

**PUBLIC PRIVATE PARTNERSHIP (P3)  
VOLUME II  
DESIGN-BUILD-MAINTAIN AGREEMENT**

for

**202 MA 054 H882701C  
SR 202L (SOUTH MOUNTAIN FREEWAY)  
I-10 (MARICOPA FREEWAY) – I-10 (PAPAGO FREEWAY)**

Between



**ARIZONA DEPARTMENT OF TRANSPORTATION**

and

**[DEVELOPER]**

Dated as of: [ \_\_\_\_\_ ], 2016

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- 1 I. This Agreement and the other Contract Documents (defined in Section 1.2.1)  
2 collectively constitute a P3 agreement, as contemplated under the Statute and  
3 the Guidelines, and are entered into in accordance with the provisions of the  
4 RFP.
- 5 J. The Director of ADOT has been authorized to enter into this Agreement pursuant  
6 to the Statute, and the Arizona State Transportation Board has included the  
7 Project in the current ADOT Five-Year Transportation Facilities Construction  
8 Program.
- 9 K. The Parties intend for this Agreement, as it relates to the D&C Work, to be a  
10 lump sum design-build agreement obligating Developer to perform all D&C Work  
11 by the Completion Deadlines specified herein and for payment of the D&C Price,  
12 subject to certain exceptions set forth herein. In order to allow ADOT to budget  
13 for and finance the D&C Work and to reduce the risk of cost overruns, this  
14 Agreement includes restrictions that affect Developer's ability to make claims for  
15 increases to the D&C Price or extensions of the Completion Deadlines.  
16 Developer hereby agrees to assume such responsibilities and risks and has  
17 reflected the assumption of such responsibilities and risks in the D&C Price.
- 18 L. If Developer fails to complete the D&C Work by the Completion Deadlines set  
19 forth in the Contract Documents, then ADOT and the members of the public  
20 represented by ADOT will suffer substantial losses and damages. The Contract  
21 Documents provide that Developer shall pay ADOT substantial Liquidated  
22 Damages if such completion is delayed.
- 23 M. The Parties intend for Developer to perform the Maintenance Services during the  
24 Maintenance Period and for the Maintenance Price, subject to certain exceptions  
25 set forth herein.
- 26 NOW, THEREFORE, in consideration of the sums to be paid by ADOT to Developer,  
27 the Work to be performed by Developer, the foregoing premises and the covenants and  
28 agreements set forth herein, the Parties hereby agree as follows:

1 **ARTICLE 1.**  
2 **DEFINITIONS; CONTRACT DOCUMENTS; INTERPRETATION OF CONTRACT**  
3 **DOCUMENTS**

4 **1.1 Definitions**

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

7 **1.2 Contract Documents; Order of Precedence**

8 **1.2.1** The term "Contract Documents" shall mean the documents listed in  
9 this Section 1.2. Each of the Contract Documents is an essential part of the agreement  
10 between the Parties, and a requirement occurring in one is as binding as though  
11 occurring in all. The Contract Documents are intended to be complementary and to  
12 describe and provide for a complete agreement. Subject to Sections 1.2.2 through  
13 1.2.6, in the event of any conflict among the Contract Documents, the order of  
14 precedence, from highest to lowest, shall be as set forth below:

15 (a) Supplemental Agreements and Agreement amendments  
16 (excluding amendments to the Technical Provisions which are separately addressed in  
17 subparagraphs (d) and (e), below), and all exhibits and attachments thereto;

18 (b) This Agreement (including all exhibits and the executed  
19 originals of exhibits that are contracts, except Exhibit 2;

20 (c) Developer's Proposal Commitments and ATCs (as set forth in  
21 Exhibit 2);

22 (d) Technical Provisions amendments, and all exhibits and  
23 attachments to such amendments;

24 (e) Technical Provisions, and all exhibits and attachments to the  
25 Technical Provisions;

26 (f) Special provisions in publications and manuals to the extent  
27 incorporated by reference into the Technical Provisions;

28 (g) Publications and manuals to the extent incorporated by  
29 reference into the Technical Provisions; and

30 (h) RFC Documents to be developed in accordance with the  
31 Contract Documents, provided that: (a) specifications contained therein shall have  
32 precedence over plans; (b) no conflict shall be deemed to exist between the RFC  
33 Documents and the other Contract Documents with respect to requirements of the RFC  
34 Documents that ADOT determines are more beneficial than the requirements of the  
35 other Contract Documents; and (c) any other Deviations contained in the RFC  
36 Documents shall have priority over conflicting requirements of other Contract

1 Documents only to the extent that the conflicts are specifically identified to ADOT by  
2 Developer and ADOT approves such Deviations in writing in its sole discretion.

3 **1.2.2** Notwithstanding the order of precedence among Contract Documents  
4 set forth in Section 1.2.1, in the event and to the extent that Exhibit 2-3 expressly  
5 specifies that it is intended to supersede specific provisions in the Contract Documents,  
6 including approved Deviations expressly listed in Exhibit 2-3, Exhibit 2-3 shall control  
7 over specific provisions of the Contract Documents. Moreover, if a Contract Document  
8 contains differing provisions on the same subject matter than another Contract  
9 Document, the provisions that establish the higher quality, manner or method of  
10 performing the Work or use more stringent standards shall prevail.

11 **1.2.3** In the event of a conflict among any standards, criteria, requirements,  
12 conditions, procedures, specifications or other provisions applicable to the Project  
13 established by reference to a described manual or publication within a Contract  
14 Document or set of Contract Documents, the standard, criterion, requirement, condition,  
15 procedure, specification or other provision offering higher quality or better performance  
16 will apply, unless ADOT in its sole discretion, approves otherwise in writing. If either  
17 Party becomes aware of any such conflict, it shall promptly notify the other party of the  
18 conflict. ADOT will issue a written determination respecting which of the conflicting  
19 items shall apply promptly after it becomes aware of any such conflict.

20 **1.2.4 Proposal**

21 If the Proposal, including Developer's Schematic Design, includes statements,  
22 offers, terms, concepts or designs that can reasonably be interpreted as offers to  
23 provide higher quality items than otherwise required by the other Contract Documents  
24 or to perform services or meet standards in addition to or better than those otherwise  
25 required, or otherwise contains terms or designs which are more advantageous to  
26 ADOT than the requirements of the other Contract Documents, as reasonably  
27 determined by ADOT, then Developer's obligations hereunder shall include compliance  
28 with all such statements, offers, terms, concepts and designs, which shall have the  
29 priority of Developer's Proposal Commitments.

30 **1.2.5 Project Management Plan and Maintenance Management Plan**

31 In the event of any conflict, ambiguity or inconsistency between the Project  
32 Management Plan or Maintenance Management Plan and any of the Contract  
33 Documents, the latter shall prevail.

34 **1.2.6 Reference Information Documents**

35 Portions of the Reference Information Documents are specifically referenced in  
36 the Contract Documents for the purpose of defining requirements of the Contract  
37 Documents. Portions of the Reference Information Documents that are specifically  
38 referenced in the Contract Documents for the purpose of defining certain requirements  
39 shall be deemed incorporated into the Contract Documents to the extent so referenced  
40 with the same order of priority as the applicable Contract Document.

1 **1.3 Construction and Interpretation of Contract Documents**

2 **1.3.1 Interpretation**

3 The language in all parts of the Contract Documents shall in all cases be  
4 construed simply, as a whole and in accordance with its fair meaning and not strictly for  
5 or against any Party. The Parties acknowledge and agree that the Contract Documents  
6 are the product of an extensive and thorough, arm’s length exchange of ideas,  
7 questions, answers, information and drafts during the Proposal preparation process,  
8 that each Party has been given the opportunity to independently review the Contract  
9 Documents with legal counsel, and that each Party has the requisite experience and  
10 sophistication to negotiate, understand, interpret and agree to the particular language of  
11 the provisions of the Contract Documents. Accordingly, in the event of an ambiguity in  
12 or Dispute regarding the interpretation of the Contract Documents, the Contract  
13 Documents shall not be interpreted or construed against the Party preparing it, and  
14 instead other rules of interpretation and construction shall be utilized. ADOT’s final  
15 answers to the questions posed during the Proposal preparation process for this  
16 Agreement shall in no event be deemed part of the Contract Documents and shall not  
17 be relevant in interpreting the Contract Documents except as they may clarify provisions  
18 otherwise considered ambiguous.

19 **1.3.2 Number and Gender**

20 In this Agreement, terms defined in the singular have the corresponding plural  
21 meaning when used in the plural and vice versa, and words in one gender include all  
22 genders.

23 **1.3.3 Headings**

24 The division of this Agreement into parts, articles, sections and other  
25 subdivisions is for convenience of reference only and shall not affect the construction or  
26 interpretation of this Agreement. The headings in this Agreement are not intended to be  
27 full or precise descriptions of the text to which they refer and shall not be considered  
28 part of this Agreement.

29 **1.3.4 References to this Agreement**

30 The words “herein”, “hereby”, “hereof”, “hereto” and “hereunder” and words of  
31 similar import refer to this Agreement as a whole and not to any particular portion of it.  
32 The words “Article”, “Section”, “paragraph”, “sentence”, “clause” and “Exhibit” mean and  
33 refer to the specified article, section, paragraph, sentence, clause or exhibit of, or to,  
34 this Agreement. A reference to a subsection or clause “above” or “below” refers to the  
35 denoted subsection or clause within the Section in which the reference appears.

36 **1.3.5 References to Agreements and Other Documents**

37 Unless specified otherwise, a reference to an agreement or other document is  
38 considered to be a reference to such agreement or other document (including any

1 schedules or exhibits thereto) as it may be amended, modified or supplemented from  
2 time to time in accordance with its terms.

3 **1.3.6 References to Any Person**

4 A reference in this Agreement to any Person at any time refers to such Person's  
5 permitted successors and assigns.

6 **1.3.7 Meaning of Including**

7 In this Agreement, the word "including" (or "include" or "includes") means  
8 "including without limitation" and shall not be considered to set forth an exhaustive list.

9 **1.3.8 Meaning of Discretion**

10 In this Agreement, except as otherwise stated herein, the word "discretion" with  
11 respect to any Person means the sole and absolute discretion of such Person.

12 **1.3.9 Computation of Periods**

13 If a specified date to perform any act or give any notice in the Contract  
14 Documents (including the last date "within" a specified time period) falls on a non-  
15 Business Day, such act or notice may be timely performed on the next succeeding  
16 Business Day; provided, however, that non-Business Day deadlines contained in the  
17 Contract Documents for actions to be taken in the event of an Emergency or other  
18 circumstances, where it is clear that performance is intended to occur on a non-  
19 Business Day, shall not be extended to the next succeeding Business Day.

20 **1.3.10 Meaning of Promptly**

21 In this Agreement, the word "promptly" means as soon as reasonably practicable  
22 in light of then-prevailing circumstances.

23 **1.3.11 Trade Meanings**

24 Unless otherwise defined herein, words or abbreviations that have well-known  
25 trade meanings are used herein in accordance with those meanings.

26 **1.3.12 Dimensions**

27 On plans, working drawings, and standard plans, calculated dimensions shall  
28 prevail over scaled dimensions.

29 **1.3.13 Laws**

30 Unless specified otherwise, a reference to a Law is considered to be a reference  
31 to: (a) such Law as it may be amended, modified, supplemented or interpreted by the  
32 courts from time to time; (b) all regulations and rules pertaining to or promulgated  
33 pursuant to such Law; (c) the successor to the Law resulting from recodification or

1 similar reorganizing of Laws; and (d) all future Laws pertaining to the same or similar  
2 subject matter.

3 **1.3.14 Currency**

4 Unless specified otherwise, all statements of or references to dollar amounts or  
5 money in this Agreement are to the lawful currency of the United States of America.

6 **1.3.15 Time Zones**

7 Unless specified otherwise, references in the Agreement to time or hours shall be  
8 to Mountain Standard Time. Arizona does not observe Daylight Saving Time.

9 **1.4 Referenced Manuals, Publications, Standards, Policies and Specifications**

10 **1.4.1** References in the Technical Provisions to manuals or other  
11 publications governing the Work shall mean the most recent edition or revision thereof  
12 and amendments and supplements thereto in effect on the Setting Date.

13 **1.4.2** In interpreting standards, policies and specifications referenced in the  
14 Technical Provisions, the following apply:

15 (a) References to the “project owner” shall mean ADOT; and

16 (b) References to “plan(s)” shall mean the RFC Documents.

17 **1.5 Errors and Misdemeanors**

18 **1.5.1** Developer acknowledges that prior to the Effective Date Developer had  
19 the opportunity to identify any Errors and potentially unsafe provisions in the Technical  
20 Provisions and other Contract Documents, and the opportunity and duty to notify ADOT  
21 of such fact and of the changes to the provisions that Developer believed were the  
22 minimum necessary to render the provisions correct and safe. Developer shall not take  
23 advantage of or benefit from any Error in the Contract Documents that Developer knew  
24 of or, through the exercise of reasonable care, had reason to know of prior to the  
25 Effective Date.

26 **1.5.2** If it is reasonable or necessary to adopt changes to the Technical  
27 Provisions after the Effective Date to make the provisions correct and safe, such  
28 changes shall not be grounds for any adjustment to the Price, Completion Deadlines or  
29 other Claim; provided, however, that adoption of such a change shall be treated as an  
30 ADOT-Directed Change if: (a) Developer neither knew nor had reason to know prior to  
31 the Effective Date that the provision was erroneous or created a potentially unsafe  
32 condition; or (b) Developer knew of and reported to ADOT the erroneous or potentially  
33 unsafe provision prior to the Effective Date, and ADOT did not adopt reasonable and  
34 necessary changes. If Developer commences or continues any Work affected by such  
35 a change after the need for the change was discovered or suspected, or should have

1 been discovered or suspected through the exercise of reasonable care, Developer shall  
2 bear any additional costs associated with redoing the Work already performed.

3 **1.5.3** If Developer identifies any Errors in the Contract Documents (including  
4 those Reference Information Documents described in Section 1.2.6), Developer shall  
5 promptly notify ADOT of such Errors and obtain specific instructions from ADOT  
6 regarding any such Error before proceeding with the affected Work.

7 **1.5.4** If Developer determines that the Contract Documents do not detail or  
8 describe sufficiently the Work or any matter relative thereto, Developer shall request  
9 further explanation from ADOT and shall comply with any explanation thereafter  
10 provided by ADOT. The fact that the Contract Documents omit or misdescribe any  
11 details of any Work that are necessary to carry out the intent of the Contract Documents  
12 shall not relieve Developer from performing such omitted Work (no matter how  
13 extensive) or misdescribed details of the Work. Instead, Developer shall be deemed to  
14 have known or have had reason to know of such omission or misdescription prior to the  
15 Effective Date, and shall perform such Work as if the details were fully and correctly set  
16 forth and described in the Contract Documents without entitlement to a Supplemental  
17 Agreement, except as specifically allowed under Section 14.

18 **1.5.5** Errors in the Schematic Design that require a Necessary Schematic  
19 ROW Change are governed by Sections 6.4.3 and 14.4.1.

20 **1.5.6** Inconsistent or conflicting provisions of the Contract Documents shall  
21 not be treated as erroneous provisions under this Section 1.5.6, but instead shall be  
22 governed by Section 1.2.

23 **1.6 Reference Information Documents**

24 **1.6.1** ADOT has provided the Reference Information Documents to  
25 Developer.

26 **1.6.2** Except as provided in Sections 1.2.6 and 1.6.3, Developer  
27 acknowledges and agrees that:

28 (a) The Reference Information Documents are not mandatory or  
29 binding on Developer;

30 (b) Developer is not entitled to rely on the Reference Information  
31 Documents as presenting any design, engineering or maintenance solutions or other  
32 direction, means or methods for complying with the requirements of the Contract  
33 Documents, Governmental Approvals or Law;

34 (c) ADOT will not be liable for any causes of action, claims or  
35 Losses suffered by any Developer-Related Entity by reason of any use of information  
36 contained in, or any action or forbearance in reliance on, the Reference Information  
37 Documents;

1 (d) ADOT has not verified the information in the Reference  
2 Information Documents, and does not represent or warrant that the information  
3 contained in the Reference Information Documents is free from Error or that such  
4 information is in conformity with the requirements of the Contract Documents, NEPA  
5 Approval, other Governmental Approvals or Laws;

6 (e) Without limiting clause (d) above, ADOT makes no  
7 representations or warranties as to any surveys, data, reports or other information  
8 provided by ADOT or other Persons concerning surface conditions and subsurface  
9 conditions, including information relating to Utilities, Hazardous Materials, contaminated  
10 groundwater, archeological, paleontological, cultural and historic resources, unexploded  
11 ordnance, seismic conditions, and Threatened or Endangered Species, affecting the  
12 Work, the Site or surrounding locations;

13 (f) Developer shall have no right to additional compensation or  
14 Completion Deadline adjustment based on any Error in the Reference Information  
15 Documents;

16 (g) Developer is capable of conducting and obligated hereunder to  
17 conduct Reasonable Investigation to verify or supplement the Reference Information  
18 Documents; and

19 (h) If and to the extent Developer or anyone on Developer's behalf  
20 in any way uses information in the Reference Information Documents, such use is made  
21 on the basis that such use is entirely at Developer's own risk and at its own discretion  
22 and that Developer, not ADOT, is responsible for such information.

23 **1.6.3** Section 1.6.2 shall not adversely affect the specific relief available to  
24 Developer under Article 14 for Relief Events under clauses (h), (i), (k), (l), (m) and (q) of  
25 the definition of Relief Event.

26 **1.7 Professional Services Licensing Requirements**

27 ADOT does not intend to contract for, pay for, or receive any Professional Services that  
28 are in violation of any professional licensing or registration laws, and by execution of  
29 this Agreement, Developer acknowledges that ADOT has no such intent. It is the intent  
30 of the Parties that Developer is fully responsible for furnishing the Professional Services  
31 of the Project through itself or Subcontracts with licensed/registered Professional  
32 Service firm(s) as provided herein; and any reference to Developer's responsibilities or  
33 obligations to "perform" the Professional Services portions of the Work shall be deemed  
34 to mean that Developer shall "furnish" the Professional Services for the Project as  
35 described in this Section 1.7. The terms and provisions of this Section 1.7 shall control  
36 and supersede every other provision of all Contract Documents.

37 **1.8 Federal Requirements**

38 Developer shall comply and require its Subcontractors to comply with all Federal  
39 Requirements, including those requirements set forth in Exhibit 4. In the event of any

1 conflict between any applicable Federal Requirements and the other requirements of  
2 the Contract Documents, the Federal Requirements shall prevail, take precedence and  
3 be in force over and against any such conflicting provisions.

4 **1.9 Incorporation of ATCs**

5 If the Contract Documents incorporate any ATCs and either: (a) Developer does not  
6 comply with one or more ADOT conditions of pre-approval for the ATC or (b) Developer  
7 does not obtain the required third-party approval for the ATC, then Developer shall  
8 comply with the requirements in the Contract Documents that would have applied in the  
9 absence of such ATC, including acquiring Developer-Designated ROW necessary to  
10 comply with the Contract Documents, and such compliance shall be without any  
11 increase in the Price, extension of the Completion Deadlines or any other Supplemental  
12 Agreement.

13 **1.9.1** ATCs contained in proposals submitted by unsuccessful proposers  
14 may, in ADOT's discretion, be presented to Developer as a Request for Change  
15 Proposal in accordance with Section 15.1.2.

