Section 18.07(b)) to the Concessionaire, to inspect financial or other records relating to the Project. Upon the Concessionaire's request, the Department will provide the Concessionaire with the results of any such test or inspections subject to any protections from disclosure under applicable Law.

#### **Section 10.04 Compensation for Oversight Services**

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



(b) Notwithstanding Section 10.04(a), if at any time the Concessionaire has failed to perform any of its construction, operating, or maintenance obligations in any material respect then, in addition to other remedies available pursuant to this Agreement and the other Project Agreements, the Department, with written notice to the Concessionaire given concurrently with the increase in the Department's monitoring or as soon as practicable thereafter, is entitled to adequately and appropriately increase the level of its monitoring of the Project and the Concessionaire's compliance with its construction, operation, and maintenance obligations pursuant to this Agreement, until such time as the Concessionaire has demonstrated to the Department's reasonable satisfaction that it will perform and is capable of performing its construction, operation and maintenance obligations pursuant to this Agreement. The Concessionaire will compensate the Department for all Allocable Costs incurred by the Department as a result of such increased level of monitoring from and after the date on which such increased level of monitoring begins, *provided*, that if the increased monitoring is due to a delay in achieving Substantial Completion, Service Commencement, 395 Final Completion, Fred Ex Final Completion, or Final Acceptance, the Concessionaire will compensate the Department for such increased monitoring solely by payment of liquidated damages pursuant to Section 8.10. The Concessionaire's total liability to the Department during the Construction Period in connection with any increased monitoring will not exceed \$2,000,000 in the aggregate.

(c) If the Department increases its monitoring or oversight as permitted in this Agreement during the Operating Period, then the Department will give notice of such increased level of monitoring as provided in Section 10.04(b). Within 10 Days following the day on which increased monitoring activities begin, the Department will provide the Concessionaire with a budget for its increased oversight and/or monitoring activities which sets out its total proposed costs in reasonable detail. If there is a change in circumstances in the oversight activities or the events which precipitated them occurs following the submission of the Department's initial budget, then the Department will provide a revised budget, which budget will detail any increased costs.

(d) The Concessionaire may submit a cure plan describing specific actions the Concessionaire will undertake to improve its performance and avoid the need for increased monitoring, which the Department may accept or reject. Notwithstanding Section 10.04(c), if the Department accepts a cure plan, the Department shall not increase its monitoring or other Oversight Services unless the Concessionaire fails to diligently pursue such cure plan.

### **Section 10.05 Department Approvals**

(a) This Section 10.05 sets forth procedures governing certain submittals or requests by the Concessionaire (or the Design-Build Contractor, the TTMS Contractor, or the O&M Contractor) to the Department (including, but not limited to, plans, schedules, designs, Design Documentation and Construction Documentation) which require an approval, review, comment, consent, notification, determination, decision or other response (collectively, a "Response") from the Department pursuant to this Agreement. All submittals or requests to the Department will be made in the form required by, and otherwise in conformity with, the requirements set forth in the Technical Requirements. Except as otherwise provided in this Agreement, the procedures set forth in this Section 10.05 will apply to any submittal or request by the Concessionaire relating to, or any required approval or disapproval by the Department of, the following: any proposed



OSPS Improvement Plan pursuant to Section 5.08(b); the issuance of a Design Work Notice to Proceed pursuant to Section 8.03(a) or a Construction Notice to Proceed pursuant to Section 8.03(b); any submittal of Design Documentation and Construction Documentation relating to the Work pursuant to Section 8.04(a); the approval of the ROW Acquisition and Relocation Plan pursuant to Section 8.05(a); the determination of whether Substantial Completion has been achieved pursuant to Section 8.08(e); the determination of whether Final Acceptance has been achieved pursuant to Section 8.09(c); the determination of whether 395 Final Completion has been achieved pursuant to Section 8.18(e); the determination of whether Fred Ex Final Completion has been achieved pursuant to Section 8.21; the determination of whether the conditions precedent for achieving the applicable Service Commencement have been achieved pursuant to Section 9.02(b), (f), and (g); any Signage Plan pursuant to Section 9.09(a); data, reports and any proposed Remedial Action Plan pursuant to Section 16.01(b); insurance submittals pursuant to Section 17.02(e); and a Disbursement Request pursuant to the Public Funds Amount Payment Terms attached as Exhibit N.

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

(c) In any case in which a submittal or request is or has been deemed to be complete under Section 10.05(b), the Department will review and respond to such submittal or request as promptly as reasonably possible, and no later than 21 Days (or 14 Days for the 395 Project) after the date on which the Concessionaire (or the Design-Build Contractor, the O&M Contractor, or the TTMS Contractor) has delivered such submittal or request to the Department. The Department will respond within such 21-Day or 14-Day period, as applicable, by (i) approving, certifying or taking other appropriate action with respect to, the submittal or request, as applicable or (ii) disapproving such submittal or request and providing written notice to the Concessionaire specifying in reasonable detail the reasons for which it has disapproved the submittal or request. If the Department objects or disapproves any submittal or request in accordance with clause (ii) of the preceding sentence, the Concessionaire will resubmit the submittal or request as promptly as reasonably possible, and the Department will resume its review and respond to such submittal or request by approving or disapproving the submittal or request (provided that such submittal or request is complete or has been deemed to be complete under Section 10.05(b)) within 10 Days following its receipt of a resubmittal or request. The Department's review of a resubmittal or request will be limited to the issue, condition, or deficiency which gave rise to the Department's disapproval and will not extend to other aspects for which a notice of disapproval was not previously provided to the Concessionaire unless the issue, condition, or deficiency which gave rise to the Department's disapproval reasonably relates to the Department's disapproval for which notice was previously provided. The Concessionaire is in no way obligated to incorporate the Department's comments unless necessary to comply with a specific requirement of this Agreement.

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

(e) Unless otherwise provided in this Agreement, if the Department fails to respond to a complete submittal or request which has been timely submitted or resubmitted, as the case may be within the applicable time periods, as provided in this Section 10.05, the Department will be deemed to have approved, certified, or taken other similar action with respect to, such submittal or request; *provided* that such deemed approval will not be deemed a waiver of the Department's other rights or the Concessionaire's other obligations pursuant to this Agreement, including compliance with the Technical Requirements, Governmental Approvals, Good Industry Practice, and applicable Law. Notwithstanding the foregoing, the deemed approval provisions of this Section 10.05(e) will not apply to the issuance of a Design Work Notice to Proceed pursuant to Section 8.03(a) or a Construction Notice to Proceed pursuant to Section 8.03(b), the approval of the ROW Acquisition and Relocation Plan pursuant to Section 8.05(a), the determination of whether Substantial Completion has been achieved pursuant to Section 8.08(e); the determination of whether Final Acceptance has been achieved pursuant to Section 8.09(c); the determination of whether 395 Final Completion has been achieved pursuant to Section 8.18(e); the determination of whether Fred Ex Final Completion has been achieved pursuant to Section 8.21; the submission of any data, reports and any proposed Remedial Action Plan pursuant to Section 16.01(b); or a Disbursement Request pursuant to the Public Funds Amount Payment Terms attached as Exhibit N.

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

(g) In all cases where Responses are required to be provided hereunder, such Responses will not be withheld or delayed unreasonably and such determinations will be made reasonably except in cases where a different standard is specified. In cases where sole discretion is specified with respect to a Response by the Department, the Response will not be subject to the dispute resolution procedures set forth in Article 21. Any failure of the Department to respond to a matter which is determined in the Department's sole discretion (by way of example, Deviations pursuant to Section 14.03) within 21 Days (or 14 Days for the 395 Project) after delivery of the Concessionaire's request to the Department will be deemed disapproval by the Department. The Department will provide within ten days after a request by the Concessionaire its rationale, in reasonable detail, for any disapproval or deemed disapproval of any matter where the Department has sole discretion to approve or disapprove.

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

### **Section 10.06 Limitations on the Concessionaire's Right to Rely**

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

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

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

(iii) to perform Oversight Services,

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

(b) To the maximum extent permitted by Law, and subject to the provisions of this Agreement, the Concessionaire hereby releases and discharges the Department from any and all duty and obligation to cause permitting, Project Right of Way acquisition, Utility Relocation, construction, equipping, operations, maintenance, policing, renewal, replacement, traffic management or other management of or for the Project or the Project Right of Way, by the Department, to satisfy the standards and requirements set forth in the Project Agreements; *provided*, that the foregoing will not limit the Department's liability or obligations under this Agreement. The Department will be entitled to remedies for Non-Conforming Work pursuant to Section 8.11(b).

(c) No rights of the Department described in Section 10.06(a), no exercise or failure to exercise such rights, no failure of the Department to meet any particular standard of care in the exercise of such rights, no issuance of permits or certificates of completion or acceptance and no

Final Acceptance, 395 Final Completion, or Fred Ex Final Completion relating to the Project or any Project Enhancement will:

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

(ii) relieve the Concessionaire of any of its obligations or liabilities under the Project Agreements;

(iii) be deemed or construed to waive any of the Department's rights and remedies under the Project Agreements; or

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

(d) Notwithstanding Section 10.06(a), (b), and (c) above: (i) any Notices to Proceed and certificates or notices of Substantial Completion, Service Commencement, 395 Final Completion, Fred Ex Final Completion, and Final Acceptance will be binding on the Department and the Concessionaire will be entitled to rely thereon; *provided* however, that the delivery of such notices and certificates will not constitute a waiver by the Department of any breach of this Agreement by the Concessionaire or relieve the Concessionaire of any of its obligations hereunder; (ii) the Concessionaire will be entitled to rely on specific approved written Deviations and interpretative engineering decisions the Department gives pursuant to this Agreement in accordance with the Technical Requirements, the Design-Build Contract or any Development Contract, and any Law; (iii) the Department is not relieved from any liability arising out of a knowing, intentional material misrepresentation under any written statement the Department delivers; and (iv) the Department is not relieved from its obligations under this Agreement or any Development Contract.

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

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

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

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

(iii) failure to provide proof of required insurance coverage or to provide or maintain the required Performance Security;

- (iv) failure to carry out and comply with Directive Letters; and
- (v) failure to satisfy any conditions to commencing performance of the applicable portion of the Work set forth in Article 8 or Section 9.01.

(b) The Department will lift the suspension order promptly after it is permitted by the terms of the court order or judgment, after the dangerous or unsafe condition is rectified, or after the Concessionaire fully cures and corrects the applicable breach or failure to perform.

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

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

## **ARTICLE 11.**

### **NON-COMPLIANCE POINTS SYSTEM**

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

(a) Exhibit W to this Agreement sets forth a table for the identification of certain Concessionaire breaches or failures to perform its obligations under this Agreement that may result in the assessment by the Department of Non-Compliance Points. The Non-Compliance Points system is used by the Department to measure the Concessionaire's performance levels and the accumulation of Non-Compliance Points by the Concessionaire may trigger the remedies set forth or referenced in this Article 11. This Article 11 shall apply only during the Operating Period. The inclusion in Exhibit W of a breach or failure to perform shall not determine whether such breach or failure is material.

(b) The Department may exercise any of its remedies under this Article 11 without prejudice to any other rights or remedies it has under this Agreement.

(c) If the Department determines any breach or failure described in Exhibit W has occurred, the Department shall within five Days of its determination deliver to the Concessionaire written notice thereof describing the breach or failure in reasonable detail. Within five Days of receipt of the Department's notice, the Concessionaire shall investigate the Department's claim and provide a written report as to whether the breach or failure in performance has in fact occurred and describing any mitigating factors. Within 10 Days after receiving the Concessionaire's report, the Department shall deliver to the Concessionaire a

written determination setting forth the number of Non-Compliance Points, if any, the Department, in its sole discretion, has assessed to the Concessionaire.

### **Section 11.02 Assessment of Non-Compliance Points and Cure Periods**

The Department may assess Non-Compliance Points as described in Section 11.03 and Section 11.04 subject to the following terms and conditions.

(a) The Non-Compliance Points system will apply commencing on the later of (i) December 28, 2014 and (ii) the fifth anniversary of the “Service Commencement Date” as such term is defined in the Capital Beltway Comprehensive Agreement. In addition, there will be a phased introduction of the Non-Compliance Points system, and for the initial year that the Non-Compliance Points system is applicable, the thresholds for “Total Cumulative Number of Uncured Points” specified on page 1 of Exhibit W will be increased by 50% for the first year, and over the period of the next five years such threshold will be reduced 10% per year such that the thresholds in Exhibit W apply. The Non-Compliance Points system will apply to the 395 Concessionaire Assets commencing on the 61<sup>st</sup> Day after the 395 Service Commencement Date. The Non-Compliance Points system will apply to the Fred Ex Assets commencing on the Fred Ex Service Commencement Date.

(b) The Department will not assess points for the first instance of each breach or failure provided that the breach or failure is cured within the cure period stated in Exhibit W. However, the Department will provide notice to the Concessionaire that a breach or failure has occurred. Any subsequent instances of each breach or failure may be subject to the assessment of Non-Compliance Points.

(c) Exhibit W sets forth the maximum number of Non-Compliance Points the Department may assess for each breach or failure. The Department may, in its sole discretion, assess fewer Non-Compliance Points for a particular breach or failure based on the merits of the individual breach or failure.

(d) Where a single act or omission gives rise to more than one breach or failure as described in Exhibit W, the Department may assess Non-Compliance Points for only one breach or failure. In such circumstances, the Department may, in its sole discretion, assess Non-Compliance Points for the breach or failure with the highest maximum number of Non-Compliance Points shall apply.

(e) For breaches or failures classified as category A in Exhibit W, Non-Compliance Points shall be assessed only at the end of the applicable cure period if the Concessionaire has failed to cure within that time. Additional Non-Compliance Points may be assessed again at the end of each subsequent cure period, until the breach or failure is cured, or the cumulative total of cured and uncured Non-Compliance Points equals or exceeds the level described in Section 11.05(c).

(f) For breaches or failures classified as category B in Exhibit W, the Non-Compliance Points shall be assessed on the date of the written determination from the Department to the Concessionaire. Provided that the breach or failure is not then cured within the applicable cure period, Non-Compliance Points shall be assessed again at the end of the first



and each subsequent cure period, until the breach or failure is cured, or the cumulative total of cured and uncured Non-Compliance Points equals or exceeds the level described in Section 11.05(c).

(g) For breaches or failures identified as category C in Exhibit W (no applicable cure period), the Non-Compliance Points shall be assessed on the date of the written determination from the Department to the Concessionaire.

(h) Any cure period specified in Exhibit W shall be extended day-for-day for any Delay Event that prevents performance of Work to cure a breach or failure.

(i) At every 10 year anniversary of the Agreement Date, or upon significant revision of the Technical Requirements, either party, by written notice to the other party at least 90 Days prior to such anniversary reserves the right to request a review of the Non-Compliance Points system. Upon receiving the notice, both parties must review the existing Non-Compliance Point system in place and agree in writing to any revisions required to the system.

### **Section 11.03 Notification of Cure**

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

### **Section 11.04 Accumulation of Non-Compliance Points**

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

(b) The cumulative total of cured and uncured Non-Compliance Points assessed by the Department shall be monitored in rolling 365 Day cycles from the time the breach has been cured for those breaches classified in categories A and B, and from the time the breach has occurred for those breaches classified in category C. At the end of each 365 Day cycle, the Non-Compliance Points assessed for that specific breach will be subtracted for the cumulative total number of Non-Compliance Points the Concessionaire has been assessed.

### **Section 11.05 Impact of Non-Compliance Points**

(a) Increased Monitoring. If the Concessionaire is assessed 135 or more Non-Compliance Points during any 365 Day cycle or maintains 30 (or any higher applicable number during the phase-in period) or more uncured Non-Compliance Points at any time as described in Section 11.05, the Department may increase the level of monitoring of the Project in accordance with Section 10.04. The Concessionaire shall compensate the Department for its Allocable Costs incurred as a result of such increased level of monitoring. The Concessionaire may submit a



cure plan describing specific actions the Concessionaire will undertake to improve its performance and avoid the need for increased monitoring, which the Department may accept or reject.

(b) The Remedial Plan.

(i) If the Concessionaire is assessed 200 or more Non-Compliance Points during any 365 Day cycle or maintains 45 (or any higher applicable number during the phase-in period) or more uncured Non-Compliance Points at any time as described in Section 11.04, the Department may require the Concessionaire to prepare and submit a remedial plan for the Department's approval. The remedial plan shall be delivered to the Department within 45 Days of its request. The remedial plan shall set forth a schedule and describe specific actions the Concessionaire will undertake to improve its performance as demonstrated by its incurring no additional Non-Compliance Points and by reducing the total number of uncured Non-Compliance Points it has accumulated to date. Such actions may include but are not limited to improvements to Concessionaire's quality management practices, plans and procedures; changes in its organizational and management structures; increased monitoring and inspections; changes in key personnel; and the replacement of subcontractors.

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

(c) Default. If the Concessionaire: (1) fails to deliver to the Department the remedial plan within 45 Days of the Department's request; or (2) fails to comply with the course of action set forth in the remedial plan and incurs a total of 245 Non-Compliance Points during any 365 Day cycle or maintains 68 (or any higher applicable number during the phase-in period) or more uncured Non-Compliance Points at any time as described in Section 11.04(a), the Department may notify the Concessionaire in writing that such failure is a breach of a material obligation hereunder, in which event such failure shall become a Concessionaire Default under Section 19.01(b) unless cured following such notice within the time period specified in Section 19.01(b).

### **Section 11.06 Disputes Regarding the Assessment of Non-Compliance Points**

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

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

(c) If for any reason the Concessionaire fails to deliver its written notice of objection within the time period specified in Section 11.06(a), the Concessionaire shall have waived its right to challenge the Department's assessment of Non-Compliance Points.

## **ARTICLE 12.**

### **PROJECT ENHANCEMENTS AND SAFETY COMPLIANCE ORDERS**

#### **Section 12.01 Project Enhancements by the Concessionaire**

(a) The Concessionaire will have the right, at its sole cost and expense (unless the Department agrees to contribute funds for a Concessionaire Project Enhancement), at any time after the Service Commencement Date, to design, develop, construct, operate and maintain Concessionaire Project Enhancements within the Project Right of Way, including any fundamental change in the dimensions, character, quality, location, or position of all or any part of the Project; *provided*, that the Concessionaire will not undertake any such Project Enhancements (except for the Concessionaire Project Enhancement in Section 12.01(b)) unless all aspects thereof are approved in writing by the Department in its sole discretion, and the Concessionaire has entered into a Development Contract with the Department with respect to such Concessionaire Project Enhancement.

(b) As of the Amended and Restated Agreement Date and during the remainder of the Term, the Concessionaire may develop as a Concessionaire Project Enhancement, the development, design, construction, financing, operation, and maintenance of an existing HOV ramp (that is an HOV ramp as of the 395 Service Commencement Date) as a HOT ramp in the 395 Corridor. Notwithstanding any other provision of this Agreement except this Section 12.01, such Concessionaire Project Enhancement shall be at the Concessionaire's sole discretion, risk, cost, and expense, including all Governmental Approvals.

#### **Section 12.02 Project Enhancements by the Department**

(a) The Department will have the right from time to time after the Initial Service Commencement Date, at its sole cost and expense (unless the Concessionaire agrees to contribute funds for a Department Project Enhancement), to design, develop, construct, operate,

and maintain Department Project Enhancements. The Department will have the right to design, develop, construct, operate, and maintain Department Project Enhancements through one or more of the following mechanisms, as the Department selects from time to time in its sole discretion:

- (i) use by the Department of its own personnel, materials and equipment;
- (ii) contracting with third parties through requests for proposals, competitive bids, negotiations, or any other lawful procurement process; and
- (iii) authorizing and directing the Concessionaire, at the Department's sole cost and expense (unless the Concessionaire agrees to contribute funds for a Department Project Enhancement), to undertake the Department Project Enhancements, through contracting for necessary traffic and revenue studies and all necessary planning, design, engineering, permitting, financial, right-of-way acquisition services, Utility Relocation, construction, installation, project management, operation, maintenance, repair, and other work and services;

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

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

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

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

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

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

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

### **Section 12.03 Safety Compliance Orders**

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

(b) The Department will use good faith efforts to inform the Concessionaire at the earliest practicable time of any circumstance or information relating to the Project which in the Department's reasonable judgment is likely to result in a Safety Compliance Order. Except in the case of an Emergency, the Department will consult with the Concessionaire, prior to issuing a Safety Compliance Order concerning the risk to public or worker safety, alternative compliance measures, cost impacts and the availability of Concessionaire resources to fund the Safety Compliance Work. The Department may, in its discretion, monitor and inspect the Project Assets at any time and from time to time for the purposes of determining whether any circumstances exist that warrant issuance of a Safety Compliance Order and giving the Department and the Concessionaire reports and recommendations related to such matters.

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

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

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

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

#### **Section 12.04 Development of Other Facilities**

(a) Except for the right of the Concessionaire to receive compensation set forth in Section 12.02, Section 12.04(d) (with respect to disruptions to the construction of the Project) Section 12.05 (with respect to disruptions to the construction of the Project), the State Parties will have the unlimited right, each in its sole discretion, at any time and without liability, to finance, develop, approve, construct, expand, improve, modify, upgrade, add capacity to, reconstruct, rehabilitate, restore, renew, and replace any existing and new transportation or other facilities other than the Project (including, without limitation, free roads, connecting roads, service roads, frontage roads, turnpikes, managed lanes, HOT/HOV lanes, light rail, heavy rail, high-speed rail, freight rail, and bus lanes) and exercise all of its authority to advise and recommend on transportation planning, development and funding, and to otherwise improve the GP Lanes and other roadways and structures within or adjacent to the Original Corridor, the STE Corridor, the 395 Corridor, or the Fred Ex Corridor (collectively, the "Department Projects") outside the HOT Lanes, and whether nearby or otherwise located as to affect the Project, its operation and maintenance (including the costs and expenses thereof), its vehicular traffic and/or its revenues, *provided*, that:

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

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

(b) The Department Projects include those facilities (i) owned or operated by the State Parties, including those owned or operated by a private entity pursuant to a contract with a State Party; (ii) owned or operated by a joint powers authority or similar entity to which a State Party is a member; (iii) owned or operated by any other Governmental Authority pursuant to a contract with a State Party, including, without limitation, regional mobility authorities, joint powers authorities, counties, and municipalities and (iv) owned or operated by any other Governmental Authority (including, without limitation, regional mobility authorities, joint powers authorities, counties and municipalities) with respect to which a State Party has contributed funds, in-kind contributions or other financial or administrative support. The

foregoing rights include the ability to institute, increase, or decrease tolls or other fees and charges on such facilities or modify, change, or institute new or different operation and maintenance procedures.

(c) The State Parties will have the right, without liability, to make discretionary and non-discretionary distributions of Federal and other funds for any transportation projects, programs and planning, and to exercise all of its authority to advise and recommend on transportation planning, development, and funding on any project of its choosing.

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

#### **Section 12.05 Alternative Facilities.**

(a) Additional Lanes.

(i) If the Department determines that Additional Lanes are in the State's best interests, the Department will consult with the Concessionaire as to an appropriate strategy to implement such Additional Lanes. Prior to undertaking construction of Additional Lanes, the Department will give the Concessionaire the first right to submit a proposal to construct such Additional Lanes as new high-occupancy toll lanes and HOV Lanes at the Concessionaire's sole cost as a Concessionaire Project Enhancement, so long as the Concessionaire demonstrates that (A) it has or can obtain sufficient funding (whether debt, equity, other sources of funds or combination thereof) for such Concessionaire Project Enhancement, and (B) it has or can obtain (with appropriate assistance from the Department) all required Governmental Approvals for such Concessionaire Project Enhancement.

(ii) The Concessionaire's proposal to construct Additional Lanes as new high-occupancy toll lanes pursuant to a Concessionaire Project Enhancement will contain the information specified by the Department in writing and delivered to the Concessionaire. The Concessionaire's failure to submit such a proposal within 120 Days of its receipt of the Department's specifications as to the contents of the Concessionaire's proposal will constitute a waiver of the Concessionaire's right to submit a proposal pursuant to this Section 12.05. If a valid proposal is submitted by the Concessionaire, the Department will evaluate the Concessionaire's proposal in accordance with the Department's specifications within 90 Days of its submission. If the Concessionaire determines not to pursue the construction of such Additional Lanes as a Concessionaire Project



Enhancement or the Department does not approve such Concessionaire Project Enhancement after review in accordance with the Department's specifications, the Department may add Additional Lanes as a Department Project; and except as provided in clause (iv), such Additional Lanes will constitute a Compensation Event.

(iii) The Department will coordinate the activities described in Section 12.05(a) with the Concessionaire so as to minimize to the extent reasonably feasible the disruption to the Concessionaire's construction, operation and maintenance of the Project and the generation of Toll Revenues.

(iv) Without limiting the applicability of clause (ii) above, the construction of Additional Lanes by or on behalf of the Department will not constitute a Compensation Event if the IRR Threshold has been reached as of the date on which Commencement of Use of such Additional Lanes begins.

(b) Route One Improvements and Fred Ex Route One Improvements. The Route One Improvements and Fred Ex Route One Improvements will be treated as a Compensation Event unless the IRR Threshold has been reached as of the Commencement of Use of the Route One Improvements, or the Fred Ex Route One Improvements, as applicable.

(c) Occoquan Bridge Improvements. The Occoquan Bridge Improvements will be treated as a Compensation Event unless the IRR Threshold has been reached as of the Commencement of Use of the Occoquan Bridge Improvements.

(d) Southern HOT Lanes no Longer an Alternative Facility. Under provisions of the Original Comprehensive Agreement and the First ARCA, the "Southern HOT Lanes" was a defined Alternative Facility that could be developed by the Concessionaire as a Concessionaire Project Enhancement. Under this Second ARCA, as a Concessionaire Project Enhancement the Concessionaire will design, build, finance, operate, and maintain the Fred Ex HOT Lanes, which themselves constitute only a segment (and not the entirety) of the Southern HOT Lanes. In addition, the parties agree that the remainder of the Southern HOT Lanes will no longer be considered an Alternative Facility or a Compensation Event. Accordingly, the Department may add high-occupancy toll lanes in the median of Interstate 95 south of exit 133, which high-occupancy toll lanes will not be an Alternative Facility or a Compensation Event, *provided* however, that if the construction activities associated with such high-occupancy toll lanes directly causes a material disruption to the construction of the Fred Ex Project, then such construction activities may entitle the Concessionaire to Concessionaire Damages or other relief as provided in the Agreement; *provided further* however, that Concessionaire will not be entitled to Concessionaire Damages or other relief if such material disruption is caused by a Concessionaire Party.

(e) Fred Ex Additional Lanes. For the purposes of this Section 12.05, any Fred Ex Additional Lanes will be treated the same as Additional Lanes, except:

(i) during the first 10 years following the Fred Ex Service Commencement Date, the Concessionaire shall be eligible to receive Concessionaire Damages only to the extent it can demonstrate (x) an adverse Net Revenue Impact resulting directly from Fred



Ex Additional Lanes, and (y) actual Gross Revenues in any calendar quarter following Commencement of Use of such Fred Ex Additional Lanes are less than the Gross Revenues forecasted for such quarter listed in the row entitled “Gross Revenue” set forth in either the final Base Case Financial Model Update (Fred Ex Final) or the final Base Case Financial Model Update (Fred Ex Final/Additional), as applicable;

(ii) following the 10<sup>th</sup> anniversary of the Fred Ex Service Commencement Date, the Concessionaire shall be eligible to receive Concessionaire Damages with respect to Fred Ex Additional Lanes only to the extent it can demonstrate (p) the reduction in the Concessionaire’s Net Cash Flow would result in a violation of the minimum debt service coverage ratio covenants in the Project Financing Agreements, and (q) the decrease in Toll Revenues results directly from the Fred Ex Additional Lanes. The amount of such Concessionaire Damages shall not exceed the difference, if any, between (x) the Concessionaire’s Net Cash Flow following such Compensation Event (if Concessionaire’s Net Cash Flow has decreased) and (y) any and all of the Concessionaire’s debt service coverage requirements; and

(iii) after the 30<sup>th</sup> anniversary of the Fred Ex Financial Close Date, the Department may develop and construct any Fred Ex Additional Lanes, which Fred Ex Additional Lanes shall not give rise to a Compensation Event, whether during design, construction, or operation and maintenance of such Fred Ex Additional Lanes, and whether developed and constructed under a single project or multiple projects.

(f) Occoquan Auxiliary Lane. An Occoquan Auxiliary Lane shall not constitute a Compensation Event, without regard to whether the IRR Threshold has been reached.

(g) Procedures.

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

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

(iii) The Concessionaire acknowledges that each of CTB and the Department has a paramount public interest and duty to develop and operate whatever Department

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

## **ARTICLE 13.**

### **DELAY EVENTS**

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

(a) If the Concessionaire is affected by a Delay Event, it will give written notice to the Department within 30 Days following the date on which the Concessionaire first became aware (or should have become aware, using all reasonable due diligence) that an event has occurred and that it is or will become a Delay Event, (*provided*, that in the case of the same Delay Event being a continuing cause of delay, only one notice will be necessary) (a "Delay Event Notice"). Such Delay Event Notice will include (i) a detailed description of the Delay Event, (ii) details of the circumstances from which the Delay Event arises and (iii) an estimate of the duration of the delay in the performance of obligations pursuant to this Agreement attributable to such Delay Event and information in support thereof, if known at that time. The Concessionaire will also provide such further information relating to the Delay Event as the Department may reasonably require. The Concessionaire will bear the burden of proving the occurrence of a Delay Event and the resulting impacts.

(b) If for any reason the Concessionaire fails to deliver a Delay Event Notice within such 30-Day period, the Concessionaire will be deemed to have irrevocably and forever waived and released any Claim or right to time extensions or any other relief with respect to such Delay Event pursuant to this Agreement or any Project Agreement.

(c) Upon the occurrence of a Delay Event, the Concessionaire will promptly undertake efforts to mitigate the effects of such Delay Event, including all steps that would generally be taken in accordance with Good Industry Practice. The Concessionaire will promptly deliver to the Department an explanation of the measures being undertaken to mitigate the delay and other consequences of the Delay Event. The Concessionaire will notify the Department within 30 Days following the date on which it first became aware (or should have become aware, using all reasonable due diligence) that such a Delay Event has ceased.

(d) Notwithstanding the occurrence of a Delay Event, the Concessionaire will continue its performance and observance pursuant to this Agreement of all of its obligations and covenants to be performed to the extent that it is reasonably able to do so and will use its reasonable efforts to minimize the effect and duration of the Delay Event. Without limiting the foregoing, the occurrence of a Delay Event will not excuse the Concessionaire from timely payment of monetary obligations pursuant to this Agreement, from compliance with Law, or from compliance with the Technical Requirements, except temporary inability to comply with the Technical Requirements as a direct result of the Delay Event.

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

### **Section 13.02 Delay Events During the Construction Period**

A Delay Event occurring during the Construction Period will excuse the Concessionaire from performance of its obligations to perform the Work pursuant to this Agreement but only to the extent that such obligations are directly affected by such Delay Event. In addition, during the Construction Period, extensions of milestones and/or activities identified on the Applicable Baseline Schedule for Delay Events affecting the Work will be made based on Time Impact Analysis, using the then-current Applicable Baseline Schedule and taking into account impacts of the Delay Events on Critical Path items, in accordance with the Technical Requirements, and will extend the Guaranteed Substantial Completion Date, the Final Acceptance Deadline, the 395 Guaranteed Final Completion Date, the Long Stop Date, the 395 Long Stop Date, the Fred Ex Guaranteed Final Completion Date, and the Fred Ex Long Stop Date. For avoidance of doubt, the Long Stop Date, the 395 Long Stop Date, or the Fred Ex Long Stop Date may be extended in accordance with this Agreement by reason of a Delay Event that occurs during the period after the Guaranteed Substantial Completion Date, the 395 Guaranteed Final Completion Date, or the Fred Ex Guaranteed Final Completion Date, as applicable. If the Department and the Concessionaire cannot agree upon the extension, then either party will be entitled to refer the matter to the dispute resolution procedures in Article 21. This Section 13.02 shall not apply to the design, development, and construction of the STE.

### **Section 13.03 Delay Events After the Service Commencement Date**

A Delay Event occurring after the applicable Service Commencement Date will only excuse the Concessionaire from performance of its obligations to perform O&M Work pursuant to this Agreement directly affected by such Delay Event.

## ARTICLE 14.

### **COMPENSATION EVENTS; DEPARTMENT CHANGES; DEVIATIONS; NET COST SAVINGS**

#### **Section 14.01 Compensation Events**

(a) Compensation Event Notice.

(i) If the Concessionaire is affected by a Compensation Event, it will give written notice to the Department within 30 Days following the date on which the Concessionaire first became aware (or should have become aware, using all reasonable due diligence) that an event has occurred and that it is or will become a Compensation Event (a “Compensation Event Notice”); *provided*, that, in the case of a Department Project Enhancement, a Compensation Event Notice must be given within 30 days following the Commencement of Use of such Department Project Enhancement. The Compensation Event Notice will set forth (A) the Compensation Event and its date of occurrence in reasonable detail, (B) the amount claimed as Concessionaire Damages and (C) details of the calculation thereof including a written analysis and calculation of the estimated Net Cost Impact, if any, and estimated Net Revenue Impact, if known at that time; *provided* that, if the amount of Concessionaire Damages and details of the calculation thereof are not available within the 30-Day notice period required in this Agreement, the Concessionaire may submit an estimate of the amount, or if known, the actual amount claimed as Concessionaire Damages and details of the calculation thereof no later than 60 Days from submission of the Compensation Event Notice; *provided* however, the Concessionaire may update the amount of claimed Concessionaire Damages and details thereof every 30 Days.

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

(iii) After the Concessionaire submits a Compensation Event Notice, the Department may, but is not required to, obtain, at its sole cost, (A) a comprehensive report as to the Concessionaire’s estimate of the Net Cost Impact attributable to the Compensation Event and (B) from a traffic and revenue consultant a traffic and revenue study, prepared in accordance with Good Industry Practice, analyzing and calculating the estimated Net Revenue Impact attributable to the Compensation Event. Within 90 Days after receiving a Compensation Event Notice and the supporting documentation required by Section 14.01(a)(i), the Department will provide to the Concessionaire a copy of such reports as it has elected to obtain. If the Department disagrees with the entitlement to or amount of Concessionaire Damages claimed by the Concessionaire, the Concessionaire and Department will commence good faith negotiations to resolve the Dispute within 120 Days after the delivery of the Compensation Event Notice. If the Dispute cannot be

resolved within such 120 Days, either party may submit the Dispute for resolution pursuant to Article 21.

(b) Concessionaire Damages Determination.

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

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

(iii) The Concessionaire Damages will be net of all applicable insurance proceeds payable to the Concessionaire or its Contractors associated with the Compensation Event (or that would have been payable to the Concessionaire or its Contractors but for the failure by the Concessionaire or its Contractors to comply with the insurance requirements set forth in Section 14.01(b)(v) and Article 17), except as any payment of such insurance proceeds is affected by the bankruptcy or insolvency of the provider of such insurance, and will include all costs of asserting a Claim for such insurance proceeds and any increased insurance premium resulting from any such Claim; *provided*, that any increased insurance premium resulting from such Claim is certified in writing by the insurance provider of the Concessionaire or its Contractor, as applicable, prior to payment by the Department.

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

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

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

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

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

(i) in the case of any lump sum payment of the Concessionaire Damages or any other payment schedule that differs from the projected timing of the Concessionaire Damages, the net present value of the Concessionaire Damages will be determined using the then appropriate risk adjusted discount rate(s), as agreed between the Department and the Concessionaire;

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

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

(iv) any Net Cost Savings or positive Net Revenue Impact attributable to such Compensation Event must be included in the determination of Concessionaire Damages under the provisions of this Section 14.01, as agreed between the Department and the Concessionaire.

(d) Concessionaire Funding of Concessionaire Damages. If requested by the Department, the Concessionaire will use commercially reasonable efforts to obtain funding for a portion or the full amount of Concessionaire Damages; *provided*, however, that the Concessionaire will not be obligated to obtain such funding if the Concessionaire, in its reasonable discretion, determines that obtaining such funding will diminish the Project Value, or to the extent such funding, combined with any payments from the Department, will not make funds available in such time and in such amounts as are required to make current payments to



third parties as they are due or will become due in respect of any portion of Net Cost Impact included as part of such Concessionaire Damages. If the Concessionaire is able to obtain funding for all or part of the Concessionaire Damages, the Concessionaire will submit a funding proposal for the Department's review and approval. Such funding proposal will identify the terms and conditions required to secure funding for such Concessionaire Damages, including any proposed payments by the Department. The Department will reject or accept the funding proposal within 30 Days of receipt of the funding proposal. If the funding proposal is accepted by the Department, the Department will issue a Change Order to implement the funding proposal and to the extent such funding proposal secures financing for less than 100% of the Concessionaire Damages, the Change Order will provide funding for the remainder thereof on terms and conditions mutually agreed by the parties.

(e) Sole Remedy and Release of Claims.

(i) Without limiting the Concessionaire's rights with respect to non-monetary relief for Delay Events, the Concessionaire Damages as determined according to this Section 14.01 will represent the sole right to compensation and damages for the adverse effects of a Compensation Event.

(ii) As a condition precedent to the Department's obligation to compensate any portion of the Concessionaire Damages, following a determination of the Concessionaire Damages, the Concessionaire will execute a full, unconditional, irrevocable release, in form reasonably acceptable to the Department, of any Claims, Losses or other rights to compensation or other monetary relief associated with such Compensation Event, except for (A) the Claim and right to the subject Concessionaire Damages, (B) the Concessionaire's right to non-monetary relief for a Delay Event and (C) the right to terminate this Agreement in accordance with Article 20 and to receive any applicable termination compensation.

(f) Additional Provisions for Certain Compensation Events.

(i) For the Compensation Event described in clause (k) of the definition thereof, the Concessionaire will be entitled to recover the Net Cost Impact for such Compensation Event; *provided*, however, that:

(A) in no event will the Concessionaire be entitled to submit a Claim if the Net Cost Impact of such Compensation Event does not equal or exceed \$10 million per occurrence ("Claim Threshold");

(B) if such Compensation Event meets the Claim Threshold, the Department will be solely responsible for the Net Cost Impact in excess of \$10 million for such Compensation Event; *provided*, however, that the Concessionaire will be solely responsible for the Net Cost Impact up to \$10 million per occurrence for the first two Compensation Events that meet the Claim Threshold; and

(C) the Department will be responsible for the Net Cost Impact for such Compensation Events after the first two such Compensation Events occur that meet the Claim Threshold.



For the avoidance of doubt, the Concessionaire will be solely responsible for such Compensation Events with a Net Cost Impact under \$10 million per occurrence.

(ii) For the Compensation Event described in clause (l) of the definition thereof, the Concessionaire will be entitled to recover the Net Cost Impact for such Compensation Event, *provided*, however, that:

(A) the Concessionaire will be solely responsible for the Net Cost Impact up to \$5 million (\$3 million for the 395 Project and also \$3 million for the Fred Ex Project) in the aggregate for such Compensation Event;

(B) the Department will be solely responsible for the Net Cost Impact in excess of \$5 million (\$3 million for the 395 Project and also \$3 million for the Fred Ex Project) but less than or equal to \$10 million (\$6 million for the 395 Project and also \$6 million for the Fred Ex Project) for such Compensation Event; and

(C) the parties will share evenly the Net Cost Impact in excess of \$10 million (\$6 million for the 395 Project and also \$6 million for the Fred Ex Project) for such Compensation Event.

The provisions of this Section 14.01(f)(ii) apply to each event and not in the aggregate.

## **Section 14.02 Department Changes**

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

(i) is not in compliance with Law;

(ii) would contravene an existing Governmental Approval and such contravention cannot be corrected by the issuance of a further or revised Governmental Approval;

(iii) would cause an insured risk to become uninsurable; or

(iv) would give rise to a material and adverse health or safety issue.

(b) Request for Change Proposal.

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

(ii) Within 21 Days following Concessionaire's receipt of the Request for Change Proposal, the Concessionaire will provide the Department with a preliminary

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

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

(iv) The Department will pay the Concessionaire’s Allocable Costs for preparing a Change Proposal and conducting preliminary work to respond to a Request for Change Proposal at the Department’s request. Upon payment of such Allocable Costs, the Department will own all Work Product included in the Change Proposal.

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

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

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

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

(d) Disputed Work.

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

(ii) If the parties disagree whether the Work in question constitutes a Department Change, the Department will have the right to issue a Directive Letter, directing the Concessionaire to proceed with the performance of the Work in question,

and the Concessionaire will proceed with such work. Such Directive Letter will include any changes to the Technical Requirements necessary to proceed with the Work covered by the Directive Letter.

(iii) Upon receipt of a Directive Letter under (i) or (ii) above, the Concessionaire will implement and perform the Work in question as directed by the Department and the Department will make payments to the Concessionaire for such Work performed pursuant to Section 14.02(e).

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

(e) Payments for Directive Letter Work. If the Department issues a Directive Letter to the Concessionaire pursuant to Section 14.02(d), the Department will make payments to the Concessionaire on a monthly basis for the Work in question for the reasonable Allocable Costs of the Work in question, subject to subsequent adjustment through the dispute resolution procedures set forth in Article 21.

(f) Technical Requirements Revisions. Notwithstanding anything to the contrary contained in this Agreement, during the Construction Period, a change in the terms and conditions of the Technical Requirements (including changes in the standards applicable to the Work) required or authorized by the Department will constitute a Department Change; provided, however that the Technical Requirements, as amended for the 395 Project and as amended for the Fred Ex Project, will not constitute a Department Change.

(g) 395 Department Assets. Although the 395 Department Assets are being developed as Change Orders, the Parties agree that full and complete compensation for the full scope of the Work associated with the 395 Department Assets is included within this Agreement as of the Amended and Restated Agreement Date, and nothing within the scope of such Work will, in and of itself, entitle the Concessionaire to any additional relief (including a Delay Event or a Compensation Event) or require the Department or the Concessionaire to comply with any of the provisions herein related to Change Orders (but only with regard to the scope of Work associated with the 395 Department Assets as of the Amended and Restated Agreement Date). Notwithstanding the foregoing, if a Delay Event or a Compensation Event occurs during the Construction Period for the 395 Department Assets, the Concessionaire will be entitled to seek relief in accordance with this Agreement.

### **Section 14.03 Concessionaire Requests for Deviations**

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

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

(ii) a statement concerning the basis for the request, benefits to the Department or the Project and an itemization of the contract items and requirements affected by the request;

(iii) a detailed estimate of the time and/or cost savings and impacts on Gross Revenues;

(iv) proposed specifications and recommendations as to the manner in which the requested changes are to be accomplished; and

(v) the time by which the request must be approved so as to obtain the maximum cost-effectiveness.

(b) The Department may consider and approve or disapprove, in its sole discretion, any such request, and the Concessionaire will bear the burden of persuading the Department that the Deviation sought constitutes sound and safe engineering consistent with Good Industry Practice and achieves the Department's applicable safety standards and criteria. No Deviation will exist or be effective unless and until approval thereof is expressly provided in writing by the Department. Approval of a submission containing a Deviation will not constitute approval of the Deviation unless and until the Department expressly and specifically approves the Deviation in writing pursuant to the terms of this Section 14.03(b). The Department's decision will not be subject to the dispute resolution procedures of Article 21. If not previously communicated, the Department will provide within 10 Days after a request by the Concessionaire its rationale, in reasonable detail, for any disapproval of a Deviation proposed by the Concessionaire.

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

#### **Section 14.04 Net Cost Savings or Positive Net Revenue Impact**

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

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

(c) Following a determination of the Net Cost Saving or positive Net Revenue Impact by mutual agreement or the dispute resolution procedures set forth in Article 21, the Department will decide on the percentage share of each that it desires as compensation, in any event not to exceed 50% of the applicable Net Cost Savings and/or positive Net Revenue Impact. The Concessionaire will compensate the Department in an amount equal to the selected percentage in the manner provided for in Section 14.01(c); *provided* that when Concessionaire Damages and Net Cost Saving or positive Net Revenue Impact are payable in the same time period, such amounts shall be netted to the extent possible. The parties will select one or any combination of the following methods of compensation:

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

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

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

## **ARTICLE 15.**

### **INDEMNIFICATION**

#### **Section 15.01 Indemnities of the Concessionaire**

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

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

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

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

(d) any actual or alleged inverse condemnation, trespass, nuisance or similar taking of or harm to real property committed or caused by a Concessionaire Party in connection with the Project arising from any actual or alleged (i) failure by the Concessionaire to comply with, observe or perform any of the covenants, obligations, agreements, terms or conditions in this Agreement; (ii) breach by Concessionaire of its representations or warranties set forth in this Agreement or (iii) misconduct, negligence or other culpable act, error or omission of a Concessionaire Party; *provided*, however, that the Concessionaire will not be required to indemnify, defend or hold harmless a State Indemnitee from and against any Losses actually suffered or incurred by such State Indemnitee due to Third-Party Claims that are based upon any actual inverse condemnation arising from the establishment of the Project Right of Way as identified in the NEPA Documents and any other real property or real property rights outside the Project Right of Way acquired pursuant to Section 8.05(b);

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

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

(g) any actual or alleged claim for brokerage commissions, fees or other compensation by any Person who acted on behalf of the Concessionaire, its Affiliates or their respective Representatives in connection with this Agreement or a Project Agreement, any Transfer of the Concessionaire's Interest or any part thereof.

## **Section 15.02 Defense and Indemnification Procedures**

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

(b) The Concessionaire will be entitled and obligated to appoint counsel of its choice at the expense of the Concessionaire to represent a State Indemnitee in any action for which indemnification is sought (in which case the Concessionaire will not thereafter be responsible for the fees and expenses of any separate counsel retained by that State Indemnitee except as set forth below); *provided*, that such counsel will be satisfactory to such State Indemnitee.



Notwithstanding the Concessionaire's appointment of counsel to represent a State Indemnitee in any action, such State Indemnitee will have the right to employ separate counsel, and the Concessionaire will bear the reasonable fees, costs and expenses of such separate counsel, if:

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

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

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

(iv) the Concessionaire authorizes the State Indemnitee to employ separate counsel at the Concessionaire's expense.

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

## ARTICLE 16.

### HAZARDOUS SUBSTANCES

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

(a) The Concessionaire will be responsible for the management, treatment, handling, storage, monitoring, remediation, removal, transport, and/or disposal of any Hazardous Substances the presence of which constitutes a Hazardous Environmental Condition that are discovered on, in or under the Project Right of Way on which the Work is performed, after the earlier to occur of (i) the issuance of an LNTP, 395 LNTP, or Fred Ex LNTP (but limited to the portion of the Project Right of Way on which the LNTP Work, 395 Early Work, or Fred Ex Early Work is performed pursuant to such LNTP, 395 LNTP, or Fred Ex LNTP), (ii) issuance of the applicable Construction Notice to Proceed, or (iii) the applicable Service Commencement Date in accordance with this Agreement. The Concessionaire will be responsible for the management, treatment, handling, storage, monitoring, remediation, removal, transport, and/or disposal of any Hazardous Substances the presence of which constitutes a Hazardous Environmental Condition that are discovered on, in or under the Project Right of Way within the STE Corridor on which the Work is performed on and after the applicable Service Commencement Date.



(b) After the earlier to occur of (i) the issuance of an LNTP, 395 LNTP, or Fred Ex LNTP (but limited to the portion of the Project Right of Way on which the LNTP Work, 395 Early Work, or Fred Ex Early Work is performed pursuant to such LNTP, 395 LNTP, or Fred Ex LNTP, as applicable), (ii) the issuance of the applicable Construction Notice to Proceed, or (iii) the applicable Service Commencement Date, if the Concessionaire encounters any Hazardous Environmental Condition that must be managed, treated, handled, stored, monitored, removed, transported, or disposed of (collectively, “Remedial Actions”), then the Concessionaire will promptly notify the Department. In the case of Hazardous Environmental Conditions that are attributable to Known Pre-Existing Hazardous Substances, the Concessionaire will thereafter proceed with such Remedial Actions in accordance with the Concessionaire’s Environmental Management Plan. In the case of all other Hazardous Environmental Conditions and to the extent not covered by the Environmental Management Plan, the Concessionaire will develop a Remedial Action Plan setting out the scope of the Remedial Actions that the Concessionaire proposes to take in relation to the relevant Hazardous Environmental Condition, such actions to include, but not be limited to: (i) conducting such further investigations as may be necessary or appropriate to determine the nature and extent of the Hazardous Substances and submitting copies of such data and reports to the Department for its review and approval, (ii) taking reasonable steps, including in the case of excavation, construction, reconstruction or rehabilitation, modifications and/or construction techniques, to avoid or minimize excavation or dewatering in areas with Hazardous Substances (iii) preparing and obtaining Governmental Approvals for remedial action plans, including Department approval, (iv) carrying out the Remedial Action Plan, including, as necessary, disposal of the Hazardous Substances and (v) timely informing the Department of all such actions.

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

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

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

cooperate with and notify each other with respect to activities undertaken pursuant to this Section 16.01(e).

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

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

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

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

(c) At all times during the Term, the Concessionaire will provide cost estimates with respect to such Remedial Actions which may be paid by the Department, for the Department's review and approval prior to proceeding with any such Remedial Actions, *provided*, that in the case of a sudden release of any Hazardous Substances, the Concessionaire may take all reasonable actions necessary to stabilize and contain the release without prior submission of such cost estimates. If the Department has not responded to a request for such approval pursuant to this Section 16.02(c) within 21 Days after the Department's acknowledgement of receipt (or in the case of an emergency a reasonably appropriate shorter period), the request will be deemed to be approved, except to the extent matters deviate from applicable Technical Requirements, or Law.

### **Section 16.03 Concessionaire Indemnifications Regarding Hazardous Substances**

(a) The Concessionaire will indemnify, protect, defend and hold harmless and release each State Indemnitee from and against any and all Third Party Claims, including attorney's fees,

expert witness fees and court costs suffered or incurred by such State Indemnitee, to the extent caused by:

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

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

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

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

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

#### **Section 16.04 Generator Status**

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

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

### **ARTICLE 17.**

#### **INSURANCE; PERFORMANCE SECURITY**

##### **Section 17.01 Insurance Coverage Required**

In general, the Concessionaire shall provide and maintain at its own expense all insurance coverage types and amounts stated in Exhibit Y.

(a) Required Insurance for the Construction Period. The Concessionaire will provide and maintain at its own expense, or cause the Design-Build Contractor to provide and maintain, for the Construction Period the insurance coverages specified in Section 1 of the Insurance Requirements attached as Exhibits Y-1 and Y-2. Section 17.01(a) shall not apply to the design, development and construction of the STE.

(b) Required Insurance for Operating Period. The Concessionaire will provide and maintain at its own expense, or cause the O&M Contractor to provide and maintain, for the Operating Period and for any time period following the Term's expiration if the Concessionaire is required to return and perform any additional work, the insurance coverages specified in the Insurance Requirements attached as Exhibit Y-3 and the Technical Requirements.

(c) Railroad Protective Liability Insurance. The Concessionaire will provide and maintain at its own expense, or cause to be provided and maintained, during the Term, railroad protective liability insurance as specified in the Insurance Requirements attached as Exhibit Y and the Technical Requirements or as may be required by any railroad in connection with Work across, under or adjacent to the railroad's tracks or railroad right-of-way.

(d) Required Insurance for the 395 Early Work. The Concessionaire will provide and maintain at its own expense, or cause the 395 Design-Build Contractor or the TTMS Contractor to provide and maintain, during the period while the 395 Design-Build Contractor or the TTMS Contractor is performing the 395 Early Work, the insurance coverages specified in Section 4 of the Insurance Requirements attached as Exhibit Y-1.

(e) Required Insurance for the Fred Ex Early Work. The Concessionaire will provide and maintain at its own expense, or cause the Design-Build Contractor or the TTMS Contractor to provide and maintain, during the period while the Fred Ex Design-Build Contractor or the TTMS Contractor is performing the Fred Ex Early Work, the insurance coverages specified in Section of the Insurance Requirements attached as Exhibit Y-2.

### **Section 17.02 General Requirements Applicable to Insurance**

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

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

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

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

(d) will be maintained with insurers that at the time coverage commences are authorized to do business in the State and have a current policyholder's management and

financial size category rating of not less than “A-: VIII” according to A.M. Best’s Financial Strength Rating and Financial Size Category, except as otherwise approved by the Department;

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

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

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

(h) other than for workers compensation insurance, employer’s liability insurance, automobile liability insurance, property and business interruption insurance, professional liability insurance and contractor pollution liability insurance, will be effected on a severability of interest basis for the purposes of which the insurer accepts the term “insured” as applying to each of the persons comprising the insured as if a separate policy of insurance had been issued to each of them (subject always to the overall policy limit not being increased as a result);

(i) other than for professional liability insurance, worker’s compensation insurance, employer’s liability insurance and property and business interruption insurance, will include cross-liability clauses allowing one insured to bring a claim against another insured party;

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

(k) other than for workers compensation insurance, employer’s liability insurance, automobile liability insurance, professional liability insurance and contractor pollution liability insurance, will contain a provision under which the insurer agrees that the failure of one insured to observe and fulfill the terms of the policy will not prejudice the coverage of the other insureds;

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

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

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

### **Section 17.03 Proof of Coverage**

The Concessionaire will deliver to the Department true and correct copies of policies, material forms, endorsements, and premium indications of each insurance policy certified by the Concessionaire's insurance broker (or as appropriate the Design-Build Contractor's, the Lead Engineering Contractor's, the TTMS Contractor's or the O&M Contractor's broker) to be true and correct copies of such policies, forms, endorsements and premium indications, as a condition to receiving the applicable notices to proceed set forth in this Agreement, and annually thereafter no later than ten Days prior to policy renewal or replacement. The Concessionaire will also deliver to the Department duplicate originals or copies of each Project-specific insurance policy and endorsements for the Project coverage of each other insurance policy certified by the Concessionaire's insurance broker (or as appropriate the Design-Build Contractor's, the Lead Engineering Contractor's, the TTMS Contractor's or the O&M Contractor's broker) to be true and correct copies of the originals no later than 60 Days after receiving the applicable notices to proceed set forth in this Agreement and annually thereafter no later than 60 Days after policy renewal or replacement, and also whenever reasonably requested by the Department.

### **Section 17.04 Adjustments in Coverage Amounts**

(a) All insurance coverage limits stipulated in Section 17.01(b), as well as deductibles and self-insured retentions, will be reviewed every three years and adjusted as appropriate, in line with such amounts that would be insured by a prudent business similar to, and undertaking similar activities to, the Concessionaire; *provided*, that no such review or adjustments will be required with respect to insurance coverage required for the Design-Build Work.

(b) In determining increases in limits and adjustments to deductibles or self-insured retentions, the parties will take into account (A) Claims and Loss experience for the Project, *provided*, that premium increases due to adverse Claims experience will not be a basis for justifying increased deductibles or self-insured retentions; (B) the condition of the Project, (C) the safety compliance and performance record for the Project; (D) then-prevailing Good Industry Practice for insuring comparable transportation projects; and (E) the provisions regarding unavailability of increased coverage set forth in Section 17.05.

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

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



## Section 17.05 Unavailability of Insurance

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

(b) The Concessionaire will not be excused from satisfying the insurance requirements of this Article 17 merely because premiums for such insurance are higher than anticipated. To establish that the required coverages (or required terms of such coverages, including insurance policy limits) are not available on commercially reasonable terms, the Concessionaire will bear the burden of proving either that (i) the same is not available at all in the global insurance and reinsurance markets or (ii) the premiums for the same have so materially increased over those previously paid for the same coverage that a reasonable and prudent risk manager for a Person seeking to insure comparable risks would conclude that such increased premiums are not justified by the risk protection afforded. For the purpose of clause (ii), the only increases in premiums that may be considered are those caused by changes in general market conditions in the insurance industry.

(c) In the event that the Concessionaire and the Department cannot reach a resolution acceptable to both parties within ten Days, the Concessionaire and the Department will make arrangements for the formation of an insurance panel consisting of the Concessionaire's insurance advisor (or broker), the Department or its insurance advisor (or broker) and an independent insurance expert from a nationally recognized insurance brokerage firm, chosen by the Concessionaire and reasonably acceptable to the Department. Such independent expert will conduct a separate review of the relevant insurance requirements of this Article 17 and the Technical Requirements and the market for such insurance at the time, giving due consideration to the representations of both insurance advisors, and upon conclusion of such review will issue a written report stating whether such insurance is available or unavailable on a commercially reasonable basis.

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

(e) The Department makes no representation that the limits of liability specified for any insurance policy to be carried pursuant to this Agreement are adequate to protect the Concessionaire against its undertakings pursuant to this Agreement, to the Department, or any



third party. No such limits of liability will preclude the Department from taking any actions as are available to it under the Project Agreements or Law.

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

(a) If in any instance the Concessionaire has not performed its obligations respecting insurance coverage set forth in this Agreement (as may be adjusted in accordance with Section 17.05) or is unable to enforce and collect any such insurance for failure to assert Claims in accordance with the terms of the insurance policies, then for purposes of determining the Concessionaire's liability and the limits thereon or determining reductions in compensation due from the Department to the Concessionaire on account of available insurance, the Concessionaire will be treated as if it has elected to self-insure up to the full amount of insurance coverage which would have been available had the Concessionaire performed such obligations and not committed such failure.

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

#### **Section 17.07 Restoration; Insurance Proceeds**

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

(i) give the Department notice thereof promptly after the Concessionaire receives actual notice of such casualty;

(ii) except (A) in the case of destruction or damage caused by a Compensation Event (in which case the provisions of Section 14.01 will apply) or (B) as otherwise provided in Section 20.03, at its sole cost and expense (whether or not insurance proceeds, if any, are equal to the estimated cost of repairs, alterations, restorations, replacement and rebuilding (the "Casualty Cost")), proceed diligently to restore the Project to its pre-casualty condition;

(iii) deposit all insurance proceeds received by the Concessionaire in connection with any restoration with a Depositary (such insurance proceeds, together with any interest earned thereon, the "Restoration Funds"); *provided*, that the procedures of this Section 17.07(a)(iii) will only apply to casualty events for which the cost of restoration exceeds \$5,000,000, adjusted annually by the percentage increase in CPI.