16 **1.10 ADOT Monetary Obligations**

17 The Project is included in the current ADOT Five-Year Transportation Facilities  
18 Construction Program. All ADOT monetary obligations under the Contract Documents  
19 are subject to appropriation by the Arizona Legislature; provided, however, that in the  
20 absence of such appropriation, such monetary obligations shall be payable solely from  
21 other unencumbered lawfully available funds of ADOT (whether available at such time  
22 or in the future) that are not funds appropriated by the Arizona Legislature. ADOT will  
23 submit a request in accordance with applicable Law to obtain an appropriation from the  
24 Arizona Legislature, or shall perform actions permitted by Law to obtain, designate, or  
25 use any other lawfully available funds that are not funds appropriated by the Arizona  
26 Legislature. This Section 1.10 applies to all monetary obligations of ADOT, set forth in  
27 the Contract Documents, notwithstanding any contrary provisions of the Contract  
28 Documents. The Contract Documents do not create a debt under the Arizona  
29 Constitution.

30  
31

1 **ARTICLE 2.**  
2 **TERM; GENERAL OBLIGATIONS OF DEVELOPER; REPRESENTATIONS AND**  
3 **WARRANTIES**

4 **2.1 Term**

5 This Agreement shall take effect on the Effective Date, and shall remain in effect until  
6 the earlier to occur of: (a) the end of the Maintenance Period; or (b) the date that this  
7 Agreement is terminated as provided herein (the "Term").

8 **2.2 General Obligations of Developer**

9 **2.2.1 D&C Work**

10 As more fully described in the Contract Documents, Developer shall perform the  
11 D&C Work. The D&C Work shall include the development, design and construction of  
12 the Project, conforming to the Basic Configuration and otherwise complying with the  
13 requirements of the Contract Documents, except as otherwise approved by ADOT in its  
14 sole discretion. All materials, services and efforts necessary to achieve Substantial  
15 Completion and Final Acceptance of the Project on or before the applicable Completion  
16 Deadline shall be solely Developer's responsibility, except as otherwise specifically  
17 provided in the Contract Documents. Developer shall plan, schedule, and execute all  
18 aspects of the D&C Work and shall coordinate its activities with all Persons who are  
19 directly impacted by the D&C Work. Subject to the terms of Article 14, the cost of all  
20 D&C Work, including such materials, services and efforts as are necessary for the D&C  
21 Work, are included in the D&C Price.

22 **2.2.2 Maintenance Services**

23 As more fully described in the Contract Documents, Developer shall perform the  
24 Maintenance Services. The Maintenance Services shall include Routine Maintenance  
25 and Capital Asset Replacement Work, each of which will be funded through separate  
26 funding sources. The Maintenance Services shall comply with corresponding  
27 requirements set forth in the Technical Provisions and other Contract Documents,  
28 except as otherwise approved by ADOT in its sole discretion. Developer shall furnish all  
29 Maintenance Services throughout the Maintenance Period, as more specifically set forth  
30 in the Technical Provisions. Subject to the terms of Article 14, the cost of all  
31 Maintenance Services, including all materials, services and efforts necessary to perform  
32 the Maintenance Services, are included in the Maintenance Price.

33 **2.3 Representations, Warranties and Covenants of Developer**

34 Developer makes the representations, warranties and covenants set forth in this  
35 Section 2.3.

36 **2.3.1** During all periods necessary for the performance of the Work,  
37 Developer and its Subcontractors shall maintain all required authority, licenses,

1 registrations, professional ability, skills and capacity to perform the Work in accordance  
2 with the requirements contained in the Contract Documents.

3 **2.3.2** As of the Effective Date, based upon Developer's Reasonable  
4 Investigation, Developer has evaluated the constraints affecting design and construction  
5 of the Project, including the limits of the Schematic ROW as well as the conditions of the  
6 NEPA Approval, and has reasonable grounds for believing and does believe that the  
7 Project can be designed and built within such constraints.

8 **2.3.3** Developer has evaluated the feasibility of performing the D&C Work  
9 within the Completion Deadlines and for the D&C Price, accounting for constraints  
10 affecting the Project, including the Maximum Allowable Cumulative Draw Schedule set  
11 forth in Exhibit 6 and the assumed NTP 3 Window, and has reasonable grounds for  
12 believing and does believe that such performance (including achievement of Substantial  
13 Completion and Final Acceptance by the applicable Completion Deadlines for the D&C  
14 Price) is feasible and practicable, subject to Developer's right to seek relief for  
15 Necessary Schematic ROW changes under Article 14.

16 **2.3.4** Developer has evaluated the feasibility of performing the Maintenance  
17 Services throughout the Maintenance Period and for the Maintenance Price and has  
18 reasonable grounds for believing and does believe that such performance is feasible  
19 and practicable.

20 **2.3.5** Prior to the Proposal Due Date and in accordance with Good Industry  
21 Practice, Developer conducted a Reasonable Investigation and as a result of such  
22 Reasonable Investigation is familiar with and accepts the physical requirements of the  
23 Work, subject to Developer's right to seek relief under Article 14.

24 **2.3.6** Developer has familiarized itself with the requirements of any and all  
25 applicable Laws and the conditions of any required Governmental Approvals prior to  
26 entering into this Agreement. As of the Effective Date, Developer has no reason to  
27 believe that any Governmental Approval required to be obtained by Developer will not  
28 be granted in due course and thereafter remain in effect so as to enable the Work to  
29 proceed in accordance with the Contract Documents.

30 **2.3.7** All Work furnished by Developer shall be performed by or under the  
31 supervision of Persons who hold all necessary and valid licenses to perform the Work in  
32 the State, by personnel who are careful, skilled, experienced and competent in their  
33 respective trades or professions, who are professionally qualified to perform the Work in  
34 accordance with the Contract Documents and who shall assume professional  
35 responsibility for the accuracy and completeness of the Design Documents,  
36 Construction Documents and other documents prepared or checked by them.

37 **2.3.8** As of the Effective Date, Developer is a **[NTD – INSERT**  
38 **DEVELOPER'S FORM OF LEGAL ENTITY]** duly organized and validly existing under  
39 the laws of the **[NTD – INSERT DEVELOPER'S STATE OF ORGANIZATION]** with all  
40 requisite power and all required licenses to carry on its present and proposed

1 obligations under the Contract Documents and has full power, right and authority to  
2 execute and deliver the Contract Documents and the Key Subcontracts to which  
3 Developer is (or will be) a party and to perform each and all of the obligations of  
4 Developer provided for herein and therein.

5 **2.3.9** Developer is duly qualified to do business, and is in good standing, in  
6 the State as of the Effective Date, and will remain in good standing throughout the Term  
7 and for as long thereafter as any obligations remain outstanding under the Contract  
8 Documents.

9 **2.3.10** At any time a Guaranty is required to be in place pursuant to the  
10 Contract Documents, the applicable Guarantor is duly organized, validly existing and in  
11 good standing under the laws of the state of its organization, is duly qualified to do  
12 business in, and is in good standing in, the State, and shall remain in good standing for  
13 as long as any obligations guaranteed by such Guarantor remain outstanding under the  
14 Contract Documents and each such Guarantor has all requisite power and all required  
15 licenses to carry on its present and proposed obligations under the Contract  
16 Documents.

17 **2.3.11** At any time a Guaranty is required to be in place pursuant to the  
18 Contract Documents, all required approvals have been obtained with respect to the  
19 execution, delivery and performance of such Guaranty, and performance of such  
20 Guaranty will not result in a breach of or a default under the applicable Guarantor's  
21 organizational documents or any indenture or loan or credit agreement or other material  
22 agreement or instrument to which the applicable Guarantor is a party or by which its  
23 properties and assets may be bound or affected.

24 **2.3.12** Each Guaranty has been duly authorized by all necessary corporate  
25 action, has been duly executed and delivered by each Guarantor, and constitutes the  
26 legal, valid and binding obligation of such Guarantor, enforceable in accordance with its  
27 term, subject only to applicable bankruptcy, insolvency and similar laws affecting the  
28 enforceability of the rights of creditors generally and the general principles of equity.

29 **2.3.13** The execution, delivery and performance of the Contract Documents  
30 and the Key Subcontracts to which Developer is (or will be) a party have been (or will  
31 be) duly authorized by all necessary corporate action of Developer; each person  
32 executing the Contract Documents and the Key Subcontracts on behalf of Developer  
33 has been (or at the time of execution will be) duly authorized to execute and deliver  
34 each such document on behalf of Developer; and the Contract Documents and the Key  
35 Subcontracts have been (or will be) duly executed and delivered by Developer.

36 **2.3.14** Neither the execution and delivery by Developer of the Contract  
37 Documents or the Key Subcontracts to which Developer is (or will be) a party, nor the  
38 consummation of the transactions contemplated hereby or thereby, is (or at the time of  
39 execution will be) in conflict with or has resulted or will result in a default under or a  
40 violation of the governing instruments or organizational documents of Developer or a  
41 breach or default under any indenture or loan or credit agreement or other material

1 agreement or instrument to which Developer is a party or by which its properties and  
2 assets may be bound or affected.

3 **2.3.15** Each of the Contract Documents and the Key Subcontracts to which  
4 Developer is (or will be) a party constitutes (or at the time of execution and delivery will  
5 constitute) the legal, valid and binding obligation of Developer, enforceable against  
6 Developer, in accordance with its terms, subject only to applicable bankruptcy,  
7 insolvency and similar laws affecting the enforceability of the rights of creditors  
8 generally and to general principles of equity.

9 **2.3.16** As of the Effective Date, there is no action, suit, proceeding,  
10 investigation or litigation pending and served on Developer which challenges  
11 Developer's authority to execute, deliver or perform, or the validity or enforceability of,  
12 the Contract Documents or the Key Subcontracts to which Developer is a party, or  
13 which challenges the authority of any of Developer's officials that are executing the  
14 Contract Documents or the Key Subcontracts; and Developer has disclosed to ADOT  
15 prior to the Effective Date any pending and un-served or threatened action, suit,  
16 proceeding, investigation or litigation with respect to such matters of which Developer is  
17 aware.

18 **2.3.17** As of the Proposal Due Date, Developer disclosed to ADOT in writing  
19 all organizational conflicts of interest of Developer and its Subcontractors of which  
20 Developer was actually aware; and between the Proposal Due Date and the Effective  
21 Date, Developer has not obtained knowledge of any additional organizational conflict of  
22 interest, and there have been no organizational changes to Developer or its  
23 Subcontractors identified in its Proposal which have not been approved in writing by  
24 ADOT. For this purpose, organizational conflict of interest has the meaning set forth in  
25 the RFP.

26 **2.3.18** To the extent the Lead Subcontractor, the Lead Engineering Firm or  
27 the Lead Maintenance Firm is not Developer, Developer represents and warrants, as of  
28 the effective date of the relevant Subcontract, as follows:

29 (a) Each of the Lead Subcontractor, the Lead Engineering Firm and  
30 the Lead Maintenance Firm is duly organized, validly existing and in good standing  
31 under the laws of the state of its organization and is duly qualified to do business, and is  
32 in good standing, in the State;

33 (b) The ownership interests of each of them that is a single purpose  
34 entity formed for the Project (including options, warrants and other rights to acquire  
35 ownership interests), is owned by the Persons whom Developer has set forth in a  
36 written certification delivered to ADOT prior to the Effective Date;

37 (c) Each of them has the power and authority to do all acts and  
38 things and execute and deliver all other documents as are required to be done,  
39 observed or performed by it in connection with its engagement by Developer;

1 (d) Each of them has (i) obtained and will maintain all necessary or  
2 required registrations, permits, licenses and approvals required under applicable Law  
3 and (ii) expertise, qualifications, experience, competence, skills and know-how to  
4 perform the D&C Work and Maintenance Services, as applicable, in accordance with  
5 the Contract Documents;

6 (e) Each of them will comply with all health, safety and  
7 environmental Laws in the performance of any work activities for, or on behalf of,  
8 Developer for the benefit of ADOT; and

9 (f) None of them is in breach of any applicable Law that would  
10 have a material adverse effect on any aspect of the Work.

## 11 **2.4 Representations and Warranties of ADOT**

12 ADOT makes the representations, warranties and covenants set forth in this  
13 Section 2.4.

14 (a) As of the Effective Date, ADOT has full power, right and  
15 authority to execute, deliver and perform its obligations under, in accordance with and  
16 subject to the terms and conditions of the Contract Documents to which it is a Party.

17 (b) Each Person executing on behalf of ADOT, the Contract  
18 Documents to which ADOT is a Party, has been or at the time of execution will be duly  
19 authorized to execute each such document on behalf of ADOT.

20 (c) As of the Effective Date, there is no action, suit, proceeding,  
21 investigation or litigation pending and served on ADOT which challenges ADOT's  
22 authority to execute, deliver or perform, or the validity or enforceability of, the Contract  
23 Documents to which ADOT is a Party, or which challenges the authority of the officials  
24 executing the Contract Documents; provided, however, that no such representation is  
25 made regarding the existence or effect of litigation regarding compliance with NEPA or  
26 other laws identified in the Federal Highway Administration Record of Decision for the  
27 Project dated March 5, 2015.

28 (d) As of the Effective Date, each of the Contract Documents to  
29 which ADOT is (or will be) a party constitutes (or at the time of execution and delivery  
30 will constitute) the legal, valid and binding obligation of ADOT, enforceable against  
31 ADOT in accordance with its terms, subject only to applicable bankruptcy, insolvency  
32 and similar laws affecting the enforceability of the rights of creditors generally and to  
33 general principles of equity.

34 (e) The execution and delivery by ADOT of this Agreement will not  
35 result, at the time of execution, in a default under any other agreement or instrument to  
36 which it is a party or by which it is bound.

37 (f) The execution and delivery by ADOT of the Contract  
38 Documents and performance by ADOT of its obligations thereunder will not conflict with

1 any Laws applicable to ADOT that are valid and in effect on the Effective Date;  
2 provided, however, that no such representation is made regarding the existence or  
3 effect of litigation regarding compliance with NEPA or other laws identified in the  
4 Federal Highway Administration Record of Decision for the Project dated March 5,  
5 2015.

## 6 **2.5 Survival of Representations and Warranties**

7 The representations and warranties of Developer and ADOT contained herein shall  
8 survive expiration or earlier termination of this Agreement.  
9

**ARTICLE 3.**  
**MANAGEMENT SYSTEMS AND OVERSIGHT**

**3.1 Submittal, Review and Approval Terms and Procedures**

**3.1.1 General**

This Section 3.1 sets forth uniform terms and procedures that shall govern all Submittals to ADOT pursuant to the Contract Documents or the Project Management Plan, Maintenance Management Plan and component plans thereunder. In the event of any irreconcilable conflict between the provisions of this Section 3.1 and any other provisions of the Contract Documents or the Project Management Plan, Maintenance Management Plan and component plans thereunder concerning submission, review and approval procedures, this Section 3.1 shall exclusively govern and control, except to the extent that the conflicting provision expressly states otherwise.

**3.1.2 Time Periods**

**3.1.2.1** Except as otherwise provided in this Section 3.1.2 or in Section 7.5, whenever ADOT is entitled to review, comment on, review and comment on, or to affirmatively approve or accept, a Submittal, ADOT will have a period of ten Business Days to act after the date ADOT receives an accurate and complete Submittal in conformity with the Contract Documents, together with a completed transmittal form in a form to be mutually agreed by the Parties and all necessary or requested information and documentation concerning the subject matter. If ADOT determines that a Submittal is not complete, ADOT will notify Developer of such determination within ten Business Days of receipt of such Submittal. ADOT's review period for Developer's re-submission of a previously submitted, complete Submittal shall be ten Business Days. The Parties shall agree in good faith upon any necessary extensions of the review-comment-and-approval period to accommodate particularly complex or comprehensive Submittals.

**3.1.2.2** If any other provision of the Contract Documents expressly provides a longer or shorter period for ADOT to act, such period shall control over the time periods set forth in Section 3.1.2.1. If the time period for ADOT to act should end on a day when ADOT is closed, the time period shall automatically be extended to the next day when ADOT is open.

**3.1.2.3** If at any given time ADOT is in receipt of more than (a) 20 concurrent Submittals in the aggregate (or other number of aggregate concurrent Submittals mutually agreed in writing by ADOT and Developer), except Submittals of parts or components of the Project Management Plan prior to issuance of NTP 1, or (b) the maximum number of concurrent Submittals of any particular type set forth in any other provision of the Contract Documents (e.g., GP Section 110.10.2.1.8 of the Technical Provisions), ADOT may extend the applicable period for it to act to that period in which ADOT can reasonably accommodate the Submittals under the circumstances, or such other period of extension set forth in any other provision of the Contract

1 Documents, and no such extension shall constitute an ADOT-Caused Delay, ADOT-  
2 Directed Change, Relief Event or other basis for any Claim. However, if at any time  
3 ADOT is in receipt of some Submittals subject to clause (a) above and some Submittals  
4 subject to clause (b) above, then the higher number of Submittals shall be used to  
5 determine whether ADOT may extend the applicable period for it to act. Submittals are  
6 deemed to be concurrent to the extent the review time periods available to ADOT under  
7 this Section 3.1.2 regarding such Submittals entirely or partially overlap. Whenever  
8 ADOT is in receipt of excess concurrent Submittals, Developer may establish by written  
9 notice to ADOT an order of priority for processing such Submittals; and ADOT will  
10 attempt to comply with such order of priority.

11 **3.1.2.4** All time periods for ADOT to act shall be extended by the  
12 period of any delay caused by any Relief Event (for this purpose modified, where  
13 applicable, to refer to Developer acts or omissions rather than ADOT's) or caused by  
14 delay, act, omission, breach, fault or negligence of any Developer-Related Entity.

15 **3.1.2.5** During any time there exists a Persistent Developer Default,  
16 the applicable period for ADOT to act on any Submittals received during such time, and  
17 not related to curing the Persistent Developer Default shall automatically be extended  
18 by ten Business Days.

19 **3.1.2.6** ADOT will endeavor to reasonably accommodate a written  
20 request from Developer for expedited action on a specific Submittal, within the practical  
21 limitations on availability of ADOT personnel appropriate for acting on the types of  
22 Submittal in question; provided Developer sets forth in its request specific, abnormal  
23 circumstances, not caused by a Developer-Related Entity, demonstrating the need for  
24 expedited action. This provision shall not apply, however, during any time described in  
25 Section 3.1.2.4 or 3.1.2.5.

### 26 **3.1.3 ADOT Discretionary Approvals**

27 **3.1.3.1** If the Submittal is one where the Contract Documents  
28 indicate approval or consent or acceptance is required from ADOT in its sole discretion  
29 or absolute discretion, then ADOT's lack of approval, determination, decision or other  
30 action within the applicable time period described in Section 3.1.2 shall be deemed  
31 disapproval. If approval is subject to the sole discretion or absolute discretion of ADOT,  
32 then ADOT's decision shall be final, binding and not subject to dispute resolution and  
33 such decision shall not constitute an ADOT-Caused Delay, ADOT-Directed Change,  
34 Relief Event or other basis for any Claim.

35 **3.1.3.2** If the Submittal is one where the Contract Documents  
36 indicate approval or consent or acceptance is required from ADOT in its good faith  
37 discretion and ADOT delivers no approval, consent, determination, decision or other  
38 action within the applicable time period under Section 3.1.2, then Developer may deliver  
39 to ADOT a written notice stating the date within which ADOT was to have decided or  
40 acted and that if ADOT does not decide or act within five Business Days after receipt of  
41 the notice, delay from and after lapse of the applicable time period under Section 3.1.2

1 may constitute ADOT-Caused Delay for which Developer will be entitled to issue a  
2 Relief Event Notice under Section 14.1.1. If the approval is subject to the good faith  
3 discretion of ADOT, then its decision shall be binding unless it is finally determined by  
4 clear and convincing evidence that such decision was arbitrary or capricious. If the  
5 decision is determined to be arbitrary and capricious and causes delay, it will constitute  
6 and be treated as an ADOT-Caused Delay.

7 **3.1.4 Other ADOT Approvals**

8 **3.1.4.1** Whenever the Contract Documents indicate that a Submittal  
9 or other matter is subject to ADOT's approval or consent but the approval or consent is  
10 one not governed by Section 3.1.3 concerning discretionary approvals, then the  
11 standard shall be reasonableness.

12 **3.1.4.2** Whenever the reasonableness standard applies and ADOT  
13 delivers no approval, consent, determination, decision or other action within the  
14 applicable time period under Section 3.1.2, then Developer may deliver to ADOT a  
15 written notice stating the date within which ADOT was to have decided or acted and that  
16 if ADOT does not decide or act within five Business Days after receipt of the notice,  
17 delay from and after lapse of the applicable time period under Section 3.1.2 may  
18 constitute ADOT-Caused Delay for which Developer will be entitled to issue a Relief  
19 Event Notice under Section 14.1.

20 **3.1.5 ADOT Review and Comment**

21 Whenever the Contract Documents indicate that a Submittal or other matter is  
22 subject to ADOT's review, comment, review and comment, disapproval or similar action  
23 not entailing a prior approval and ADOT delivers no comments, exceptions, objections,  
24 rejections or disapprovals within the applicable time period under Section 3.1.2, then  
25 Developer may proceed thereafter at its election and risk, without prejudice to ADOT's  
26 rights to later object or disapprove in accordance with Section 3.1.7.1. No such failure  
27 or delay by ADOT in delivering comments, exceptions, objections, rejections or  
28 disapprovals within the applicable time period under Section 3.1.2 shall constitute an  
29 ADOT-Caused Delay, ADOT-Directed Change, Relief Event or other basis for any  
30 Claim. When used in the Contract Documents, the phrase "completion of the review  
31 and comment process", "comments addressed", "respond to the comments", "comments  
32 (are) (have been) resolved" or similar terminology means either (a) ADOT has reviewed,  
33 provided comments, exceptions, objections, rejections or disapprovals, and all the same  
34 have been fully resolved, or (b) the applicable time period has passed without ADOT  
35 providing any comments, exceptions, objections, rejections or disapprovals.

36 **3.1.6 Submittals Not Subject to Prior Review, Comment or Approval**

37 Whenever the Contract Documents indicate that Developer is to deliver a  
38 Submittal to ADOT but express no requirement for ADOT review, comment,  
39 disapproval, prior approval or other ADOT action, then Developer is under no obligation  
40 to provide ADOT any period of time to review the Submittal or obtain approval of it

1 before proceeding with further Work, and ADOT will have the right, but is not obligated,  
2 to at any time review, comment on, take exception to, object to, reject or disapprove the  
3 Submittal in accordance with Section 3.1.7.1. No failure or delay by ADOT in delivering  
4 comments, exceptions, objections, rejections or disapprovals with respect to the  
5 Submittal shall constitute an ADOT-Caused Delay, ADOT-Directed Change, Relief  
6 Event or other basis for any Claim.

7           **3.1.7       Resolution of ADOT Comments and Objections**

8                   **3.1.7.1** If the Submittal is not governed by Section 3.1.3, then  
9 ADOT’s exception, objection, rejection or disapproval shall be deemed reasonable, valid  
10 and binding if based on any of the following grounds or other grounds set forth  
11 elsewhere in the Contract Documents:

12                           (a) The Submittal or subject provision thereof fails to  
13 comply, or is inconsistent, with any applicable covenant, condition, requirement,  
14 standard, term or provision of the Contract Documents or Project Management Plan,  
15 Maintenance Management Plan or component plans thereunder;

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

18                           (c) Developer has not provided all content or information  
19 required or reasonably requested in respect of the Submittal or subject provisions  
20 thereof, in which case Developer shall have the subsequent opportunity to resubmit the  
21 Submittal with the required content or information;

22                           (d) Adoption of the Submittal or subject provision thereof,  
23 or of any proposed course of action thereunder, would result in a conflict with or  
24 violation of any Law or Governmental Approval; or

25                           (e) In the case of a Submittal that is to be delivered to a  
26 Governmental Entity as a proposed Governmental Approval, or in order to obtain,  
27 modify, amend, supplement, renew, extend, waive or carry out a Governmental  
28 Approval, it proposes commitments, requirements, actions, terms or conditions that are  
29 (i) inconsistent with the Contract Documents, the Project Management Plan (or  
30 component plans thereunder), Maintenance Management Plan (or component plans  
31 thereunder), applicable Law, the requirements of Good Industry Practice, or ADOT  
32 practices for public-private contracting, or (ii) not usual and customary arrangements  
33 that ADOT offers or accepts for addressing similar circumstances affecting its projects  
34 (except if usual and customary for ADOT regarding its projects delivered via public-  
35 private contracting).

36                   **3.1.7.2** Developer shall respond in writing to all of ADOT’s  
37 comments, exceptions, disapprovals and objections to a Submittal and, except as  
38 provided below, make modifications to the Submittal as necessary to fully reflect and  
39 resolve all such comments, exceptions, disapprovals and objections, in accordance with  
40 the review processes set forth in this Section 3.1 and Section GP 110.10.2.1.5 in the

1 Technical Provisions. However, if the Submittal is not governed by Section 3.1.3, the  
2 foregoing shall in no way be deemed to obligate Developer to incorporate any  
3 comments or resolve exceptions, disapprovals or objections that: (a) are not on any of  
4 the grounds set forth in Section 3.1.7.1 (and not on any other grounds set forth  
5 elsewhere in the Contract Documents); (b) are otherwise not reasonable with respect to  
6 subject matter or length; and (c) would result in a delay to the Critical Path on the  
7 Project Schedule, in Extra Work Costs or in Delay Costs, except pursuant to an ADOT-  
8 Directed Change. If Developer does not accommodate or otherwise resolve any  
9 comment, exception, disapproval or objection, Developer shall deliver to ADOT within a  
10 reasonable time period, not to exceed 30 days after receipt of ADOT's comments,  
11 exceptions, disapprovals or objections, a written explanation why modifications based  
12 on such comment, exception, disapproval or objection are not required. The  
13 explanation shall include the facts, analyses and reasons that support the conclusion.

14 **3.1.7.3** The foregoing shall in no way be deemed to obligate  
15 Developer to incorporate any comments or resolve exceptions, disapprovals and  
16 objections that would render the Submittal erroneous, defective or less than Good  
17 Industry Practice, except pursuant to an ADOT-Directed Change.

18 **3.1.7.4** If Developer fails to notify ADOT within the time period set  
19 forth in Section 3.1.7.2, ADOT may deliver to Developer a written notice stating the date  
20 by which Developer was to have addressed ADOT's comments and that if Developer  
21 does not address those comments within five Business Days after receipt of this notice,  
22 then that failure shall constitute Developer's agreement to make all changes necessary  
23 to accommodate and resolve the comment or objection and full acceptance of all  
24 responsibility for such changes without right to an ADOT-Caused Delay, Supplemental  
25 Agreement, Relief Event or other Claim, including any Claim that ADOT assumes  
26 design or other liability.

27 **3.1.7.5** After ADOT receives Developer's explanation as to why the  
28 modifications are not required as provided in Sections 3.1.7.2, 3.1.7.3 and 3.1.7.4 and  
29 Section GP 110.10.2.1.5 of the Technical Provisions, if ADOT is not satisfied with  
30 Developer's explanation the Parties shall attempt in good faith to informally resolve the  
31 Dispute. If the Parties are unable to informally resolve the Dispute and the Submittal is  
32 not one governed by Section 3.1.3.1, the Dispute shall be resolved according to the  
33 Dispute Resolution Procedures; provided, however, that if ADOT elects to issue a  
34 Directive Letter pursuant to Section 14.1 with respect to the matter in Dispute,  
35 Developer shall proceed in accordance with ADOT's Directive Letter while retaining any  
36 Claim as to the matter in Dispute.

## 37 **3.1.8 Limitations on Developer's Right to Rely**

38 **3.1.8.1** No review, comment, objection, rejection, approval,  
39 disapproval, acceptance, concurrence, certification (including certificates of Substantial  
40 Completion and Final Acceptance), or Oversight by or on behalf of ADOT, including  
41 review and approval of the Project Management Plan, and no lack thereof by ADOT,  
42 shall constitute acceptance by ADOT of materials or Work or waiver of any legal or

1 equitable right under the Contract Documents, at Law, or in equity. ADOT will be  
2 entitled to complete and accurate Submittals, to remedies for unapproved Deviations,  
3 Nonconforming Work and Developer Defaults, and to identify and require additional  
4 Work which must be done to bring the Work and Project into compliance with  
5 requirements of the Contract Documents, regardless of whether previous review,  
6 comment, objection, rejection, approval, disapproval, acceptance, concurrence,  
7 certification or Oversight were conducted or given by ADOT. Regardless of any such  
8 activity or failure to conduct any such activity by ADOT, Developer at all times shall  
9 have an independent duty and obligation to fulfill the requirements of the Contract  
10 Documents. Developer agrees and acknowledges that any such activity or failure to  
11 conduct any such activity by ADOT:

12 (a) Is solely for the benefit and protection of ADOT;

13 (b) Does not relieve Developer of its responsibility for the  
14 selection and the competent performance of all Developer-Related Entities;

15 (c) Does not create or impose upon ADOT any duty,  
16 standard of care or obligation toward Developer to cause it to fulfill the requirements of  
17 the Contract Documents or toward any other Person, all of which are hereby expressly  
18 disclaimed.;

19 (d) Shall not be deemed or construed as any kind of  
20 warranty, express or implied, by ADOT;

21 (e) May not be relied upon by Developer or used as  
22 evidence in determining whether Developer has fulfilled the requirements of the  
23 Contract Documents;

24 (f) Shall not be deemed or construed as any assumption  
25 of risk by the ADOT as to design, construction, operations, maintenance, performance  
26 or quality of Work or materials; and

27 (g) May not be asserted by Developer against ADOT as a  
28 defense, legal or equitable, to, or as a waiver of or relief from, Developer's obligation to  
29 fulfill the requirements of the Contract Documents.

30 **3.1.8.2** Developer shall not be relieved or entitled to reduction of its  
31 obligations to perform the Work in accordance with the Contract Documents, or any of  
32 its other liabilities and obligations, including its indemnity obligations, as the result of  
33 any activity identified in Section 3.1.8.1 or failure to conduct any such activity by ADOT.  
34 Such activity by ADOT will not relieve Developer from liability for, and responsibility to  
35 cure and correct any unapproved Deviations, Nonconforming Work or Developer  
36 Defaults.

37 **3.1.8.3** To the maximum extent permitted by Law, Developer hereby  
38 releases and discharges ADOT from any and all duty and obligation to cause

1 Developer's Work, Submittals or the Project to satisfy the standards and requirements  
2 of the Contract Documents.

3 **3.1.8.4** Notwithstanding the provisions of Sections 3.1.8.1, 3.1.8.2  
4 and 3.1.8.3:

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

10 (b) Developer shall be entitled to rely on specific written  
11 Deviations ADOT approves under Section 6.2.4;

12 (c) Developer shall be entitled to rely on the certificates  
13 of Substantial Completion and Final Acceptance from ADOT for the limited purpose of  
14 establishing that Substantial Completion and Final Acceptance, as applicable, have  
15 occurred, and the respective dates thereof, nevertheless without prejudice to any rights  
16 and remedies available to ADOT respecting unapproved Deviations, Nonconforming  
17 Work and Developer Defaults;

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

21 (e) ADOT is not relieved from performance of its express  
22 responsibilities under the Contract Documents in accordance with all standards  
23 applicable thereto.

## 24 **3.2 Role of General Engineering Consultant and ADOT Consultants**

25 The General Engineering Consultant will assist ADOT in the management and oversight  
26 of the Project and the Contract Documents. Further, ADOT may retain other  
27 consultants to provide services to ADOT relating to the Project. Developer shall  
28 cooperate with the General Engineering Consultant and other ADOT consultants in the  
29 exercise of their respective duties and responsibilities in connection with the Project.

## 30 **3.3 Role of and Cooperation with FHWA**

31 Developer acknowledges and agrees that FHWA will have certain approval rights with  
32 respect to the Project (including rights to approve the Project design and certain  
33 Supplemental Agreements), as well as the right to provide certain oversight and  
34 technical services with respect to the Project. Developer shall cooperate with FHWA in  
35 the reasonable exercise of FHWA's duties and responsibilities in connection with the  
36 Project.

## 37 **3.4 Project Management Plan**

1           **3.4.1**     Developer is responsible for all quality assurance and quality control  
2 activities necessary to manage the Work, including the Utility Adjustment Work.  
3 Developer shall undertake all aspects of quality assurance and quality control for the  
4 Project and Work in accordance with the ADOT-approved Project Management Plan,  
5 Good Industry Practice and applicable Law.

6           **3.4.2**     Developer shall develop the Project Management Plan and its  
7 component parts, plans and other documentation in accordance with the requirements  
8 set forth in Section GP 110.04 of the Technical Provisions and Good Industry Practice.  
9 The Project Management Plan shall include all the parts, component plans and other  
10 documentation identified in Table 110-6 of Section GP 110.04 of the Technical  
11 Provisions. In accordance with the RFP, Developer was authorized to commence work  
12 on the Project Management Plan prior to the Effective Date, and is authorized to  
13 continue such work, as necessary, after the Effective Date.

14           **3.4.3**     Developer shall ensure that the Project Management Plan meets all  
15 requirements of Good Industry Practice, including those for quality assurance and  
16 quality control, and all FHWA oversight requirements.

17           **3.4.4**     Developer shall submit to ADOT, in accordance with the procedures  
18 described in Section 3.1 and the time line set forth in Table 110-7 of Section GP 110.03  
19 the Technical Provisions, each component part, plan and other documentation of the  
20 Project Management Plan and any proposed changes or additions to or revisions of any  
21 such component part, plan or other documentation. The same shall be subject to  
22 ADOT's approval, review and comment, or other disposition as set forth in Table 110-7  
23 of Section GP 110.03 of the Technical Provisions. For components of the Project  
24 Management Plan subject to ADOT's reasonable approval (if any), it is deemed  
25 reasonable for ADOT to disapprove or require changes to comply or be consistent with  
26 Good Industry Practice, applicable provisions of the Contract Documents, FHWA  
27 oversight requirements, Governmental Approvals or applicable Law.

28           **3.4.5**     Developer shall not commence or permit the commencement of any  
29 aspect of the Project's construction or maintenance before the relevant component  
30 parts, plans and other documentation of the Project Management Plan applicable to  
31 such Work have been submitted to and approved by ADOT in accordance with the  
32 procedures described in Section 3.1 and the applicable time lines set forth in Table 110-  
33 7 of Section GP 110.04.4 of the Technical Provisions. The applicable schedule for  
34 submitting each component part, plan and other documentation of the Project  
35 Management Plan is set forth in the corresponding section of the Technical Provisions  
36 describing the requirements for each such component part, plan and other  
37 documentation.

38           **3.4.6**     If any part, plan or other documentation of the Project Management  
39 Plan refers to, relies on or incorporates any manual, plan, procedure or like document,  
40 then all such referenced or incorporated materials shall be submitted to ADOT for  
41 approval at the time that the relevant part, plan or other documentation of the Project

1 Management Plan or change, addition or revision to the Project Management Plan is  
2 submitted to ADOT.

3 **3.4.7** Developer shall carry out internal audits of Developer’s compliance  
4 with the Project Management Plan at the times prescribed in Section GP 110.04 of the  
5 Technical Provisions.

6 **3.4.8** Developer shall cause each of its Subcontractors at every level to  
7 comply with the applicable requirements of the approved Project Management Plan.

8 **3.4.9** The Quality Manager shall, irrespective of his other responsibilities,  
9 have authority from Developer to: (i) establish and maintain the Project Management  
10 Plan, and (ii) report to ADOT on the performance of the Project Management Plan. The  
11 Quality Manager shall have authority independent of the Project Manager and at least  
12 equivalent in level of authority to that of the Project Manager. The Quality Manager  
13 shall have direct reporting obligations to superiors that are above the level of the Project  
14 Manager. The Project Management Plan, including the Professional Services Quality  
15 Management Plan and Construction Quality Management Plan, shall be consistent with  
16 this Section 3.4.9. Refer to Sections GP 110.07 and GP 110.08 of the Technical  
17 Provisions for additional terms and conditions applicable to the Quality Manager and  
18 Developer’s other quality management personnel.

## 19 **3.5 Traffic Management**

### 20 **3.5.1 Transportation Management Plan**

21 Developer shall be responsible for the management of traffic on the Project or  
22 impacted by the Work in accordance with applicable Technical Provisions, Laws,  
23 Governmental Approvals and the Transportation Management Plan. Developer shall  
24 prepare the Transportation Management Plan in accordance with Section DR 462.2.3 of  
25 the Technical Provisions. Throughout the Term, Developer shall carry out all  
26 Construction Work and Maintenance Services (including Routine Maintenance and  
27 Capital Asset Replacement Work) in accordance with the Transportation Management  
28 Plan or, if required pursuant to Section 8.4.1, updates thereto. In accordance with  
29 Section 7.4, preparation of the initial Transportation Management Plan and resolution of  
30 all ADOT comments thereon shall be a condition precedent to issuance of NTP 2.

### 31 **3.5.2 ADOT’s Rights**

32 Notwithstanding the foregoing, ADOT will have at all times, and without obligation  
33 or liability to Developer, the right to provide traffic management and operations on the  
34 Project, including via dynamic message signs or other means, traveler and driver  
35 information, and other public information (e.g., Amber alerts).

## 36 **3.6 Oversight, Inspection and Testing**

37 **3.6.1** ADOT will have the right at all times to conduct Oversight to:  
38 (a) comply with FHWA or other applicable federal agency requirements; and (b) to verify

1 Developer's compliance with the Contract Documents and Project Management Plan.  
2 ADOT may designate any Person or Persons, including its consultants and independent  
3 auditors, to carry out any Oversight on ADOT's behalf. ADOT will conduct Oversight in  
4 accordance with Developer's safety procedures and manuals, and in a manner that  
5 does not unreasonably interfere with normal Project construction activity or normal  
6 Project operation and maintenance activity.

7 **3.6.2** ADOT's Oversight rights shall include the following:

8 (a) Monitoring and auditing Developer, Developer-Related Entities  
9 and their Books and Records as more particularly set forth in Section 23.5;

10 (b) Conducting periodic reviews of Project documentation and files;

11 (c) Conducting material tests, according to ADOT's test methods, to  
12 verify Developer's compliance with all testing frequencies and requirements, including  
13 performance and acceptance testing, set forth in the Contract Documents and the  
14 approved Project Management Plan, the accuracy of the tests, inspections and audits  
15 performed by or on behalf of Developer pursuant to the approved Professional Services  
16 Quality Management Plan and approved Construction Quality Management Plan, and  
17 compliance of materials incorporated into the Project with the applicable requirements,  
18 conditions and standards of the Contract Documents, Governmental Approvals, the  
19 Project Management Plan and Law;

20 (d) Reviewing and commenting on Submittals;

21 (e) Reviewing, commenting on and giving recommendations,  
22 objections or exceptions regarding the Capital Asset Replacement Work Plan and  
23 revisions thereto, as provided in Section 8.3.2;

24 (f) Participating in meetings described in Section 3.10 to discuss  
25 design progress, construction progress, Developer's quality control processes, audit  
26 activities, and other Project Management Plan issues;

27 (g) Accompanying Developer on Inspections, conducting its own  
28 inspections in addition to the Inspections, assessing and scoring Developer's records of  
29 Inspections, Maintenance Services and Project conditions, and assessing the condition  
30 of Elements and performing Asset Condition Scoring;

31 (h) Attending and witnessing Developer's other tests and  
32 inspections, including system start-up and acceptance tests and inspections;

33 (i) Reviewing Developer's certification of Record Drawings and  
34 surveys and as-built Schedules; and

35 (j) Investigating and confirming Developer's compliance with the  
36 Safety Management Plan.