(b) Subject to Section 17.07(a)(ii), if the Concessionaire (i) fails or neglects to commence the diligent restoration of the Project or the portion thereof so damaged or destroyed, (ii) having so commenced such restoration, fails to diligently complete the same in accordance with the terms of this Agreement or (iii) prior to the completion of any such restoration, this Agreement expires or terminates in accordance with the terms of this Agreement, the Department

may, but will not be required to, complete such restoration at the Concessionaire's expense and will be entitled to be paid out of the Restoration Funds for the relevant restoration costs incurred by the Department. Subject to Section 17.07(a)(ii), in any case where this Agreement will expire or be terminated prior to the completion of the restoration, the Concessionaire will (A) account to the Department for all amounts spent in connection with any restoration which was undertaken, (B) immediately pay over or cause the Depository to pay over to the Department the remainder, if any, of the Restoration Funds received by the Concessionaire prior to such termination or cancellation and (C) pay over or cause the Depository to pay over to the Department, within five Business Days after receipt thereof, any Restoration Funds received by the Concessionaire or the Depository subsequent to such termination or cancellation. The Concessionaire's obligations under this Section 17.07(b) will survive the expiration or termination of this Agreement.

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

(i) prior to commencing any restoration, the Concessionaire will furnish to the Department for its approval the estimated cost, estimated schedule and detailed plan for the completion of the restoration, each prepared by an architect or engineer;

(ii) the Restoration Funds will be paid to the Concessionaire in installments as the restoration progresses, subject to Section 17.07(c)(iii), based upon requisitions to be submitted by the Concessionaire to the Depository, with a copy to the Department, in compliance with Section 17.07(d), showing the cost of labor and materials purchased for incorporation in the restoration, or incorporated therein since the previous requisition, or the amounts payable or paid to the Contractor, as the case may be, and due and payable or paid by the Concessionaire; *provided*, that if any Lien caused by a Concessionaire Party is filed against the Project or any part thereof in connection with the restoration (other than a Permitted Encumbrances (but not including clause (c) of the definition thereof)), the Concessionaire will not be entitled to receive any further installment until such Lien is satisfied or discharged (by bonding or otherwise); *provided further*, that notwithstanding the foregoing, but subject to the provisions of Section 17.07(c)(iii), the existence of any such Lien will not preclude the Concessionaire from receiving any installment of Restoration Funds so long as such Lien will be discharged with funds from such installment and at the time the Concessionaire receives such installment the Concessionaire delivers to the Department and the Depository a release of such Lien executed by the holder of such Lien and in recordable form;

(iii) the amount of each installment to be paid to the Concessionaire will be the aggregate amount of Casualty Costs theretofore incurred by the Concessionaire minus the aggregate amount of Restoration Funds theretofore paid to the Concessionaire in connection therewith; *provided*, that all disbursements to the Concessionaire will be made based upon an architect's or engineer's certificate for payment in accordance with industry standards, and disbursements may be made for advance deposits for materials

and Contractors to the extent that such disbursements are customary in the industry and that the unapplied portion of the funds held by the Depository, together with other funds available to the Concessionaire for such Restoration, as certified by the Concessionaire, are sufficient to complete the restoration; and

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

(d) The following will be conditions precedent to each payment made to the Concessionaire as provided in Section 17.07(c):

(i) the Concessionaire will have furnished the Department with estimates of costs and schedule and a detailed plan for the completion of the restoration, as provided for in Section 17.07(c)(i);

(ii) the Concessionaire will have furnished the Department a certificate stating that the materials and other items which are the subject of the requisition have been delivered to the Project (except with respect to requisitions for advance deposits permitted under Section 17.07(c)(iii)), free and clear of all Liens (other than Permitted Encumbrances), and no unsatisfied or unbonded mechanic's or other Liens have been claimed, except for any Lien that will be discharged, by bonding or otherwise, with funds to be received pursuant to such requisition (*provided*, that a release of such Lien is delivered to the Depository in accordance with Section 17.07(c)(ii));

(iii) the restoration will be carried out under the supervision of the relevant architect or engineer, who is licensed in the State and has met all of the requirements of the Virginia Department of Professional and Occupational Regulation applicable to an architect or engineer and who may be a licensed employee of the Concessionaire or a Contractor, and there will be submitted to the Depository and the Department the certificate of such architect or engineer stating that:

(A) the sum then requested to be withdrawn either has been paid by the Concessionaire or is due and payable to Contractors, engineers, architects or other Persons (whose names and addresses will be stated), who have rendered or furnished services or materials for the work and giving a brief description of such services and materials and the principal subdivisions or categories thereof and the several amounts so paid or due to each of such Persons in respect thereof, and stating in reasonable detail the progress of the work up to the date of such certificate;

(B) no part of such expenditures has been made the basis, in any previous requisition (whether paid or pending), for the withdrawal of Restoration Funds or has been made out of the Restoration Funds received by the Concessionaire;

(C) the sum then requested does not exceed the value of the services and materials described in the certificate;

(D) other than amounts for disbursements for advance deposits for materials and Contractors, the work relating to such requisition has been performed in accordance with this Agreement;

(E) the balance of the Restoration Funds held by the Depositary or available from other sources will be sufficient upon completion of the restoration to pay for the same in full, and stating in reasonable detail an estimate of the cost of such completion; and

(F) in the case of the final payment to the Concessionaire, the restoration has been completed in accordance with this Agreement.

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

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

(g) Restoration Funds deposited with a Depositary will be invested and reinvested in direct obligations of and obligations fully guaranteed by, the United States of America or any agency or instrumentality of the United States of America, the obligations of which are backed by the full faith and credit of the United States of America, or in other “permitted investments” under the Project Financing Agreements, and all interest earned on such investments will be added to the Restoration Funds.

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

### **Section 17.08 Funding and Performance Security**

(a) Performance Security – Equity Funding Guaranties or Equity Letters of Credit.

(i) With respect to the Original Project, the Concessionaire will cause each Equity Member to provide an equity funding guaranty from each of the Fluor Guarantor and the Transurban Guarantor, as applicable (each, an “Equity Funding Guaranty”),

which guarantees the funding of capital contributions of the Equity Members in accordance with the terms of the Equity Funding Agreements.

(ii) With respect to the 395 Project, the Concessionaire will cause each Equity Sponsor to provide either:

(A) one or more Letters of Credit in an aggregate amount equal to the 395 Equity Commitment Amount (the “395 Equity Letter of Credit”) in accordance with the 395 Project Financing Agreements; and/or

(B) an equity funding guaranty from the Transurban Guarantor (the “395 Equity Funding Guaranty”) which guarantees the funding of capital contributions of such Equity Sponsor in accordance with the terms of the 395 Equity Funding Agreements.

(iii) With respect to the Fred Ex Project, the Concessionaire will cause each Equity Sponsor to provide either:

(A) one or more Letters of Credit in an aggregate amount equal to the Fred Ex Equity Commitment Amount (the “Fred Ex Equity Letter of Credit”) in accordance with the Fred Ex Project Financing Agreements; and/or

(B) an equity funding guaranty from the Transurban Guarantor (the “Fred Ex Equity Funding Guaranty”) which guarantees the funding of capital contributions of such Equity Sponsor in accordance with the terms of the Fred Ex Equity Funding Agreements in an aggregate amount equal to the Fred Ex Equity Commitment Amount.

(C) Subject to the provisions of the Direct Agreement, the 395 Direct Agreement, and the Fred Ex Direct Agreement, the Project Financing Agreements will include a provision granting the Department the right to direct the Collateral Agent to draw upon the applicable Equity Funding Guaranty, the 395 Equity Letter of Credit (if any), the 395 Equity Funding Guaranty (if any), the Fred Ex Equity Letter of Credit (if any), and/or the Fred Ex Equity Funding Guaranty (if any), with respect to any amounts that the relevant Equity Member or Equity Sponsor has failed to fund when due and payable (whether at the scheduled date or upon acceleration upon an event of default under the Project Financing Agreements), and that the proceeds of such draw will be deposited in a project account as designated by the Collateral Agent in accordance with the Project Financing Agreements.

(b) Design-Build Performance Security – Design-Build and TTMS.

(i) Design-Build Security – Original Project.

(A) Design-Build Letter of Credit. With respect to the Original Project, the Concessionaire will require the Design-Build Contractor to furnish a Letter of Credit (the “Design-Build Letter of Credit”) in an amount not less than seven and one-half percent (7.5%) of the price of the Design-Build Contract. The Design-Build Letter

of Credit will provide that it may be transferred by the Concessionaire to the Department, as beneficiary, with rights to draw upon or exercise other remedies thereunder if the Department succeeds to the position of the Concessionaire under the Design-Build Contract.

(B) Upon the Concessionaire's receipt from the Department of the Substantial Completion Certificate, the Design-Build Letter of Credit may be reduced to an amount not less than three percent (3%) of the price of the Design-Build Contract. If the Punch List has not been completed within 60 Days after the Final Acceptance Deadline, the Concessionaire agrees to draw on the Design-Build Letter of Credit at the written direction of the Department and to use the proceeds of such drawing to provide for the prompt completion of the items on the Punch List.

(C) Design-Build Work Guarantee. In connection with the Original Project and concurrently with Financial Close or, if earlier, the commencement of Work under the Design-Build Contract, the Concessionaire will cause to be delivered to the Department, an executed copy of a guaranty agreement of the Fluor Guarantor, in substantially the form set forth in Exhibit F (the "Design-Build Work Guarantee"), in which the Fluor Guarantor guarantees the performance of the Design-Build Contractor's obligations under the Design-Build Contract. In addition to and notwithstanding the Design-Build Work Guarantee required to be delivered pursuant to the preceding sentence, the Concessionaire will ensure that the Design-Build Contract will include customary provisions limiting the Design-Build Contractor's liability to not less than 40% of the aggregate dollar value of the Work to be performed thereunder.

(ii) Design-Build and TTMS Performance Security – 395 Project.

(A) 395 Payment Bond and 395 Performance Bond. In connection with the 395 Project, the Concessionaire will furnish or require the 395 Design-Build Contractor to furnish (1) a Payment Bond from a surety or other firm acceptable to the Department (the "395 Payment Bond") in an amount equal to 100% of the 395 Design-Build Cost and (2) a Performance Bond from a surety or other firm acceptable to the Department (the "395 Performance Bond") in an amount equal to 100% of the 395 Design-Build Cost, each in substantially the forms set forth in Exhibit Q-1.

(B) Performance Security for the 395 TTMS Work. In connection with the 395 TTMS Work, the Concessionaire will require the 395 TTMS Contractor to furnish either: (1)(x) a Payment Bond from a surety or other firm acceptable to the Department (the "395 TTMS Payment Bond") in an amount equal to 100% of the cost for the 395 TTMS Work and (y) a Performance Bond from a surety or other firm acceptable to the Department (the "395 TTMS Performance Bond") in an amount equal to 100% of the cost for the 395 TTMS Work or (2) a Letter of Credit (the "395 TTMS Letter of Credit") in an amount equal to 100% of the cost for the 395 TTMS Work.

(C) Each of the 395 Payment Bond, the 395 Performance Bond, the 395 TTMS Payment Bond and the 395 TTMS Performance Bond may be provided in multiple forms that, in the aggregate, equal the required amount for each of such 395



Payment Bond, the 395 Performance Bond, the 395 TTMS Payment Bond and the 395 TTMS Performance Bond, as applicable. The 395 Payment Bond, the 395 Performance Bond, the 395 TTMS Payment Bond and the 395 TTMS Performance Bond each will name the Department and the Collateral Agent (as applicable) as an obligee and will provide that it may be transferred by the Concessionaire to the Department or the Collateral Agent, as beneficiary, with rights to draw upon or exercise other remedies thereunder if the Department or the Collateral Agent, as applicable, succeeds to the position of the Concessionaire under the 395 Design-Build Contract or the 395 TTMS Contract, as applicable. The 395 TTMS Letter of Credit will provide that it may be transferred by the Concessionaire to the Department (or the Collateral Agent, as applicable), as beneficiary, with rights to draw upon or exercise other remedies thereunder if the Department succeeds to the position of the Concessionaire under the 395 TTMS Contract.

(iii) Design-Build and TTMS Performance Security – Fred Ex Project.

(A) Fred Ex Payment Bond and Fred Ex Performance Bond. In connection with the Fred Ex Project, the Concessionaire will furnish or require the Fred Ex Design-Build Contractor to furnish (1) a Payment Bond from a surety or other firm acceptable to the Department (the “Fred Ex Payment Bond”) in an amount equal to 100% of the Fred Ex Design-Build Cost and (2) a Performance Bond from a surety or other firm acceptable to the Department (the “Fred Ex Performance Bond”) in an amount equal to 100% of the Fred Ex Design-Build Cost, each in substantially the forms set forth in Exhibit Q-2.

(B) Performance Security for the Fred Ex TTMS Work. In connection with the Fred Ex TTMS Work, the Concessionaire will require the TTMS Contractor to furnish either: (1)(x) a Payment Bond from a surety or other firm acceptable to the Department (the “Fred Ex TTMS Payment Bond”) in an amount equal to 100% of the cost for the Fred Ex TTMS Work and (y) a Performance Bond from a surety or other firm acceptable to the Department (the “Fred Ex TTMS Performance Bond”) in an amount equal to 100% of the cost for the Fred Ex TTMS Work or (2) a Letter of Credit (the “Fred Ex TTMS Letter of Credit”) in an amount equal to 100% of the cost for the Fred Ex TTMS Work.

(C) Each of the Fred Ex Payment Bond, the Fred Ex Performance Bond, the Fred Ex TTMS Payment Bond, and the Fred Ex TTMS Performance Bond may be provided in multiple forms that, in the aggregate, equal the required amount for each of such Fred Ex Payment Bond, the Fred Ex Performance Bond, the Fred Ex TTMS Payment Bond, and the Fred Ex TTMS Performance Bond, as applicable. The Fred Ex Payment Bond, the Fred Ex Performance Bond, the Fred Ex TTMS Payment Bond, and the Fred Ex TTMS Performance Bond each will name the Department and the Collateral Agent (as applicable) as an obligee and will provide that it may be transferred by the Concessionaire to the Department or the Collateral Agent, as beneficiary, with rights to draw upon or exercise other remedies thereunder if the Department or the Collateral Agent, as applicable, succeeds to the position of the Concessionaire under the Fred Ex Design-Build Contract or the Fred Ex TTMS Contract, as applicable. The Fred Ex



TTMS Letter of Credit will provide that it may be transferred by the Concessionaire to the Department (or the Collateral Agent, as applicable), as beneficiary, with rights to draw upon or exercise other remedies thereunder if the Department succeeds to the position of the Concessionaire under the Fred Ex TTMS Contract.

(D) Any Major Subcontract in addition to the Fred Ex Design-Build Contract and the Fred Ex TTMS Contract will be subject to customary competitive procurement, FHWA and Department review and approval, insurance, performance and payment security, and other requirements analogous to those applicable to the Fred Ex Design-Build Contract and the Fred Ex TTMS Contract.

(c) Additional Requirements for all Performance Security.

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

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

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

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

(d) Performance Security – Project Enhancements and Major Maintenance. With regard to the entire Project (*i.e.*, the Original Project, the 395 Project, the Fred Ex Project, and the STE), the Concessionaire will require its contractors to furnish the Major Maintenance Performance Security with respect to Project Enhancements and Major Maintenance during the Term if and to the extent required by the Project Financing Agreements or, if there are no Project Financing Agreements, as may be reasonably required by the Department. The Major Maintenance Performance Security will name the Department a permitted assignee or transferee beneficiary (as applicable), with rights to draw upon or exercise other remedies thereunder if the Department succeeds to the position of the Concessionaire under the O&M Contract.

## ARTICLE 18.

### **OWNERSHIP AND ACCESS TO RECORDS**

#### **Section 18.01 Maintenance of Records**

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

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

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

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

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

(a) All Work Product (including records thereof in software form), including reports, studies, data, information, logs, records, and similar terms, which is prepared or procured by or on behalf of the Department or its other contractors, whether before or after the Agreement Date, will be and remain the exclusive property of the Department; *provided*, that the Department will make available to the Concessionaire, without charge, and without representation or warranty of any kind, any documents in the possession of the Department relating to the planning, design, engineering, and permitting of the Project and any Project Enhancement that the Concessionaire elects to or is directed to carry out.

(b) Prior to the expiration or earlier termination of this Agreement, all Work Product prepared by or on behalf of the Concessionaire will remain exclusively the property of the Concessionaire, notwithstanding any delivery of copies thereof to the Department. Upon the expiration or earlier termination of this Agreement for any reason, including termination by the Concessionaire for a Department Default, (i) the Concessionaire will promptly turn over to the Department a copy of all Work Product the Concessionaire owns and (ii) subject to Section 18.04, all such Work Product will be considered the sole and exclusive property of the Department (other than Proprietary Work Product (inclusive of Proprietary Intellectual Property), with respect to which the Department will have a nonexclusive, nontransferable, irrevocable, fully paid up license in connection with the Project), without compensation due the Concessionaire or any other party. The Department will enter into a confidentiality agreement reasonably requested by the Concessionaire with respect to any Proprietary Work Product (inclusive of Proprietary Intellectual Property), subject to Section 18.02. The Concessionaire will continue to have a full and complete right to use any and all duplicates or other originals of such Proprietary Work Product (inclusive of Proprietary Intellectual Property) in any manner it chooses.

(c) Prior to the earlier termination of the 395 Project pursuant to Section 20.12, all Work Product prepared by or on behalf of the Concessionaire for the 395 Project will remain exclusively the property of the Concessionaire, notwithstanding any delivery of copies thereof to the Department. Upon the earlier termination of the 395 Project pursuant to Section 20.12, (i) the Concessionaire will promptly turn over to the Department a copy of all Work Product for the 395 Project the Concessionaire owns and (ii) subject to Section 18.04, all such Work Product will be considered the sole and exclusive property of the Department (other than Proprietary Work Product (inclusive of Proprietary Intellectual Property), with respect to which the Department will have a nonexclusive, nontransferable, irrevocable, fully paid up license in connection with the Project), without compensation due the Concessionaire or any other party. The Department will enter into a confidentiality agreement reasonably requested by the Concessionaire with respect to any Proprietary Work Product (inclusive of Proprietary Intellectual Property), subject to Section 18.02. The Concessionaire will continue to have a full and complete right to use any and all duplicates or other originals of such Proprietary Work Product (inclusive of Proprietary Intellectual Property) in any manner it chooses.

(d) Prior to the early termination of the Fred Ex Project pursuant to Section 20.13, all Fred Ex Work Product will remain exclusively the property of the Concessionaire, notwithstanding any delivery of copies thereof to the Department. Upon the early termination of

the Fred Ex Project pursuant to Section 20.13, (i) the Concessionaire will promptly turn over to the Department a copy of all Fred Ex Work Product the Concessionaire owns and (ii) subject to Section 18.04, all such Fred Ex Work Product will be considered the sole and exclusive property of the Department (other than Proprietary Work Product (inclusive of Proprietary Intellectual Property), with respect to which the Department will have a nonexclusive, nontransferable, irrevocable, fully paid up license in connection with the Project), without compensation due the Concessionaire or any other party. The Department will enter into a confidentiality agreement reasonably requested by the Concessionaire with respect to any Fred Ex Work Product that is Proprietary Work Product (inclusive of Proprietary Intellectual Property), subject to Section 18.02. The Concessionaire will continue to have a full and complete right to use any and all duplicates or other originals of such Fred Ex Work Product that is Proprietary Work Product (inclusive of Proprietary Intellectual Property) in any manner it chooses.

#### **Section 18.04 Ownership of Proprietary Intellectual Property**

(a) All Proprietary Intellectual Property of the Concessionaire will remain exclusively the property of the Concessionaire, notwithstanding any delivery of copies thereof to the Department. Upon the expiration or earlier termination of, or any assignment by the Concessionaire of its rights under, this Agreement for any reason whatsoever, the Department will have a nonexclusive, nontransferable, irrevocable, fully paid up license to use the Proprietary Intellectual Property of the Concessionaire solely in connection with the Project. The Department will not at any time sell any such Proprietary Intellectual Property or use or allow any party to use any such Proprietary Intellectual Property for any purpose whatsoever other than in connection with the Project (except as permitted on other State Highways in accordance with Section 18.04(b)). Subject to Section 18.02, the Department will not disclose any Proprietary Intellectual Property of the Concessionaire (other than to its concessionaires, Contractors, employees, attorneys and agents in connection with the development and operation of the Project who agree to be bound by any confidentiality obligations of the Department relating thereto), and the Department will enter into a confidentiality agreement reasonably requested by the Concessionaire with respect to any such Proprietary Intellectual Property.

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

(c) With respect to any Proprietary Intellectual Property owned by a Person other than the Concessionaire or the Department, the Concessionaire will obtain from such owner, concurrently with execution of any Contract or purchase order with such owner, both for the Concessionaire and the Department, nonexclusive, nontransferable, irrevocable, fully paid up (other than with respect to ongoing maintenance and support fees) licenses to use such Proprietary Intellectual Property solely in connection with the Project, of at least identical scope, purpose, duration and applicability as the licenses granted by Section 18.04(a); *provided*, that the foregoing requirement will not apply to standard, pre-specified manufacturer licenses of mass-

marketed products (including software products) or equipment where the license cannot be extended to the Department using commercially reasonable efforts or to other licenses of products or equipment where the products or equipment are not reasonably necessary for the operation or maintenance of the Project. The Concessionaire will use commercially reasonable efforts to obtain from such owner a right in favor of the Department to purchase from such owner a nonexclusive, nontransferable, irrevocable, fully paid up license to use such owner's Proprietary Intellectual Property on any other tolled State Highway owned and operated by the Department or other State agency on commercially reasonable terms. The limitations on sale and disclosure by the Department set forth in Section 18.04(a) will also apply to the Department's licenses in such Proprietary Intellectual Property.

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

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

(f) On or before the Amended and Restated Agreement Date, the Department will grant to the Concessionaire a nonexclusive, nontransferable, irrevocable, fully paid up license to use any Proprietary Intellectual Property of the Department that has been developed for the 395 Project, solely in connection with the development, construction, operation, maintenance and other incidental activities of the 395 Project. The Concessionaire will not at any time sell such



Proprietary Intellectual Property or use or allow any party to use such Proprietary Intellectual Property for any purpose whatsoever other than in connection with the 395 Project. On or before the Amended and Restated Agreement Date, the Department will also assign in favor of the Concessionaire the Department's rights with respect to any license by the Department's software suppliers (to the extent permitted by, and subject to the terms of, such license) for the use of any Proprietary Intellectual Property for the 395 Project, together with an assignment of the Department's rights under any escrow for the Source Code and Source Code Documentation relating to such Proprietary Intellectual Property, which assignments will be reasonably satisfactory to the Concessionaire. The Concessionaire will not disclose any such Proprietary Intellectual Property (other than to its Contractors, employees, attorneys, agents and Affiliates in connection with the 395 Project who agree to be bound by any confidentiality obligations of the Concessionaire relating thereto), and the Concessionaire will enter into a confidentiality agreement reasonably requested by the Department with respect to any such Proprietary Intellectual Property. The Department will continue to have a full and complete right to use any and all duplicates or other originals of its Proprietary Intellectual Property in any manner it chooses.

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

### **Section 18.05 Escrow Documents**

(a) General.

(i) Prior to the Agreement Date, the Concessionaire, the Department and the Escrow Agent will have executed and delivered the Escrow Agreement to implement the provisions of this Section 18.05. The Concessionaire will submit to the Department for its review and approval the following materials (collectively, the "95 Escrow

Documents”): one copy of all documentary information generated with respect to (i) the expected costs of the Work (which uses the estimating methodology actually used by the Design-Build Contractor) available to the Concessionaire under the Design-Build Contract (the “95 Construction Escrow Documents”) and (ii) the components of, and formulae for, the Initial Base Case Financial Model, the Adjusted Financial Model and the Base Case Financial Model, including, without limitation, forecast revenue and expected non-financial costs of the Project during the Term included in the Initial Base Case Financial Model, the Adjusted Financial Model and the Base Case Financial Model (the “95 Financing Escrow Documents”). The Concessionaire will deliver the Construction Escrow Documents to the Department within 14 Days following the Agreement Date and will deliver the Financing Escrow Documents not later than the Agreement Date.

(ii) Prior to the Amended and Restated Agreement Date, the Concessionaire, the Department and the Escrow Agent will have amended the existing Escrow Agreement to implement the provisions of this Section 18.05. The Concessionaire will submit to the Department for its review and approval the following materials (collectively, the “395 Escrow Documents”): one copy of all documentary information generated with respect to (i) the expected costs of the Work (which uses the estimating methodology actually used by the 395 Design-Build Contractor and the TTMS Contractor) available to the Concessionaire under the 395 Design-Build Contract and the 395 TTMS Contract (the “395 Construction Escrow Documents”) and (ii) the components of, and formulae for, the Base Case Financial Model Update, including, without limitation, forecast revenue and expected non-financial costs of the Project during the Term included in the Base Case Financial Model Update (the “395 Financing Escrow Documents”). The Concessionaire will deliver the 395 Construction Escrow Documents to the Department within 14 Days following the Amended and Restated Agreement Date and will deliver the 395 Financing Escrow Documents not later than the Amended and Restated Agreement Date.

(iii) Prior to the Second Amended and Restated Agreement Date, the Concessionaire, the Department, and the Escrow Agent will have amended the existing Escrow Agreement to implement the provisions of this Section 18.05. The Concessionaire will submit to the Department for its review and approval the following materials (collectively, the “Fred Ex Escrow Documents”): one copy of all documentary information generated with respect to (i) the expected costs of the Work (which uses the estimating methodology actually used by the Fred Ex Design-Build Contractor and the TTMS Contractor) available to the Concessionaire under the Fred Ex Design-Build Contract and the Fred Ex TTMS Contract (the “Fred Ex Construction Escrow Documents”) and (ii) the components of, and formulae for, the Base Case Financial Model Update (Fred Ex Final), including, without limitation, forecast revenue and expected non-financial costs of the Project during the Term (the “Fred Ex Financing Escrow Documents”). The Concessionaire will deliver the Fred Ex Construction Escrow Documents to the Department within 14 Days following the Second Amended and Restated Agreement Date and will deliver the Fred Ex Financing Escrow Documents not later than the Fred Ex Financial Close Date.



(b) Format and Contents.

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

(ii) The Escrow Documents will be submitted in English and clearly itemize the estimated costs of performing each item of the Project, including financing, administrative and related costs. Cost items will be separated into sub-items as required to present a detailed cost estimate and allow a detailed cost review.

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

(iv) The Construction Escrow Documents will identify all costs. If detailed costs are not available to the Concessionaire, estimated unit costs are acceptable without a detailed cost estimate, *provided*, that labor, equipment, materials and subcontracts, as applicable, are specified, and *provided further*, that indirect costs, contingencies, and mark-up, as applicable, are allocated.

(c) Submittal.

(i) The Concessionaire will submit the Escrow Documents in sealed containers, the Construction Escrow Documents in one and the Financing Escrow Documents in another, to the Department, which containers have been clearly marked on the outside with the Concessionaire's name, reference to the Project, and the words "I-95 HOV/HOT Lanes Project Construction Escrow Documents," "I-95 HOV/HOT Lanes Project Financing Escrow Documents," "I-395 Project Construction Escrow Documents," "I-395 Project Financing Escrow Documents," "Fred Ex Project Construction Escrow Documents," or "Fred Ex Project Financing Escrow Documents," as applicable.

(ii) On or before the Agreement Date, the Amended and Restated Agreement Date, or the Second Amended and Restated Agreement Date, as applicable, representatives of the Department, assisted by members of the Concessionaire's staff who are knowledgeable in how the Escrow Documents were prepared, will have examined, organized, and inventoried the Escrow Documents. This examination was to ensure that the Escrow Documents are legible and complete. It did not include review of, and does not constitute approval of proposed construction methods, estimating assumptions, or interpretations of any Project Agreements, including the Design-Build Contract and the 395 TTMS Contract. Such examination will not alter any condition or term of any Project Agreement.

(iii) Timely submission of complete Escrow Documents as of the Agreement Date, the Amended and Restated Agreement Date, or the Second Amended and Restated Agreement Date, as applicable, is an essential element of the Concessionaire's responsibility and a prerequisite to the execution and delivery of this Agreement by the Department.

(iv) To the extent the Concessionaire plans to contract out any part of the Work as of the Agreement Date, the Amended and Restated Agreement Date, or the Second Amended and Restated Agreement Date, as applicable, the Concessionaire will cause each Contractor whose total Contract price exceeds 5% of the Project costs as set forth in the Design-Build Contract or the TTMS Contract to provide separate similar documentation to be included with those of the Concessionaire. Such documents will be opened and examined in the same manner and at the same time as the examination described above for the Concessionaire to the extent that they are relevant to the issue at hand.

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

(e) Storage.

(i) The 95 Escrow Documents, the 395 Escrow Documents, and the Fred Ex Escrow Documents will be stored at the following address:

SunTrust Bank  
919 East Main Street, Floor 7  
Richmond, Virginia 23219  
Attention: Corporate Agency Services  
Telephone: 804-782-5400  
Facsimile: 804-782-7855

(ii) The Concessionaire will bear the cost for storing the Escrow Documents.

(f) Examination.