1           **3.6.3**       ADOT will have the right, but does not intend, to conduct formal  
2 reviews of every Design Document and Construction Document. ADOT will have the  
3 right to conduct “over-the-shoulder” reviews of Design Documents and other Submittals  
4 in accordance with GP Section 110.10.2.1.6 of the Technical Provisions. However, no  
5 over the shoulder review by or on behalf of ADOT shall constitute acceptance by ADOT  
6 of materials or Work or waiver of any legal or equitable right under the Contract  
7 Documents, at Law, or in equity. Whether or not over-the-shoulder reviews are  
8 conducted, Developer at all times shall have an independent duty and obligation to fulfill  
9 the requirements of the Contract Documents.

10           **3.6.4**       Nothing in the Contract Documents shall preclude, and Developer shall  
11 not interfere with, any review, inspection or oversight of Submittals or of Work that the  
12 FHWA, ADOT or any regulatory agency with jurisdiction may desire to conduct pursuant  
13 to their agreements with ADOT and applicable Law.

### 14   **3.7   Rights of Cooperation and Access**

15           **3.7.1**       Developer at all times shall coordinate and cooperate, and require its  
16 Subcontractors to coordinate and cooperate, with ADOT, its Authorized Representative  
17 and its designees to facilitate ADOT Oversight activities. Developer shall cause its  
18 representatives to be available at all reasonable times for consultation with ADOT and  
19 its designees.

20           **3.7.2**       Without limiting the foregoing, ADOT, its Authorized Representative  
21 and its designees shall have the right to, and Developer shall afford them: (a) safe and  
22 unrestricted access to the Project at all times, (b) safe access during normal business  
23 hours to Developer’s Project offices and operations buildings and those of its  
24 Subcontractors, (c) safe access during normal business hours to the Project-Specific  
25 Locations, and (d) unrestricted access to data respecting the Project design, Project  
26 ROW acquisition, construction, operations and maintenance, and the Utility Adjustment  
27 Work.

### 28   **3.8   Testing and Test Results**

29 ADOT, its Authorized Representative and its designees shall have the right to attend  
30 and witness any tests and verifications to be conducted pursuant to the Technical  
31 Provisions and applicable, component plans of the Project Management Plan.  
32 Developer shall provide to ADOT all test results and reports (which may be provided in  
33 electronic format in accordance with the Technical Provisions) within ten days after  
34 Developer or its Subcontractor receives them.

### 35   **3.9   Interpretive Engineering Decisions**

36           **3.9.1**       Developer may apply in writing to ADOT for approvals of an  
37 interpretive engineering decision concerning the meaning, scope, interpretation and  
38 application of the Technical Provisions (an “Interpretive Engineering Decision”). If,  
39 however, meaning, scope, interpretation or application of the Technical Provisions is  
40 uncertain because of irreconcilable conflict, ambiguity or inconsistency among the

1 Contract Documents or provisions within other Contract Documents, then this  
2 Section 3.9 shall not apply and, instead, the provisions of Section 1.2 shall apply.  
3 ADOT may issue a written approval of Developer's proposed Interpretive Engineering  
4 Decision (if any), may issue its own Interpretive Engineering Decision or may  
5 disapprove any Interpretive Engineering Decision Developer proposes. No document,  
6 including any field directive, shall be valid, effective or enforceable as an Interpretive  
7 Engineering Decision unless expressly identified as an "Interpretive Engineering  
8 Decision" and signed by ADOT's design manager, construction manager or project  
9 manager for the Project.

10 **3.9.2** Within ten Business Days after Developer applies for an Interpretive  
11 Engineering Decision, or such other time period as ADOT and Developer may agree to  
12 at the time of such application, ADOT will provide its written determination including  
13 explanation of any disapproval of such application or any differing interpretation. If  
14 ADOT does not respond within such time period, the request shall be deemed  
15 disapproved. If Developer disputes ADOT's disposition of the application, such Dispute  
16 shall be subject to resolution in accordance with the Dispute Resolution Procedures.

17 **3.9.3** Accepted Interpretive Engineering Decisions shall constitute provisions  
18 of the Technical Provisions and shall not constitute an ADOT-Directed Change or entitle  
19 Developer to any additional compensation, time or deadline extension or other Claim or  
20 relief. Subsequent ADOT written orders and directives that are signed by ADOT's  
21 design manager, construction manager or project manager for the Project, and contrary  
22 to the Interpretive Engineering Decision shall constitute an ADOT-Directed Change.

23 **3.10 Meetings**

24 **3.10.1** Developer shall conduct or participate in various Project meetings with  
25 ADOT during the D&C Period and Maintenance Period, in accordance with  
26 Section GP 110.02 of the Technical Provisions. In addition, each Party shall conduct or  
27 participate in any other meeting set forth in other sections of the Technical Provisions or  
28 other Contract Document. At ADOT's request, Developer shall require the Lead  
29 Subcontractor or Lead Maintenance Firm, as applicable, other Subcontractors and  
30 engineers of record to attend any such meetings.

31 **3.10.2** Developer shall conduct regular DBE/OJT meetings with ADOT's  
32 Compliance Oversight Committee at least once a month during the design and  
33 construction, as more particularly set forth in Section 13.02 of the DBE Special  
34 Provisions and Section 8.0 of the OJT Special Provisions.

35 **3.10.3** Further, ADOT and Developer, through their respective Authorized  
36 Representatives, shall meet from time to time at the other Party's request to discuss  
37 and resolve matters relating to the Design Work, Construction Work, Maintenance  
38 Services or the Project.

39 **3.10.4** For all meetings that ADOT will attend, Developer shall schedule such  
40 meetings on dates and at times and place reasonably convenient to both Parties.

1 Except in the case of urgency, Developer shall provide ADOT with written notice and a  
2 meeting agenda as set forth in Section GP 110.02 of the Technical Provisions.

3 **3.10.5** ADOT will have the right to include representatives of FHWA or other  
4 Governmental Entities in any ADOT meetings with Developer or Subcontractors. Such  
5 representatives shall have the right to fully participate in such meetings and to raise  
6 questions, concerns and opinions without restriction; provided, however, that such  
7 representatives shall not have the right to direct or control such meetings, and  
8 Developer shall take direction (if any) only from ADOT regarding performance of the  
9 Work.

### 10 **3.11 Software Compatibility**

11 **3.11.1** Unless otherwise specifically stated in the Contract Documents,  
12 Developer is responsible for assuring that all software it uses for any aspect of the  
13 Project is compatible with software used by ADOT. Prior to using any software or  
14 version of software not then in use by ADOT, Developer must obtain approval from  
15 ADOT. In addition, Developer shall provide to ADOT staff, at Developer's cost, working  
16 electronic copies of the software, any necessary licenses for ADOT's use of the  
17 software required under Section 23.7.3.1, and any training reasonably necessary to  
18 assure that ADOT is able to implement compatible usage of all software utilized by  
19 Developer.

20 **3.11.2** Developer shall submit all documents, correspondence and Submittals  
21 to ADOT through a Developer-maintained document storage or FTP internet site for the  
22 Project.  
23

1 **ARTICLE 4.**  
2 **PROJECT PLANNING, GOVERNMENTAL APPROVALS;**  
3 **ENVIRONMENTAL COMPLIANCE; PUBLIC INFORMATION**

4 **4.1 Planning and Engineering Activities**

5 **4.1.1** Developer, through the appropriately qualified and licensed design  
6 professionals identified in the Project Management Plan, shall perform or cause to be  
7 performed all Professional Services necessary to develop the Project and the Utility  
8 Adjustments included in the Design Work and the Construction Work in accordance with  
9 the Contract Documents and Good Industry Practice.

10 **4.1.2** Before commencing any Work on a particular portion or aspect of the  
11 Project, Developer shall verify all governing dimensions of the Site and shall examine all  
12 Related Transportation Facilities and adjoining work (including Adjacent Work) that may  
13 have an impact on such Work. Developer shall ensure that any Design Documents and  
14 Construction Documents furnished as part of the Work accurately depict all governing  
15 and adjoining dimensions.

16 **4.2 Site Conditions**

17 **4.2.1** Developer shall bear the risk of any incorrect or incomplete review,  
18 examination and investigation by Developer of the Site and surrounding locations (even  
19 if Developer conducted a Reasonable Investigation), and of any incorrect or incomplete  
20 information resulting from preliminary engineering activities conducted by Developer,  
21 ADOT or any other Person.

22 **4.2.2** Developer shall bear the risk of changes in surface topography,  
23 variations in subsurface moisture content, and variations in groundwater levels.

24 **4.2.3** The provisions of this Section 4.2 do not apply to, and shall not  
25 adversely affect, the specific relief available to Developer under Article 14 for Relief  
26 Events under clauses (h), (i), (k), (l), (m) and (q) of the definition of Relief Event.

27 **4.3 Governmental Approvals**

28 **4.3.1** ADOT obtained for the Project the NEPA Approval, based on the  
29 Schematic Design. Developer acknowledges it received and is familiar with the NEPA  
30 Approval and supporting documentation, as contained in the Reference Information  
31 Documents.

32 **4.3.2** Developer hereby assumes responsibility for, and shall obtain:

33 **4.3.2.1** All Environmental Approvals, other than the NEPA Approval,  
34 required in connection with Developer's Schematic Design or Final Design, the Project,  
35 the Project ROW, the Work or any Relief Event;

1                   **4.3.2.2** All reevaluations, amendments and supplements of the  
2 NEPA Approval required in connection with Developer's Schematic Design or Final  
3 Design, the Project, the Project ROW, the Work or a Relief Event; and

4                   **4.3.2.3** All other Governmental Approvals required in connection  
5 with Developer's Schematic Design or Final Design, the Project, the Project ROW or the  
6 Work.

7                   **4.3.3** Developer shall deliver to ADOT true and complete copies of all new or  
8 amended Governmental Approvals, including reevaluations, amendments and  
9 supplements of the NEPA Approval.

10                  **4.3.4** Prior to submitting to a Governmental Entity any application for a  
11 Governmental Approval (or any proposed reevaluation, amendment, supplement,  
12 modification, renewal, extension or waiver of a Governmental Approval or provision  
13 thereof), Developer shall submit the same, together with any supporting environmental  
14 studies, analyses and data, to ADOT for appropriate action, if any, in accordance with  
15 Section DR 420.2.6 of the Technical Provisions. ADOT assumes no duty, obligation or  
16 liability regarding completeness or correctness of any such application, regardless of  
17 ADOT's approval, review and comment, or lack thereof.

18                  **4.3.5** As between ADOT and Developer, Developer shall be fully responsible  
19 for all necessary actions, and Developer shall bear all risk of delay and all risk of  
20 increased cost, required due to, resulting from or arising out of: (1) any differences  
21 between Developer's Final Design for any portion of the Project and the Schematic  
22 Design or Developer's Schematic Design, including differences due to any alternative  
23 technical concepts approved by ADOT and included in Developer's Schematic Design,  
24 but excluding any differences due to an ADOT-Directed Change; or (2) differences  
25 between the construction means and methods (including temporary works) Developer  
26 chooses for any portion of the Project and those set forth, referred to or contemplated in  
27 the NEPA Approval, excluding any differences due to an ADOT-Directed Change. Such  
28 Developer actions and risks shall include:

29                   (a) Any associated with change in the Project location due to  
30 Developer's design;

31                   (b) Conducting all necessary environmental studies and re-  
32 evaluations and preparing all necessary environmental documents in compliance with  
33 applicable Environmental Laws;

34                   (c) Obtaining and complying with all necessary new Governmental  
35 Approvals;

36                   (d) Obtaining and complying with all necessary modifications,  
37 renewals and extensions of the NEPA Approval or other existing Governmental  
38 Approvals; and

39                   (e) All risk and cost of litigation.

1           **4.3.6**       In the event Developer is unable to obtain any of the items described in  
2 Sections 4.3.5(c) or 4.3.5(d), then Developer shall be obligated to design and construct  
3 the Project based on the Schematic Design (with changes as necessary to comply with  
4 the Technical Provisions and Applicable Standards) and the construction means and  
5 methods (including temporary works) set forth, referred to or contemplated in the NEPA  
6 Approval, or such other design, means and methods for which Developer is able to  
7 obtain necessary Governmental Approvals and that comply with the Contract  
8 Documents. None of the foregoing circumstances described in this Section 4.3.6 shall:  
9 (a) constitute an ADOT-Caused Delay or ADOT-Directed Change, Relief Event or other  
10 basis for any Claim; or (b) result in any representation or warranty by ADOT as to the  
11 feasibility, accuracy or completeness of, or absence of errors in, the Schematic Design.

12           **4.3.7**       If Developer pursues Developer-Designated ROW, Temporary  
13 Construction Easements outside the Project ROW, Developer's Temporary Work Areas,  
14 Replacement Utility Property Interests, or any other modification of or Deviation from  
15 any Governmental Approvals, including the NEPA Approval, Developer shall first  
16 comply with, and obtain any consent or waiver required pursuant to, then-existing  
17 agreements between ADOT and other Governmental Entities.

18           **4.3.8**       At Developer's request and subject to Section 4.3.9, ADOT will  
19 reasonably assist and cooperate with Developer in obtaining the Governmental  
20 Approvals (including any modifications, renewals and extensions of existing  
21 Governmental Approvals) that Developer is required to obtain under the Contract  
22 Documents. Such assistance and cooperation shall include:

23                       (a)   Joining in conferences and meetings with applicable  
24 Governmental Entities;

25                       (b)   Sharing data, information and documents available to ADOT  
26 that are relevant to the application for the Governmental Approvals and are not deemed  
27 confidential;

28                       (c)   Coordinating and working with elected and other public officials,  
29 as necessary and appropriate;

30                       (d)   Assisting with evaluation and definition of solutions;

31                       (e)   If necessary, acting as the lead agency and directly coordinating  
32 with applicable Governmental Entities; and

33                       (f)   Otherwise partnering to facilitate issuance of such  
34 Governmental Approvals.

35           **4.3.9**       ADOT's obligation to assist and cooperate under Section 4.3.8 shall  
36 not require ADOT to:

37                       (a)   Take a position which it believes to be inconsistent with the  
38 Contract Documents, the Project Management Plan (and component plans thereunder),

1 applicable Law, Governmental Approval(s), the requirements of Good Industry Practice  
2 or ADOT, or State, practices for public-private partnership contracting;

3 (b) Take a position that is not usual and customary for ADOT to  
4 take in addressing similar circumstances affecting its own projects (except if usual and  
5 customary for ADOT regarding its projects delivered via public-private partnership  
6 contracting); or

7 (c) Refrain from concurring with a position taken by a  
8 Governmental Entity if ADOT believes that position to be correct.

9 **4.3.10** Litigation involving Environmental Approvals is subject to the  
10 provisions in Sections 4.3.10.1, 4.3.10.2 and 4.3.10.3.

11 **4.3.10.1** In the event any pending Environmental Approval is denied,  
12 then (a) the Parties shall promptly confer to analyze the circumstances and determine  
13 what further action to take, and (b) either Party may elect to appeal such denial and to  
14 bring legal action challenging the denial. If either Party elects, or both Parties elect, to  
15 appeal and bring legal action, then the Parties shall reasonably assist and cooperate  
16 with one another, each at its own expense, in the conduct of such appeal and legal  
17 action. The Parties may mutually choose, but are not obligated, to be jointly  
18 represented by legal counsel or to enter into a joint prosecution agreement in such  
19 appeal and legal action.

20 **4.3.10.2** In the event any administrative proceeding, litigation or other  
21 legal action is or has been brought by a third party challenging the issuance of an  
22 Environmental Approval for the Project, excluding the NEPA Approval, the Parties shall  
23 actively assist and cooperate with one another, each at its own expense, to defend their  
24 interests and the subject Environmental Approval and to settle such administrative  
25 proceeding, litigation or other legal action. The Parties may mutually choose, but are  
26 not obligated, to be jointly represented by legal counsel or to enter into a joint defense  
27 agreement in such administrative proceeding, litigation or other legal action.

28 **4.3.10.3** In the event a third party brings or has brought any  
29 administrative proceeding, litigation or other legal action challenging the issuance of the  
30 NEPA Approval, Developer shall, at the request of ADOT, reasonably and actively  
31 assist and cooperate with ADOT to defend ADOT's interest and the NEPA Approval.  
32 Developer's assistance and cooperation shall be at ADOT's expense unless the  
33 administrative proceeding, litigation or other legal action is based, in whole or in part, on  
34 Developer's design, but only to the extent Developer's design differs from the  
35 Schematic Design.

36 **4.3.11** Certain Governmental Entities may require that Governmental  
37 Approvals issued by such Governmental Entities be applied for or issued in ADOT's  
38 name, or that ADOT directly coordinate with such Governmental Entities in connection  
39 with obtaining the Governmental Approvals. In such event, Sections 4.3.8 and 4.3.9  
40 shall apply, and Developer at its expense shall provide all necessary support and efforts

1 to apply for and obtain the Governmental Approvals. Such support shall include  
2 conducting necessary field investigations, preparing mitigation analyses and studies  
3 and plans, preparing surveys, and preparing any required reports, applications and  
4 other documents in form approved by ADOT. Such support also may include joint  
5 coordination and joint discussions and attendance at meetings with the applicable  
6 Governmental Entity. Refer to Section DR 420.2.6.2 of the Technical Provisions for  
7 more specific provisions on applications for Environmental Approvals filed in ADOT's  
8 name.

9 **4.3.12** Developer shall be solely responsible for compliance with all applicable  
10 Laws in relation to Developer's Temporary Work Areas and for obtaining any  
11 Environmental Approval or other Governmental Approval required in connection with  
12 Developer's Temporary Work Areas.

#### 13 **4.4 Environmental Compliance**

14 **4.4.1** Except as provided otherwise in Section 4.4.2, ADOT delegates to  
15 Developer, and Developer accepts, all ADOT obligations, commitments and  
16 responsibilities under all Environmental Approvals. Except as provided otherwise in  
17 Section 4.4.2, throughout the Term and the course of the Work, Developer shall at its  
18 sole cost and expense:

19 (a) Comply with all Environmental Laws;

20 (b) Comply with all conditions and requirements imposed by all  
21 Environmental Approvals;

22 (c) Perform all commitments and mitigation measures set forth in all  
23 Environmental Approvals; and

24 (d) Undertake all actions required by, or necessary to maintain in  
25 full force and effect, all Environmental Approvals.

26 **4.4.2** ADOT retains sole responsibility for payment and performance of the  
27 environmental obligations, commitments and responsibilities expressly identified as not  
28 delegated to Developer in the Developer's Environmental Commitment Requirements  
29 set forth in TP Attachment 420-1 of the Technical Provisions.

30 **4.4.3** Developer shall perform or cause to be performed all environmental  
31 mitigation measures required under the Contract Documents.

32 **4.4.4** Developer shall comply with the provisions, requirements and  
33 obligations regarding environmental compliance set forth in Section DR 420 and  
34 CR 420 of the Technical Provisions.

35 **4.4.5** Developer expressly acknowledges that the Project Environmental  
36 Commitment Requirements set forth in TP Attachment 420-1 of the Technical  
37 Provisions may not contain an exhaustive or accurate list of all environmental

1 obligations, commitments and responsibilities that apply to the Project. ADOT does not  
2 warrant or represent the completeness or accuracy of the Project Environmental  
3 Commitment Requirements set forth in TP Attachment 420-1 of the Technical  
4 Provisions, which is made available to Developer as a convenience to assist Developer  
5 in preparing the Environmental Management Plan. Developer is solely responsible for  
6 the completeness and accuracy of the Environmental Management Plan, including the  
7 correction of any errors or omissions in TP Attachment 420-1 of the Technical  
8 Provisions. Neither incompleteness nor inaccuracy of the Project Environmental  
9 Commitment Requirements set forth in Attachment TP 420-1 of the Technical  
10 Provisions shall alter or limit the scope of Developer's environmental compliance  
11 obligations as set forth in the Contract Documents or shall entitle Developer to any  
12 Claim or relief.

#### 13 **4.5 Community Outreach and Public Information**

14 Developer's obligations regarding public outreach, stakeholder communications and  
15 construction relations are set forth in Section 425 of the Technical Provisions.  
16

1 **ARTICLE 5.**  
2 **RIGHT OF WAY ACQUISITION; ACCESS TO PROJECT RIGHT OF WAY; UTILITY**  
3 **ADJUSTMENTS; RELATED TRANSPORTATION FACILITIES**

4 **5.1 Developer's ROW Services**

5 **5.1.1** Developer shall provide all acquisition, relocation and demolition  
6 services and activities (collectively the "ROW Services"), as more particularly set forth in  
7 Section DR 470 of the Technical Provisions, with respect to:

8 (a) All Project ROW, including Developer-Designated ROW, ADOT  
9 Additional Properties and Temporary Construction Easements, excluding, however, the  
10 Retained Parcels;

11 (b) All Replacement Utility Property Interests (unless performed by  
12 the Utility Company); and

13 (c) All Developer's Temporary Work Areas.

14 **5.1.2** ADOT will have no obligation to directly participate in such activities  
15 except as otherwise set forth in this Section 5 and Section DR 470 of the Technical  
16 Provisions, but shall have full rights of review, approval, and audit.

17 **5.1.3** Developer's ROW Services shall include:

18 (a) Documentation and document control, as set forth in greater  
19 detail in Section DR 470.2.3 of the Technical Provisions (Documentation and  
20 Reporting);

21 (b) Conducting and documenting meetings regarding Project ROW  
22 activities, as set forth in greater detail in Section DR 470.2.2 of the Technical Provisions  
23 ("ROW Coordination Meetings");

24 (c) Development of Project ROW Plans, ROW Exhibits, and Legal  
25 Descriptions, including land surveys and archeological surveys, as set forth in greater  
26 detail in Section DR 470.3.1 of the Technical Provisions ("ROW Exhibits and Legal  
27 Descriptions");

28 (d) Title services as set forth in greater detail in Section DR 470.3.2  
29 of the Technical Provisions (Title Services);

30 (e) Introduction to property owners as set forth in greater detail in  
31 Section DR 470.3.3 ("Introduction to Property Owners");

32 (f) Preparing Environmental Site Assessments, phases I and II, as  
33 set forth in greater detail in Section DR 470.3.4 of the Technical Provisions  
34 ("Environmental Site Assessments");

1 (g) Appraisal services as set forth in greater detail in Section  
2 DR 470.3.5 of the Technical Provisions (“Appraisals”);

3 (h) Appraisal review services as set forth in greater detail in  
4 Section DR 470.3.5.2 of the Technical Provisions (Appraisal Review);

5 (i) Development and submittal to ADOT of Acquisition Packages  
6 as set forth in greater detail in Section DR 470.3.6 of the Technical Provisions (“Project  
7 ROW Acquisition Package Approval”);

8 (j) Negotiation services as set forth in greater detail in  
9 Section DR 470.4.1 of the Technical Provisions (“Project ROW Negotiations”);

10 (k) Relocation assistance as set forth in greater detail in  
11 Section DR 470.4.2 of the Technical Provisions (“Relocation Assistance”);

12 (l) Closing services as set forth in greater detail in Section DR  
13 470.4.3 of the Technical Provisions (“Closing Services”);

14 (m) Processing payment Submittals as set forth in greater detail in  
15 Section DR 470.4.4 of the Technical Provisions (“Payment of Property Owners and  
16 Displacees”);

17 (n) Condemnation support services as set forth in greater detail in  
18 Section DR 470.4.5 of the Technical Provisions (“Condemnation Support”);

19 (o) Property management;

20 (p) Clearance and demolition of improvements as set forth in  
21 greater detail in Section DR 470.4.7 of the Technical Provisions (“Clearance and  
22 Demolition of Project ROW”);

23 (q) Acquisition of Replacement Utility Property Interests (even  
24 though not part of the Project ROW), subject to ADOT’s potential assistance as  
25 provided in Section 5.4.3;

26 (r) Quality management regarding ROW Services as described in  
27 Section GP 110.07.2.1.2.1 of the Technical Provisions and the approved ROW Activity  
28 Plan; and

29 (s) Obtaining temporary entry as necessary to make examinations,  
30 surveys and maps, as set forth in ARS 12-1115, in accordance with the ADOT Right of  
31 Way Procedures Manual.

32 **5.2 ADOT’s Role Respecting ROW Acquisition**

33 **5.2.1 General**

1 In connection with acquisition of Project ROW, ADOT will:

2 (a) Provide final approval as set forth in Section DR 470 of the  
3 Technical Provisions of all ROW Plans, Exhibits and Legal Descriptions, appraisals,  
4 Acquisition Packages, Condemnation Packages and other Submittals under  
5 Section DR 470 of the Technical Provisions requiring ADOT approval (including  
6 submittals for payments to property owners and displacees, relocation eligibility  
7 determinations, relocation appeals, administrative settlement submittals, closing  
8 submittals, and court settlement requests from the Attorney General's Office), subject to  
9 submission requirements and timelines in Section DR 470 of the Technical Provisions,  
10 including Table 470-2 (Nonexclusive Submittals List) therein;

11 (b) Coordinate with the Office of the Attorney General to provide  
12 legal counsel to prepare and files complaints in, and pursue, condemnation and eviction  
13 proceedings, except as provided otherwise in this Section 5. The Office of the Attorney  
14 General is general counsel for ADOT. Developer shall not be responsible for providing  
15 or paying for legal counsel for pursuing such proceedings;

16 (c) Pay the bond or deposit required by any order for immediate  
17 possession and notify Developer and the Office of the Attorney General of the payment;

18 (d) Deliver to Developer a copy of each order for immediate  
19 possession obtained after the Effective Date within five Business Days after receiving  
20 the signed and certified order for immediate possession from the court;

21 (e) Provide all coordination services between Developer and the  
22 Office of the Attorney General as set forth in greater detail in Section DR 470.2.11 of the  
23 Technical Provisions; and

24 (f) Provide Developer a status report on condemnation parcel  
25 activities up to the time of possession at each scheduled ROW coordination meeting  
26 with Developer.

## 27 **5.2.2 Retained Parcels**

28 ADOT will provide all ROW Services with respect to the Retained Parcels,  
29 including providing relocation assistance, performing demolition and managing  
30 Hazardous Materials remediation, except Utility Adjustments.

## 31 **5.3 ROW Activity Plan**

32 **5.3.1** Upon issuance of NTP 1, Developer shall prepare and submit to ADOT  
33 for approval in ADOT's sole discretion a ROW Activity Plan. The ROW Activity Plan  
34 shall be based upon the Preliminary ROW Activity Plan that Developer submitted with  
35 the Proposal, subject to any changes ADOT may require.

36 **5.3.2** ADOT's approval of the final ROW Activity Plan, and expiration of the  
37 five-Business Day waiting period after delivery to the property owner of a Letter of

1 Introduction pursuant to Section DR 470.2.3 of the Technical Provisions, shall be  
2 conditions precedent to Developer's commencing any contact with property owners,  
3 displacees or any other Person having a compensable interest.

4 **5.3.3** The ROW Activity Plan shall meet the requirements set forth in  
5 Section DR 470.1.4 of the Technical Provisions. After ADOT approves the ROW  
6 Activity Plan, Developer shall update it, and deliver the update to ADOT in accordance  
7 with the applicable timelines set forth in Section DR 470.1.4 of the Technical  
8 Provisions.

9 **5.4 Acquisition of Property**

10 **5.4.1 Project ROW**

11 **5.4.1.1** All Project ROW shall be acquired in the name of the State.  
12 Developer shall undertake and complete the ROW Services in accordance with Section  
13 DR 470 of the Technical Provisions, the ADOT-approved ROW Activity Plan and all  
14 applicable Laws relating to such services, including the Uniform Act. ADOT will:  
15 (a) review and approve (or disapprove) appraisals, Acquisition Packages,  
16 Condemnation Packages and other Submittals for Project ROW, as provided herein and  
17 in Section DR 470 of the Technical Provisions; and (b) except as provided below,  
18 undertake eminent domain proceedings, if necessary, for Project ROW in accordance  
19 with the procedures established in Section DR 470 of the Technical Provisions and the  
20 approved ROW Activity Plan.

21 **5.4.1.2** Acquisition of Developer-Designated ROW shall be subject  
22 to ADOT's prior written approval, provided that acquisition of Developer-Designated  
23 ROW identified in an ADOT-approved ATC is deemed approved. Grounds for ADOT to  
24 disapprove shall consist of the following:

25 (a) The acquisition would require major changes to the  
26 environmental documents, including the NEPA Approvals, such as the need for a  
27 supplemental environmental impact statement;

28 (b) The acquisition would require a public hearing regarding  
29 environmental impacts; or

30 (c) The subject property is located within the boundaries of the  
31 GRIC reservation.

32 **5.4.2 Developer's Temporary Work Areas**

33 Developer shall acquire, or cause to be acquired, all Developer's Temporary  
34 Work Areas in its own name and in accordance with Section DR 100.3.6 of the  
35 Technical Provisions. Developer shall comply with all applicable Governmental  
36 Approvals and Laws in acquiring, maintaining or disposing of any Developer's  
37 Temporary Work Areas. ADOT will not exercise its power of eminent domain in  
38 connection with Developer's acquisition of any such property right or interest for

1 Developer's Temporary Work Areas. ADOT will have no obligations or liabilities with  
2 respect to the acquisition, maintenance or disposition of Developer's Temporary Work  
3 Areas. Developer shall have no obligation to submit Acquisition Packages to ADOT for,  
4 or obtain ADOT's approval of Developer's acquisition of, any property right or interest  
5 for Developer's Temporary Work Areas. Developer shall cause the lease, license or  
6 other agreement by which Developer acquires a property right or interest in a  
7 Developer's Temporary Work Area to contain the granting party's express  
8 acknowledgment that ADOT will have no liability with respect thereto. Developer shall  
9 promptly deliver a copy of such documentation to ADOT.

10 **5.4.3 Replacement Utility Property Interests**

11 ADOT's involvement in acquisition of Replacement Utility Property Interests is  
12 subject to the following terms and conditions:

13 **5.4.3.1** ADOT will assist in the acquisition of Replacement Utility  
14 Property Interests only if both Developer and the Utility Company provide evidence  
15 reasonably satisfactory to ADOT that: (a) acquisition of the subject Replacement Utility  
16 Property Interest is necessary because it is not physically possible, including through  
17 commercially reasonable design modifications as described in Section 14.4.1.1(a), to  
18 perform the subject Utility Adjustment within the Schematic ROW or to use Protection in  
19 Place; and (b) the Utility Company either lacks the power to acquire the Replacement  
20 Utility Property Interest or has been unsuccessful in negotiating the acquisition.

21 **5.4.3.2** Except as provided otherwise in Section 14.4.5.2, Developer  
22 shall compensate ADOT for costs ADOT incurs in connection with the acquisition of  
23 Replacement Utility Property Interests, to the same extent ADOT would be owed  
24 compensation for acquisition of Developer-Designated ROW under Section 5.6.4. If the  
25 Utility Company is responsible under Law for the acquisition costs, such as in the case  
26 of a Replacement Utility Property Interest that is a Betterment, then: (a) Developer shall  
27 use best efforts to cause the Utility Company to agree in writing with ADOT to joint and  
28 several liability with Developer for such compensation due ADOT; and (b) such written  
29 agreement from the Utility Company shall be a condition precedent to ADOT's  
30 commencement of assistance.

31 **5.4.3.3** Any assistance ADOT provides shall not relieve Developer  
32 of its sole responsibility for satisfactory compliance with its obligations respecting Utility  
33 Adjustment work and timely completion thereof.

34 **5.4.3.4** ADOT will not be obligated to take title to the Replacement  
35 Utility Property Interest unless otherwise required by Law in connection with ADOT's  
36 exercise of its power to acquire. If ADOT is obligated by Law to take title, then it will do  
37 so on the condition that the Utility Company concurrently accepts conveyance of title  
38 from ADOT to the Utility Company, without warranty or representation and with the  
39 Utility Company's written indemnification against any third party liability that may arise  
40 out of ADOT's status as title holder.

1                   **5.4.3.5** Except as provided otherwise in Section 14.4.5.2, ADOT will  
2 have no risk or liability whatsoever due to delay in its completing acquisition of any  
3 Replacement Utility Property Interest, and no such delay shall constitute an ADOT-  
4 Caused Delay or other Relief Event.

5   **5.5    Acquisition and Relocation Standards and Procedures**

6                   **5.5.1** Developer shall perform all its ROW Services in accordance with the  
7 Laws, standards and procedures set forth in Section DR 470 of the Technical  
8 Provisions.

9                   **5.5.2** For each of the first 20 parcels, Developer shall not make an offer to  
10 the property owner until Developer obtains ADOT’s written approval of the Acquisition  
11 Package. Thereafter, Developer may make offers to property owners based on ADOT’s  
12 written approval of the appraisal and use of an Acquisition Package consistent with  
13 those previously approved. ADOT reserves the right to require ADOT’s review and  
14 approval of Acquisition Packages on any parcels. Acquisition Packages shall meet the  
15 requirements set forth in Section 470.3.6 of the Technical Provisions.

16                   **5.5.3** Developer shall notify ADOT in writing, for ADOT’s concurrence, of the  
17 failure of negotiations with respect to the acquisition of any parcel included in the  
18 Project ROW and shall submit to ADOT for approval a Condemnation Package for the  
19 parcel as described in Section DR 470.4.5 of the Technical Provisions. ADOT will have  
20 the time period set forth in Section GP 110.10 of the Technical Provisions either to:  
21 (i) approve the Condemnation Package; or (ii) provide its comments or request for  
22 additional information to Developer if ADOT determines that the Condemnation  
23 Package is incomplete, otherwise deficient or contains or identify facts or issues of an  
24 unusual nature or which do not clearly fit within ADOT standards. Developer shall  
25 incorporate any suggested changes and provide any additional information requested  
26 by ADOT and shall resubmit the Condemnation Package to ADOT for review and  
27 approval within the time period set forth in Section GP 110.10 of the Technical  
28 Provisions.

29                   **5.5.4** At no additional cost to ADOT, Developer shall cooperate in all  
30 respects with ADOT and shall cause all expert witnesses, appraisers, surveyors, land  
31 planners and other consultants utilized by Developer in connection with the acquisition  
32 of the Project ROW subject to condemnation to be available to and assist ADOT and  
33 the Office of the Attorney General in connection with the eminent domain proceedings,  
34 including testifying as an expert witness or provide expert witness services, as set forth  
35 in Section 470.4.5 of the Technical Provisions, through the end of the order to show  
36 cause hearing for immediate possession. After such hearing, Developer shall continue  
37 to provide such cooperation and assistance as and when requested by ADOT or the  
38 Office of the Attorney General, and ADOT will reimburse Developer for its reasonable  
39 fees and expenses at the same rate established under the applicable Subcontract for  
40 such services during the period up to the order to show cause hearings.

1           **5.5.5**     Developer shall provide advance notice to ADOT of Developer's  
2 acquisition of real property located outside the Project ROW.

3   **5.6    Costs of Acquisitions, Relocations and Demolitions**

4           **5.6.1**     Subject to Section 13.3.3.2, ADOT will pay the purchase price,  
5 severance damages, relocation assistance payments (if any) and title insurance  
6 premiums for real property needed for the Project within the Schematic ROW. For  
7 clarity, the foregoing includes Temporary Construction Easements located within the  
8 Schematic ROW where permanent acquisition of the area for the Temporary  
9 Construction Easement is not required for the Project's physical improvements. With  
10 respect only to Retained Parcels, ADOT also shall pay the costs of demolition and  
11 clearance, except for Utility Adjustments.

12           **5.6.2**     ADOT will pay the costs for the legal counsel from the Office of the  
13 Attorney General or for private legal counsel retained as directed by the Office of the  
14 Attorney General in connection with any condemnation actions, except (a) for such legal  
15 fees and costs that arise out of the acts, omissions, negligence, intentional misconduct,  
16 or breach of applicable Law, contract or Governmental Approval of a Developer-Related  
17 Entity in the performance of its obligations under the Contract Documents, and (b) as  
18 provided otherwise in Section 5.6.4.1 regarding Developer-Designated ROW.

19           **5.6.3**     ADOT will pay the purchase price, severance damages, relocation  
20 assistance payments (if any), demolition costs and title insurance premiums for any real  
21 property that is an ADOT Additional Property and solely with respect to ADOT  
22 Additional Properties required due to an ADOT-Directed Change or a Force Majeure  
23 Event, any other reasonable costs and expenses incurred by Developer to perform  
24 ROW Services for such real property, subject to the limitations in Article 14. Developer  
25 shall perform all ROW Services respecting ADOT Additional Properties, including any  
26 services related to re-evaluation or modification of any NEPA Approval, if necessary.

27           **5.6.4**     Developer shall be responsible for and shall pay directly all costs and  
28 expenses in connection with acquiring all Developer-Designated ROW.

29                   **5.6.4.1**   Such costs and expenses include:

- 30                           (a)    The cost of all ROW Services;
- 31                           (b)    The cost of condemnation proceedings incurred by  
32 the Office of the Attorney General, including expert witness fees, and all fees and  
33 expenses for exhibits, transcripts, photos and other documents and materials  
34 production, other than the Attorney General's or private attorneys' direct fees;
- 35                           (c)    The purchase prices, severance damages, court  
36 awards or judgments for all Developer-Designated ROW (to be paid by Developer at the  
37 time of closing or final condemnation award, as applicable);
- 38                           (d)    The cost of permitting;

1 (e) Closing costs associated with parcel purchases, in  
2 accordance with the Uniform Act and ADOT policies, including title insurance premiums;

3 (f) Relocation assistance payments and costs, in  
4 accordance with the Uniform Act; and

5 (g) Demolition and clearance costs.

6 **5.6.4.2** Developer shall not be entitled to any adjustment in the D&C  
7 Price or Maintenance Price on account of such costs and expenses.

8 **5.6.4.3** Except as required as a direct result of an ADOT-Directed  
9 Change or a Necessary Schematic ROW Change, property outside of the Schematic  
10 ROW that is acquired for drainage easements hereunder shall be treated as Developer-  
11 Designated ROW.

12 **5.6.4.4** If ADOT incurs any such costs and expenses on Developer's  
13 behalf, ADOT may submit any invoices for such costs and expenses to Developer, in  
14 which case Developer shall pay the invoices within ten days after delivery to Developer.  
15 Alternatively, ADOT may deduct the amount of such costs and expenses from any sums  
16 owed by ADOT to Developer pursuant to this Agreement.

17 **5.6.5** Developer shall be responsible for and shall pay directly all costs and  
18 expenses of ROW Services, and all other costs and expenses, in connection with  
19 acquiring, renting, using, maintaining, insuring and disposing of Developer's Temporary  
20 Work Areas that Developer determines necessary or desirable for its convenience in  
21 constructing the Project. Developer shall not be entitled to any adjustment in the D&C  
22 Price or Maintenance Price on account of such costs and expenses.

23 **5.6.6** Developer shall not be entitled to any increase in the Price or any  
24 Completion Deadline adjustment as a result of: (a) Site conditions associated with any  
25 Developer-Designated ROW or Developer's Temporary Work Areas (including those  
26 relating to Hazardous Materials, Differing Site Conditions or Utilities); and (b) any delay,  
27 inability or cost associated with the acquisition of any Developer-Designated ROW,  
28 including Developer-Designated ROW required to implement any ATCs, or Developer's  
29 Temporary Work Areas.