(i) Subject to the terms of the Escrow Agreement, the Escrow Documents may be examined by the Department and the Concessionaire at any time deemed necessary by the Department or the Concessionaire and the Department may delegate review of the Escrow Documents to members of its staff or to Consultants; *provided*, that, unless a Consultant is bound by a confidentiality agreement or other obligations to keep the Escrow Documents confidential, each such Consultant will enter into a confidentiality agreement reasonably requested by the Concessionaire with respect to any such examination. No other person will have access to the Escrow Documents. The Department will provide advance notice of any such examination to the Design-Build Contractor and the TTMS Contractor, and the Design-Build Contractor and TTMS Contractor will have the right to be present during an examination of the Construction Escrow Documents; *provided*, however, that such right will not in any way limit the Department's right to review the Construction Escrow Documents if the Design-Build Contractor and the TTMS Contractor does not attend such examination. Notwithstanding the foregoing, the Escrow Documents and information contained therein may be used:

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

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

(C) in any dispute resolution procedure commenced hereunder.

(ii) Access to the documents will take place in the presence of duly designated representatives of both the Department and the Concessionaire, except that, if the Concessionaire refuses to be present or to cooperate in any other way in the review of the documents, the Department may upon notice to the Concessionaire, review such documents without the Concessionaire being present.

(g) Ownership. The Escrow Documents are, and will always remain, the property of the Concessionaire, subject to joint review by the Department and the Concessionaire, as provided in this Agreement. The Department stipulates and expressly acknowledges that the Escrow Documents constitute trade secrets. This acknowledgement is based on the Department's express understanding that the information contained in the Escrow Documents is not known outside the Concessionaire's business, is known only to a limited extent and only by a limited number of employees of the Concessionaire, is safeguarded while in the Concessionaire's possession, is extremely valuable to the Concessionaire and could be extremely valuable to the Concessionaire's competitors by virtue of its reflecting Concessionaire's contemplated techniques of design and construction. The Department further acknowledges that the Concessionaire expended substantial sums of money in developing the information included in the Escrow Documents and further acknowledges that it would be difficult for a competitor to replicate the information contained therein. The Department further acknowledges that the

Escrow Documents and the information contained therein are made available to the Department only because such action is an express prerequisite to the execution and delivery of this Agreement. The Department further acknowledges that the Escrow Documents include a compilation of the information used in the Concessionaire's business, intended to give the Concessionaire an opportunity to obtain an advantage over competitors who do not know of or use the contents of the documentation.

(h) Final Disposition and Return of Escrow Documents. The 395 Construction Escrow Documents will be returned to the Concessionaire upon the earlier to occur of (i) completion of the 395 Design-Build Work and the 395 TTMS Work, including tender of final payment and resolution of all claims or disputes arising under the 395 Design-Build Contract and 395 TTMS Contract or (ii) termination of this Agreement and resolution of all claims or disputes arising pursuant to this Agreement. The Fred Ex Construction Escrow Documents will be returned to the Concessionaire upon the earlier to occur of (i) completion of the Fred Ex Design-Build Work and the Fred Ex TTMS Work, including tender of final payment and resolution of all claims or disputes arising under the Fred Ex Design-Build Contract and Fred Ex TTMS Contract or (ii) termination of this Agreement and resolution of all claims or disputes arising pursuant to this Agreement. The remaining Escrow Documents will be returned upon termination of this Agreement and resolution of all claims or disputes arising pursuant to this Agreement.

#### **Section 18.06 Source Code Escrow**

(a) The Department and the Concessionaire acknowledge that the Concessionaire and/or the Concessionaire's Software suppliers may not wish to disclose directly to the Department at the time of installation the Source Code and Source Code Documentation which is Proprietary Intellectual Property of the Concessionaire and/or the Concessionaire's software suppliers, as public disclosure could deprive the Concessionaire and/or the Concessionaire's software suppliers of commercial value, but that the Department must be ensured access to such Source Code and Source Code Documentation in either of the following circumstances:

(i) in the case of Source Code and Source Code Documentation that is a Contractor's Proprietary Intellectual Property, if this Agreement is terminated for Concessionaire Default or upon assignment by Concessionaire of its rights pursuant to this Agreement, the Department assumes the contract or subcontract with such Software supplier, and either (A) a business failure (including voluntary or involuntary bankruptcy, and insolvency) of the Software supplier occurs or (B) the Software supplier fails or ceases to provide services as necessary to permit continued use of the software by the Department as contemplated by this Agreement; or

(ii) in the case of Source Code and Source Code Documentation that is the Concessionaire's Proprietary Intellectual Property, (A) this Agreement is terminated for Concessionaire Default, (B) a business failure (including voluntary or involuntary bankruptcy, and insolvency) of the Concessionaire occurs or (C) the Concessionaire fails or ceases to provide services as necessary to permit continued use of the software by the Department as contemplated by this Agreement.

(b) By no later than the Initial Service Commencement Date, the Department and the Concessionaire will establish one or more escrows (the “Source Code Escrows”) with the Escrow Agent on terms and conditions reasonably acceptable to the Department and to the Concessionaire into which such Source Code and Source Code Documentation will be escrowed, including all relevant commentary, explanations and other documentation, as well as instructions to compile such Source Code and Source Code Documentation and all modifications, additions or substitutions made to such Source Code and Source Code Documentation.

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

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

### **Section 18.07 Inspection and Audit Rights**

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

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

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

(d) In addition, the Concessionaire, at its expense, will cause a reputable independent auditor to annually audit its books and records relating to the Project, according to GAAP or any other generally accepted accounting standards, which are acceptable to the Department. The Concessionaire will cause the independent auditor to deliver the audit report to the FHWA and the Department promptly after it is completed, but in any event within 120 Days of the end of each of the Concessionaire's fiscal years.

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

(f) No audit rights will extend to the make-up of any lump sum amount or unit price or rate under the Design-Build Contract once such amount, price or rate has been agreed.

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

## ARTICLE 19.

### DEFAULTS, BREACHES, AND REMEDIES

#### **Section 19.01 Concessionaire Defaults**

The occurrence of any one or more of the following events (each a "Concessionaire Default Triggering Event") during the Term will constitute a "Concessionaire Default" pursuant to this Agreement:

(a) any representation or warranty made by the Concessionaire in this Agreement or in any other Project Agreement to which the Concessionaire and the Department are parties is false or misleading in any respect on the date made and a material adverse effect upon the Project or the Department's rights or obligations under the Project Agreements results therefrom, and such circumstance continues without cure for a period of 90 Days following the date the Department delivers to the Concessionaire written notice thereof, with cure regarded as complete only when the adverse effects are remedied;



(b) the Concessionaire fails to comply with, perform or observe any other material obligation, covenant, agreement, term or condition in this Agreement or any Project Agreement to which the Department and the Concessionaire are parties (provided, that a debarment pursuant to the provisions set forth in Section 24.03(b) (relating to SWaM participation) will not constitute a Concessionaire Default), which failure materially and adversely affects the Department's rights or obligations under this Agreement or any other VDOT Project Agreement, and such failure continues without cure for a period of 90 Days following the date the Department delivers to the Concessionaire written notice thereof (giving particulars of the failure in reasonable detail) or for such longer period as may be reasonably necessary to cure such failure up to a maximum cure period of 180 Days; *provided*, that the maximum cure period may be extended one time for any such failure to a final date if (i) at least 30 Days prior to the end of the maximum 180-Day cure period, the Concessionaire delivers a written work plan to the Department outlining the actions by which the Concessionaire will cure such failure and setting forth a final date by which the Concessionaire will cure such failure and (ii) the Department approves such work plan within 30 Days in its reasonable discretion; *provided*, that in all cases and regardless of the duration of the cure period, (A) the Concessionaire is proceeding with all due diligence to cure or cause to be cured such failure, (B) the failure is capable of being cured within a reasonable period of time, and (C) such failure is in fact cured within such period of time; *provided* further, that this Section 19.01(b) will not apply to events covered by other provisions of this Section 19.01; and *provided, further*, that any failure to comply with, perform or observe any obligation that is covered by the Non-Compliance Points system will constitute a Concessionaire Default only as provided in Section 11.05(c);

(c) the Concessionaire fails to pay to the Department when due any undisputed amount in excess of \$100,000, adjusted annually by the percentage increase in CPI, payable to the Department pursuant to this Agreement or any other VDOT Project Agreement or to deposit funds to any reserve account in the amount and within the time period required by this Agreement, and such failure, including any failure to pay interest at the Bank Rate from the date due, continues without cure for a period of 90 Days following the date the Department delivers to the Concessionaire written notice thereof;

(d) other than a Permitted Closure, the Concessionaire closes all or part of the HOT Lanes to traffic, at any time following the applicable Service Commencement Date, other than in accordance with the terms of this Agreement, and such closure continues without cure for a period of ten Days following the date the Department delivers to the Concessionaire written notice thereof;

(e) (i) the Concessionaire fails to achieve Substantial Completion of the Project by the Long Stop Date, as such date may be extended pursuant to this Agreement or (ii) in the case where a new Long Stop Date has been established pursuant to Section 8.15 hereof, the Concessionaire fails to diligently implement the Substantial Completion Recovery Plan, *provided*, however, that failure by the Concessionaire to achieve 395 Final Completion by the 395 Long Stop Date shall not be a Concessionaire Default, and further *provided*, that failure by the Concessionaire to achieve Fred Ex Final Completion by the Fred Ex Long Stop Date shall not be a Concessionaire Default;



(f) the Concessionaire fails to maintain, or to cause to be maintained, in effect the insurance, guarantees, letters of credit or other performance security as and when required pursuant to this Agreement for the benefit of relevant parties, or fails to comply with any requirement of this Agreement pertaining to the amount, terms or coverage of the same and such failure continues without cure for a period of ten Business Days following the date the Department delivers to the Concessionaire written notice thereof;

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

(h) after exhaustion of all rights of appeal, (i) there occurs any suspension or debarment (distinguished from ineligibility due to lack of financial qualifications), or there goes into effect an agreement for voluntary exclusion, of the Concessionaire, any affiliate of the Concessionaire (as "affiliate" is defined in 29 CFR 98.905 or successor regulation of similar import), or Transurban or the Design-Build Contractor, in each case, whose work is not completed, from bidding, proposing or contracting with any Federal or State department or agency or (ii) the Concessionaire, Transurban or the Design-Build Contractor, in each case, who have ongoing Work, or any of their respective officers, directors, or Administering Employees have been convicted of, or plead guilty or nolo contendere to, a violation of Law for fraud, conspiracy, collusion, bribery, perjury, or material misrepresentation, as a result in whole or in part of activities relating to any project in the State, and such failure continues without cure for a period of 90 Days following the date the Department delivers to the Concessionaire written notice thereof (giving particulars of the failure in reasonable detail); *provided*, that a debarment pursuant to the provisions set forth in Section 24.03(b) (relating to SWaM participation) will not constitute a Concessionaire Default. If the offending Person is an officer, director or Administering Employee, cure will be regarded as complete when the Concessionaire proves that such Person has been removed from any position or ability to manage, direct or control the decisions of the Concessionaire, Transurban or the Design-Build Contractor (as applicable) or to perform Work; and if the Person debarred or suspended or subject to an agreement for voluntary exclusion is an affiliate of the Concessionaire (as "affiliate" is defined in 29 CFR 98.905 or successor regulation of similar import), Transurban or the Design-Build Contractor, cure will be regarded as complete when the Concessionaire replaces such Person in accordance with this Agreement;

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

(j) within 90 Days after the commencement of any proceeding against the Concessionaire or any Concessionaire Financial Party seeking any reorganization, liquidation, dissolution or similar relief under the present or any future U.S. bankruptcy code or any similar

Law, such proceeding has not been dismissed, or, within 90 Days after the appointment, without the consent or acquiescence of such Concessionaire or Concessionaire Financial Party, of any trustee, receiver, custodian, assignee, sequestrator, liquidator or other similar official of such Concessionaire or Concessionaire Financial Party or of all or any substantial part of its properties or of the Project or any interest therein, such appointment has not been vacated or stayed on appeal or otherwise, or, within 90 Days after the expiration of any such stay, such appointment has not been vacated;

(k) a levy under execution or attachment has been made against all or any part of the Project or any interest therein (including the Concessionaire's Interest) as a result of any Lien (other than a Lien relating to permitted Concessionaire Debt) created, incurred, assumed or suffered to exist by the Concessionaire or any Person claiming through it, and such execution or attachment has not been vacated, removed or stayed by court order, bonding or otherwise within a period of 60 Days, unless such levy resulted from actions or omissions of the Department or its Representatives; and

(l) after the sixth full month following the Initial Service Commencement Date, the Concessionaire (i) fails to deliver an OSPS Improvement Plan meeting the requirements set forth in Section 5.08(b) at the time specified in Section 5.08(b) and such failure continues without cure for a period of 30 Days following the date on which the Department delivers to the Concessionaire notice of such failure, or (ii) fails to use commercially reasonable efforts to comply with any of the provisions set forth in an OSPS Improvement Plan submitted pursuant to Section 5.08(b), and such failure to use commercially reasonable efforts continues without cure for a period of 30 Days following the date on which the Department delivers notice of such failure to the Concessionaire.

### **Section 19.02 Department Remedies upon Concessionaire Default**

Upon the occurrence of a Concessionaire Default, the Department may, subject to the provisions of the Direct Agreement, the 395 Direct Agreement, and the Fred Ex Direct Agreement, do any or all of the following as the Department, in its sole discretion, will determine:

(a) the Department may terminate this Agreement and any other Project Agreements to which the Department and the Concessionaire are both parties, to the extent provided in Section 20.04(f);

(b) if the Concessionaire Default is by reason of the failure to pay any undisputed monies to a third party, the Department may (but will have no obligation to) make payment on behalf of the Concessionaire of such monies, and any amount so paid by the Department will be payable by the Concessionaire to the Department within five Days after demand, including accrued interest at the Bank Rate from the date such payment is made by the Department to the repayment date; *provided*, that (i) the Department will not incur any liability to the Concessionaire for any act or omission of the Department or any other Person in the course of remedying or attempting to remedy any Concessionaire Default and (ii) the Department's cure of any Concessionaire Default will not waive or affect the Department's rights against the Concessionaire by reason of the Concessionaire Default;

(c) the Department may cure the Concessionaire Default (but this will not obligate the Department to cure or attempt to cure a Concessionaire Default or, after having commenced to cure or attempted to cure a Concessionaire Default, to continue to do so), and all costs and expenses reasonably incurred by the Department in curing or attempting to cure the Concessionaire Default, including the Department's Allocable Costs, will be payable by the Concessionaire to the Department within five Days of demand, including accrued interest at the Bank Rate from the date such costs or expenses were incurred to the repayment date; *provided*, that (i) the Department will not incur any liability to the Concessionaire, and the Concessionaire hereby irrevocably waives and releases any liability of the Department to the Concessionaire, for any act or omission of the Department or any other Person in the course of remedying or attempting to remedy any Concessionaire Default and (ii) the Department's cure of any Concessionaire Default will not waive or affect the Department's rights against the Concessionaire by reason of the Concessionaire Default;

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

(e) without notice and without awaiting lapse of the period to cure, in the event of a Concessionaire Default under Section 19.01(d) (closure of all or any part of the Project or any lane in violation of this Agreement), or any failure to perform a Safety Compliance Order and the Concessionaire Default or failure to perform the Safety Compliance Order results in or prolongs an Emergency or danger to persons or property, the Department may enter and take control of the Project or applicable portion thereof to the extent the Department finds it necessary to rectify the closure, Emergency or danger, and may suspend construction Work and/or close or cause to be closed the portion of the Project affected by the Emergency or danger, until such time as such breach or failure is cured, or the Department terminates this Agreement. In the event of such action by the Department, the Department may, subject to Law, distraint against any of the materials and equipment purchased exclusively for the Project that are situated on the Project and the Concessionaire waives any statutory protections and exemptions in connection therewith. Further, the Concessionaire will pay to the Department on demand the Department's Allocable Costs in connection with the exercise of the Department's rights pursuant to this Section 19.02(e). So long as the Department undertakes such action in good faith, even if under a mistaken belief in the occurrence of such a breach or failure, such action will not be deemed unlawful or a breach of this Agreement, will not expose the Department to any liability to the Concessionaire and will not entitle the Concessionaire to any other remedy, it being acknowledged that the Department has a high priority, paramount public interest in providing and maintaining continuous public access to the Project Assets and in protecting public and worker safety. The foregoing will not, however, protect the Department from the Concessionaire's lawful Claims for recovery for third party bodily injury or property damage arising out of any such Department action, if and to the extent (i) (A) the Department was mistaken in believing such a breach or failure occurred, or (B) such injury or property damage was caused by the Department's gross negligence, recklessness or willful misconduct, and (ii) the third party liability is not insured and not required to be insured pursuant to this Agreement. Immediately following rectification of such breach or failure, as determined by the Department,

acting reasonably, the Department will relinquish control and possession of the Project or applicable portion thereof back to the Concessionaire; and

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

### **Section 19.03 Financial Close Liquidated Damages**

No liquidated damages will be assessed for failure to achieve Financial Close by the Financial Close Deadline, failure to achieve 395 Financial Close by the 395 Financial Close Deadline (other than the 395 Financial Close Security), or failure to achieve Fred Ex Financial Close by the Fred Ex Financial Close Deadline (other than the Fred Ex Financial Close Security).

### **Section 19.04 Department Default**

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

(a) any representation or warranty made by the Department in this Agreement or in any other Project Agreement to which the Department and the Concessionaire are parties is false or misleading in any respect on the date made and a material adverse effect upon the Project or the Concessionaire’s rights or obligations under such Project Agreements results therefrom, and such circumstance continues without cure for a period of 90 Days following the date the Concessionaire delivers to the Department written notice thereof, with cure regarded as complete only when the adverse effects are remedied;

(b) the Department fails to comply with, perform or observe any material obligation, covenant, agreement, term or condition in this Agreement or any other Project Agreement to which it is a party, which failure materially adversely affects the Concessionaire’s Interest, and such failure continues without cure for a period of 90 Days following the date the Concessionaire delivers to the Department written notice thereof (giving particulars of the failure in reasonable detail) or for such longer period as may be reasonably necessary to cure such failure up to a maximum cure period of 180 Days; provided, that in the latter case, (i) the Department is proceeding with all due diligence to cure or cause to be cured such failure, (ii) the failure is capable of being cured within a reasonable period of time and (iii) such failure is in fact cured within such period of time; or

(c) subject to Section 25.19, the Department fails to pay to the Concessionaire when due any undisputed amount in excess of \$100,000, adjusted annually by the percentage increase in CPI, payable to the Concessionaire pursuant to this Agreement, and such failure continues without cure for a period of 90 Days following the date on which the Concessionaire delivers to the Department written notice thereof.

### **Section 19.05 Concessionaire Remedies upon Department Default**

(a) Upon the occurrence of a Department Default pursuant to this Agreement, the Concessionaire may by notice to the Department declare the Department to be in default and

may, subject to the provisions of Section 19.05(b), do any or all of the following as the Concessionaire, in its discretion, will determine:

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

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

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

### **Section 19.06 395 Concessionaire Breach**

The occurrence of any one or more of the following events (each a "395 Concessionaire Breach Triggering Event") with respect to the 395 Project during the Construction Period for the 395 Project will constitute a "395 Concessionaire Breach" pursuant to this Agreement:

(a) any representation or warranty made by the Concessionaire in this Agreement or in any other Project Agreement to which the Concessionaire and the Department are parties is false or misleading in any respect on the date made and a material adverse effect upon the 395 Project or the Department's rights or obligations under the Project Agreements results therefrom, and such circumstance continues without cure for a period of 90 Days following the date the Department delivers to the Concessionaire written notice thereof, with cure regarded as complete only when the adverse effects are remedied;

(b) the Concessionaire fails to comply with, perform or observe any other material obligation, covenant, agreement, term or condition in this Agreement or any Project Agreement to which the Department and the Concessionaire are parties (provided, that a debarment pursuant to the provisions set forth in Section 24.03(b) (relating to SWaM participation) will not constitute a 395 Concessionaire Breach), which failure materially and adversely affects the Department's rights or obligations under this Agreement or any other VDOT Project Agreement, and such failure continues without cure for a period of 90 Days following the date the Department delivers to the Concessionaire written notice thereof (giving particulars of the failure in reasonable detail) or for such longer period as may be reasonably necessary to cure such failure up to a maximum cure period of 180 Days; *provided*, that the maximum cure period may be extended one time for any such failure to a final date if (i) at least 30 Days prior to the end of the maximum 180-Day cure period, the Concessionaire delivers a written work plan to the Department outlining the actions by which the Concessionaire will cure such failure and setting forth a final date by which the Concessionaire will cure such failure and (ii) the Department approves such work plan within 30 Days in its reasonable discretion; *provided*, that in all cases and regardless of the duration of the cure period, (A) the Concessionaire is proceeding with all due diligence to cure or cause to be cured such failure, (B) the failure is capable of being cured within a reasonable period of time, and (C) such failure is in fact cured within such period of



time; *provided* further, that this Section 19.06(b) will not apply to events covered by other provisions of this Section 19.06;

(c) the Concessionaire fails to pay to the Department when due any undisputed amount in excess of \$100,000, adjusted annually by the percentage increase in CPI, payable to the Department with respect to the 395 Project pursuant to this Agreement or any other VDOT Project Agreement or to deposit funds to any reserve account in the amount and within the time period required by this Agreement, and such failure, including any failure to pay interest at the Bank Rate from the date due, continues without cure for a period of 90 Days following the date the Department delivers to the Concessionaire written notice thereof;

(d) (i) the Concessionaire fails to achieve 395 Final Completion by the 395 Long Stop Date, as such date may be extended pursuant to this Agreement or (ii) in the case where a new 395 Long Stop Date has been established pursuant to Section 8.15(d) hereof, the Concessionaire fails to diligently implement the 395 Final Completion Recovery Plan;

(e) the Concessionaire fails to maintain, or to cause to be maintained, in effect the insurance, guarantees, letters of credit or other performance security as and when required pursuant to this Agreement for the benefit of relevant parties, or fails to comply with any requirement of this Agreement pertaining to the amount, terms or coverage of the same and such failure continues without cure for a period of ten Business Days following the date the Department delivers to the Concessionaire written notice thereof; and

(f) after exhaustion of all rights of appeal, (i) there occurs any suspension or debarment (distinguished from ineligibility due to lack of financial qualifications), or there goes into effect an agreement for voluntary exclusion, of the Concessionaire, any affiliate of the Concessionaire (as “affiliate” is defined in 29 CFR 98.905 or successor regulation of similar import), Transurban, the 395 Design-Build Contractor or the TTMS Contractor, in each case, whose work is not completed, from bidding, proposing or contracting with any Federal or State department or agency or (ii) the Concessionaire, Transurban, the 395 Design-Build Contractor or the TTMS Contractor, in each case, who have ongoing Work, or any of their respective officers, directors, or Administering Employees have been convicted of, or plead guilty or nolo contendere to, a violation of Law for fraud, conspiracy, collusion, bribery, perjury, or material misrepresentation, as a result in whole or in part of activities relating to any project in the State, and such failure continues without cure for a period of 90 Days following the date the Department delivers to the Concessionaire written notice thereof (giving particulars of the failure in reasonable detail); *provided*, that a debarment pursuant to the provisions set forth in Section 24.03(b) (relating to SWaM participation) will not constitute a 395 Concessionaire Breach. If the offending Person is an officer, director or Administering Employee, cure will be regarded as complete when the Concessionaire proves that such Person has been removed from any position or ability to manage, direct or control the decisions of the Concessionaire, Transurban, the 395 Design-Build Contractor or the TTMS Contractor (as applicable) or to perform Work; and if the Person debarred or suspended or subject to an agreement for voluntary exclusion is an affiliate of the Concessionaire (as “affiliate” is defined in 29 CFR 98.905 or successor regulation of similar import), Transurban, the 395 Design-Build Contractor or the TTMS Contractor, cure will be regarded as complete when the Concessionaire replaces such Person in accordance with this Agreement.

### **Section 19.07 Limitations on 395 Concessionaire Breach**

(a) A 395 Concessionaire Breach shall arise from a 395 Concessionaire Breach Triggering Event that affects only the 395 Project. If a single event affects more than just the 395 Project (even if the event otherwise meets the definition of a 395 Concessionaire Breach Triggering Event), the parties will treat it as a Concessionaire Default Triggering Event unless otherwise mutually agreed.

(b) Concessionaire Default Triggering Events under Sections 19.01(d) and (l) will always be treated as Concessionaire Default Triggering Events unless otherwise mutually agreed, even if such events affect only the 395 Project.

(c) Concessionaire Default Triggering Events under Sections 19.01(g), (i) and (k) will always be treated as Concessionaire Default Triggering Events unless otherwise mutually agreed.

(d) After 395 Final Completion, Sections 19.06, 19.07, 19.08, and 20.12 will no longer apply and all events giving rise to Concessionaire Default will be governed by Section 19.01.

### **Section 19.08 Department Remedies upon 395 Concessionaire Breach**

Upon the occurrence of a 395 Concessionaire Breach, the Department may, subject to the provisions of the 395 Direct Agreement, do any or all of the following as the Department, in its sole discretion, will determine:

(a) except for a 395 Concessionaire Breach occurring under Section 19.06(d), the Department may terminate the 395 Project and any provisions in and terms of this Agreement and any other Project Agreements to which the Department and the Concessionaire are both parties that solely relates to the 395 Project, to the extent provided in Section 20.12;

(b) if the 395 Concessionaire Breach is by reason of the failure to pay any undisputed monies to a third party, the Department may (but will have no obligation to) make payment on behalf of the Concessionaire of such monies, and any amount so paid by the Department will be payable by the Concessionaire to the Department within five Days after demand, including accrued interest at the Bank Rate from the date such payment is made by the Department to the repayment date; *provided*, that (i) the Department will not incur any liability to the Concessionaire for any act or omission of the Department or any other Person in the course of remedying or attempting to remedy any 395 Concessionaire Breach and (ii) the Department's cure of any 395 Concessionaire Breach will not waive or affect the Department's rights against the Concessionaire by reason of the 395 Concessionaire Breach;

(c) the Department may cure the 395 Concessionaire Breach (but this will not obligate the Department to cure or attempt to cure a 395 Concessionaire Breach or, after having commenced to cure or attempted to cure a 395 Concessionaire Breach, to continue to do so), and all costs and expenses reasonably incurred by the Department in curing or attempting to cure the 395 Concessionaire Breach, including the Department's Allocable Costs, will be payable by the Concessionaire to the Department within five Days of demand, including accrued interest at the



Bank Rate from the date such costs or expenses were incurred to the repayment date; *provided*, that (i) the Department will not incur any liability to the Concessionaire, and the Concessionaire hereby irrevocably waives and releases any liability of the Department to the Concessionaire, for any act or omission of the Department or any other Person in the course of remedying or attempting to remedy any 395 Concessionaire Breach and (ii) the Department's cure of any 395 Concessionaire Breach will not waive or affect the Department's rights against the Concessionaire by reason of the 395 Concessionaire Breach; and

(d) at any time after a 395 Concessionaire Breach occurring under Section 19.06(d), if the Concessionaire has already achieved Service Commencement for the 395 HOT Lanes, the Department may elect to assume, and upon the Department's election the Concessionaire shall assign to the Department or its designee, the 395 Design-Build Contract under which the 395 Design-Build Contractor will complete the 395 Department Assets, and within 30 days of the 395 Design-Build Contractor achieving 395 Final Completion, the Concessionaire shall pay to the Department any amounts incurred by the Department to reach 395 Final Completion beyond the 395 Public Funds Amount; for the avoidance of doubt, if the Department elects to assume the 395 Design-Build Contract under this Section 19.08(d), the Concessionaire will retain its right to operate and maintain the Original HOT Lanes, the STE, and the 395 HOT Lanes.