30 **5.6.7** If at any time, Developer or any Developer-Related Entity directly or  
31 indirectly (a) acquires or has previously acquired any interest in real property likely to be  
32 parcels of the Project ROW or the remainders of any such parcels, (b) loans or has  
33 previously loaned money to any interest holder in any real property likely to be a Project  
34 ROW parcel and accepts as security for such loan the parcel, or the remainder of any  
35 such parcel that is not a whole acquisition, or (c) purchases or has previously  
36 purchased from an existing mortgagee the mortgage instrument that secures an existing  
37 loan against real property likely to be a Project ROW parcel, or the remainder of any  
38 such parcel, Developer shall promptly disclose the same to ADOT. If Developer, or any  
39 subsidiary or parent company of Developer, acquires a real property interest, whether  
40 title or mortgage, in parcels of the Project ROW, the real property interest acquired or a

1 release of mortgage as the case may be, shall be conveyed to the State of Arizona  
2 without the necessity of eminent domain and without payment to Developer or the  
3 subsidiary or parent company of Developer. Developer shall not acquire or permit the  
4 acquisition by Developer or any Developer-Related Entity of any real property interest in  
5 a Project ROW parcel, whether in fee title or mortgage, for the purpose of avoiding  
6 compliance with the Laws, practices, guidelines, procedures and methods described in  
7 Section DR 470.2.1.

8 **5.6.8** Subject to Section 5.6.3, the D&C Price is inclusive of all of  
9 Developer's costs of performing ROW Services. If ADOT incurs any such costs and  
10 expenses on Developer's behalf, ADOT may submit invoices for such costs and  
11 expenses to Developer, in which case Developer shall pay the invoices within ten days  
12 after delivery to Developer. Alternatively, ADOT may deduct the amount of such costs  
13 and expenses from any sums owed by ADOT to Developer pursuant to this Agreement.

14 **5.6.9** If a parcel acquired by ADOT includes both (a) property for which  
15 ADOT is responsible for paying the price of acquisition (e.g., ADOT Additional  
16 Properties), and (b) property for which Developer is responsible for paying the price of  
17 acquisition (e.g., Developer-Designated ROW), then Developer shall reimburse ADOT a  
18 *pro rata* share of the parcel's total purchase price, severance damages, relocation  
19 costs, Hazardous Materials management costs, and related fees and costs based on  
20 the ratio of the physical area of the property referenced in clause (b) above to the  
21 physical area of the entire acquired parcel.

## 22 **5.7 Developer Incentives for Avoiding Schematic ROW Parcels**

23 **5.7.1** After the Effective Date, Developer will have the opportunity to benefit,  
24 in the form of an additional payment from ADOT, from the avoidance of parcels that  
25 comprise the Schematic ROW. References below to "parcel" or "partial parcel" mean  
26 those parcels and partial parcels within the boundaries of the Schematic ROW.  
27 References to "avoidance", "avoid" or "avoided" means that the parcel or partial parcel  
28 will not be needed or used for the Project or for Temporary Construction Easements.

29 **5.7.2** To obtain this benefit, Developer must submit to ADOT:

30 (a) A map depicting each parcel or partial parcel to be avoided in  
31 whole or in part;

32 (b) A calculation, for each such parcel or partial parcel, of the  
33 approximate avoided square footage;

34 (c) A calculation of the net cost savings respecting such parcel or  
35 partial parcel (taking into account severance damages, if any), together with supporting  
36 documentation justifying the calculation. For the acquisition price savings, the market  
37 value shown in the Acquisition/Relocation Status Report, as updated on the Effective  
38 Date, shall be used, without regard to subsequent appraisals or changes in market  
39 conditions.

1 (d) Design Documents showing the design features that will enable  
2 avoidance in whole or in part of the parcel or partial parcel.

3 **5.7.3** Within ten Business Days after it receives such a Submittal, ADOT will  
4 inform Developer in writing, for each parcel or partial parcel, whether the Submittal is  
5 approved. ADOT may reject the Submittal and make no such payment if ADOT  
6 determines, in its sole discretion, that:

7 (a) The design does not represent a credible means to actually  
8 avoid the parcel or partial parcel; or

9 (b) The proposal is to avoid only a portion, rather than the entirety,  
10 of a single family residential parcel.

11 **5.7.4** ADOT will calculate the cost savings, if any, using ADOT's standard  
12 procedures and estimation techniques.

13 **5.7.4.1** If ADOT has not already acquired the parcel or partial parcel,  
14 if ADOT has not already received acceptance of an offer to acquire the parcel or partial  
15 parcel, and if no displacee in connection with the parcel or partial parcel has incurred  
16 material relocation costs for which ADOT is responsible as a result of ADOT's relocation  
17 notice, and has not otherwise materially changed its position in reliance on or in  
18 response to ADOT's relocation notice, then the credit amount will be the sum of:

19 (a) The savings in ADOT's acquisition costs for the avoided parcel  
20 or partial parcel, which shall equal ADOT's estimated value per square foot set forth in  
21 the Acquisition/Relocation Status Report in Attachment 470-3 to the Technical  
22 Provisions, as of the Effective Date, without regard to subsequent appraisals or  
23 changes in market conditions; plus

24 (b) ADOT's estimate of avoided severance damages (if any); minus

25 (c) ADOT's estimate of the increased severance damages (if any)  
26 caused by the proposed ROW avoidance; plus

27 (d) ADOT's estimate of avoided relocation costs (if any); plus

28 (e) Only for Retained Parcels, ADOT's estimate of avoided  
29 demolition costs.

30 **5.7.4.2** If ADOT has already acquired the parcel or partial parcel, if  
31 ADOT has already received acceptance of an offer to acquire the parcel or partial  
32 parcel, or if any displacee regarding the parcel or partial parcel has incurred material  
33 relocation costs for which ADOT is responsible as a result of ADOT's relocation notice,  
34 or has otherwise materially changed its position in reliance on or in response to ADOT's  
35 relocation notice, then the credit amount will be ADOT's determination, in its good faith  
36 discretion, of the net proceeds, if any, it is likely to obtain from re-sale of the parcel or  
37 partial parcel as a remnant piece of vacant land.

1                   **5.7.4.3** All amounts will be estimated without including contingency.

2                   **5.7.5** ADOT will review and assess the calculation of the Developer's cost  
3 savings, which will be subject to ADOT's reasonable approval. ADOT may require  
4 further information and documentation in support of Developer's calculation of the cost  
5 savings, and may respond with its own calculation of the cost savings. If ADOT  
6 disagrees with Developer's calculation, the Parties shall thereafter negotiate promptly  
7 and in good faith to mutually determine the cost savings. At the conclusion of such  
8 negotiations, ADOT will finally determine the cost savings, which determination shall  
9 control.

10                  **5.7.6** If such a Submittal is approved by ADOT, Developer will be entitled to  
11 a payment from ADOT equal to:

12                   (a) For avoided Retained Parcels, (i) 70% of the ADOT-approved  
13 savings in acquisition costs; plus (ii) 50% of the ADOT-approved avoided severance  
14 damages, relocation costs and, if applicable, demolition costs; minus (iii) 50% of the  
15 ADOT-approved increase in severance damages (if any) caused by the proposed ROW  
16 avoidance, and

17                   (b) For other avoided property; (i) 70% of the ADOT-approved  
18 savings in acquisition costs; plus (ii) 50% of the ADOT-approved avoided severance  
19 damages and relocations costs; minus (iii) 50% of Developer's savings in demolition  
20 costs; minus (iv) 50% of the ADOT-approved increase in severance damages (if any).

21                  **5.7.7** The payment will be due from ADOT to Developer not later than 30  
22 days after Final Acceptance.

23                  **5.7.8** If and when ADOT approves such a Submittal, the Parties shall  
24 suspend or, as appropriate, modify their ROW acquisition activities for the portion of the  
25 parcel or partial parcel to which the Submittal relates. Thereafter, and notwithstanding  
26 any contrary provisions of the Contract Documents, ADOT will have no obligation to  
27 Developer to acquire such property or any Temporary Construction Easement thereon  
28 (unless it becomes ADOT Additional Property), and Developer at its sole cost and risk  
29 shall be responsible for obtaining third party approvals (including Governmental  
30 Approvals) and completing the Final Design such that the avoided parcels or partial  
31 parcels need not be acquired.

32                  **5.7.9** If a parcel or partial parcel is avoided but ADOT must subsequently  
33 acquire it as ADOT Additional Property as a result of an ADOT-Directed Change or  
34 Necessary Schematic ROW Change, then ADOT will be entitled to reduce the payment  
35 under Section 5.7.7 by the portion thereof attributable to such parcel or partial parcel.

36 **5.8 Water Wells**

37 **5.8.1 General**

1 Water wells held for public use are deemed Utilities under the Contract  
2 Documents and are subject to the provisions therefor. Water wells held for private use  
3 are deemed real property subject to the Uniform Act and real property acquisition  
4 provisions of the Contract Documents, and, except as provided in Section 5.8.2, ADOT  
5 has the power to condemn such water wells that may need closure or abandonment in  
6 order to build the Project.

## 7 **5.8.2 GRIC Wells**

8 **5.8.2.1** This Section 5.8.2 provides special terms that supersede  
9 any contrary provisions in this Article 5 or in Section DR 470 of the Technical  
10 Provisions.

11 **5.8.2.2** Developer recognizes and acknowledges that ADOT has no  
12 power to condemn any water wells owned by or on behalf of the GRIC (“GRIC wells”)  
13 that may need closure and abandonment in order to build the Project according to  
14 Developer’s design.

15 **5.8.2.3** If Developer requires acquisition of any GRIC well or  
16 relocation of the wellhead for Developer’s design, then:

17 (a) Developer shall make diligent efforts to reasonably  
18 accommodate continued operation of the GRIC wells, such as via relocation and access  
19 either within or outside ADOT’s control of access lines, subject to ADOT satisfaction  
20 that any location within the control of access lines is safe;

21 (b) Any price or cost that Developer negotiates for the  
22 acquisition, relocation or abandonment of any GRIC well shall be subject to ADOT’s  
23 approval that it represents market value; and

24 (c) Developer shall bear all risk that the GRIC will refuse  
25 or delay selling, relocating or abandoning any GRIC well. If such refusal or delay  
26 occurs, Developer shall be obligated to re-design the affected portions of the Project in  
27 order to avoid such GRIC well(s) and preserve the GRIC’s legal access to the well(s).  
28 Developer shall not be entitled to any Supplemental Agreement for additional  
29 compensation or Completion Deadline adjustment as a result of such refusal, delay or  
30 need to re-design.

31 (d) Section 5.7 shall not apply to GRIC wells.

## 32 **5.9 Access to Project ROW; Delays**

### 33 **5.9.1 Physical Possession of Project ROW; Transfer of Title to** 34 **Improvements**

35 **5.9.1.1** ADOT will notify Developer of the availability of Project ROW  
36 within five Business Days after ADOT obtains possession of such Project ROW. For  
37 clarity, ADOT obtains possession of a ROW parcel only after ADOT pays the immediate

1 possession bond and satisfies the conditions, if any, required under the order for  
2 immediate possession; ADOT does not obtain possession when the court issues the  
3 corresponding order for immediate possession. Developer shall be responsible for  
4 being informed of and complying with any access restrictions that may be set forth in  
5 any documents granting possession of any Project ROW.

6 **5.9.1.2** Upon obtaining knowledge of any anticipated delay in the  
7 dates for acquisition of any Project ROW, the Party obtaining knowledge shall promptly  
8 notify the other Party in writing. In such event, Developer shall immediately determine  
9 whether the delay impacts the Critical Path and, if so, to what extent it might be possible  
10 to avoid such delay through re-sequencing, reallocation or other alternative construction  
11 methods or otherwise (which, in the case of a Relief Event, shall be subject to  
12 Section 14.8.3). Developer shall promptly meet with ADOT to determine the best  
13 course of action and prepare a written report setting forth its recommendations, which  
14 recommendations shall be subject to ADOT's written approval.

15 **5.9.1.3** Developer is entitled to retain any salvage value from its  
16 demolition of improvements.

17 **5.9.2 Access to Project ROW**

18 **5.9.2.1** To the extent that Developer has not been provided with  
19 access to portions of the Project ROW on or prior to the date set forth on the Project  
20 Schedule, Developer shall work around such Project ROW with the goals of minimizing  
21 delay to the completion of the Project. Except for delays caused by the types of events  
22 described in clauses (d) and (e) of the definition of "ADOT-Caused Delay" Developer  
23 shall not be entitled to any increase in the Price or Completion Deadline adjustment for  
24 delays caused by the failure or inability of ADOT to provide Project ROW.

25 **5.9.2.2** Where Developer makes a written request for access or  
26 temporary entry agreement for any Project ROW for which access has not yet been  
27 acquired, Developer may, with ADOT's prior written consent, which may be withheld or  
28 withdrawn at any time, in ADOT's good faith discretion, and subject to the provisions of  
29 Section 5.9.1 and Section DR 470.2.6 of the Technical Provisions, negotiate with  
30 property owners or occupants for early access or temporary use of land, provided that  
31 any such negotiations shall comply in all respects with applicable Law, including the  
32 Uniform Act. Developer's negotiations with property owners or occupants for temporary  
33 entry agreements shall occur only under such terms and conditions as are stipulated by  
34 ADOT, in its good faith discretion. ADOT will not be bound by the terms and conditions  
35 agreed upon by Developer and any property owner or occupant until such time as  
36 ADOT has expressly so indicated in writing (and, then, only to the extent expressly set  
37 forth therein). All temporary entry agreements must be approved by FHWA.

38 **5.10 Utility Adjustments**

39 **5.10.1 Developer's Responsibility**

1                   **5.10.1.1** Developer shall coordinate and cause to be completed all  
2 Utility Adjustments necessary for the timely construction and maintenance of the  
3 Project, in accordance with the Contract Documents. Developer shall cause to be  
4 completed, in accordance with the Project Schedule, all Utility Adjustments necessary to  
5 accommodate construction, operation, maintenance and use of the Project, as located  
6 under the Final Design. All Utility Adjustment Work performed by Developer or a Utility  
7 Company shall comply with the Contract Documents. Developer shall coordinate,  
8 monitor and otherwise undertake the necessary efforts to cause Utility Companies  
9 performing Utility Adjustment Work to perform such work timely, in coordination with the  
10 Work, and in compliance with the standards of design and construction and other  
11 applicable requirements specified in the Contract Documents. However, regardless of  
12 the arrangements made with the Utility Companies and except as otherwise provided in  
13 Article 14, Developer shall continue to be the responsible party to ADOT for timely  
14 performance of all Utility Adjustment Work so that upon completion of the Construction  
15 Work, all Utilities that might impact the Project are compatible with the Project.

16                   **5.10.1.2** Except with respect to Developer's rights to claim a Relief  
17 Event for Utility Company Delays pursuant to Section 14.4.4, or for Inaccurate Utility  
18 Information pursuant to Section 14.4.5, Developer shall not be entitled to submit a claim  
19 for Extra Work Costs, Delay Costs, Completion Deadline adjustment or other relief  
20 related to the Utility Adjustment Work, inaccuracy of the Utility Information or Utilities  
21 located within or outside the Project ROW or otherwise impacted by, or having an  
22 impact on, the Project or the Work.

## 23                   **5.10.2     Utility Memoranda of Understanding; Utility Agreements**

24                   **5.10.2.1** Prior to the Effective Date, ADOT conducted coordination  
25 meetings with Utility Companies. Based on these coordination meetings, ADOT  
26 documented discussion items to serve as the bases for separate Utility Memoranda of  
27 Understanding between ADOT and the Utility Companies. The corresponding  
28 documented discussion items and Utility Memoranda of Understanding, if any, are  
29 included in the Reference Information Documents. Developer is hereby delegated, and  
30 hereby accepts and assumes, the responsibilities and obligations of ADOT set forth in  
31 documented discussion items and Utility Memoranda of Understanding, if any.  
32 Developer shall comply with, be bound by and timely perform all such responsibilities  
33 and obligations except to the extent specifically changed by a Utility Agreement  
34 between Developer and the applicable Utility Company.

35                   **5.10.2.2** For all Utility Adjustments, Developer is responsible for  
36 preparing, negotiating and entering into instruction-specific, construction-detailed Utility  
37 Agreements with all Utility Companies, regardless of whether the Utility Companies are  
38 identified in the Technical Provisions or Reference Information Documents. Developer  
39 shall use the information in the documented discussion items and terms in the Utility  
40 Memorandum of Understanding, described in Section 5.10.2.1, as a basis for  
41 negotiating a Utility Agreement with each Utility Company affected by the Project. The  
42 general procedures and framework for preparing the Utility Agreements and processing  
43 utility issues within the Project area shall follow the standard practices of the respective

1 Utility Companies for such Utility Agreements. Developer shall prepare and provide all  
2 written or plan information concerning the Project necessary to negotiate Utility  
3 Agreements. Developer shall cause each Utility Agreement it negotiates and executes  
4 to name ADOT as an intended third party beneficiary of Developer's rights and interests  
5 thereunder.

6 **5.10.2.3** Each Utility Agreement shall set forth all required terms and  
7 conditions for the subject Utility Adjustment Work, including:

8 (a) A clear description and specification of the scope of  
9 Utility Adjustment Work Developer is to perform, and the scope the Utility Company is to  
10 perform;

11 (b) The applicable Utility conflict map;

12 (c) A schedule for the Utility Adjustment Work, or  
13 procedures for preparing and implementing such schedule;

14 (d) The applicable Adjustment Standards and any terms  
15 and conditions regarding any Change in Adjustment Standards;

16 (e) If necessary, requirements and location for any  
17 Replacement Utility Property Interest;

18 (f) Provisions for payments, payment terms, controlling  
19 specifications, and work description;

20 (g) Any Utility permits that may then exist with respect to  
21 the construction and relocation of the subject Utility;

22 (h) Specific procedures for resolving scheduling, design,  
23 construction and payment issues arising due to errors or omissions in information the  
24 Utility Company provides to Developer;

25 (i) Terms and provisions regarding Betterments, if any;

26 (j) Requirements for the Utility Company to provide cost  
27 records as set forth in Section 5.10.4.7; and

28 (k) The terms described in Sections 5.10.2.4, 5.10.5.1  
29 and 5.10.6.

30 **5.10.2.4** ADOT agrees to cooperate, at its own cost, as reasonably  
31 requested by Developer in pursuing Utility Agreements, including attendance at  
32 negotiation sessions and review of Utility Agreements. Developer shall keep ADOT  
33 informed of the status of any such negotiations and shall deliver to ADOT, within ten  
34 days after execution, a true and complete copy of each Utility Agreement entered into  
35 by Developer. Except as provided in Sections 5.10.2.5 or 5.10.2.6 ADOT will not be a

1 party to such Utility Agreements, and Developer shall cause each Utility Agreement to  
2 expressly provide that ADOT will have no liability under the Utility Agreement unless  
3 and until ADOT receives a written assignment of the Developer's interests in the Utility  
4 Agreement and assumes in writing Developer's obligations thereunder; provided,  
5 however, that Developer shall cause the Utility Agreements to designate the  
6 Department as an intended third-party beneficiary thereof and to permit assignment of  
7 Developer's right, title and interest thereunder to ADOT without necessity for Utility  
8 Company consent. Developer shall not enter into any agreement with a Utility  
9 Company that purports to bind ADOT in any way, unless ADOT has executed such  
10 agreement as a party thereto (ADOT's signature indicating approval or review of an  
11 agreement between Developer and a Utility Company, or its status as a third-party  
12 beneficiary, shall not satisfy this requirement).

13 **5.10.2.5** If a Utility Company has proper Prior Rights Documentation  
14 in connection with a Utility Adjustment, then ADOT, together with Developer and the  
15 Utility Company, will be a party to the corresponding Utility Agreement. In such a case,  
16 ADOT will be a signatory to the Utility Agreement for the sole purpose of indicating its  
17 consent thereto and agreeing to the terms and conditions in the Utility Agreement  
18 respecting the Utility Company's prior rights. If a Utility Company does not have proper  
19 Prior Rights Documentation in connection with a Utility Adjustment, then ADOT will  
20 choose whether to be a party to the corresponding Utility Agreement, provided that it will  
21 be a party, together with Developer and the Utility Company, if the Utility Company  
22 refuses to execute a Utility Agreement only with Developer. In such case, ADOT will be  
23 a signatory to the Utility Agreement for the sole purpose of indicating its consent thereto  
24 and agreeing to the terms and conditions in the Utility Agreement respecting any  
25 encroachment permit the Utility Company will need from ADOT.

26 **5.10.2.6** If Developer has prepared and negotiated an instruction-  
27 specific, construction-detailed Utility Agreement with a Utility Company and such Utility  
28 Company refuses to enter into the Utility Agreement with Developer but is willing to  
29 enter into the Utility Agreement with ADOT, ADOT may in its discretion enter into the  
30 Utility Agreement directly with the Utility Company and delegate its obligations to  
31 Developer, in which case Developer shall accept such delegation and assume such  
32 obligations.

33 **5.10.2.7** Developer shall be solely responsible for the terms and  
34 conditions of all Utility Agreements into which it enters or for which it assumes  
35 obligations. Developer shall comply with and timely perform all obligations imposed on  
36 Developer by any Utility Agreement to which it is a party or which it assumes.

37 **5.10.2.8** Developer shall ensure that the Utility Adjustment Work is  
38 completed in accordance with the Contract Documents, regardless of the nature or  
39 provisions of the Utility Agreements and regardless of whether Developer or its  
40 Subcontractors, or the Utility Company or its contractors, performs the Utility Adjustment  
41 Work.

1                   **5.10.2.9** If a conflict occurs between the terms of a Utility Agreement  
2 and those of the Contract Documents, the terms that establish the higher quality,  
3 manner or method of performing Utility Adjustment Work, establish better Good Industry  
4 Practice, or use more stringent standards shall prevail between Developer and ADOT.  
5 If the foregoing criteria are not relevant to the terms at issue, then the Contract  
6 Documents shall prevail, unless expressly provided otherwise in the Contract  
7 Documents.

### 8                   **5.10.3 Requirements**

9                   Each Utility Adjustment (whether performed by Developer or by the Utility  
10 Company) shall comply with the Adjustment Standards, including applicable Changes in  
11 Adjustment Standards. Developer is solely responsible for negotiating any terms and  
12 conditions of its Utility Agreements that might limit a Utility Company's Changes in  
13 Adjustment Standards, if an applicable Utility Memorandum of Understanding does not  
14 provide such limits. In addition, all Utility Adjustment Work shall comply with all  
15 applicable Laws, the applicable Utility Agreement(s), and all other requirements  
16 specified in Sections DR 430.2, DR 430.3 and CR 430.3 of the Technical Provisions.

### 17                   **5.10.4 Utility Adjustment Risk**

18                   **5.10.4.1** Developer's right to Claims in connection with the Utility  
19 Adjustment Work is limited to the relief this Agreement provides for Utility Company  
20 Delays and Inaccurate Utility Information, and subject to further limitations pursuant to  
21 Sections 14.4.4 and 14.4.5.

22                   **5.10.4.2** Developer shall: (a) perform at its own cost (subject to  
23 payments out of the D&C Price) the Utility Adjustment Work itself, if permitted by the  
24 Utility Company (except that any assistance provided by any Developer-Related Entity  
25 to the Utility Company in acquiring Replacement Utility Property Interests shall be  
26 provided outside of the Work); or (b) reimburse (out of the D&C Price or otherwise) the  
27 Utility Company for its Utility Adjustment Work within the time and in the manner  
28 required by the applicable Utility Agreement. However, Developer has no obligation to  
29 reimburse a Utility Company for Utility Adjustment costs for any Service Line  
30 Adjustment for which the affected property owner has been compensated in connection  
31 with Project ROW acquisition. Developer is solely responsible for collecting directly  
32 from the Utility Company any reimbursement due to Developer for Betterment costs or  
33 other costs incurred by Developer for which the Utility Company is responsible under  
34 applicable Law.

35                   **5.10.4.3** For each Utility Adjustment, the eligibility of Utility Company  
36 costs (both indirect and direct) for reimbursement by Developer, as well as the  
37 determination of any Betterment or other costs due to Developer, shall be established in  
38 accordance with applicable Law and the applicable Utility Agreement(s).

39                   **5.10.4.4** For each Utility Adjustment, Developer shall compensate the  
40 Utility Company for each Existing Utility Property Interest relinquished, to the extent

1 ADOT would be required to do so by applicable Law or to the extent required by the  
2 applicable Utility Agreement and provided that ADOT has approved the Utility  
3 Company's claim. Developer is advised that in some cases reimbursement of the Utility  
4 Company's acquisition costs for a Replacement Utility Property Interest will satisfy this  
5 requirement.

6 **5.10.4.5** ADOT may declare a Developer Default under clause (h) of  
7 Section 19.1.1 if Developer breaches any covenant in this Section 5.9.4 respecting  
8 reimbursement of Utility Company costs.

9 **5.10.4.6** If for any reason Developer is unable to collect any amounts  
10 due to Developer from any Utility Company, then: (a) ADOT will have no liability for  
11 such amounts; (b) Developer shall have no right to collect such amounts from ADOT or  
12 to offset such amounts against amounts otherwise owing from Developer to ADOT; and  
13 (c) Developer shall have no right to stop Work or to exercise any other remedies against  
14 ADOT on account of such failure to pay.

15 **5.10.4.7** If any local Governmental Entity is participating in any  
16 portion of Utility Adjustment costs, Developer shall coordinate with ADOT and such local  
17 Governmental Entity regarding accounting for and approval of those costs.

18 **5.10.4.8** Developer shall maintain a complete set of records for the  
19 costs of each Utility Adjustment (whether incurred by Developer or by the Utility  
20 Company), in a format compatible with the estimate attached to the applicable Utility  
21 Agreement and in sufficient detail for analysis. Developer shall obtain from the Utility  
22 Company a complete set of records of the Utility Company's costs incurred for such  
23 Utility Adjustment Work. For both Utility Company costs and Developer costs, the totals  
24 for each cost category shall be shown in such manner as to permit comparison with the  
25 categories stated on the estimate. Developer also shall indicate in these records the  
26 source of funds used for each Utility Adjustment. All records with respect to Utility  
27 Adjustment Work shall comply with the record keeping and audit requirements of the  
28 Contract Documents and applicable Law, including 23 CFR Part 645, Subpart A.

29 **5.10.5 FHWA Utility Requirements**

30 **5.10.5.1** Unless ADOT advises Developer otherwise:

31 (a) The Project will be subject to 23 CFR Part 645  
32 Subpart A (including its requirements as to plans, specifications, estimates, charges,  
33 tracking of costs, credits, billings, records retention, and audit) and FHWA's associated  
34 policies;

35 (b) Utility Agreements for Utilities shall incorporate by  
36 reference 23 CFR Part 645 Subparts A and B and assign the obligations arising  
37 thereunder;

38 (c) Developer shall comply (and shall require the Utility  
39 Companies to comply) with 23 CFR Part 645 Subparts A and B as necessary for any

1 Utility Adjustment costs to be eligible for reimbursement from any federal financing or  
2 funding;

3 (d) Each Utility Agreement shall include the requirement  
4 for the Utility Company to meet the Buy America requirements (as specified in 23 USC  
5 313, 23 CFR § 635.410 and Attachment 7 to Exhibit 4 (Federal Requirements), except  
6 to the extent such requirements establish an exemption for the particular Utility  
7 Adjustment. Each such Utility Agreement shall require a definitive statement to be  
8 provided by Developer, the Utility Company or contractor performing any relocation  
9 work, about the origin of all products permanently incorporated into the Project, covered  
10 under the Buy America requirements.

11 **5.10.5.2** Developer acknowledges, however, that:

12 (a) It is not anticipated that Developer will be eligible for  
13 FHWA reimbursement of any Utility Adjustment outlays; and

14 (b) Developer will not have any share in any  
15 reimbursement from FHWA or other federal financing or funding that ADOT may receive  
16 on account of Utility Adjustments.

17 **5.10.6 Utility Enhancements**

18 **5.10.6.1** Developer shall address any requests by Utility Companies  
19 that Developer design or construct Betterments or Utility Company Projects (collectively,  
20 "Utility Enhancements"). Any Betterment performed as part of a Utility Adjustment,  
21 whether by Developer or by the Utility Company, shall be subject to the same standards  
22 and requirements as if it were a necessary Utility Adjustment, and shall be addressed in  
23 the appropriate Utility Agreement. Developer shall perform any work on a Utility  
24 Company Project only by separate contract outside of the Work, and such work shall be  
25 subject to Section 5.10.9. Under no circumstances shall Developer proceed with any  
26 Utility Enhancement that is incompatible with the Project in its final configuration or is  
27 not in compliance with applicable Law, the Governmental Approvals or the Contract  
28 Documents, including the Completion Deadlines. Under no circumstances will  
29 Developer be entitled to any additional compensation or Completion Deadline  
30 adjustment hereunder as the result of any Utility Enhancement, whether performed by  
31 Developer or by the Utility Company. Developer may, but is not obligated to, design  
32 and construct Utility Enhancements. Developer shall be responsible for and liable to  
33 ADOT for any deficiencies relating to any Utility Enhancements.

34 **5.10.7 Failure of Utility Companies to Cooperate**

35 **5.10.7.1** Developer shall use diligent efforts to obtain the cooperation  
36 of each Utility Company as necessary for Utility Adjustments. Developer shall notify  
37 ADOT immediately if:

1 (a) Developer is unable (or anticipates that it will be  
2 unable), after diligent efforts, to reach agreement with a Utility Company on a necessary  
3 Utility Agreement within a reasonable time;

4 (b) Developer reasonably believes for any other reason  
5 that any Utility Company will not undertake or permit a Utility Adjustment in a manner  
6 consistent with the timely completion of the Project or in accordance with Law, the  
7 Governmental Approvals or the Contract Documents;

8 (c) Developer becomes aware that any Utility Company  
9 is not cooperating in a timely manner to provide agreed-upon or necessary work or  
10 approvals; or

11 (d) Any other dispute arises between Developer and a  
12 Utility Company with respect to the Project, despite Developer's diligent efforts to obtain  
13 such Utility Company's cooperation or otherwise resolve such dispute.

14 This notice may include a request that ADOT assist in resolving the dispute or in  
15 otherwise obtaining the Utility Company's timely cooperation. Developer shall provide  
16 ADOT with such information as ADOT requests regarding the Utility Company's failure  
17 to cooperate and the effect of any resulting delay on the Project Schedule. After  
18 delivering to ADOT any notice or request for assistance, Developer shall continue to  
19 use diligent efforts to pursue the Utility Company's cooperation.

20 **5.10.7.2** If Developer requests ADOT's assistance pursuant to  
21 Section 5.10.7.1, then, subject to Section 5.10.7.3, the following provisions shall apply:

22 (a) Developer shall provide evidence reasonably  
23 satisfactory to ADOT that: (i) the subject Utility Adjustment is necessary; (ii) the time for  
24 completion of the Utility Adjustment in the Project Schedule was, in its inception, a  
25 reasonable amount of time for completion of such work; (iii) Developer has made  
26 diligent efforts to obtain the Utility Company's cooperation; and (iv) the Utility Company  
27 is not cooperating (the foregoing clauses (a)(i) through (iv) are referred to herein as the  
28 "conditions to assistance").

29 (b) Following ADOT's receipt of satisfactory evidence,  
30 ADOT will take such reasonable steps as Developer may request to assist Developer in  
31 obtaining the cooperation of the Utility Company or resolving the dispute; provided,  
32 however, that ADOT will have no obligation to prosecute eminent domain or other legal  
33 proceedings, or to exercise any other remedy available to it under applicable Law or  
34 existing contract, unless ADOT elects to do so in its sole discretion.

35 (c) If ADOT holds contractual or property rights that might  
36 be used to enforce the Utility Company's obligation to cooperate, and if ADOT elects in  
37 its sole discretion not to exercise those rights, and if such rights are assignable, then  
38 ADOT will assign those rights to Developer upon Developer's request; provided,  
39 however, that such assignment shall be without any representation or warranty as to the  
40 enforceability of such rights.

1 (d) Any assistance ADOT provides shall not relieve  
2 Developer of its sole responsibility for satisfactory compliance with its obligations  
3 respecting Utility Adjustment Work and timely completion thereof, except as otherwise  
4 expressly set forth herein.

5 **5.10.7.3** If ADOT objects in writing to a request for assistance made  
6 pursuant to Section 5.9.7.1 based on Developer's failure to satisfy one or both of the  
7 conditions to assistance described in Sections 5.10.7.2(a)(i) and (ii), then Developer  
8 shall take such action as is appropriate to satisfy the condition(s) and shall then have  
9 the right to submit another request for assistance on the same subject matter. If ADOT  
10 objects in writing to a request for assistance made pursuant to Section 5.10.7.1 based  
11 on Developer's failure to satisfy one or both of the conditions to assistance described in  
12 Sections 5.10.7.2(a)(iii) and (iv), then Developer shall take such action as Developer  
13 deems advisable during the next ten days to obtain the Utility Company's cooperation  
14 and shall then have the right to submit another request for assistance on the same  
15 subject matter. Notwithstanding the foregoing, no resubmittal will be accepted unless  
16 all ADOT's objections have been addressed in accordance with the preceding two  
17 sentences. This process shall be followed until Developer succeeds in obtaining the  
18 Utility Company's cooperation or in otherwise resolving the dispute or until ADOT  
19 determines, based on evidence Developer presents, that the conditions to assistance  
20 have been satisfied. Developer shall have the right to submit the question of the  
21 reasonableness of ADOT's determination for resolution according to the Dispute  
22 Resolution Procedures.

23 **5.10.7.4** In certain cases where a Utility Company is not cooperating  
24 with Developer or ADOT, ADOT may, in its sole discretion and where applicable Law  
25 authorizes ADOT to take unilateral action, issue a Directive Letter directing Developer to  
26 proceed with a Utility Adjustment without a Utility Agreement or other written consent by  
27 the Utility Company. If ADOT directs Developer to perform work pursuant to this  
28 Section 5.10.7.4, then Developer, without cost to ADOT, shall proceed with such work  
29 as if Developer has entered into a Utility Agreement providing for Developer to perform  
30 such work, and shall perform such work in accordance with applicable Adjustment  
31 Standards and the requirements of the Contract Documents otherwise applicable to  
32 Developer's performance of Utility Adjustment Work.

## 33 **5.10.8 Security for Utility Adjustment Costs; Insurance**

34 **5.10.8.1** Developer shall satisfy all requirements in the Utility  
35 Memoranda of Understanding and Utility Agreements to provide security for  
36 reimbursement of Utility Adjustment costs to which the Utility Company is entitled, in  
37 form, type and amount and on terms provided by the Utility Memoranda of  
38 Understanding and Utility Agreements.

39 **5.10.8.2** Developer shall satisfy all requirements in Utility Memoranda  
40 of Understanding and Utility Agreements to provide liability insurance for the protection  
41 of the Utility Company.

1                   **5.10.9     Applications for Utility Permits**

2                   **5.10.9.1** It is anticipated that, during the D&C Period, Utility  
3 Companies will apply to ADOT for utility permits and other agreements and approvals to  
4 install new Utilities that would cross or longitudinally occupy the Project ROW, or to  
5 modify, upgrade, relocate or expand existing Utilities within the Project ROW for  
6 reasons other than to accommodate the Project. The provisions of Sections 5.10.9.2  
7 through 5.10.9.5 shall apply to all such Utility Company applications. No work or  
8 services required of Developer, and no accommodation of new Utilities or of  
9 modifications, upgrades, relocations or expansions of existing Utilities, pursuant hereto,  
10 shall entitle Developer to additional compensation, Completion Deadline adjustment or  
11 other Claim hereunder.

12                   **5.10.9.2** For all Utility Company applications described in  
13 Section 5.10.9.1 and pending as of or submitted after the Effective Date, Developer  
14 shall: (a) furnish to the applicants the most recent pertinent Project design information  
15 or Record Drawings, as applicable; (b) assist the applicants with information regarding  
16 the location of other proposed and existing Utilities; and (c) use commercially  
17 reasonable efforts to coordinate work schedules with the applicants so that the  
18 applicants' activities do not interfere with the Project Schedule. Developer shall keep  
19 records of its costs related to new Utilities separate from other costs.

20                   **5.10.9.3** Developer shall assist ADOT in deciding whether to approve  
21 a permit or other agreement or approval applied for by a Utility Company. Within ten  
22 Business Days after receiving an application for a utility permit or other agreement or  
23 approval, Developer shall analyze the application and provide to ADOT a  
24 recommendation (together with supporting analysis) as to whether it should be  
25 approved, denied, or approved subject to conditions. Developer shall limit the grounds  
26 for its recommendation of denial or conditions to approval to the grounds (as ADOT  
27 communicates to Developer from time to time) on which ADOT is legally entitled to deny  
28 or condition approval of the application.

29                   **5.10.9.4** To the extent permitted by Law, ADOT will impose  
30 conditions in any approved permit or other agreement or approval: (a) prohibiting the  
31 Utility Company from interfering with Developer's schedule for D&C Work or  
32 Developer's performance of the D&C Work; (b) requiring the Utility Company to  
33 compensate Developer for the adverse impact to Developer of any prohibited  
34 interference; (c) requiring the Utility Company and its contractors to cooperate and  
35 coordinate with Developer and its Subcontractors; and (d) requiring the Utility Company  
36 to adhere to Developer's on-site safety standards and procedures whenever the Utility  
37 Company or its subcontractors are in any active work zone of Developer or its  
38 Subcontractors.

39                   **5.10.9.5** If Developer and ADOT disagree on the response to a utility  
40 application, such disagreement shall be resolved according to the Dispute Resolution  
41 Procedures; provided, however, that if Developer recommends against issuance of the

1 permit or other agreement or approval and ADOT determines issuance is appropriate or  
2 required, then:

3 (a) ADOT's determination shall control unless issuance is  
4 arbitrary and capricious and not required by Law;

5 (b) ADOT may elect to issue the utility permit or other  
6 agreement or approval in advance of resolution of the Dispute, but if it is finally  
7 determined that such issuance was arbitrary and capricious and not required by Law,  
8 such issuance shall be deemed an ADOT-Directed Change (and therefore a potential  
9 Relief Event); and

10 (c) If ADOT elects to delay issuance of a utility permit or  
11 other agreement or approval pending final resolution of the Dispute, Developer's  
12 indemnity under Section 21.1.1(j) shall be deemed to apply with respect to any applicant  
13 claim of wrongful delay or denial.

14 **5.10.10 Assignment of Rights against Utility Companies**

15 In the event of bona fide claims on behalf of Developer for wrongful actions or  
16 inactions of a Utility Company within the Project ROW, ADOT agrees that, upon receipt  
17 of a written request from Developer, ADOT in its reasonable discretion will assign to  
18 Developer ADOT's rights of recovery, as such may exist, under any existing agreement  
19 between ADOT and a Utility Company, including any utility permits, utility relocation  
20 agreements, or other agreements.

21 **5.10.11 Utility Services**

22 **5.10.11.1** Developer shall provide all Utility service facilities (both on-  
23 Site and off-Site) required to carry out the D&C Work and Capital Asset Replacement  
24 Work. The service facilities include those needed for power, gas, communications,  
25 water, sewage and drainage. Except for incremental additional costs directly  
26 attributable to a Relief Event, Developer is responsible for all costs of such other Utility  
27 service facilities and Utility services, including costs of design and construction (both on-  
28 Site and off-Site), Governmental Approvals, connection fees, testing, inspection, and  
29 certification, and Utility service/usage fees and charges.