#### **Section 19.09 Fred Ex Concessionaire Breach**

The occurrence of any one or more of the following events (each a "Fred Ex Concessionaire Breach Triggering Event") with respect to the Fred Ex Project during the Construction Period for the Fred Ex Project will constitute a "Fred Ex Concessionaire Breach" pursuant to this Agreement:

(a) any representation or warranty made by the Concessionaire in this Agreement or in any other Project Agreement to which the Concessionaire and the Department are parties is false or misleading in any respect on the date made and a material adverse effect upon the Fred Ex Project or the Department's rights or obligations under the Project Agreements results therefrom, and such circumstance continues without cure for a period of 90 Days following the date the Department delivers to the Concessionaire written notice thereof, with cure regarded as complete only when the adverse effects are remedied;

(b) the Concessionaire fails to comply with, perform or observe any other material obligation, covenant, agreement, term or condition in this Agreement or any Project Agreement to which the Department and the Concessionaire are parties (provided, that a debarment pursuant to the provisions set forth in Section 24.03(b) (relating to SWaM participation) will not constitute a Fred Ex Concessionaire Breach), which failure materially and adversely affects the Department's rights or obligations under this Agreement or any other VDOT Project Agreement, and such failure continues without cure for a period of 90 Days following the date the Department delivers to the Concessionaire written notice thereof (giving particulars of the failure in reasonable detail) or for such longer period as may be reasonably necessary to cure such failure up to a maximum cure period of 180 Days; *provided*, that the maximum cure period may be extended one time for any such failure to a final date if (i) at least 30 Days prior to the end of the maximum 180-Day cure period, the Concessionaire delivers a written work plan to the Department outlining the actions by which the Concessionaire will cure such failure and setting

forth a final date by which the Concessionaire will cure such failure and (ii) the Department approves such work plan within 30 Days in its reasonable discretion; *provided*, that in all cases and regardless of the duration of the cure period, (A) the Concessionaire is proceeding with all due diligence to cure or cause to be cured such failure, (B) the failure is capable of being cured within a reasonable period of time, and (C) such failure is in fact cured within such period of time; *provided* further, that this Section 19.09(b) will not apply to events covered by other provisions of this Section 19.09;

(c) the Concessionaire fails to pay to the Department when due any undisputed amount in excess of \$100,000, adjusted annually by the percentage increase in CPI, payable to the Department with respect to the Fred Ex Project pursuant to this Agreement or any other VDOT Project Agreement or to deposit funds to any reserve account in the amount and within the time period required by this Agreement, and such failure, including any failure to pay interest at the Bank Rate from the date due, continues without cure for a period of 90 Days following the date the Department delivers to the Concessionaire written notice thereof;

(d) (i) the Concessionaire fails to achieve Fred Ex Final Completion by the Fred Ex Long Stop Date, as such date may be extended pursuant to this Agreement or (ii) in the case where a new Fred Ex Long Stop Date has been established pursuant to Section 8.15(f) hereof, the Concessionaire fails to diligently implement the Fred Ex Final Completion Recovery Plan;

(e) the Concessionaire fails to maintain, or to cause to be maintained, in effect the insurance, guarantees, letters of credit or other performance security as and when required pursuant to this Agreement for the benefit of relevant parties, or fails to comply with any requirement of this Agreement pertaining to the amount, terms or coverage of the same and such failure continues without cure for a period of ten Business Days following the date the Department delivers to the Concessionaire written notice thereof; and

(f) after exhaustion of all rights of appeal, (i) there occurs any suspension or debarment (distinguished from ineligibility due to lack of financial qualifications), or there goes into effect an agreement for voluntary exclusion, of the Concessionaire, any affiliate of the Concessionaire (as “affiliate” is defined in 29 CFR 98.905 or successor regulation of similar import), Transurban, the Fred Ex Design-Build Contractor or the TTMS Contractor, in each case, whose work is not completed, from bidding, proposing or contracting with any Federal or State department or agency or (ii) the Concessionaire, Transurban, the Fred Ex Design-Build Contractor or the TTMS Contractor, in each case, who have ongoing Work, or any of their respective officers, directors, or Administering Employees have been convicted of, or plead guilty or nolo contendere to, a violation of Law for fraud, conspiracy, collusion, bribery, perjury, or material misrepresentation, as a result in whole or in part of activities relating to any project in the State, and such failure continues without cure for a period of 90 Days following the date the Department delivers to the Concessionaire written notice thereof (giving particulars of the failure in reasonable detail); *provided*, that a debarment pursuant to the provisions set forth in Section 24.03(b) (relating to SWaM participation) will not constitute a Fred Ex Concessionaire Breach. If the offending Person is an officer, director or Administering Employee, cure will be regarded as complete when the Concessionaire proves that such Person has been removed from any position or ability to manage, direct or control the decisions of the Concessionaire, Transurban, the Fred Ex Design-Build Contractor or the TTMS Contractor (as applicable) or to perform

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

### **Section 19.10 Limitations on Fred Ex Concessionaire Breach**

(a) A Fred Ex Concessionaire Breach shall arise from a Fred Ex Concessionaire Breach Triggering Event that affects only the Fred Ex Project. If a single event affects more than just the Fred Ex Project (even if the event otherwise meets the definition of a Fred Ex Concessionaire Breach Triggering Event), the parties will treat it as a Concessionaire Default Triggering Event unless otherwise mutually agreed.

(b) Concessionaire Default Triggering Events under Sections 19.01(d) and (l) will always be treated as Concessionaire Default Triggering Events unless otherwise mutually agreed, even if such events affect only the Fred Ex Project.

(c) Concessionaire Default Triggering Events under Sections 19.01(g), (i) and (k) will always be treated as Concessionaire Default Triggering Events unless otherwise mutually agreed.

(d) After Fred Ex Final Completion, Sections 19.09, 19.10, 19.11, and 20.13 will no longer apply and all events giving rise to Concessionaire Default will be governed by Section 19.01.

### **Section 19.11 Department Remedies upon Fred Ex Concessionaire Breach**

Upon the occurrence of a Fred Ex Concessionaire Breach, the Department may, subject to the provisions of the Fred Ex Direct Agreement, do any or all of the following as the Department, in its sole discretion, will determine:

(a) except for a Fred Ex Concessionaire Breach occurring under Section 19.09(d), the Department may terminate the Fred Ex Project and any provisions in and terms of this Agreement and any other Project Agreements to which the Department and the Concessionaire are both parties that solely relates to the Fred Ex Project, to the extent provided in Section 20.13;

(b) if the Fred Ex Concessionaire Breach is by reason of the failure to pay any undisputed monies to a third party, the Department may (but will have no obligation to) make payment on behalf of the Concessionaire of such monies, and any amount so paid by the Department will be payable by the Concessionaire to the Department within five Days after demand, including accrued interest at the Bank Rate from the date such payment is made by the Department to the repayment date; *provided*, that (i) the Department will not incur any liability to the Concessionaire for any act or omission of the Department or any other Person in the course of remedying or attempting to remedy any Fred Ex Concessionaire Breach and (ii) the Department’s cure of any Fred Ex Concessionaire Breach will not waive or affect the Department’s rights against the Concessionaire by reason of the Fred Ex Concessionaire Breach; and

(c) the Department may cure the Fred Ex Concessionaire Breach (but this will not obligate the Department to cure or attempt to cure a Fred Ex Concessionaire Breach or, after having commenced to cure or attempted to cure a Fred Ex Concessionaire Breach, to continue to do so), and all costs and expenses reasonably incurred by the Department in curing or attempting to cure the Fred Ex Concessionaire Breach, including the Department's Allocable Costs, will be payable by the Concessionaire to the Department within five Days of demand, including accrued interest at the Bank Rate from the date such costs or expenses were incurred to the repayment date; *provided*, that (i) the Department will not incur any liability to the Concessionaire, and the Concessionaire hereby irrevocably waives and releases any liability of the Department to the Concessionaire, for any act or omission of the Department or any other Person in the course of remedying or attempting to remedy any Fred Ex Concessionaire Breach and (ii) the Department's cure of any Fred Ex Concessionaire Breach will not waive or affect the Department's rights against the Concessionaire by reason of the Fred Ex Concessionaire Breach.

## ARTICLE 20.

### **TERMINATION; HANDBACK**

#### **Section 20.01 Termination Upon Expiration of Term**

Unless earlier terminated in accordance with the terms of this Article 20, all the rights and obligations of the parties hereunder will cease and terminate, without notice or demand, on the last Day of the Term. Not later than 180 Days preceding the end of the Term, the Concessionaire and the Department will develop a plan (the "Transition Plan") to assure the orderly transition of the Project to the Department or its designee (which Transition Plan is in addition to the adjustments and changes to the Life Cycle Maintenance Plan under Section 20.02). The parties will then diligently implement the Transition Plan in accordance with the Technical Requirements.

#### **Section 20.02 Handback Obligations and Reserve**

(a) Upon the end of the Term, the Concessionaire shall hand-back the Project Assets to the Department, at no charge to the Department, with asset condition having a remaining life of the greater of: (i) five years; or (ii) life within its normal lifecycle (collectively referred to as the "Handback Requirements"). In addition, if requested by the Department, the Concessionaire will dismantle the HOT Lanes toll system as required to convert the HOT Lanes back to HOV Lanes; *provided* that the Department shall notify the Concessionaire at least one year prior to the end of the Term if the HOT Lanes are to be converted back to HOV Lanes. Any such dismantling of the HOT Lanes toll system shall be at Concessionaire's sole cost and expense.

(b) Beginning 20 years prior to the expiration of the Term and every five years thereafter, the Concessionaire and the Department will jointly conduct inspections of the Project Assets, for the purposes of jointly (i) determining and verifying the condition of all Project Assets and their residual lives, and (ii) determining, revising and updating the Life Cycle Maintenance Plan to reflect the Handback Requirements.

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

(d) The Concessionaire shall diligently perform and complete all work contained in the Life Cycle Maintenance Plan prior to reversion of the Project Assets back to the Department, based on the required adjustments and changes to the Life Cycle Maintenance Plan resulting from the inspections and analysis under Section 20.02(b) and (c). The Concessionaire shall complete all such work prior to the end of the Term.

(e) Starting five years prior to the expiration of the Term, the Concessionaire shall post to the Department a ten-year irrevocable Letter of Credit or a Performance Bond for a period of five years after expiration of the Term in an amount equal to 50% of the nominal lifecycle cost expended in the previous five years of the Term pursuant to the most recent Life Cycle Maintenance Plan approved by the Department. This Letter of Credit or Performance Bond may be drawn upon by the Department only in the event that subsequent to termination or expiration of the Term, the Project Assets are found to fail to address the Handback Requirements and in the amount required to address such failures up to the full amount of the Letter of Credit or Performance Bond.

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

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

(a) If a Significant Force Majeure Event occurs, then

(i) the Concessionaire may elect to terminate this Agreement unless the Department elects, within 14 Days following receipt of the Concessionaire’s written notice of election to terminate, to treat the Significant Force Majeure Event as a Compensation Event; and

(ii) the Department may elect to terminate this Agreement unless the Concessionaire elects, within 60 Days following the Significant Force Majeure Event, to restore any resulting damage or destruction at the Concessionaire’s sole cost and expense and furnishes a restoration plan acceptable to the Department with respect to such damage or destruction;

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

(b) If the Concessionaire has elected to restore the Project in accordance with Section 20.03(a)(ii), it will promptly carry out the restoration of the Project in accordance with the terms of this Agreement and the restoration plan approved by the Department.

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

**Section 20.04 Termination for Failure to Achieve Financial Close; Termination of the Fred Ex Project Based on Excess Fred Ex Financial Protections**

(a) Failure to Achieve Financial Close by Financial Close Deadline. If the Concessionaire fails to achieve Financial Close by the Financial Close Deadline, either party may, at its sole discretion, elect to terminate this Agreement and any other Project Agreement to which it is a party. If a party elects to terminate pursuant to this Section 20.04(a), such party will provide written notice of termination to the other party, and such termination will be effective immediately upon delivery of such notice. In the event of such termination, the Department will pay the Concessionaire the Non-Financial Close Termination Amount, which shall apply neither to the 395 Project nor the Fred Ex Project.

(b) Liability Upon Termination. In the event of any termination under Section 20.04(a), the Department will have no liability to the Concessionaire under this Agreement or any other Project Agreement other than the Non-Financial Close Termination Amount, and the Concessionaire will not be entitled to any Concessionaire Damages.

(c) Failure to Achieve Fred Ex Financial Close by the Fred Ex Financial Close Deadline.

(i) If the Concessionaire fails to achieve Fred Ex Financial Close by the Fred Ex Financial Close Deadline, either party may, at its sole discretion, elect to terminate the Fred Ex Project and any provisions in and terms of this Agreement and any other Project Agreement to which it is a party that solely relates to the Fred Ex Project.

(ii) If a party elects to terminate the Fred Ex Project pursuant to this Section 20.04(c), such party will provide written notice of termination to the other party, and such termination will be effective immediately upon delivery of such notice. In addition to any such termination rights, the Department will have the right to draw on the Fred Ex Financial Close Security, subject to the limitations set out in to Section 7.03B(f)(ii).

(d) Termination of the Fred Ex Project Based on Excess Fred Ex Financial Protections.

(i) Subject to Section 7.03B(c), if on any of the Fred Ex Financial Protections Calculation Dates, the total combined amount of the Fred Ex Financial Protections would exceed \$50,000,000, the Department may terminate the Fred Ex Project and any provisions in and terms of this Agreement and any other Project Agreement to which it is a party that solely relates to the Fred Ex Project. The \$50,000,000 overall Fred Ex Financial Protections cap applies to the specific amount of the Fred Ex Financial Protections offered by the Department, without regard to whether such amount is realized



by the Concessionaire (a) as a payment from the Department, (b) offset against amounts owed from the Concessionaire to the Department, or (c) by any other means.

(ii) In the event of termination of the Fred Ex Project pursuant to this Section 20.04(d), the Department will not have the right to draw on the Fred Ex Financial Close Security and the Department shall return the Fred Ex Financial Close Security to the Concessionaire within five (5) Business Days of such termination. In addition, if the Department terminates the Fred Ex Project pursuant to this Section 20.04(d), then the Department will reimburse the Concessionaire for one half of the Concessionaire's properly documented and invoiced third-party Fred Ex External Engineering Costs not to exceed \$5,700,000. After such termination, the Department will own all rights in all Fred Ex Work Product.

(e) In the event of termination of the Fred Ex Project pursuant to Sections 20.04(c) or (d), the Concessionaire will retain its right to operate and maintain the Original HOT Lanes, the 395 HOT Lanes, and the STE, but will lose its right to develop and operate the Fred Ex HOT Lanes, and the Department may complete the Fred Ex Project or any portion thereof, in which case the Department's completion of the Fred Ex Project or any portion thereof will not be treated as a Compensation Event. In the event of termination of the Fred Ex Project pursuant to this Section 20.04, the Concessionaire and the Department will follow the procedures in Section 20.08 applied to the Fred Ex Project alone, and not applied to the Original Project, the 395 Project or the STE.

(f) In the event of termination of the Fred Ex Project pursuant to Sections 20.04(c) or (d), the Concessionaire will assign the Fred Ex Design-Build Contract to the Department or its designee upon receipt of written notice by the Department to be provided at the Department's sole discretion, and the parties agree that the provisions in and terms of this Agreement and any other Project Agreements to which the Department and the Concessionaire are both parties related to the Fred Ex Project and the Fred Ex Corridor are null and void and no longer applicable to the Project, and the First ARCA, including all exhibits thereto will be reinstated and will govern the Project, inclusive of the Permit Fee.

### **Section 20.05 Termination for Concessionaire Default**

(a) Subject to the provisions of the Direct Agreement, the 395 Direct Agreement, and the Fred Ex Direct Agreement, at any time after the occurrence and during the continuance of a Concessionaire Default, the Department is entitled to terminate this Agreement and any other Project Agreement to which the Department and the Concessionaire are both parties.

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

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

(d) A termination by the Department for Concessionaire Default or any other termination of this Agreement by the Department which is later determined by the court of proper jurisdiction to be wrongful or in violation of this Agreement will be deemed to have been a termination for Department Default pursuant to Section 20.06 for the sole purpose of calculating the compensation owed to the Concessionaire by the Department.

### **Section 20.06 Termination for Department Default**

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

(b) If the Concessionaire elects to terminate pursuant to this Section 20.06, the Concessionaire will deliver to the Department a written notice of intent to terminate this Agreement. Upon receipt of such notice of intent to terminate, the Department will be entitled to cure such Department Default by providing the Concessionaire with a written work plan within the 90-Day period after the Department receives the written notice of intent to terminate. The work plan will outline the actions by which the Department will ensure future compliance with the obligation, covenant, agreement, term, or condition in this Agreement that the Department failed to perform or observe. The work plan will be subject to the Concessionaire's written approval (which approval will not be unreasonably withheld, delayed, or conditioned).

(c) If (i) the Department fails to provide the Concessionaire with the work plan required pursuant to Section 20.06(b) or (ii) the Department fails to comply in any material respect with the work plan approved by the Concessionaire pursuant to Section 20.06(b) and in the case of this clause (ii), such failure continues without cure for 60 Days following the date the Concessionaire delivers to the Department written notice thereof, the Concessionaire may terminate this Agreement by delivering to the Department written notice of its election to terminate, which termination will take effect not less than 30 Days after the delivery of such notice.

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

### **Section 20.07 Other Termination**

(a) If this Agreement is terminated by the Department or the State prior to the end of the Term, other than pursuant to Sections 19.02, 20.03, 20.04, 20.05, or 20.06, or is canceled, rescinded, or voided during the Term, subject to Section 25.19, the Department will pay to the Concessionaire the Other Termination Amount. A termination as contemplated by this Section 20.07 shall not be effective unless and until Project Value has been determined pursuant to Section 20.11.

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

## **Section 20.08 Concessionaire Actions Upon Termination**

(a) On delivery of notice of termination of this Agreement or the Concessionaire's rights hereunder for any reason prior to the expiration of the Term, the provisions of this Section 20.08 will apply. The Concessionaire will timely comply with such provisions independently of, and without regard to, the timing for determining, adjusting, settling and paying any amounts due to the Concessionaire or the Department on account of termination. In connection with the expiration of the Term, certain provisions of this Section 20.08, as specified, will apply.

(b) The Concessionaire will conduct all discussions and negotiations to determine the amount of any termination compensation, and will share with the Department all data, documents and information pertaining thereto, on an Open Book Basis.

(c) Except as otherwise specified in this Agreement, within 30 Days after receipt of a notice of termination, or, if applicable, not later than 120 Days before expiration of the Term, the Concessionaire will meet and confer with the Department for the purpose of developing an interim transition plan for the orderly transition of Work, demobilization and transfer to the Department of control of the Project and Project Right of Way. The parties will use diligent efforts to complete preparation of the interim transition plan within 15 Days after the date the Concessionaire receives the notice of termination or, if applicable, not later than 15 Days before expiration of the Term. The parties will use diligent efforts to complete a final transition plan within 30 Days after such date. The transition plan will be in form and substance acceptable to the Department in its good faith discretion and will include and be consistent with the other provisions and procedures set forth in this Section 20.08, all of which procedures the Concessionaire will promptly follow, regardless of any delay in preparation or acceptance of the transition plan.

(d) Upon receipt of a notice of termination, or, if applicable, before expiration of the Term, the Concessionaire will take all action that may be necessary, or that the Department may reasonably direct, for the protection and preservation of the Project, the Work and such materials, goods, machinery, equipment, parts, supplies, and other property. For the avoidance of doubt, during the period from its receipt of a notice of termination until the expiration of the Term, the Concessionaire will continue to perform its obligations and be entitled to receive Toll Revenues pursuant to this Agreement.

(e) The Concessionaire will deliver to the Department on the date of expiration of the Term or on the effective date of any earlier termination:

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

(ii) possession and control of the Project and Project Assets (other than the Department Shared Assets and the 395 Department Assets), free and clear of any and all

Liens created, incurred or suffered by the Concessionaire, any Concessionaire Party or any Affiliate or anyone claiming under any of them; *provided*, that release of the Liens of the Lenders will be subject to payment of termination compensation owing by the Department;

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

(iv) a notice of termination of this Agreement and the Concessionaire's Interest, in the form reasonably required by the Department, executed and acknowledged by the Concessionaire.

(f) If, as of the date on which the notice of termination is delivered, the Concessionaire has not completed construction of all or part of the Project, the Department may, subject to the provisions of the Direct Agreement, the 395 Direct Agreement, or the Fred Ex Direct Agreement, elect, by written notice to the Concessionaire, the Design-Build Contractor, and the TTMS Contractor, if applicable, delivered within 90 Days after the date on which the notice of termination is delivered, to continue in effect the Design-Build Contract or the TTMS Contract or to require the termination of any such agreement. If the Department does not deliver written notice of election within such time period, the Department will be deemed to elect to require termination of the Design-Build Contract or the TTMS Contract, as applicable. If the Department elects to continue the Design-Build Contract or the TTMS Contract, in effect, then the Concessionaire will execute and deliver to the Department a written assignment, in form and substance acceptable to the Department, acting reasonably, of all the Concessionaire's right, title, and interest in and to the Design-Build Contract or the TTMS Contract and the Department will assume in writing the Concessionaire's obligations thereunder that arise from and after the end of the Term. If the Department elects (or is deemed to elect) to require termination of the Design-Build Contract or the TTMS Contract, then the Concessionaire will:

(i) unless the Department has granted Replacement Agreements to a Lender or its Substituted Concessionaire, take such steps as are necessary to terminate the Design-Build Contract or the TTMS Contract, including notifying the Design-Build Contractor or TTMS Contractor that the Design-Build Contract or the TTMS Contract is being terminated and that the Design-Build Contractor or TTMS Contractor is to immediately stop work and stop and cancel orders for materials, services, or facilities unless otherwise authorized in writing by the Department;

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

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

(iv) subject to the prior written approval of the Department, settle all outstanding liabilities and all Claims arising out of the Design-Build Contract or the TTMS Contract;

(v) cause the Design-Build Contractor or TTMS Contractor to execute and deliver to the Department a written assignment, in form and substance acceptable to the Department, acting reasonably, of all the Design-Build Contractor's or TTMS Contractor's right, title and interest in and to (A) all third party agreements and permits, except Contracts for performance of the Design-Build Work or the TTMS Work, as applicable; *provided*, that the Department assumes in writing all of the Design-Build Contractor's or TTMS Contractor's obligations thereunder that arise after the effective date of termination and (B) all assignable warranties and Claims held by the Design-Build Contractor or TTMS Contractor against other Contractors and other third parties in connection with the Project or the Work; *provided* that the Design-Build Contractor or TTMS Contractor will be entitled to retain its rights and remedies with respect to Work performed prior to the effective date of termination; and

(vi) carry out such other directions as the Department may give for suspension or termination of Work performed under the Design-Build Contract or the TTMS Contract.

(g) If, as of the date notice of termination is delivered, the Concessionaire has entered into any other Contract for the design, construction, permitting, installation, and equipping of the Project, subject to the provisions of the Direct Agreement, the 395 Direct Agreement, and the Fred Ex Direct Agreement, the Department will elect, by written notice to the Concessionaire, to continue in effect such Contract or to require its termination. If the Department elects to continue the Contract in effect, then the Concessionaire will execute and deliver to the Department a written assignment, in form and substance acceptable to the Department, acting reasonably, of all the Concessionaire's right, title, and interest in and to the Contract, and the Department will assume in writing the Concessionaire's obligations thereunder that arise from and after the effective date of termination. If the Department elects to require termination of the Contract, then the Concessionaire will take actions comparable to those set forth in Section 20.08(f) with respect to the Contract.

(h) If, as of the date notice of termination is delivered, the Concessionaire has entered into any operations or maintenance Contract, the Department will elect, by written notice to the Concessionaire, to continue it in effect or require its termination; *provided*, that if a Lender is entitled to Replacement Agreements following termination, the Department will not elect to terminate any such Contract until the Lender's right to Replacement Agreements expires without exercise. If the Department elects to continue any such Contract in effect, then on or about the effective date of termination (or promptly after any later election to terminate) the Concessionaire will execute and deliver to the Department a written assignment, in form and substance acceptable to the Department, acting reasonably, of all the Concessionaire's right, title and interest in and to the Contract, and the Department will assume in writing the Concessionaire's obligations thereunder that arise from and after the effective date of termination.

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

(a) If this Agreement is terminated by reason of a Concessionaire Default or a Department Default or any other Project Agreement is terminated for default thereunder, such termination will not excuse the defaulting party from any liability arising out of such default as provided in the Project Agreements. If any outstanding Claim of the Concessionaire against the Department that is independent of the event of termination and determination of the termination compensation is resolved prior to payment of the termination compensation (if any), the parties will adjust the termination compensation by the amount of the unpaid award, if any, on the Claim. Notwithstanding the foregoing, any termination of this Agreement will automatically extinguish any Claim of the Concessionaire to payment of Concessionaire Damages for adverse Net Cost Impacts and Net Revenue Impacts accruing after the effective date of termination from Compensation Events that occurred prior to termination; *provided*, however, that (i) Claims for any such Net Cost Impacts that cannot reasonably be avoided by the Concessionaire will not be extinguished, and (ii) the foregoing will not limit any Claim of the Concessionaire for interest on unpaid amounts owing or to become owing by the Department as provided in this Agreement.

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

(c) The Department will, as of the effective date of termination of this Agreement or the Concessionaire's rights hereunder, whether due to expiration or earlier termination of the Term, assume full responsibility for the Project or, if Substantial Completion, 395 Final Completion, or Fred Ex Final Completion has not been achieved or other Work has otherwise not been completed as of such date, be permitted to assume full responsibility for such outstanding Work, and as of such date, the Concessionaire will have no liability or responsibility for such Work, as the case may be, occurring after such date; *provided*, that the Department and the Concessionaire will remain fully responsible for all of their respective obligations or liabilities pursuant to this Agreement or any other Project Agreement arising before the effective date of termination and those obligations pursuant to this Agreement or other Project Agreements which survive termination.

(d) Each of the Concessionaire and the Department will be liable for all costs, expenses and other amounts for which it is liable or responsible hereunder incurred up to the effective date of termination of this Agreement or the Concessionaire's rights hereunder, whether due to expiration or earlier termination of the Term, and the Concessionaire will not be liable for any costs, expenses and amounts incurred in connection with the Project or the Work on and after such date, except to the extent such costs, expenses and amounts are properly included in the measure of any damages due to the Department arising from a default by the Concessionaire pursuant to this Agreement. The amount of any termination compensation is subject to reduction and offset for such damages.



(e) Regardless of the Department's prior actual or constructive knowledge thereof, no contract or agreement to which the Concessionaire is a party (unless the Department is also a party thereto) as of the effective date of termination will bind the Department, unless the Department elects to assume such contract or agreement in writing. Except in the case of the Department's express written assumption, no such contract or agreement will entitle the contracting party to continue performance of work or services respecting the Project following the effective date of termination, or to any Claim, legal or equitable, against the Department.

(f) As of the effective date of termination of this Agreement, whether due to expiration or earlier termination of the Term, the Permit and all of the Concessionaire's Interest will automatically terminate and expire, and all Liens created, permitted or suffered by the Concessionaire will be automatically extinguished, *provided* however, that the foregoing will not prohibit the Concessionaire from assigning its right to receive termination payments to the Lenders.

### **Section 20.10 Exclusive Termination Remedies**

(a) Each of the Department and the Concessionaire hereby acknowledges and agrees that it may only terminate this Agreement, the 395 Project, or the Fred Ex Project in accordance with the express terms hereof.

(b) Article 19 and this Article 20 set forth the entire and exclusive provisions and rights of the Department and the Concessionaire regarding termination of this Agreement, the 395 Project, or the Fred Ex Project, and any and all other rights at law or in equity to terminate or to payment of compensation upon termination are hereby waived to the maximum extent permitted by Law. The parties hereto agree that, upon any termination of this Agreement, the 395 Project, or the Fred Ex Project, the payments provided in this Agreement will constitute the Concessionaire's sole compensation (and the Concessionaire shall have no further liability to the Department except as otherwise provided in this Agreement) pursuant to this Agreement and in the event the Department or any designee or licensee of the Department imposes tolls for travel on the Project after termination of this Agreement, the 395 Project, or the Fred Ex Project, neither the Concessionaire nor any beneficiary or Lender as a result of a Financing Assignment will be entitled to any further compensation in respect thereof. In furtherance of the foregoing, the parties hereto agree that the provisions of Section 33.2-1813B of the Code of Virginia will not apply to the Project after the termination of this Agreement.

### **Section 20.11 Determination of Project Value**

(a) In the event the Department owes the Concessionaire an amount calculated by reference to the Project Value, Project Value will be determined according to the following procedures:

(i) within 30 Days after a party requests the appointment of an appraiser, the Department and the Concessionaire will confer in good faith to mutually appoint an independent third-party appraiser to determine the Project Value by written appraisal. This appraiser must be nationally recognized and experienced in appraising similar assets;

(ii) if the parties are unable to agree upon such a single appraiser within such 30-Day period, then within ten Days thereafter the Department and the Concessionaire will each appoint an independent third-party appraiser and both such appraisers will be instructed jointly to select, within 15 Days after they are appointed, a third independent third-party appraiser who is nationally recognized and experienced in appraising similar assets to make the appraisal referred to above;

(iii) if the appraisers appointed by the parties are unable to appoint an independent third-party appraiser under Section 20.11(a)(ii) within 60 Days after a party has requested the appointment of an appraiser under Section 20.11(a)(i), then either party may petition the Circuit Court for the City of Richmond to appoint an independent third-party appraiser having such reputation and experience;

(iv) each party will pay the costs of its own appraiser. The Department and the Concessionaire will pay in equal shares the reasonable costs and expenses of the third independent appraiser;

(v) each party will diligently cooperate with the appraiser, including promptly providing the appraiser with data and information regarding the Project, Project Right of Way, asset condition, historical cost and revenue data, and other information the appraiser may request that is in the possession of or reasonably available to the party. Each party will provide the appraiser with access to the party's books and records regarding the Project on an Open Book Basis; and

(vi) once appointed, the independent third-party appraiser will conduct an appraisal of the Project Value and deliver to both parties a draft appraisal report and draft valuation. The appraisal will determine Project Value as of the effective date of termination of the Agreement, based on the then condition of the Project (but without regard to any damage or loss resulting from a Department Default). The appraiser will appraise Project Value by taking into account the terms and conditions of this Agreement, projected cash flows and projected costs of the Project for the remainder of the projected Term had this Agreement not been terminated, as determined by the appraiser. For the avoidance of doubt, the calculation of Project Value is the sum of the fair market value of the projected Distributions for the remainder of the Term without taking into consideration any terminations pursuant to Article 20 and the fair market value of any Concessionaire Debt outstanding as of the date of the calculation, and will include Concessionaire Damages for adverse Net Cost Impacts and Net Revenue Impacts accruing after the effective date of termination from Compensation Events that occurred prior to termination. In conducting the appraisal, and before issuing a draft appraisal report, the independent appraiser will afford reasonable and comparable opportunity to each party to provide the appraiser with information, data, analysis and reasons supporting each party's view on the Project Value. The parties will have 15 Days after receipt of the draft appraisal report to comment thereon. After the opportunity to comment has expired, the independent third-party appraiser will consider and evaluate all comments, prepare a final appraisal report stating the Project Value, and deliver the final appraisal report to both parties.

(b) If either party disagrees with the Project Value, either party may invoke the dispute resolution procedures set forth in Article 21, by delivery of notice to the other party within 60 Days following receipt of the appraiser's report. Failure to invoke the dispute resolution procedures within such time period will conclusively constitute acceptance of the Project Value.

### **Section 20.12 Termination of 395 Project for 395 Concessionaire Breach**

(a) Subject to the provisions of the 395 Direct Agreement, and except for a 395 Concessionaire Breach occurring under Section 19.06(d), at any time after the occurrence and during the continuance of a 395 Concessionaire Breach, the Department is entitled to terminate the 395 Project and any provisions in and terms of this Agreement and any other Project Agreements to which the Department and the Concessionaire are both parties that solely relates to the 395 Project.

(b) If the Department elects to terminate the 395 Project pursuant to this Section 20.12, the Department will deliver to the Concessionaire and the Collateral Agent written notice of its election to terminate the 395 Project, which termination will take effect not less than 60 Days after the delivery of such notice.

(c) In the event of termination of the 395 Project pursuant to this Section 20.12, the Department will pay to the Concessionaire in accordance with Section 25.19, the 395 Concessionaire Breach Termination Amount.

(d) In the event of termination of the 395 Project pursuant to this Section 20.12, the Concessionaire will retain its right to operate and maintain the Original HOT Lanes and STE, but will lose its right to develop and operate the 395 HOT Lanes, and the Department may complete the 395 Project or any portion thereof, in which case the Department's completion of the 395 Project or any portion thereof will not be treated as a Compensation Event. In the event of termination of the 395 Project pursuant to this Section 20.12, the Concessionaire and the Department will follow the procedures in Section 20.08 applied to the 395 Project alone, and not applied to the Original HOT Lanes or STE.

(e) In the event of termination of the 395 Project pursuant to this Section 20.12, the Parties agree that the provisions in and terms of this Agreement and any other Project Agreements to which the Department and the Concessionaire are both parties related to the 395 Project and the 395 Corridor are null and void and no longer applicable to the Project.

### **Section 20.13 Termination of Fred Ex Project for Fred Ex Concessionaire Breach**

(a) Subject to the provisions of the Fred Ex Direct Agreement, and except for a Fred Ex Concessionaire Breach occurring under Section 19.09(d), at any time after the occurrence and during the continuance of a Fred Ex Concessionaire Breach, the Department is entitled to terminate the Fred Ex Project and any provisions in and terms of this Agreement and any other Project Agreements to which the Department and the Concessionaire are both parties that solely relates to the Fred Ex Project.

(b) If the Department elects to terminate the Fred Ex Project pursuant to this Section 20.13, the Department will deliver to the Concessionaire and the Collateral Agent written notice of its election to terminate the Fred Ex Project, which termination will take effect not less than 60 Days after the delivery of such notice.

(c) In the event of termination of the Fred Ex Project pursuant to this Section 20.13, the Department will pay to the Concessionaire in accordance with Section 25.19, the Fred Ex Concessionaire Breach Termination Amount. In addition, the Concessionaire will deliver to the Department all Fred Ex Work Product in accordance with Section 18.03(d).

(d) In the event of termination of the Fred Ex Project pursuant to this Section 20.13, the Concessionaire will retain its right to operate and maintain the Original HOT Lanes, the 395 HOT Lanes, and STE, but will lose its right to develop and operate the Fred Ex HOT Lanes, and the Department may complete the Fred Ex Project or any portion thereof, in which case the Department's completion of the Fred Ex Project or any portion thereof will not be treated as a Compensation Event. In the event of termination of the Fred Ex Project pursuant to this Section 20.13, the Concessionaire and the Department will follow the procedures in Section 20.08 applied to the Fred Ex Project alone, and not applied to the Original HOT Lanes, the 395 HOT Lanes, or STE.

(e) In the event of termination of the Fred Ex Project pursuant to this Section 20.13, the parties agree that the provisions in and terms of this Agreement and any other Project Agreements to which the Department and the Concessionaire are both parties related to the Fred Ex Project and the Fred Ex Corridor are null and void and no longer applicable to the Project, and the First ARCA, including all exhibits thereto will be reinstated and will govern the Project, inclusive of the Permit Fee.

## **ARTICLE 21.**

### **DISPUTE RESOLUTION**

#### **Section 21.01 General**

(a) The parties will attempt to resolve any Disputes arising out of this Agreement at the Project level through good faith negotiations between designated representatives. The Department, the Concessionaire, the Design-Build Contractor, the TTMS Contractor, all subcontractors, and the FHWA are firmly committed to the following principles:

(i) trust and open communications are encouraged and expected by all participants;

(ii) all of the participants move quickly to address and resolve issues at the lowest possible level by approaching problems from the perspectives and needs of all of the participants involved;

(iii) all of the participants have identified common goals and respect each other's individual goals and values; and

(iv) all of the participants create an atmosphere conducive to cooperation and teamwork in finding better solutions to potential problems and issues at hand.

(b) If the Dispute cannot be resolved at the Project level in accordance with Section 21.01(a) above, then either party will have the right to submit the Dispute to the Steering Committee for resolution. The Steering Committee will convene a meeting within ten Days of notification by either party of any unresolved Dispute. After the meeting has convened, the Steering Committee will have seven Days to resolve the Dispute.

(c) If the Steering Committee has not resolved the Dispute pursuant to Section 21.01(a)(i), then either party may request non-binding mediation of the Dispute or any other form of alternative dispute resolution process that is mutually acceptable to both parties. If the Dispute has not been resolved within 60 Days after the initiation of mediation proceedings or, if both parties do not agree to mediation, the other form of alternative dispute resolution process, either party will have the right to proceed in accordance with Section 21.02. The first face-to-face meeting between the mediator and both parties will be deemed to be the initiation of mediation.

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

### **Section 21.02 Litigation; Venue**

(a) All litigation between the parties arising out of or pertaining to this Agreement or its breach will be filed, heard and decided in the Circuit Court for the City of Richmond, Virginia, Division I, which will have exclusive jurisdiction and venue.

(b) As permitted by Section 33.2-1814 of the Code of Virginia, the parties agree that any requirement that the State Corporation Commission issue a declaratory judgment regarding a material default (as defined in Section 33.2-1800 of the Code of Virginia) pursuant to such Section 33.2-1814, as a prerequisite to exercising any remedy set forth in this Agreement or such Section 33.2-1814, will not apply to this Agreement.

(c) Satisfaction of the procedures set forth in Section 21.01 will be a condition precedent to instituting a legal action in court; *provided*, that if the Department determines, in its sole discretion, that a Dispute involves an issue that poses an immediate and serious threat to the public health, safety, and welfare, the Department will be entitled to take whatever steps it deems appropriate and to initiate litigation of the matter in court without first submitting the Dispute to the dispute resolution procedures of this Agreement.

### **Section 21.03 Conduct During Pendency of Dispute**

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

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

#### **Section 21.04 Costs of Dispute Resolution**

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

(b) The fees and costs of any mediator will be borne equally by each party.

### **ARTICLE 22.**

#### **RESERVED RIGHTS**

##### **Section 22.01 Exclusions from the Concessionaire's Interest**

The Concessionaire's rights and interests in the Project have been granted to the Concessionaire under the Permit in order to enable it to accomplish the Project Purposes. Subject to Section 22.04, the Concessionaire's rights and interests consist only of those expressly granted by this Agreement and other Project Agreements and specifically exclude all Reserved Rights.

##### **Section 22.02 Department Reservation of Rights**

(a) The Department may, at any time at its sole cost and expense, devote, use or take advantage of the Reserved Rights for any public purpose without any financial participation whatsoever by the Concessionaire. The Department hereby reserves to itself all ownership, development, maintenance, repair, replacement, operation, use and enjoyment of, and access to, the Reserved Rights. The Department will owe no compensation or damages on account of its exercise of Reserved Rights, unless such exercise qualifies as a Compensation Event.

(b) In addition to any rights it has, the Department reserves (for itself and its representatives, as well as others claiming by, through or under the Department) the right and will have the right to enter the Project Assets and each and every part thereof at all reasonable times in the following circumstances:

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



(ii) in the event of any circumstance or event that is reasonably believed by the Department to have caused an impairment to the continuous operation of the HOT Lanes as a public highway, and if the Department in its discretion determines that the Concessionaire is not then taking all necessary steps to respond to or to rectify such circumstance or event, to take, at such times as the Department determines necessary in its discretion and with notice to the Concessionaire if practicable under the circumstances, such actions as the Department determines may be necessary to respond to or to rectify such circumstance or event or to restore the operation of the Project, and all costs and expenses incurred by the Department in connection with or related to such actions will be paid by the Concessionaire.

(c) The Concessionaire acknowledges and agrees that all rights to own, lease, sell, assign, transfer, utilize, develop or take advantage of the Reserved Rights are hereby reserved to the Department, and the Concessionaire will not engage in any activity infringing upon the Reserved Rights.

### **Section 22.03 Disgorgement**

If a Concessionaire Default concerns a breach of the provisions of Section 22.01 or Section 22.02, in addition to any other remedies pursuant to this Agreement, the Department will be entitled to disgorgement of all profits from the prohibited activity and to sole title to and ownership of the prohibited assets and improvements.

### **Section 22.04 Alternate Treatment of Reserved Rights**

Notwithstanding Section 22.01 and Section 22.02, the Department may elect in its sole discretion to treat any development of improvements respecting Reserved Rights that it undertakes as Project Enhancements, in which case all of the provisions of Section 12.02 will apply.

### **Section 22.05 Naming Rights**

(a) The Department hereby grants the Concessionaire the naming rights for the Project, subject to (i) approval of any such name by the Department, which approval will not be unreasonably withheld, conditioned or delayed, and (ii) compliance with Law and Governmental Approvals. The Concessionaire will request the Department's approval of a name for the Project in writing and no such approval will be effective unless and until provided in writing by the Department; *provided*, that the failure of the Department to respond in writing to such request within 21 Days following receipt of the Concessionaire's request will be deemed the Department's approval thereof. The Concessionaire may sub-license any such rights to the O&M Contractor.

(b) If the Concessionaire changes the name of the HOT Lanes, the Concessionaire will pay the Department for the cost of changing names on signs maintained by the Department pursuant to the Technical Requirements.

(c) Any revenues received by the Concessionaire with respect to the naming rights granted to the Concessionaire under this Section 22.05 will be treated as Gross Revenues.

## ARTICLE 23.

### REPRESENTATIONS, WARRANTIES AND FINDINGS

#### **Section 23.01 Department Representations and Warranties**

The Department hereby represents and warrants to the Concessionaire as follows:

(a) the Department is an agency of the State and has full power, right and authority to execute, deliver and perform its obligations under, in accordance with, and subject to the terms and conditions of this Agreement and other Project Agreements to which the Department is a party;

(b) each person executing this Agreement or any other Project Agreement on behalf of the Department to which the Department is a party has been or at such time will be duly authorized to execute each such document on behalf of the Department;

(c) neither the execution and delivery by the Department of this Agreement and the other Project Agreements executed concurrently herewith to which the Department is a party, nor the consummation of the transactions contemplated hereby or thereby, is in conflict with or will result in a default under or violation of (i) any other agreements or instruments to which it is a party or by which it is bound or (ii) to its knowledge, any Law, where such violation will have a material adverse effect on the ability of the Department to perform its obligations under this Agreement;

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

(e) as of the Agreement Date, no agreement, contract, option, commitment or other right exists which binds, or which in the future may become binding on, the Department to sell, transfer, convey, dispose of or encumber the Project. The Department has not granted or assigned any interest in Gross Revenues to any other party other than the Concessionaire pursuant to this Agreement;

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

(g) the Department has taken or caused to be taken all requisite action to authorize the execution and delivery of, and the performance of its obligations under, this Agreement and the other Project Agreements to which the Department is a party;

(h) the Department is in material compliance with all Laws and Governmental Approvals applicable to its obligations in connection with this Agreement; and

(i) other than with respect to portions of the Project Right of Way not yet acquired as of the Agreement Date, the Department has good and sufficient title and interest to the Project Right of Way, free and clear of all Liens or other exceptions to title, except Permitted Encumbrances.

### **Section 23.02 Concessionaire Representations and Warranties**

The Concessionaire hereby represents and warrants to the Department as follows:

(a) the Concessionaire is a duly organized limited liability company created under the laws of the State of Delaware, is qualified to conduct business in the State, has the requisite power and all required licenses to carry on its present and proposed activities, and has full power, right and authority to execute and perform each and all of its obligations under the Project Agreements;

(b) (i) as of the Agreement Date, the membership interests in the Concessionaire are owned in 90% holdings by DRIVE USA Investments LLC and 10% holdings by Fluor and no other Person has a membership interest in the Concessionaire, (ii) as of the Amended and Restated Agreement Date, the membership interests in the Concessionaire are owned in 90% holdings by DRIVE USA Investments LLC and 10% holdings by Transurban Express Lanes LLC and (iii) as of the Second Amended and Restated Agreement Date, the membership interests in the Concessionaire is owned in 100% holdings by Transurban Express Lanes LLC, and no other Person has a membership interest in the Concessionaire;

(c) the Concessionaire has taken or caused to be taken all requisite action to authorize the execution and delivery of, and the performance of its obligations under, this Agreement and the other Project Agreements to which the Concessionaire is a party;

(d) each person executing this Agreement or any other Project Agreement on behalf of the Concessionaire has been or will at such time be duly authorized to execute each such document on behalf of the Concessionaire;

(e) this Agreement and each Project Agreement to which the Concessionaire or a Concessionaire Financial Party is a party have been duly authorized, executed and delivered by the Concessionaire or the Concessionaire Financial Party and constitutes a valid and legally binding obligation of the Concessionaire or the Concessionaire Financial Party (as the case may be), enforceable against it in accordance with its terms, subject only to applicable bankruptcy, insolvency and similar laws affecting the enforceability of the rights of creditors generally and to general principles of equity;

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

any Law, where such violation will have a material adverse effect on the ability of the Concessionaire to perform its obligations under this Agreement;

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

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

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

(j) to the best of the Concessionaire's knowledge after diligent inquiry, no event which, with the passage of time or the giving of notice, would constitute a Concessionaire Default, a 395 Concessionaire Breach, or a Fred Ex Concessionaire Breach has occurred;

(k) to the best of the Concessionaire's knowledge after diligent inquiry, no event which, with the passage of time or the giving of notice, would constitute a Delay Event or a Compensation Event under this Agreement has occurred;

(l) the Initial Base Case Financial Model (i) was prepared by or on the Concessionaire's behalf in good faith, (ii) fully discloses all Financial Model Formulas, and all cost, revenue and other financial assumptions and projections that the Concessionaire used or is using in making its decision to enter into this Agreement, (iii) fully discloses all Financial Model Formulas disclosed to the Lenders under the Project Financing Agreements and (iv) as of the Agreement Date, represents the projections that the Concessionaire believes in good faith are realistic and reasonable for the Project; *provided*, that such projections are based upon a number of estimates and assumptions and are subject to significant business, economic and competitive uncertainties and contingencies and that, accordingly, no representation or warranty is made that any of the assumptions are correct, that such projections will be achieved or that the forward-looking statements expressed in such projections will correspond to actual results;

(m) on or before the Agreement Date, the Concessionaire has delivered to the Department an audit report and an opinion of the Financial Model Auditor addressed to the Department to the effect that the Base Case Financial Model and the Financial Model Formulas reflect the terms of this Agreement and that the Financial Model Formulas and the Base Case Financial Model are suitable for use in this Agreement in connection with Compensation Events, Delay Events and early termination procedures, and covering such other matters as may have

been reasonably requested by the Department, all in form and substance acceptable to the Department; and

(n) All Early Work performed by Fluor and Transurban prior to the Agreement Date was performed in accordance with (i) Law; (ii) Governmental Approvals; and (iii) 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 engaged in the same kinds of undertakings and under the same or similar circumstances, conditions, scope and limitations (including limitations on access to the Project Right of Way and limitations agreed with the Department as to the scope of the work to be undertaken prior to the Agreement Date) as those applying to such work.

### **Section 23.03 Department's Findings Under the Act**

The Department, as the Responsible Public Entity with respect to the Project, makes the following findings:

(a) the actions taken by the Department pursuant to the Act facilitate the development, design, construction, management, operation and maintenance of the Project and the timely development of any Project Enhancements, and such public need may not be wholly satisfied by existing methods of procurement in which qualifying transportation facilities are developed and/or operated;

(b) there is a public need to construct and operate a qualifying transportation facility (as defined in Section 33.2-1800 of the Code of Virginia) of the type of the Project;

(c) the Permit granted hereunder authorizing the Concessionaire to develop, design, construct, manage and operate and maintain the Project, including the development of any Project Enhancements, may result in their availability to the public in a more timely, more efficient and less costly fashion, thereby serving the public safety and welfare;

(d) the Project, its interconnections with existing transportation facilities, and the Concessionaire's plans for the development, design, construction, operation and maintenance of the Project are reasonable and compatible with the State transportation plan and with local comprehensive plans;

(e) the estimated cost of developing, designing, constructing, operating and maintaining the Project is reasonable in relation to similar transportation facilities;

(f) the Concessionaire's plans will result in the timely construction and operation and maintenance of the Project and in the development of any Project Enhancements;

(g) the Department will continue to have fee title or good and valid interest to the Project and the Project will remain open for use by members of the public as a public road upon payment of the applicable tolls;

(h) through this Agreement, the Department intends to encourage investment in the State by the Concessionaire to facilitate the development, construction, operation and maintenance of the Project and the development of any Project Enhancements; and

(i) the terms and conditions of this Agreement serve the public purpose of the Act.

## ARTICLE 24.

### **CONTRACTING PRACTICES AND PUBLIC WELFARE CONSIDERATIONS**

#### **Section 24.01 Obligation to Refrain from Discrimination**

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

#### **Section 24.02 Contracting**

(a) General. The Concessionaire may perform the Work through use of its own personnel, materials and equipment, or by contracting to Persons with the expertise, qualifications, experience, competence, skills and know-how to perform the responsibilities being contracted in accordance with all Law, all Governmental Approvals, and the terms, conditions and standards set forth in this Agreement.

(b) Design-Build Contractors and TTMS Contractor.

(i) The Concessionaire has entered into the 395 Design-Build Contract. Notwithstanding its use of the 395 Design-Build Contractor, the Concessionaire remains responsible for the 395 Design-Build Work during the Term in accordance with this Agreement. The Concessionaire will immediately notify the Department upon the termination, replacement or removal of the 395 Design-Build Contractor. Likewise, the Concessionaire has entered into the Fred Ex Design-Build Contract. Notwithstanding its use of the Fred Ex Design-Build Contractor, the Concessionaire remains responsible for the Fred Ex Design-Build Work during the Term in accordance with this Agreement. The Concessionaire will immediately notify the Department upon the termination, replacement or removal of the Fred Ex Design-Build Contractor.

(ii) The Concessionaire has entered into the 395 TTMS Contract. Notwithstanding its use of the TTMS Contractor, the Concessionaire remains responsible for the 395 TTMS Work during the Term in accordance with this Agreement. The



Concessionaire will immediately notify the Department upon the termination, replacement or removal of the TTMS Contractor. Likewise, the Concessionaire has entered into the Fred Ex TTMS Contract. Notwithstanding its use of the TTMS Contractor, the Concessionaire remains responsible for the Fred Ex TTMS Work during the Term in accordance with this Agreement. The Concessionaire will immediately notify the Department upon the termination, replacement or removal of the TTMS Contractor.

(c) Shared Facilities Agreement. The Concessionaire has entered into the Shared Facilities Agreement with CBE for the use of the Express Operations Center. In connection therewith, the Concessionaire agrees to provide to the Department copies of all notices received or given by the Concessionaire pursuant to the Shared Facilities Agreement, unless otherwise mutually agreed to by the parties. For the avoidance of doubt, the Parties agree that there will be no Access Fee payments between the Department and the Concessionaire on one hand and the Concessionaire and its affiliates, including CBE, on the other hand, for the use of the Express Operations Center for the 395 Project, or for the Fred Ex Project.

(d) O&M Contractor.

(i) Subject to the Department's approval, which will not be unreasonably withheld, the Concessionaire may contract with one or more separate O&M Contractors with the expertise, qualifications, experience, competence, skills and know-how to perform the operations and maintenance obligations of the Concessionaire in accordance with this Agreement; *provided*, that the Department's approval will not be required with respect to any Contractor with respect to the O&M Work (other than the O&M Contractor) (A) whose Contract price is less than \$4 million adjusted annually by the percentage increase in CPI and (B) is prequalified with the Department in accordance with the Department's Rules Governing Prequalification Privileges. Notwithstanding its use of an O&M Contractor, the Concessionaire remains ultimately responsible for the operation and maintenance of the Project during the Term in accordance with this Agreement. The O&M Contractor will be subject at all times to the direction and control of the Concessionaire, and any delegation to an O&M Contractor does not relieve the Concessionaire of any of its obligations, duties or liability pursuant to this Agreement. The Concessionaire will immediately notify the Department upon the termination, replacement, removal or resignation of an O&M Contractor. Subject to the Direct Agreement, the 395 Direct Agreement, and the Fred Ex Direct Agreement, any agreement between the Concessionaire and any O&M Contractor will by its terms terminate, without penalty, at the election of the Department upon five Days' notice to such O&M Contractor upon the termination of this Agreement. The O&M Contractor will have no interest in or rights pursuant to this Agreement or the Project.

(ii) Each O&M Contractor and its Contract will comply with this Section 24.02. In addition, the material terms of the proposed Contract of the O&M Contractor must be consistent with the corresponding duties and obligations of the Concessionaire pursuant to this Agreement and the other Project Agreements.

(iii) The O&M Contractor and its Affiliates may contract to receive or recover overhead costs (“O&M Overhead Costs”) that are consistent with Part 31 of the Federal Acquisition Regulation principles and will provide the Department with a report on these costs. Any such O&M Overhead Costs will not include excluded costs of the nature described in subsection (b) of the definition of Operating Costs and will include only those costs that provide a direct and measurable benefit to the Project when compared with projects of similar scope and complexity. Any O&M Overhead Costs charged by an Affiliate of the O&M Contractor will be arms-length and commercially reasonable.

(e) Replacement of Design-Build Contractor, O&M Contractor or TTMS Contractor. Before entering into any Contract replacing a Design-Build Contractor, O&M Contractor, or TTMS Contractor, as applicable, the Concessionaire will submit a true and complete copy of the proposed Contract for the Department’s review and approval, subject to the following:

(i) the Department may disapprove such proposed Contract if such Contract or the Work to be performed thereunder does not comply, or is inconsistent, in any material respect with the applicable requirements of this Agreement; and

(ii) the Department may disapprove, in its sole discretion, of the replacement Contractor after taking into account the following factors:

(A) the financial strength and integrity of the proposed Contractor, each of its direct Contractors, and their respective direct or indirect beneficial owners, any proposed managers or operating partners and each of their respective Affiliates;

(B) the capitalization of the proposed Contractor or any parent guarantor, as applicable;

(C) the experience of the proposed Contractor and each of its direct Contractors in constructing or operating toll roads or highways and performing other projects;

(D) the presence of any actions, suits or proceedings, at law or in equity, or before any Governmental Authority, pending or, to the best of such Contractor’s knowledge, threatened against such Contractor, that would or could reasonably be expected to have a material adverse effect on its ability to perform its obligations under the Contract;

(E) the background of the proposed Contractor, each of its direct Contractors, and their respective direct or indirect beneficial owners, any proposed managers or operating partners, each of their respective officers, directors and employees and each of their respective Affiliates (including the absence of criminal, civil or regulatory Claims or actions against any such Person and the quality of any such Person’s past or present performance on other projects); and

(F) the Contractor’s compliance with any of the other provisions of this Section 24.02.

(f) Each Contract for the performance of the Work that the Concessionaire executes at a minimum:

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

(ii) will establish provisions for prompt payment by the Concessionaire in accordance with the provisions of Sections 2.2-4347 through 4356 of the Code of Virginia, which would apply if the Department was contracting with such Contractor;

(iii) will require the Contractor to carry out its scope of work in accordance with Law, the Technical Requirements, all Governmental Approvals, Good Industry Practice and the terms, conditions and standards set forth in this Agreement;

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

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

(vi) will include express requirements that, if the Department succeeds to the Concessionaire's rights under the subject Contract (by assignment or otherwise), then the relevant Contractor agrees that it will (A) maintain usual and customary books and records for the type and scope of operations of business in which it is engaged (e.g., constructor, equipment supplier, designer, service provider), (B) permit audit thereof by the Concessionaire, and provide progress reports to the Concessionaire appropriate for the type of Contract it is performing sufficient to enable the Concessionaire to provide the reports it is required to furnish the Department pursuant to this Agreement and (C) allow the Department, to assume the benefit of the Concessionaire's Contract rights and the work performed thereunder, with liability only for those remaining obligations accruing after the date of assumption, but excluding any monetary claims or obligations that the Concessionaire may have against such Contractor that existed prior to the Department's assumption of such Contract;

(vii) will not be assignable by the Contractor without the Concessionaire's prior written consent; *provided*, that the foregoing will not limit permitted subcontracting of the Work;

(viii) will expressly require the Contractor to participate in meetings between the Concessionaire and the Department, upon the Department's reasonable request, concerning matters pertaining to such Contractor or its work; *provided*, that all direction to such Contractor will be provided by the Concessionaire; and *provided further*, that nothing in this Section 24.02(f)(viii) will limit the authority of the Department to give such direction or take such action which in the opinion of the Department is necessary to remove an immediate and present threat to the safety of life or property;

(ix) will expressly provide that all Liens and claims of any Contractors at any time will not attach to any interest of the Department in the Project or the Project Right of Way; and

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

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

(h) The Concessionaire will include provisions in each Contract for the performance of the Work that the Concessionaire executes requiring the Contractor: (i) to maintain all licenses required by Law; (ii) if the Department makes a direct payment under such Contract, to comply with the requirements of the eVA Business to Government Vendor System or its successor; and (iii) to include in Contracts for the performance of the Work that such Contractor executes the provisions set forth in this Section 24.02(h).

(i) The Concessionaire will include provisions in each Contract for the performance of the Work that the Concessionaire executes (i) naming the Department as a third-party beneficiary of all Contractor representations and warranties contained in such Contract and (ii) requiring the Contractor to include in Contracts for the performance of the Work that such Contractor executes to name the Department as a third-party beneficiary of all Contractor representations and warranties contained in such Contract; *provided*, that the Department will have the right to exercise its rights under such representations and warranties only so long as the Concessionaire, the Contractor or a Lender is not pursuing remedies thereunder.

(j) The Concessionaire will not contract any part of the Design-Build Work, the O&M Work or the TTMS Work to a Contractor who is not prequalified with the Department in accordance with the Department’s Rules Governing Prequalification Privileges, unless otherwise indicated in this Agreement. This restriction does not apply to contract specialty items, consultants, manufacturers, suppliers, haulers or snow removal service providers.

(k) The appointment of Contractors will not relieve the Concessionaire of its responsibility hereunder or for the quality of work, materials and services provided by it. The Concessionaire will at all times be held fully responsible to the Department for the acts and omissions of its Contractors and persons employed by them and no Contract entered into by the Concessionaire will impose any obligation or liability upon the Department to any such Contractor or any of its employees. Further, absent the Department’s express written consent, no

Contract or delegation of Work thereunder will affect the obligation of the Concessionaire to directly communicate with the Department and to oversee the Work of the Contractor. Nothing in this Agreement will create any contractual relationship between the Department and a Contractor.

(l) The Concessionaire will not enter into or materially amend an Affiliate Contract without notice to and consent of the Department, which consent will not be unreasonably withheld or delayed if the Contract is entered into in the ordinary course of business and the Concessionaire demonstrates to the Department's satisfaction that the Affiliate Contract is on overall terms no less favorable or unfavorable to the Concessionaire than terms the Concessionaire could obtain in an arm's-length transaction for comparable services with a Person that is not an Affiliate of the Concessionaire; *provided*, that no consent will be required for (i) reasonable overhead sharing fees and reimbursement of third-party costs payable to an Affiliate for legal, accounting, tax, computer and other centralized management services provided to the Concessionaire in lieu of the Concessionaire having its own employees for such functions; or (ii) the joint ownership of assets or property used for the operation or maintenance of the Project and other projects owned or operated by Affiliates of the Concessionaire so long as the cost of such assets and properties are reasonably shared and documented.

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

(n) Upon entering into a Contract for the Design-Build Work, O&M Work or TTMS Work in excess of \$100,000, the Concessionaire will provide the Department with a copy of such Contract and, if such Contract is with an Affiliate of the Concessionaire, a list of all Contracts in effect to which such Affiliate is a party and under which all or a substantial portion of the Affiliate's responsibilities or obligations under its Contract are delegated to its Contractor. The

Concessionaire will allow the Department ready access to all Contracts and records regarding Contracts, including amendments and supplements to Contracts and guarantees thereof.

(o) As soon as the Concessionaire identifies a potential Contractor for a potential Contract described in the first sentence of Section 24.02(n), but in no event later than five Days after Contract execution, the Concessionaire will notify the Department in writing of the name, address, phone number and authorized representative of such Contractor.

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

(a) Disadvantaged Business Enterprise (DBE).

(i) General.

(A) The parties recognize the importance of pursuing, inviting and developing the participation of minority, women-owned and small businesses through the DBE program, where applicable.

(B) The Concessionaire and each Contractor shall not discriminate on the basis of race, color, national origin, or sex in the performance of this Agreement. The Concessionaire and each Contractor shall carry out applicable requirements of 49 CFR Part 26 in the award and administration of DOT-assisted contracts. Failure by the Concessionaire and each Contractor to carry out these requirements is a material breach of this Agreement, which may result in the termination of this Agreement or such other remedy as set forth in Section 24.03(a)(v).

(ii) Design-Build Work.

(A) During performance of the Design-Build Work, in an effort to comply with 49 CFR Part 26, the Department has established a goal of 10% for DBE participation.

(B) The Department and the Concessionaire agree to manage the foregoing goals as follows:

(1) the Concessionaire will submit an updated DBE/SWaM Plan on January 1 of each year of the Term that defines the Concessionaire's approach to meeting the DBE participation goals set forth in this Section 24.03(a);

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



(3) the Concessionaire will be responsible for either achieving or making Good Faith Efforts to achieve the goal of 10% for DBE participation by providing maximum contracting opportunities for DBE businesses;

(4) the Concessionaire will provide to the Department each calendar quarter documentation of all executed Contracts and payments to DBE businesses;

(5) the Concessionaire will have the opportunity to establish DBE sub-contracting work packages; and

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

(C) During the performance of the Design-Build Work, the parties will work cooperatively to accomplish the applicable DBE objectives. The Department will assist the Concessionaire in meeting the Design-Build Work goals by offering assistance to include the following items:

(1) the parties will jointly conduct outreach meetings for DBE firms;

(2) the Department will identify to the Concessionaire DBE firms that are eligible to bid on the specific bid item groups; and

(3) the Department will provide access to technical and managerial assistance to eligible DBE firms, including in part, through the VDOT/GEC Civil Rights Team and the Business Opportunity Workforce Development Center based upon available funds.

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

(E) When there is a contract goal for the Design-Build Work, the Concessionaire and the Concessionaire Parties must make Good Faith Efforts to meet the goal either through obtaining enough DBE participation or documenting the Good Faith Efforts it made to do so. 49 CFR Part 26 explicitly provides that the Department must

not disregard showings of Good Faith Efforts, and it gives the Concessionaire and the Concessionaire Parties the right to have the Department reconsider a decision that their Good Faith Efforts were insufficient. The Department must seriously consider the Concessionaire's documentation of Good Faith Efforts. The Department will issue a guidance memorandum on Good Faith Efforts, providing examples, procedures and reporting requirements for the Concessionaire.

(iii) O&M Work. During performance of the O&M Work, when contracting for such work the Concessionaire will encourage the participation of DBE firms in the Project. The Concessionaire will set annual goals and make Good Faith Efforts to achieve or exceed such goals in contracts for the O&M Work. The annual and long-term participation DBE goals for the Concessionaire in contracting for the O&M Work is 2%.

(iv) DBE Reporting and Assessment.

(A) The Concessionaire will report quarterly, within 15 Days after each calendar quarter ends, to the Chief of Administration on the Concessionaire's efforts to (1) satisfy the DBE goals set forth in this Section 24.03(a) or (2) demonstrate Good Faith Efforts to accomplish the DBE goals set forth in this Section 24.03(a).

(B) The Chief of Administration will assess, confirm and communicate to the Concessionaire within 30 Days after receiving each quarterly report whether the Concessionaire has (1) satisfied the DBE goals, (2) demonstrated Good Faith Efforts, or (3) failed to satisfy the requirements of clause (1) and (2) of this Section 24.03(a)(iv)(B).

(v) Failure to Demonstrate DBE Good Faith Efforts Related to Design-Build Work.

(A) If the Chief of Administration notifies the Concessionaire pursuant to Section 24.03(a)(iv) that the Concessionaire has failed to satisfy the requirements of clause (1) of Section 24.03(a)(iv)(B) and has failed to satisfy the requirements of clause (2) of Section 24.03(a)(iv)(B) with respect to the DBE goals for the Design-Build Work for a quarterly period, the Concessionaire will have until the end of the next consecutive quarter to demonstrate that it has satisfied the requirements of either clause (1) or (2) of Section 24.03(a)(iv)(B) with respect to such DBE goals.

(B) If the Concessionaire has failed to satisfy the requirements of clause (1) of Section 24.03(a)(iv)(B) and has failed to satisfy the requirements of clause (2) of Section 24.03(a)(iv)(B) with respect to the DBE goals for the Design-Build Work for two consecutive quarters based on the determinations by the Chief of Administration pursuant to Section 24.03(a)(iv), the Concessionaire will prepare and submit, at the Concessionaire's sole cost and expense, a DBE Performance Improvement Plan for the Department's review and approval. The DBE Performance Improvement Plan will describe the specific actions and measures that the Concessionaire will undertake to improve its performance with respect to satisfying the requirements of clause (1) and (2) of Section 24.03(a)(iv)(B) with respect to the DBE goals for the Design-Build Work. The Concessionaire will submit the DBE Performance Improvement Plan within 15 Days

after receiving notice from the Chief of Administration pursuant to Section 24.03(a)(iv) that the Concessionaire has failed to satisfy the requirements of clause (1) of Section 24.03(a)(iv)(B) and has failed to satisfy the requirements of clause (2) of Section 24.03(a)(iv)(B). The Concessionaire will pay the Department for its Allocable Costs in reviewing, approving and monitoring the Concessionaire's compliance with the DBE Performance Improvement Plan until the Concessionaire satisfies the requirements of either clause (1) or (2) of Section 24.03(a)(iv)(B) with respect to the DBE goals for the Design-Build Work.

(C) If the Concessionaire has failed to satisfy the requirements of clause (1) of Section 24.03(a)(iv)(B) and has failed to satisfy the requirements of clause (2) of Section 24.03(a)(iv)(B) with respect to the DBE goals for the Design-Build Work for three consecutive quarters based on the determinations by the Chief of Administration pursuant to Section 24.03(a)(iv), the Department may debar or disqualify the Key Members from participating in State procurements through the Department until the earlier to occur of (i) the Concessionaire satisfies the requirements of either clause (1) or (2) of Section 24.03(a)(iv)(B) with respect to the DBE goals for the Design-Build Work or (ii) twenty-four months after the effective date of the debarment. Only the Commissioner of Highways for the Department may waive the provisions of this Section 24.03(a)(v).

(D) If the Chief of Administration determines at any time that the Concessionaire has satisfied the requirements of either clause (1) or (2) of Section 24.03(a)(iv)(B) with respect to the DBE goals for the Design-Build Work performed to date with respect to the applicable calendar quarter, then any prior determinations by the Chief of Administration of the Concessionaire's failure to satisfy the requirements of clause (1) of Section 24.03(a)(iv)(B) and the Concessionaire's failure to satisfy the requirements of clause (2) of Section 24.03(a)(iv)(B) with respect to such DBE goals will be disregarded, the Concessionaire will be deemed to be in compliance with this Section 24.03, and any future determinations of a failure to satisfy the requirements of clause (1) of Section 24.03(a)(iv)(B) and a failure to satisfy the requirements of clause (2) of Section 24.03(a)(iv)(B) with respect to such DBE goals will be pursuant to the provisions set forth in Section 24.03(a)(v)(A).

(E) Any decision or action taken by the Chief of Administration or the Department pursuant to Section 24.03(a) is subject to the dispute resolution procedures set forth in Article 21.

(b) Small, Women-Owned and Minority Business (SWaM).

(i) General.

(A) The parties recognize the importance of pursuing, inviting and developing the participation of minority, women-owned and small businesses through the SWaM program, where applicable.

(B) The Concessionaire shall not and will not permit its Contractors to discriminate on the basis of race, color, national origin, or sex in the performance of this Agreement. The Concessionaire shall carry out applicable requirements of Executive Order 33 (2006), in the award and administration of this Agreement and the award and administration of subcontracts pursuant to this Agreement.

(C) Failure by the Concessionaire to carry out the requirements in this Section 24.03(b) relating to SWaM participation will subject the Concessionaire to only the remedies set forth in Section 24.03(b)(v) and shall not result in a Concessionaire Default, a 395 Concessionaire Breach, or a Fred Ex Concessionaire Breach.

(D) If debarment occurs as a result of the Department's exercise of such remedies, such debarment shall not result in a Concessionaire Default, a 395 Concessionaire Breach, or a Fred Ex Concessionaire Breach.

(ii) Design-Build Work.

(A) During performance of the Design-Build Work, in an effort to support Executive Order 33 (2006), the Department has established a goal of 19% for SWaM participation.

(B) The Department and the Concessionaire agree to manage the foregoing goals as follows:

(1) the Concessionaire will submit an updated DBE/SWaM Plan on January 1 of each year of the Term that defines the Concessionaire's approach to meeting the SWaM participation goals set forth in this Section 24.03(b);

(2) the Concessionaire will have dedicated resources to the SWaM inclusion program to ensure compliance with Executive Order 33 (2006), the DBE/SWaM Plan, nondiscrimination provisions, technical assistance activities, communication of subcontracting and generate reports specific to SWaM utilization;

(3) the Concessionaire will be responsible for either achieving or making Good Faith Efforts to achieve the goal of 19% for SWaM participation by providing maximum contracting opportunities for SWaM businesses;

(4) the Concessionaire will provide to the Department each calendar quarter documentation of all executed Contracts and payments to SWaM businesses;

(5) the Concessionaire will have the opportunity to establish SWaM-only statement of work packages; and

(6) the Concessionaire will provide Good Faith Efforts documentation using form C-49 and other supplemental information as

appropriate for Contracts that do not include SWaM participation. The Concessionaire agrees that if the Department accepts the Good Faith Efforts documentation on a particular bid item group, the Concessionaire will make reasonable efforts to accomplish the overall goal using other bid item groups.

(C) During the performance of the Design-Build Work, the parties will work cooperatively to accomplish the applicable SWaM objectives. The Department will assist the Concessionaire in meeting the Design-Build Work goals by offering assistance to include the following items:

(1) the parties will jointly conduct outreach meetings for SWaM firms;

(2) the Department will identify to the Concessionaire SWaM firms that are eligible to bid on the specific bid item groups; and

(3) the Department will provide access to technical and managerial assistance to eligible SWaM firms, including in part, through the VDOT/GEC Civil Rights Team and the Business Opportunity Workforce Development Center based upon available funds.

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

(E) When there is a contract goal for the Design-Build Work, the Concessionaire and the Concessionaire Parties must make Good Faith Efforts to meet the goal either through obtaining enough SWaM participation or documenting the Good Faith Efforts it made to do so. The Department must seriously consider the Concessionaire's documentation of Good Faith Efforts. The Department will issue a guidance memorandum on Good Faith Efforts, providing examples, procedures and reporting requirements for the Concessionaire.

(iii) O&M Work. During performance of the O&M Work, when contracting for such work the Concessionaire will encourage the participation of SWaM firms in the Project. The Concessionaire will set annual goals and make Good Faith Efforts to achieve or exceed such goals in contracts for the O&M Work. The Concessionaire will provide its participation on such matters to the Department Representative, and the Department may include those participation rates, as appropriately adjusted, with its own towards the State's long-term goal established pursuant to the Office of the Governor's

Executive Order 33 (2006). The annual and long-term participation SWaM goal for the Concessionaire in contracting for the O&M Work is 4%.

(iv) SWaM Reporting and Assessment.

(A) The Concessionaire will report quarterly, within 15 Days after each calendar quarter ends, to the Chief of Administration on the Concessionaire's efforts to (A) satisfy the SWaM goals set forth in this Section 24.03(b) or (B) demonstrate Good Faith Efforts to accomplish the SWaM goals set forth in this Section 24.03(b).

(B) The Chief of Administration will assess, confirm and communicate to the Concessionaire within 30 Days after receiving each quarterly report whether the Concessionaire has (1) satisfied the SWaM goals, (2) demonstrated Good Faith Efforts, or (3) failed to satisfy the requirements of clause (1) and (2) of this Section 24.03(b)(iv)(B).

(v) Failure to Demonstrate SWaM Good Faith Efforts Related to Design-Build Work.

(A) If the Chief of Administration notifies the Concessionaire pursuant to Section 24.03(b)(iv) that the Concessionaire has failed to satisfy the requirements of clause (1) of Section 24.03(b)(iv)(B) and has failed to satisfy the requirements of clause (2) of Section 24.03(b)(iv)(B) with respect to the SWaM goals for the Design-Build Work for a quarterly period, the Concessionaire will have until the end of the next consecutive quarter to demonstrate that it has satisfied the requirements of either clause (1) or (2) of Section 24.03(b)(iv)(B) with respect to such SWaM goals.

(B) If the Concessionaire has failed to satisfy the requirements of clause (1) of Section 24.03(b)(iv)(B) and has failed to satisfy the requirements of clause (2) of Section 24.03(b)(iv)(B) with respect to the SWaM goals for the Design-Build Work for two consecutive quarters based on the determinations by the Chief of Administration pursuant to Section 24.03(b)(iv), the Concessionaire will prepare and submit, at the Concessionaire's sole cost and expense, a SWaM Performance Improvement Plan for the Department's review and approval. The SWaM Performance Improvement Plan will describe the specific actions and measures that the Concessionaire will undertake to improve its performance with respect to satisfying the requirements of clause (1) and (2) of Section 24.03(b)(iv)(B) with respect to the SWaM goals for the Design-Build Work. The Concessionaire will submit the SWaM Performance Improvement Plan within 15 Days after receiving notice from the Chief of Administration pursuant to Section 24.03(b)(iv) that the Concessionaire has failed to satisfy the requirements of clause (1) of Section 24.03(b)(iv)(B) and has failed to satisfy the requirements of clause (2) of Section 24.03(b)(iv)(B). The Concessionaire will pay the Department for its Allocable Costs in reviewing, approving and monitoring the Concessionaire's compliance with the SWaM Performance Improvement Plan until the Concessionaire satisfies the requirements of either clause (1) or (2) of Section 24.03(b)(iv)(B) with respect to the SWaM goals for the Design-Build Work.



(C) If the Concessionaire has failed to satisfy the requirements of clause (1) of Section 24.03(b)(iv)(B) and has failed to satisfy the requirements of clause (2) of Section 24.03(b)(iv)(B) with respect to the SWaM goals for the Design-Build Work for three consecutive quarters based on the determinations by the Chief of Administration pursuant to Section 24.03(b)(iv), the Department may debar or disqualify the Key Members from participating in State procurements through the Department until the earlier to occur of (i) the Concessionaire satisfies the requirements of either clause (1) or (2) of Section 24.03(b)(iv)(B) with respect to the SWaM goals for the Design-Build Work or (ii) twenty-four months after the effective date of the debarment. Only the Commissioner of Highways for the Department may waive the provisions of this Section 24.03(b)(v).

(D) If the Chief of Administration determines that the Concessionaire has satisfied the requirements of either clause (1) or (2) of Section 24.03(b)(iv)(B) with respect to the SWaM goals for the Design-Build Work performed to date, then any prior determinations by the Chief of Administration of the Concessionaire's failure to satisfy the requirements of clause (1) of Section 24.03(b)(iv)(B) and the Concessionaire's failure to satisfy the requirements of clause (2) of Section 24.03(b)(iv)(B) with respect to such SWaM goals will be disregarded, the Concessionaire will be deemed to be in compliance with this Section 24.03, and any future determinations of a failure to satisfy the requirements of clause (1) of Section 24.03(b)(iv)(B) and a failure to satisfy the requirements of clause (2) of Section 24.03(b)(iv)(B) with respect to such SWaM goals will trigger the provisions set forth in Section 24.03(b)(v)(A).

(E) Any decision or action taken by the Chief of Administration or the Department pursuant to Section 24.03(b) is subject to the dispute resolution procedures set forth in Article 21.

(c) Veteran and Local Hires.

(i) General.

(A) The Commonwealth is committed to reducing barriers to employment to ensure a diverse workforce in the construction industry. Therefore, the purpose of the Veteran and Local Hiring Program, set forth in the Department's Special Experimental Project – 14 document issued September 2, 2015 (“SEP-14”), is to support and grow the Commonwealth's commitment by means of a robust hiring and retention program for local workers and veterans and a robust on-the-job training program.

(B) The Concessionaire, the 395 Design-Build Contractor, the 395 TTMS Contractor, and any subcontractors will comply with SEP-14. **SEP 14 DOES NOT APPLY TO THE FRED EX PROJECT.**

(C) The parties recognize the importance of recruiting, hiring, and technical and workplace training of local workers and veterans in the development and execution of the 395 Project. As such, the Concessionaire will utilize workforce on-the-

job training, apprenticeship and recruitment programs to actively recruit local workers and veterans.

(D) The Concessionaire will comply with all applicable State and federal law, regulations, guidelines, and policies in the administration of SEP-14 and the award and administration of subcontracts. Failure by the Concessionaire to carry out the requirements of SEP-14 will subject the Concessionaire to only the remedies set forth in Section 24.03(c)(iv) and will not result in a Concessionaire Default or a 395 Concessionaire Breach.

(E) If debarment occurs as a result of the Department's exercise of such remedies, such debarment will not result in a Concessionaire Default or a 395 Concessionaire Breach.

(ii) Design-Build Work – 395 Project.

(A) During performance of the Design-Build Work for the 395 Project, the Department has established an on-the-job training goal of seventeen (17) participants for the 395 Concessionaire Assets and an on-the-job training goal of seven (7) participants for the 395 Department Assets. New hire participation represents employees paid specifically for work performed on the 395 Project and may be randomly verified through the checking of payrolls. Hiring by subcontractors will count toward meeting the goals.

(B) The Department and the Concessionaire agree to manage the foregoing goals as follows:

(1) the Concessionaire will submit for the Department's review and approval an initial Hiring Development Plan, and an updated Hiring Development Plan as further described in this Agreement. The initial and updated Hiring Development Plan will be submitted within 30 Days after the 395 Project has achieved 395 Financial Close and on January 30 of each year prior to achieving 395 Final Completion. The Hiring Development Plan will define the Concessionaire's approach to meeting the workforce minimum requirements set forth in Section 24.03(c)(ii)(A);

(2) the Concessionaire will designate resources, including a liaison officer designated and made known to the Department who is assigned the responsibility of administering and promoting an active and inclusive Hiring Development Plan to ensure all programs related to the Hiring Development Plan are compliant with this Section 24.03(c). The designation and identity of this officer will be submitted as part of the initial and updated Hiring Development Plan;

(3) the Concessionaire will ensure that local workers and veterans have been given full and fair opportunity to participate in the hiring process for vacant positions;

(4) the Concessionaire will make Good Faith Efforts to obtain local workers and veterans' participation in the execution and performance of this Agreement at or above the established local worker and veteran hiring goals set forth in this Agreement;

(5) the Concessionaire will provide to the Department each calendar quarter, after approval of the Initial Hiring Development Plan, documentation of all local worker and veteran workforces; and

(6) each calendar quarter, the Concessionaire will provide Good Faith Efforts documentation using Form C-66, VDOT Local Worker and Veteran Employment Report or equivalent tracking measures and other supplemental information as appropriate. Current workforce and local and veteran new hires will be tracked by the number of employees and not how many hours such employee is paid. Form C-66 or the Concessionaire's equivalent report in a format otherwise acceptable to the Department, will be used to capture the Concessionaire's workforce at contract execution and local workers and veterans hired and terminated during the course of the 395 Project.

(C) During the performance of the Design-Build Work for the 395 Project, the Parties will work cooperatively to accomplish the local worker and veteran recruitment, hiring and on-the-job objectives, as established in the approved Hiring Development Plan and its subsequent updates. The Department will assist the Concessionaire in meeting the Design-Build Work for the 395 Project workforce minimum requirements set forth in Section 24.03(c)(ii)(A) by offering assistance in the following activities:

(1) the Parties will jointly conduct outreach meetings for local workers and veterans; and

(2) the Parties will jointly identify agencies or firms that actively employ or recruit local workers and veterans.

(D) The Concessionaire acknowledges that the Department's assistance and cooperation will not eliminate or reduce the Concessionaire's responsibility to achieve the workforce minimum requirements set forth in Section 24.03(c)(ii)(A) or demonstrate Good Faith Efforts. The Concessionaire is expected to utilize a variety of means and methods and creative strategies to do so. These strategies should be employed for all phases of the 395 Project. The Concessionaire will meet the workforce minimum requirements set forth in this Agreement or demonstrate that Good Faith Efforts have been made.

(E) When there is a workforce minimum requirement for the Design-Build Work for the 395 Project, the Concessionaire will make Good Faith Efforts to meet the workforce minimum requirement through obtaining enough local and veteran worker workforce participation or documenting the Good Faith Efforts it made to do so. The Department will not disregard showings of Good Faith Efforts. The Department must

seriously consider the Concessionaire's documentation of Good Faith Efforts. The Department will issue Good Faith Efforts guidelines providing examples, procedures and reporting requirements for the Concessionaire's consideration.

(F) During the performance of both the Design-Build Work for the 395 Project, the following procedures will apply to the Hiring Development Plan for compliance purposes:

(1) Hiring: The Concessionaire will use standard hiring practices, including interviews, to consider all qualified applicants in the defined local geographic area to meet the established local and veteran hiring goal. The Concessionaire will make Good Faith Efforts to fill all available positions with local and veteran applicants. Local workforce development centers and the Virginia Employment Commission may be used for applicant referrals. The Concessionaire is encouraged to partner with local workforce development centers for local applicants;

(2) New Hire: Employees who work on the 395 Project to whom the employer anticipates paying earnings include full-time, part-time, and temporary statuses that are employed for a specific project. New hires will include employees reporting to work for the first time or re-hires (employees who return to work after being laid off, furloughed, separated, granted a leave without pay, or terminated from employment); and

(3) Good Faith Efforts Described: The Department will determine if the Concessionaire has demonstrated adequate Good Faith Efforts, and if given all relevant circumstances, those efforts were made actively and aggressively to meet the local and veteran hiring goal. Efforts to obtain local and veteran hiring goals are not Good Faith Efforts if they could not reasonably be expected to produce a level of local worker's participation sufficient to meet the local and veteran hiring goal set forth in this Special Provision. Good Faith Efforts may be determined by soliciting for vacant positions through reasonable and available means in the goal area, such as but not limited to, advertising, written notices to local workforce development centers and the Virginia Employment Commission.

(iii) Veteran and Local Hires Reporting and Assessment – 395 Project.

(A) The Concessionaire, the 395 Design-Build Contractor and each subcontractor will report to the Department quarterly, within 15 Days after each calendar quarter ends, on the Concessionaire's efforts to (A) satisfy the local and veteran worker workforce minimum requirements set forth in Section 24.03(c)(ii)(A) or (B) demonstrate Good Faith Efforts to accomplish the local and veteran worker workforce minimum requirements.

(B) The Department will assess, confirm and communicate to the Concessionaire within 30 Days after receiving each quarterly report whether the

Concessionaire has (A) satisfied the local worker and veteran workforce minimum requirements, (B) demonstrated Good Faith Efforts, or (C) failed to satisfy the requirements of clause (A) and (B), and the reasons why the Department has determined Good Faith Efforts has not been satisfied.

(C) The Concessionaire will report compliance on Form C-66, VDOT Local Worker and Veteran Employment Report, in accordance with the instructions attached to the form or an equivalent report in a format otherwise acceptable to the Department.

(iv) Failure to Demonstrate Veteran and Local Hires Good Faith Efforts Related to Design-Build Work – 395 Project.

(A) If the Department notifies the Concessionaire that the Concessionaire has failed to satisfy the requirements of Section 24.03(c)(iii) with respect to the local worker and veteran participation workforce minimum requirements for the Design-Build Work for a quarterly period, the Concessionaire will have until the end of the next consecutive quarter to demonstrate that it has satisfied the requirements of Section 24.03(c)(iii) with respect to such local worker and veteran participation workforce minimum requirements.

(B) If the Concessionaire has failed to satisfy the requirements of Section 24.03(c)(iii) with respect to the local worker and veteran participation workforce minimum requirements for the Design-Build Work for two consecutive quarters based on the determinations by the Department, the Concessionaire will prepare and submit, at the Concessionaire's sole cost and expense, a participation performance improvement plan ("Participation Performance Improvement Plan") for the Department's review and approval. The Participation Performance Improvement Plan will describe the specific actions and measures that the Concessionaire will undertake to improve its performance with respect to satisfying the requirements of Section 24.03(c)(iii) with respect to the participation workforce minimum requirements for the Design-Build Work. The Concessionaire will submit the Participation Performance Improvement Plan within 15 days after receiving notice from the Department that the Concessionaire has failed to satisfy the requirements of Section 24.03(c)(iii). The Concessionaire will reimburse the Department for its Allocable Costs in reviewing, approving and monitoring the Concessionaire's compliance with the Participation Performance Improvement Plan until the Concessionaire satisfies the requirements of Section 24.03(c)(iii).

(C) If the Concessionaire has failed to satisfy the requirements of Section 24.03(c)(iii) with respect to the Veteran and Local Hires goals for the Design-Build Work for three consecutive quarters, the Department may debar or disqualify the Key Members from participating in Commonwealth procurements through the Department until the earlier to occur of (i) the Concessionaire satisfies the requirements of Section 24.03(c)(iii) or (ii) twenty-four months after the effective date of the debarment. Only the Commissioner of Highways for the Department may waive the provisions of this Section 24.04(c)(iv)(C).

(v) Design-Build Work – Fred Ex Project.

(A) During performance of the Design-Build Work for the Fred Ex Project, the Department has established an on-the-job training goal of four (4) participants. New hire participation represents employees paid specifically for work performed on the Fred Ex Project and may be randomly verified through the checking of payrolls. Hiring by subcontractors will count toward meeting the goals.

(B) The Department and the Concessionaire agree to manage the foregoing goals as follows:

(1) the Concessionaire will submit for the Department's review and approval an initial Hiring Development Plan, and an updated Hiring Development Plan as further described in this Agreement. The initial and updated Hiring Development Plan will be submitted within 30 Days after the Fred Ex Project has achieved Fred Ex Financial Close and on January 30 of each year prior to achieving Fred Ex Final Completion. The Hiring Development Plan will define the Concessionaire's approach to meeting the workforce minimum requirements set forth in Section 24.03(c)(v)(A); and,

(2) the Concessionaire will designate resources, including a liaison officer designated and made known to the Department who is assigned the responsibility of administering and promoting an active and inclusive Hiring Development Plan to ensure all programs related to the Hiring Development Plan are compliant with the parts of Section 24.03(c) that apply to the Fred Ex Project. The designation and identity of this officer will be submitted as part of the initial and updated Hiring Development Plan.

(C) The Concessionaire acknowledges that the Department's assistance and cooperation will not eliminate or reduce the Concessionaire's responsibility to achieve the workforce minimum requirements set forth in Section 24.03(c)(v)(A) or demonstrate Good Faith Efforts. The Concessionaire is expected to utilize a variety of means and methods and creative strategies to do so. These strategies should be employed for all phases of the Fred Ex Project. The Concessionaire will meet the workforce minimum requirements set forth in this Agreement or demonstrate that Good Faith Efforts have been made.

(D) When there is a workforce minimum requirement for the Design-Build Work for the Fred Ex Project, the Concessionaire will make Good Faith Efforts to meet the workforce minimum requirement. The Department will not disregard showings of Good Faith Efforts. The Department must seriously consider the Concessionaire's documentation of Good Faith Efforts. The Department will issue Good Faith Efforts guidelines providing examples, procedures and reporting requirements for the Concessionaire's consideration.



#### **Section 24.04 Public Safety and Welfare**

The parties recognize and agree that protection of the health, safety and welfare of the public and all persons engaged in connection with the performance of the Concessionaire's obligations pursuant to this Agreement is a priority. Accordingly, the Concessionaire will comply with the following provisions, along with all other Laws and the Technical Requirements:

(a) the Concessionaire will comply, and will require all Contractors to comply, with all construction safety and health standards established by Law, including the State and Federal Occupational Health and Safety Acts. Neither the Concessionaire nor any Contractor will require any worker to work in surroundings or under working conditions that are unsanitary, hazardous or dangerous to their health or safety, as determined under construction safety and health standards promulgated by the U.S. Secretary of Labor in accordance with Section 107 of the Contract Work Hours and Safety Standards Act; and

(b) the Department will be entitled to require the Concessionaire to suspend any Work or other activities related to the Project, which, in the sole discretion of the Department, presents a risk to the public health, safety or welfare, and to take such other actions as the Department may require to prevent such risk; *provided*, that if it is determined in accordance with the dispute resolution procedures in Article 21 that the Concessionaire was in compliance with its obligations under this Agreement, then the suspension order and other actions will be treated as a Department Change pursuant to Section 14.02.

#### **Section 24.05 Labor, Employment and DBE/SWaM Related Matters**

The Concessionaire will comply, and will cause its Contractors to comply, with the provisions set forth in the Labor, Employment and DBE/SWaM Related Matters attached as Exhibit AA.

#### **Section 24.06 Federal Immigration Reform and Control Act**

In accordance with Section 2.2-4311.1 of the Code of Virginia, the Concessionaire certifies that it does not and agrees that it will not, during the Term, knowingly employ an unauthorized alien as defined in the Federal Immigration Reform and Control Act of 1986. The Concessionaire further agrees that it will require all of its Contractors to certify that they do not and will not knowingly employ an unauthorized alien as defined by such Act.

### **ARTICLE 25.**

#### **MISCELLANEOUS**

#### **Section 25.01 Transfers by the Concessionaire**

(a) Lock-Up Period. During the Lock-up Period, the Concessionaire will not, without the Department's approval, Transfer, or otherwise permit the Transfer of, any or all of the Concessionaire's Interest to or in favor of any Person (a "Transferee") or permit any Person to:

(i) Transfer, or otherwise dispose of 50% or more of any direct or indirect ownership interest in the Concessionaire;

(ii) grant any security interest, Lien or other encumbrance over its direct or indirect ownership interest in the Concessionaire;

(iii) enter into any agreement in respect of any direct or indirect ownership interest in the Concessionaire or in respect of any votes attached to any such shares held by such Person in the Concessionaire, in each case (A) other than customary shareholder, partnership or organizational agreements among the Equity Members as of the Agreement Date solely with respect to the governance and management of the Concessionaire or (B) other than agreements for Transfers of less than 50% of any direct or indirect ownership interest in the Concessionaire; or

(iv) agree, whether or not subject to any condition precedent or subsequent, to do any of the foregoing.

Notwithstanding the foregoing, this Section 25.01 will not prohibit or restrict the following:

(A) a Transfer to the Collateral Agent or trustee or such Person's nominee or transferee, as permitted in connection with the exercise of rights and remedies under the Project Financing Agreements, or a Transferee permitted or approved under the Direct Agreement, the 395 Direct Agreement, and the Fred Ex Direct Agreement;

(B) any other Transfer identified in clauses 1 through 8 of the definition of Change in Control; or

(C) any agreement to make any of the Transfers described in the preceding clauses (A) and (B) of this Section 25.01(a).

(b) Post Lock-Up Period. Following the Lock-up Period, the Concessionaire will not Transfer, any or all of the Concessionaire's Interest to or in favor of a Transferee, unless:

(i) the Department has approved such proposed Transferee based upon a determination in accordance with Section 25.01(c) (unless it is the Collateral Agent permitted under Article 7 or a Transferee that is permitted or has been approved under the Direct Agreement, the 395 Direct Agreement, and the Fred Ex Direct Agreement); and

(ii) the proposed Transferee (unless it is the Collateral Agent permitted under Article 7 or a Transferee that is permitted or has been approved under the Direct Agreement, the 395 Direct Agreement, and the Fred Ex Direct Agreement) enters into an agreement with the Department in form and substance reasonably satisfactory to the Department wherein the Transferee acquires the rights and assumes the obligations of the Concessionaire and agrees to perform and observe all of the obligations and covenants of the Concessionaire pursuant to this Agreement.

(c) The Department's approval of a proposed Transferee may be withheld only if the Department determines that the proposed Transfer is prohibited by Law or such proposed

Transferee is not capable of performing the obligations and covenants of the Concessionaire pursuant to this Agreement, which determination may be based upon, or take into account, one or more of the following factors:

- (i) the financial strength and integrity of the proposed Transferee, and its direct or indirect beneficial owners, any proposed managers or operating partners and each of their respective Affiliates;
- (ii) the capitalization of the proposed Transferee;
- (iii) the experience of the proposed Transferee and each of its direct Contractors in operating toll roads or highways and performing other projects; and
- (iv) the background of the proposed Transferee, each of its direct Contractors, and their direct or indirect beneficial owners, any proposed managers or operating partners, each of their respective officers, directors and employees and each of their respective Affiliates (including the absence of criminal, civil or regulatory Claims or actions against any such Person and the quality of any such Person's past or present performance on other projects).

If the Department is not satisfied that these conditions are met, it may condition its consent on provision of reasonable additional security or other reasonable arrangements.

(d) Except for a Transfer of all the Concessionaire's Interest to the Collateral Agent upon its exercise of remedies under the Financing Assignments or to a Transferee that is permitted or has been approved under the Direct Agreement, the 395 Direct Agreement, and the Fred Ex Direct Agreement, no Transfer of all or any of the Concessionaire's Interest will be made or have any force or effect if at the time of such Transfer there has occurred a Concessionaire Default that has not been remedied or an event that with the lapse of time, the giving of notice or otherwise would constitute a Concessionaire Default, unless the Transferee is prepared to cure such Concessionaire Default in accordance with the Direct Agreement, the 395 Direct Agreement, and the Fred Ex Direct Agreement.

(e) A Change in Control of the Concessionaire will be deemed to be a Transfer of the Concessionaire's Interest for purposes of this Section 25.01.

(f) Any Transfer or other sale, transfer, disposition or other transaction made in violation of this Section 25.01 will be null and void *ab initio* and of no force and effect.

### **Section 25.02 Ethical Standards**

(a) The Concessionaire has adopted and provided copies to the Department of its written policies establishing ethical standards of conduct for all its directors, officers and supervisory or management personnel in dealing with the Department and employment relations. Such policies including any amendments or modifications will include standards of ethical conduct concerning the following:

(i) restrictions on gifts and contributions to, and lobbying of, any State Party and any of their respective commissioners, directors, officers and employees;

(ii) protection of employees from unethical practices in the selection, use, hiring, compensation or other terms and conditions of employment, or in firing, promotion and termination of employees;

(iii) protection of employees from retaliatory actions (including discharge, demotion, suspension, threat, harassment, pay reduction or other discrimination in the terms and conditions of employment) in response to reporting of illegal (including the making of a false Claim), unethical or unsafe actions or failures to act by the Concessionaire or its personnel or any Contractors;

(iv) restrictions on directors, members, officers or supervisory or management personnel of the Concessionaire engaging in any transaction or activity, including receiving or offering a financial incentive, benefit, loan or other financial interest, that is, or to a reasonable person appears to be, in conflict with or incompatible with the proper discharge of duties or independence of judgment or action in the performance of duties, or adverse to the interests of the Project or employees;

(v) restrictions on use of an office or job position for a purpose that is, or would to a reasonable person appear to be, primarily for the private benefit of a director, member, officer or supervisory or management person, rather than primarily for the benefit of the Concessionaire or the Project, or primarily to achieve a private gain or an exemption from duty or responsibility for a director, member, officer or supervisory or management person; and

(vi) adherence to the Department's organizational conflict of interest rules and policies pertaining to the hiring of any consultant which has assisted the Department in connection with the negotiation of this Agreement or the conduct of Oversight Services for the Project.

(b) The Concessionaire will cause its directors, members, officers and supervisory and management personnel, and require those of its Contractors, to adhere to and enforce the adopted policy on ethical standards of conduct. The Concessionaire will establish reasonable systems and procedures to promote and monitor compliance with the policy.

(c) Without limiting the foregoing provisions of this Section 25.02, the Concessionaire further agrees: (i) no gifts, gratuities, or favors of any nature whatsoever will be given or offered by any Concessionaire Party to personnel of the Department; and (ii) no Concessionaire Party will employ any personnel of the Department for any services during the Term, without the prior written consent of the Department. If the Department determines, after investigation, that a Concessionaire Party or any of its employees, representatives, or agents of any person acting in its behalf have violated this provision, the Concessionaire Party may, at the discretion of the Department, be disqualified from bidding on future contracts with the Department for a period of six months from the date of the Department's determination of such a violation. Any implicated employees, agents, or representatives of the Contractor may be

prohibited from working on any contract awarded by the Department for the period of disqualification.

### **Section 25.03 Assignment by the Department**

The Department may, subject to giving the Concessionaire not less than 90 Days prior written notice or as required by Law, transfer and assign its interests, in whole or in part, in the Project, this Agreement and any other Project Agreements to any other public agency or public entity of the State as permitted by Law; *provided*, that the assignee (a) has assumed all of the Department's obligations, duties and liabilities pursuant to this Agreement and the Project Agreements then in effect and has provided the Concessionaire with reasonable assurance of its legal authority and sufficient financial resources to honor and perform same and (b) will not be required to have financial resources in excess of those then available to the Department.

### **Section 25.04 Authorized Representatives**

(a) Each of the Concessionaire and the Department hereby designates the following individuals as its initial Concessionaire Representative(s) and Department Representative(s), respectively, to administer this Agreement on its respective behalf:

(i) For the Concessionaire:

President  
95 Express Lanes LLC  
6440 General Green Way  
Alexandria, Virginia 22312

(ii) For the Department:

Chief Engineer  
Virginia Department of Transportation  
1401 E. Broad Street  
Richmond, VA 23219

(b) The Concessionaire Representatives and the Department Representatives will be reasonably available to each other during the Term and will have the authority to issue instructions and other communications on behalf of the Concessionaire and Department, respectively, and will be the recipient of notices and other written communications from the other party pursuant to this Agreement (except any notice initiating or relating to the dispute resolution procedures of Article 21 will be given in accordance with Section 25.05). However, such Representatives will not have the authority to make decisions or give instructions binding upon the Concessionaire or the Department, except to the extent expressly authorized by the Concessionaire or the Department, as the case may be, in writing. In the event the Concessionaire or the Department designates different Representatives, it will give the other party written notice of the identity of and contact information for the new Concessionaire Representative(s) or Department Representative(s), as the case may be.

## Section 25.05 Notices

(a) Whenever under the provisions of this Agreement it will be necessary or desirable for one party to serve any notice, request, demand, report or other communication on another party, the same will be in writing and will not be effective for any purpose unless and until actually received by the addressee or unless served (i) personally, (ii) by independent, reputable, overnight commercial courier, (iii) by facsimile transmission, where the transmitting party includes a cover sheet identifying the name, location and identity of the transmitting party, the phone number of the transmitting device, the date and time of transmission and the number of pages transmitted (including the cover page), where the transmitting device or receiving device records verification of receipt and the date and time of transmission receipt and the phone number of the other device, and where the facsimile transmission is immediately followed by service of the original of the subject item in another manner permitted herein or (iv) by deposit in the United States mail, postage and fees fully prepaid, registered or certified mail, with return receipt requested, addressed as follows:

If to the Department:

Virginia Department of Transportation  
1401 E. Broad Street  
Richmond, VA 23219  
Attention: Commissioner of Highways  
Facsimile: (804) 786-2940

*With copies to:*

Office of the Attorney General  
202 N. 9<sup>th</sup> Street  
Richmond, VA 23219  
Attention: Chief Transportation Section  
Facsimile: (804) 786-9136

If to the Concessionaire:

95 Express Lanes LLC  
6440 General Green Way  
Alexandria, Virginia 22312  
Attention: President  
Facsimile: (571) 419-6101

*With copies to:*

Orrick, Herrington & Sutcliffe LLP  
51 West 52nd Street  
New York, NY 10019-6142  
Attention: Young Lee

(b) Any party may, from time to time, by notice in writing served upon the other party as aforesaid, designate an additional and/or a different mailing address or an additional



and/or a different person to whom all such notices, requests, demands, reports and communications are thereafter to be addressed. Any notice, request, demand, report or other communication served personally will be deemed delivered upon receipt, if served by mail or independent courier will be deemed delivered on the date of receipt as shown by the addressee's registry or certification receipt or on the date receipt at the appropriate address is refused, as shown on the records or manifest of the United States Postal Service or independent courier, and if served by facsimile transmission will be deemed delivered on the date of receipt as shown on the received facsimile (*provided*, that the original is thereafter delivered as aforesaid).

#### **Section 25.06 Binding Effect**

Subject to the limitations of Section 25.01 and Section 25.03, this Agreement will be binding upon and will inure to the benefit of the parties hereto and their respective legal representatives, successors and permitted assigns, and wherever a reference in this Agreement is made to any of the parties hereto, such reference also will be deemed to include, wherever applicable, a reference to the legal representatives, successors and permitted assigns of such party, as if in every case so expressed.

#### **Section 25.07 Relationship of Parties**

(a) The relationship of the Concessionaire to the Department will be one of an independent contractor, not an agent, partner, lessee, joint or co-venturer or employee, and neither the Department nor the Concessionaire will have any rights to direct or control the activities of the other or their respective Affiliates, contractors or consultants, except as otherwise expressly provided in this Agreement.

(b) Officials, employees and agents of the Concessionaire or the Department will in no event be considered employees, agents, partners or representatives of the other.

#### **Section 25.08 No Third-Party Beneficiaries**

Nothing contained in this Agreement is intended or will be construed as creating or conferring any rights, benefits or remedies upon, or creating any obligations of the parties hereto toward, any person or entity not a party to this Agreement, except rights expressly contained in this Agreement for the benefit of the Lenders, the Collateral Agent and/or State Indemnitees.

#### **Section 25.09 Limitation on Consequential Damages**

Except as expressly provided in this Agreement to the contrary, neither party will be liable to the other for punitive damages or special, indirect, incidental or consequential damages of any nature, whether arising in contract, tort (including negligence) or other legal theory. The foregoing limitation will not, however, in any manner:

(a) prejudice the Department's right to recover liquidated damages from the Concessionaire as provided in this Agreement;

(b) limit the Concessionaire's liability for any type of damage arising out of the Concessionaire's obligation to indemnify, protect, defend and hold each State Indemnitee harmless from Third Party Claims under Article 15 and Section 16.03 of this Agreement;

(c) limit the Concessionaire's liability for any type of damage to the extent covered by the proceeds of insurance required hereunder; or

(d) limit the amounts expressly provided to be payable by the Department or the Concessionaire pursuant to this Agreement.

#### **Section 25.10 Waiver**

(a) No waiver by any party of any right or remedy pursuant to this Agreement or the other Project Agreements will be deemed to be a waiver of any other or subsequent right or remedy pursuant to this Agreement or the other Project Agreements. The consent by one party to any act by the other party requiring such consent will not be deemed to render unnecessary the obtaining of consent to any subsequent act for which consent is required, regardless of whether similar to the act for which consent is given.

(b) No act, delay or omission done, suffered or permitted by one party or its agents will be deemed to waive, exhaust or impair any right, remedy or power of such party pursuant to this Agreement or any other Project Agreement, or to relieve the other party from the full performance of its obligations pursuant to this Agreement and the other Project Agreements.

(c) No waiver of any term, covenant or condition of this Agreement will be valid unless in writing and executed by the obligee party.

(d) The acceptance of any payment or payment by a party will not (i) waive any preceding or then-existing breach or default by the other party of any term, covenant or condition of this Agreement, other than the other party's prior failure to pay the particular amount or part thereof so accepted, regardless of the paid party's knowledge of such preceding or then-existing breach or default at the time of acceptance of such payment or payment or (ii) continue, extend or affect (A) the service of any notice, any suit, arbitration or other legal proceeding or final judgment, (B) any time within which the other party is required to perform any obligation or (C) any other notice or demand.

(e) No custom or practice between the parties in the administration of the terms of this Agreement will be construed to waive or lessen the right of a party to insist upon performance by the other party in strict compliance with the terms of this Agreement.

#### **Section 25.11 No Brokers**

Except for any financial adviser or investment banker whose fee will be paid by the party retaining such adviser or banker (or in the case of a Concessionaire Financial Party, by such party or the Concessionaire), each party represents and warrants that it has not dealt with any real estate or business opportunity broker or agent or any finder in connection with this Agreement. Each party agrees, to the extent permitted by Law, to indemnify, protect, defend with counsel acceptable to the other party and hold harmless the other party against any Claim for commission, finder's fee or like compensation asserted by any real estate or business opportunity broker, agent, finder or other Person claiming to have dealt with the indemnifying party in connection with this Agreement.

### **Section 25.12 Governing Law; Compliance with Law and Federal Requirements**

(a) This Agreement will be governed by and construed in accordance with the Laws of the State applicable to contracts executed and to be performed within the State.

(b) The Concessionaire will keep fully informed of and comply and require its Contractors to comply with Law. The Concessionaire will execute and file the documents, statements, and affidavits required under any Law required by or affecting this Agreement or the execution of the Work. The Concessionaire will permit examination of any records made subject to such examination by such Law.

(c) The Concessionaire will comply and require its Contractors to comply with all Laws applicable to the Project as a result of the costs of the Project being financed in part with State funds, federal-aid funds and State bond proceeds, including the applicable Federal Requirements attached as Exhibit U.

(d) The Concessionaire acknowledges and agrees that the USDOT will have certain approval rights with respect to the Project, including the right to provide certain oversight and technical services with respect to the Work. The Concessionaire will cooperate with USDOT and provide such access to the Project and information as USDOT may request in the exercise of USDOT's duties, rights and responsibilities in connection with the Project.

### **Section 25.13 Use of Police Power**

Nothing in this Agreement limits the authority of the Department to exercise its regulatory and police powers granted by Law.

### **Section 25.14 Survival**

The dispute resolution procedures, the indemnifications, limitations, releases, obligations to pay termination compensation and all other provisions which by their inherent character should survive expiration or earlier termination of this Agreement and/or completion of the Work will survive the expiration or earlier termination of this Agreement and/or the completion of the Work.

### **Section 25.15 Subpoena**

Except as provided for in Section 33.2-206 of the Code of Virginia, the Concessionaire may subpoena any Department personnel; *provided*, that the Concessionaire will pay for such personnel's time at its fully burdened rate (including overhead and fringe benefits), together with all out-of-pocket expenses incurred, no later than 30 Days after the Concessionaire's receipt of an invoice reasonably documenting the amount of such time provided.

### **Section 25.16 Construction and Interpretation of Agreement**

(a) The language in all parts of this Agreement will in all cases be construed simply, as a whole and in accordance with its fair meaning and not strictly for or against any party. The parties hereto acknowledge and agree that this Agreement has been prepared jointly by the parties and has been the subject of arm's length and careful negotiation over a considerable period of time, that each party has been given the opportunity to independently review this

Agreement with legal counsel, and that each party has the requisite experience and sophistication to understand, interpret and agree to the particular language of the provisions hereof. Accordingly, in the event of an ambiguity in or Dispute regarding the interpretation of this Agreement, this Agreement will not be interpreted or construed against the party preparing it, and instead other rules of interpretation and construction will be utilized.

(b) If any court of competent jurisdiction issues a final, non-appealable judicial order finding that a term or provision of this Agreement is invalid or unenforceable, the remainder of this Agreement will not be affected thereby and each other term and provision of this Agreement will be valid and enforceable to the fullest extent permitted by Law. It is the intention of the parties to this Agreement, and the parties hereto agree, that in lieu of each clause or provision of this Agreement that is illegal, invalid or unenforceable, the parties in good faith will supply as a part of this Agreement an enforceable clause or provision as similar in terms to such illegal, invalid or unenforceable clause or provision as may be possible.

(c) The captions of the articles and sections herein are inserted solely for convenience and under no circumstances are they or any of them to be treated or construed as part of this instrument.

(d) References in this instrument to this “Agreement” mean, refer to and include this instrument as well as any riders, exhibits, addenda and attachments hereto (which are hereby incorporated herein by reference) or other documents expressly incorporated by reference in this instrument. Any references to any covenant, condition, obligation and/or undertaking “herein,” “hereunder” or “pursuant hereto” (or language of like import) mean, refer to and include the covenants, conditions, obligations and undertakings existing pursuant to this instrument and any riders, exhibits, addenda, attachments or other documents affixed to or expressly incorporated by reference in this instrument. All terms defined in this instrument will be deemed to have the same meanings in all riders, exhibits, addenda, attachments or other documents affixed to or expressly incorporated by reference in this instrument unless the context thereof clearly requires the contrary. All references to a subsection or clause “above” or “below” refer to the denoted subsection or clause within the section in which the reference appears. Unless expressly provided otherwise, all references to Articles and Sections refer to the Articles and Sections set forth in this Agreement. Unless otherwise stated in this Agreement or the Project Agreements, words which have well-known technical or construction industry meanings are used in this Agreement or the Project Agreements in accordance with such recognized meaning. Wherever the word “including,” “includes” or “include” is used in this Agreement or the Project Agreements, except where immediately preceded by the word “not”, it will be deemed to be followed by the words “without limitation”. Wherever reference is made in the Project Agreements to a particular Governmental Authority, it includes any public agency succeeding to the powers and authority of such Governmental Authority.

(e) As used in this Agreement and as the context may require, the singular includes the plural and vice versa, and the masculine gender includes the feminine and vice versa.

(f) The Project Agreements are intended to be complementary and consistent and to be read together as a complete agreement. In the event of any conflict or inconsistency between the Articles of this Agreement and the exhibits to this Agreement, the conflict or inconsistency

will be resolved by applying the following order of document precedence, from highest to lowest:

- (i) Change Orders and amendments to the articles of this Agreement and Definitions;
- (ii) the Articles of this Agreement and Definitions;
- (iii) Project Description and Scope Documentation;
- (iv) the Technical Requirements, as amended; and
- (v) the other exhibits to this Agreement, as amended.

(g) A Project Agreement to which the Department is not a party will have no effect upon the terms and conditions of this Agreement or the construction or interpretation thereof.

(h) Any standard or specification with which the Concessionaire is required to comply by a provision of this Agreement during the Construction Period, shall be the specific edition or version identified in the Technical Requirements, and the Concessionaire shall not be required during the Construction Period to comply with any newer, updated or revised edition or version unless the parties so agree or the Concessionaire is so directed by the Department as a Department Change.

#### **Section 25.17 Counterparts**

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

#### **Section 25.18 Entire Agreement; Amendment**

(a) THIS AGREEMENT AND THE PROJECT AGREEMENTS TO WHICH THE DEPARTMENT AND THE CONCESSIONAIRE ARE BOTH PARTIES CONSTITUTE THE ENTIRE AND EXCLUSIVE AGREEMENT BETWEEN THE PARTIES RELATING TO THE SPECIFIC MATTERS COVERED HEREIN AND THEREIN. ALL PRIOR WRITTEN AND PRIOR OR CONTEMPORANEOUS VERBAL AGREEMENTS, UNDERSTANDINGS, REPRESENTATIONS AND/OR PRACTICES RELATIVE TO THE FOREGOING, INCLUDING THE INTERIM AGREEMENT, ARE HEREBY SUPERSEDED, REVOKED AND RENDERED INEFFECTIVE FOR ANY PURPOSE. THIS AGREEMENT MAY BE ALTERED, AMENDED OR REVOKED ONLY BY AN INSTRUMENT IN WRITING SIGNED BY EACH PARTY HERETO, OR ITS PERMITTED SUCCESSOR OR ASSIGNEE, EXCEPT TO THE EXTENT THE DEPARTMENT HAS THE RIGHT TO AMEND BY DEPARTMENT CHANGE OR DIRECTIVE LETTER PURSUANT TO ARTICLE 14. NO VERBAL AGREEMENT OR IMPLIED COVENANT WILL BE HELD TO VARY THE TERMS HEREOF, ANY STATUTE, LAW OR CUSTOM TO THE CONTRARY NOTWITHSTANDING.

(b) This Agreement and the other Project Agreements attempt to set forth in full all requirements applicable under the Act as to the development, operation, maintenance, repair, management and financing of the Project and attempt to define in full the rights and

responsibilities of each party in connection therewith. To the extent requirements and rights and responsibilities have not been addressed in this Agreement and the other Project Agreements, the parties agree to carry out their respective responsibilities in the spirit of cooperation contemplated by the Act, recognizing that they may not have defined in a sufficient detail or anticipated fully all activities necessary for the full implementation of the Project.

(c) For the avoidance of doubt, the *Amended and Restated Advanced Development Framework Agreement Fredericksburg Extension of I-95 HOV/HOT Lanes*, Conformed Execution Version, executed by the Parties and dated August 22, 2017, as amended, is superseded and is null and void as of the Second Amended and Restated Agreement Date. In addition, the Parties acknowledge and agree the (i) *Concessionaire Proposal Specifications For Binding Proposal to Develop the Fred Ex Project* dated January 9, 2018, and (ii) the *Major Business Terms for the Fred Ex Project in the Commonwealth of Virginia* dated January 9, 2018, are both superseded and without legal effect as of the Second Amended and Restated Agreement Date.

#### **Section 25.19 Payment of Concessionaire Damages and Other Amounts by the Department**

(a) THE DEPARTMENT'S PAYMENT OF ANY CONCESSIONAIRE DAMAGES, LOSSES OR ANY OTHER AMOUNTS DUE AND OWING BY THE DEPARTMENT PURSUANT TO THIS AGREEMENT WILL BE SUBJECT TO APPROPRIATION BY THE GENERAL ASSEMBLY AND ALLOCATION BY THE CTB. Upon determination of Concessionaire Damages or such other amounts due and owing by the Department, the Department will with all practical dispatch consistent in all respects with Law and its obligations pursuant to this Agreement:

(i) deliver to the Governor and the Director of the Department of Planning and Budget of the State, before December 1 with respect to any such payment requested to be appropriated by the next regular session of the General Assembly, a statement of the amount of any such payment due or expected to be due and a request that the Governor include in his budget to be delivered to the next session of the General Assembly a provision that there be appropriated such amounts for such purpose to the extent required, from any legally available funds;

(ii) use its diligent efforts to have (A) the Governor include, in each biennial or any supplemental budget the Governor presents to the General Assembly, the amounts set forth in any statement delivered pursuant to (i) above, (B) the General Assembly appropriate and reappropriate, as applicable, such amounts to or on behalf of the Department for the purpose of paying any Concessionaire Damages or other amounts due and owing by the Department to the Concessionaire pursuant to this Agreement, and (C) the CTB allocates such appropriated amounts as applicable for payment to the Concessionaire; and

(iii) notify the Concessionaire promptly upon becoming aware of any failure by (A) the Governor to include such amounts in his budget delivered to the next session of the General Assembly, (B) the General Assembly to appropriate such amounts during



such next session of the General Assembly or (C) the CTB to so allocate such amounts for payment to the Concessionaire.

(b) The parties hereto agree and acknowledge that, subject to appropriation, such obligation of the Department to pay the Concessionaire Damages and other amounts was and is a material inducement and consideration for the execution and delivery of this Agreement by the Concessionaire.

(c) The Department will pay any sum due pursuant to Section 20.03, Section 20.04(f), Section 20.06, Section 20.07, Section 20.12, or Section 20.13, within 60 Days after the date of determination of the applicable termination compensation amount; provided, in each case, that the Department may defer payment of such sum for an additional 270 Days if it reasonably determines that such additional period is necessary in order to obtain funds to pay such sum; provided further, that any payment of such sum will be made together with interest thereon (A) at the average earnings rate on the State's Transportation Trust Fund or any successor thereto during the period that runs from the date such sum would have otherwise become due to the date that is 60 Days thereafter and (B) after such period, at the Bank Rate until the date of payment thereof; except that to the extent such payment is based on the Concessionaire Debt, such amounts will be re-calculated as of the date of payment.

(d) The Department will proceed to make payment to the Concessionaire of the undisputed amount of any sum due pursuant to Section 20.03, Section 20.04(f), Section 20.06, Section 20.07, Section 20.12, or Section 20.13, without regard to the dispute resolution procedures.

### **Section 25.20 Taxes**

The Concessionaire is solely responsible for the payment of Taxes accrued or arising out of the performance of its obligations pursuant to this Agreement.

### **Section 25.21 Payments to Department or Concessionaire**

(a) Except as otherwise expressly provided in this Agreement or in any Project Agreement, payments due to the Department or the Concessionaire hereunder, as applicable, will be due and payable within 30 Days of receipt by the Concessionaire or the Department, as applicable, of an invoice therefor, together with any supporting documentation.

(b) Each party will be entitled to deduct, offset or withhold from any amounts due from one party to the other party any amounts then due and owing from such other party.

(c) Except as otherwise provided, neither party is required to pay amounts due that are being contested in accordance with the dispute resolution procedures described in Article 21.

### **Section 25.22 Interest on Overdue Amounts**

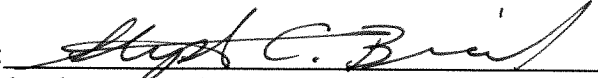
Any amount not paid when due pursuant to this Agreement will bear interest from the date such payment is due until payment is made (after as well as before judgment) at a variable rate per annum at all times equal to the Bank Rate (except as provided otherwise in Section

25.19(c)), which interest will be payable on demand. Interest will be compounded annually and payable on the date on which the related overdue amount is paid.

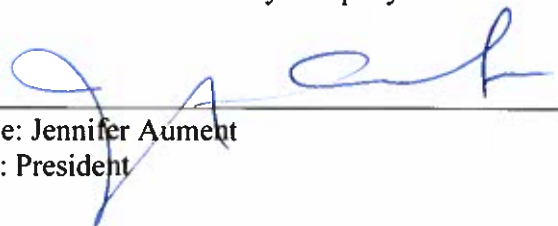
IN WITNESS WHEREOF, the parties, intending to be legally bound, have executed this Second Amended and Restated Comprehensive Agreement Relating to the I-95/395 HOV/HOT Lanes Project as of the date first written above.

[SIGNATURE PAGE(S) TO FOLLOW]

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

By:   
Stephen C. Brich, P.E.  
Commissioner of Highways

**95 EXPRESS LANES LLC,**  
a Delaware limited liability company

By:   
Name: Jennifer Aument  
Title: President