30 **5.10.11.2** Developer shall not be required to pay for Utility  
31 consumption required to provide Routine Maintenance.

32 **5.11 Integration with Related Transportation Facilities**

33 **5.11.1** Developer shall locate, configure, design and maintain the termini,  
34 interchanges, ramps, intersections, crossings, entrances and exits of the Project so that  
35 the Project will be compatible and integrated with the location, configuration, design,  
36 operation and maintenance of, and provide a smooth, safe and orderly transition of  
37 traffic to and from, Related Transportation Facilities. The design for the Project shall  
38 include and provide for such compatibility, integration and transition. The design,

1 construction and maintenance of the Project shall comply with all provisions of the  
2 Contract Documents and Project Management Plan relating to compatibility, integration  
3 and transition with or at Related Transportation Facilities, including those concerning  
4 signage, signaling and communications with users.

5 **5.11.2** Without limiting the foregoing, Developer shall cooperate and  
6 coordinate with ADOT and any third party that owns, manages, operates or maintains  
7 Related Transportation Facilities with regard to the construction, maintenance and  
8 repair programs and schedules for the Project and the Related Transportation Facilities,  
9 in order to minimize disruption to the operation of the Project and the Related  
10 Transportation Facilities.

11 **5.11.3** To assist Developer, ADOT will provide to Developer during normal  
12 working hours, reasonable access to plans, surveys, drawings, record drawings,  
13 specifications, reports and other documents and information in the possession of ADOT  
14 or its contractors and consultants pertaining to Related Transportation Facilities.  
15 Developer, at its expense, shall have the right to make copies of the same. Developer  
16 shall conduct such other inspections, investigations, document searches, surveys and  
17 other work as may be necessary to identify the Related Transportation Facilities and  
18 achieve such compatibility, integration and transition.

19 **5.11.4** At Developer's request from time to time, ADOT will provide  
20 reasonable assistance to Developer in obtaining cooperation and coordination from third  
21 parties that own, manage, operate or maintain Related Transportation Facilities and in  
22 enforcing rights, remedies and warranties that Developer may have against any such  
23 third parties. Such assistance may include ADOT's participation in meetings and  
24 discussions. In no event shall ADOT be required to bring any legal action or proceeding  
25 against any such third party. At Developer's request, ADOT and Developer shall work  
26 jointly to establish a scope of work and budget for ADOT's Recoverable Costs in  
27 connection with providing such cooperation to Developer. Subject to any agreed scope  
28 of work and budget, Developer shall reimburse ADOT for all costs, including ADOT's  
29 Recoverable Costs, it incurs in connection with rendering such assistance within ten  
30 days after written request therefor.

31 **5.11.5** ADOT and other Governmental Entities shall have at all times, without  
32 obligation or liability to Developer, the right to conduct traffic management activities on  
33 their respective Related Transportation Facilities and all other facilities of the State,  
34 regional or local transportation network in the area of the Project in accordance with  
35 their respective standard traffic management practices and procedures in effect from  
36 time to time.  
37

**ARTICLE 6.**  
**DESIGN AND CONSTRUCTION**

**6.1 General Obligations of Developer**

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

(a) Furnish all design and other services, provide all materials, equipment and labor and undertake all efforts necessary or appropriate (excluding only those materials, services and efforts that the Contract Documents expressly specify will be undertaken by ADOT or other Persons) to design and construct the Project, and maintain the Project during construction, in accordance with the requirements of the Contract Documents so as to achieve Substantial Completion and Final Acceptance by the applicable Completion Deadlines.

(b) At all times during the D&C Period provide an ADOT-approved Project Manager who: (a) will have full responsibility for the prosecution of the Work; (b) will act as agent and be a single point of contact in all matters on behalf of Developer; (c) will be present (or its approved designee will be present) at the Site at all times that D&C Work is performed, and (d) will be available to respond to ADOT or ADOT's Authorized Representatives.

(c) Comply with, and require that all Subcontractors comply with, all requirements of all Laws applicable to the D&C Work, including Environmental Laws and the Americans with Disabilities Act of 1990 (42 U.S.C. § 12101 et seq.), as amended.

(d) Cooperate with ADOT, the General Engineering Consultant, and Governmental Entities with jurisdiction in all matters relating to the Work, including their review, inspection and oversight of the design and construction of the Project and the design and construction of the Utility Adjustments.

(e) Use commercially reasonable efforts to mitigate delay to design and construction of the Project and mitigate damages due to delay in all circumstances, to the extent possible, including by re-sequencing, reallocating, or redeploying Developer's and its Subcontractors' forces to other work, as appropriate.

(f) Obtain and pay the cost of obtaining all Governmental Approvals that are required in connection with the Project and not previously obtained by ADOT.

**6.2 Performance, Design and Construction Standards; Deviations**

**6.2.1** Developer shall furnish all aspects of the Design Work and all Design Documents, including design required in connection with the maintenance of the Project and Capital Asset Replacement Work, and shall construct the Project and Utility Adjustments included in the Construction Work as designed, free from Defects, and in accordance with: (a) Good Industry Practice; (b) the requirements, terms and conditions

1 set forth in the Contract Documents; (c) the Project Schedule; (d) all Laws; (e) the  
2 requirements, terms and conditions set forth in all Governmental Approvals; (f) the  
3 ADOT-approved Project Management Plan and all component plans prepared or to be  
4 prepared thereunder; (g) the Safety Management Plan; and (h) all other applicable  
5 safety, environmental and other requirements, taking into account the Project ROW  
6 limits and other constraints affecting the Project.

7 **6.2.2** Developer also shall construct the Project and Utility Adjustments in  
8 accordance with (a) the RFC Documents, and (b) the Construction Documents, in each  
9 case taking into account the Project ROW limits and other constraints affecting the  
10 Project.

11 **6.2.3** The Project design and construction shall be subject to certification  
12 pursuant to the procedure contained in the ADOT-approved Quality Management Plan.

13 **6.2.4** Developer may apply for ADOT approval of Deviations from applicable  
14 Technical Provisions regarding the design or construction of the Project. The Deviation  
15 approval process shall be as follows:

16 (a) All applications for Deviations shall be in writing. Where  
17 Developer applies for a Deviation as part of the submittal of a component plan of the  
18 Project Management Plan, Developer shall specifically identify and label the proposed  
19 Deviation.

20 (b) ADOT will consider, in its sole discretion, but have no obligation  
21 to approve, any such application. Developer shall bear the burden of persuading ADOT  
22 that the Deviation sought constitutes sound and safe engineering consistent with Good  
23 Industry Practice and achieves ADOT's applicable safety standards and criteria.

24 (c) No Deviation shall be deemed approved or be effective unless  
25 and until stated in writing signed by ADOT's Authorized Representative. ADOT's  
26 affirmative approval of a component plan of the Project Management Plan shall  
27 constitute: (i) approval of the Deviations expressly identified and labeled as Deviations  
28 therein, unless ADOT takes exception to any such Deviation, and (ii) disapproval of any  
29 Deviations not expressly identified and labeled as Deviations therein.

30 (d) ADOT's lack of issuance of an approval for any Deviation within  
31 ten Business Days after Developer applies therefor shall be deemed a disapproval of  
32 such application.

33 (e) ADOT's denial or disapproval of a requested Deviation shall be  
34 final and not subject to the Dispute Resolution Procedures.

35 **6.2.5** Except as set forth in Section 1.5 or 6.2.4, any changes to the  
36 Technical Provisions that materially affect the Design Work or Construction Work prior  
37 to the Substantial Completion Date shall be subject to the Supplemental Agreement  
38 process in accordance with Article 15.

1 **6.3 Changes in Basic Configuration**

2 **6.3.1** Developer shall not make any change in the Basic Configuration of the  
3 Project, except as approved by ADOT in its sole discretion and authorized by a  
4 Supplemental Agreement in accordance with Article 15. A Supplemental Agreement is  
5 required regardless of the reason underlying the change and regardless of whether the  
6 change increases, decreases or has no effect on Developer’s costs.

7 **6.3.2** No Supplemental Agreement shall be required for any non-material  
8 changes in the Basic Configuration that ADOT approves in writing as part of the design  
9 review process, unless Developer claims that it is entitled to Extra Work Costs in  
10 connection with a proposed change in accordance with Section 14.4.1, or unless the  
11 proposed change constitutes a Change Request under Section 15.2.5. Developer  
12 acknowledges and agrees that constraints set forth in the NEPA Approval, Technical  
13 Provisions and other Contract Documents, as well as site conditions and the Schematic  
14 Design, will impact Developer’s ability to make non-material changes in the Basic  
15 Configuration.

16 **6.3.3** If a Change Request results in a material change in the Basic  
17 Configuration, any cost savings that result from such Change Request shall be shared  
18 in accordance with Section 15.2.5.

19 **6.4 Design Requirements; Responsibility for Design**

20 **6.4.1 Design Implementation and Submittals**

21 **6.4.1.1** Developer, through the appropriately qualified and licensed  
22 design professionals identified in Exhibit 2 and Developer’s Project Management Plan  
23 shall prepare designs, plans and specifications in accordance with the Contract  
24 Documents. Developer shall cause the engineers of record, as applicable, for the  
25 Project to sign and seal all RFC Documents.

26 **6.4.1.2** Developer shall deliver to ADOT accurate and complete  
27 duplicates of all interim, revised and final Design Documents (including the RFC  
28 Documents), Plans and Construction Documents within seven days after Developer  
29 completes preparation thereof. Developer shall construct the Project in accordance with  
30 the RFC Documents and the Construction Documents. The RFC Documents may be  
31 changed only with prior approval of ADOT. Developer may modify the Construction  
32 Documents without prior approval of ADOT, but must deliver the modifications to ADOT  
33 in advance of performance of the applicable D&C Work.

34 **6.4.2 Developer Responsibility for Design**

35 Developer agrees that it has full responsibility for the design of the Project and  
36 that Developer will furnish the design of the Project, regardless of the fact that aspects  
37 of the Schematic Design have been provided to Developer as a preliminary basis for  
38 Developer’s design. Developer specifically acknowledges and agrees that:

1 (a) Developer is not entitled to rely on: (i) the Schematic Design  
2 except as specified otherwise in Section 6.4.3; (ii) the other Reference Information  
3 Documents; or (iii) any other documents or information provided by ADOT, except to the  
4 extent specifically permitted in the Contract Documents;

5 (b) Developer is responsible for correcting any Errors in the  
6 Schematic Design through the design or construction process;

7 (c) Developer shall not be entitled to any increase in the Price or  
8 extension of a Completion Deadline for Errors in the Schematic Design, except only for  
9 the right to a Supplemental Agreement with respect to Necessary Schematic ROW  
10 Changes as set forth in Section 14.4.1, and subject to the requirements and limitations  
11 of Section 14;

12 (d) Developer's warranties and indemnities hereunder cover Errors  
13 in the Project even though they may arise from or be related to Errors in the Schematic  
14 Design; and

15 (e) Developer is responsible for verifying all calculations and  
16 quantity takeoffs contained in the RFP Documents or otherwise provided by ADOT.

### 17 **6.4.3 Changes to Schematic Design and Schematic ROW**

18 **6.4.3.1** Developer acknowledges and agrees that the requirements  
19 and constraints set forth in the Contract Documents and in the Governmental  
20 Approvals, as well as Site conditions, will impact Developer's ability to revise the  
21 concepts contained in the Schematic Design. Developer, however, may modify the  
22 Schematic Design without ADOT's prior written approval if the proposed modification:

23 (a) Meets the requirements of the Technical Provisions;

24 (b) Requires no revision, modification or amendment to  
25 the NEPA Approval, as determined in accordance with Section DR 420.2.6.1 of the  
26 Technical Provisions;

27 (c) Does not constitute a Design Exception or Design  
28 Variance; and

29 (d) Does not deviate from the design concepts included  
30 in the Proposal.

31 **6.4.3.2** Developer may rely on the Schematic ROW limits, as shown  
32 on the Schematic Design, and that it is feasible to design and develop the Project within  
33 said Schematic ROW limits. Accordingly, Developer shall have the right to certain relief  
34 due to Necessary Schematic ROW Changes, to the extent provided in Section 14.4.1;  
35 provided, however that Developer acknowledges that "feasible to design and develop  
36 the Project" is not intended to mean or be limited to Developer's design approach set  
37 forth in its Proposal or Developer's preferred design approach.

1                   **6.4.3.3** Developer acknowledges that the Schematic Design is  
2 preliminary and subject to refinement through the Final Design process, and that  
3 Developer is not entitled to additional compensation or Completion Deadline adjustment  
4 in connection with changes in the Schematic Design, except as provided for Necessary  
5 Schematic ROW Changes to the extent allowed under Section 14.4.1.

6                   **6.5 Cooperation with Other Contractors**

7                   **6.5.1 Developer Duty of Cooperation**

8                   **6.5.1.1** Developer acknowledges that ADOT has awarded or plans  
9 to award contracts for construction and other work at or near the Site, and that other  
10 projects at or near the Site may be in various stages of design and construction. For a  
11 list of such future contracts and projects, see Table 110-1 in Section GP 110.01.3.2.1 of  
12 the Technical Provisions.

13                   **6.5.1.2** Developer shall, and shall cause the Developer-Related  
14 Entities to, cooperate and coordinate the Work with other contractors, whether the  
15 contractors work for ADOT or other Persons, whose projects or work may affect the  
16 Project or the Work. Developer shall schedule and sequence the Work as reasonably  
17 necessary to accommodate the projects and work of such contractors. Further,  
18 Developer shall conduct its Work and perform its obligations under the Contract  
19 Documents without interfering with or hindering the progress or completion of the  
20 projects or work being performed by other contractors.

21                   **6.5.1.3** ADOT agrees to include in its contracts with other  
22 contractors provisions similar to this Section 6.5.1, imposing a similar duty of  
23 cooperation among contractors.

24                   **6.5.2 Interference by Other Contractors**

25                   **6.5.2.1** ADOT will protect from interference by ADOT's other  
26 contractors and prioritize over conflicting Lane Closures requested by such other  
27 contractors planned Lane Closures that Developer timely reserves on ADOT's Highway  
28 Condition Reporting System.

29                   **6.5.2.2** If, however, Developer asserts that any of ADOT's other  
30 contractors have caused damage to the Work, or have hindered or interfered with the  
31 progress or completion of the Work, then Developer's sole remedy shall be to seek  
32 recourse against such other contractors.

33                   **6.5.3 Coordination with Utility Companies and Adjacent Property**  
34 **Owners**

35                   Developer shall coordinate with Utility Companies and owners of property  
36 adjoining the Project, and with their respective contractors, as more particularly  
37 described in the Contract Documents.

1 **6.6 Substantial Completion; Punch List; Final Acceptance**

2 **6.6.1 Substantial Completion**

3 **6.6.1.1** ADOT will issue a written Certificate of Substantial  
4 Completion on the date that all the following conditions precedent to Substantial  
5 Completion have been met:

6 (a) All major safety features are installed and functional,  
7 such major safety features to include shoulders, guard rails, striping and delineations,  
8 concrete traffic barriers, bridge railings, cable safety systems, metal beam guard fences,  
9 safety end treatments, terminal anchor sections and crash attenuators;

10 (b) All required illumination is installed and functional;

11 (c) All required signs and signals are installed and  
12 functional;

13 (d) The need for temporary traffic controls or for lane  
14 closures at any time has ceased (except for any then-required for Maintenance  
15 Services, so long as Developer has complied with the notice requirements set forth in  
16 Section 6.6.1.1) and such need for controls or closures is not due to any act or failure to  
17 act by any Developer-Related Entity, and except for temporary lane closures during  
18 hours of low traffic volume in accordance with and as permitted by the Traffic  
19 Management Plan solely in order to complete Punch List items);

20 (e) All lanes of traffic (including ramps, interchanges,  
21 overpasses, underpasses, other crossings and frontage roads) set forth in the Design  
22 Documents are in their final configuration and traffic can move unimpeded through the  
23 Project at the normal, posted speed;

24 (f) Each Element meets the target for the applicable  
25 measurement record as set forth in the columns headed "Target" and "Measurement  
26 Record" in the Maintenance Table;

27 (g) All required ITS systems are installed and functional;

28 (h) Developer has otherwise completed the D&C Work in  
29 accordance with the Contract Documents and Design Documents, such that the Project  
30 is in a condition that it can be used for safe vehicular travel in all lanes at the normal,  
31 posted speed and at all points of entry and exit, subject only to Punch List items and  
32 other items of work that do not affect the ability to safely open for such normal use by  
33 the traveling public;

34 (i) Developer has satisfied all Maintenance Services  
35 Conditions Precedent as provided in Section 6.6.3; and

1 (j) All aesthetic and landscaping features for the Project  
2 have been completed in accordance with Sections DR 450 and CR 450 of the Technical  
3 Provisions, and the plans and designs prepared in accordance therewith.

4 **6.6.1.2** The procedures for notification of Substantial Completion are  
5 as follows:

6 (a) Developer shall provide ADOT with not less than 60  
7 days' prior notification of the date Developer determines it will satisfy all conditions to  
8 Substantial Completion (other than issuance by ADOT of a Certificate of Substantial  
9 Completion). During such 60-day period, Developer and ADOT will meet and confer  
10 and exchange information on a regular cooperative basis with the goal being ADOT's  
11 orderly, timely inspection and review of the Project and the RFC Documents and  
12 Construction Documents, and ADOT's issuance of a Certificate of Substantial  
13 Completion.

14 (b) During such 60-day period, ADOT will conduct an  
15 inspection of the Project and its components, a review of the applicable  
16 RFC Documents and Construction Documents and such other investigation as may be  
17 necessary to evaluate whether Substantial Completion is achieved.

18 (c) Developer shall provide ADOT a second notification  
19 when Developer determines it has met all conditions to Substantial Completion, other  
20 than issuance by ADOT of a Certificate of Substantial Completion. Within five days  
21 after expiration of the 60-day period and ADOT's receipt of the second notification,  
22 ADOT will either: (A) issue the Certificate of Substantial Completion; or (B) notify  
23 Developer, setting forth, as applicable, why the Project has not reached Substantial  
24 Completion. If ADOT and Developer cannot agree as to the date of Substantial  
25 Completion, such Dispute shall be resolved according to the Dispute Resolution  
26 Procedures.

## 27 **6.6.2 Punch List**

28 The Project Management Plan shall establish procedures and schedules for  
29 preparing a Punch List and completing Punch List work. Such procedures and  
30 schedules shall conform to the following provisions.

31 **6.6.2.1** The schedule for preparation of the Punch List either shall  
32 be consistent and coordinated with the inspections regarding Substantial Completion, or  
33 shall follow such inspections.

34 **6.6.2.2** Developer shall prepare and maintain the Punch List.  
35 Developer shall deliver to ADOT not less than five days' prior notice stating the date  
36 when Developer will commence Punch List field inspections and Punch List preparation.  
37 ADOT may, but is not obligated to, participate in the development of the Punch List.  
38 Each Party shall have the right to add items to the Punch List, but neither shall remove  
39 any item added by the other Party without such other Party's express permission. If  
40 Developer objects to the addition of an item by ADOT, the item shall be noted as

1 included under protest, and if the Parties thereafter are unable to reconcile the protest,  
2 the Dispute shall be resolved according to the Dispute Resolution Procedures.  
3 Developer shall deliver to ADOT a true and complete copy of the Punch List, and each  
4 modification thereto, as soon as it is prepared.

5 **6.6.2.3** Developer shall immediately commence work on the Punch  
6 List items and diligently prosecute such work to completion, consistent with the Contract  
7 Documents, within the time period to be set forth in the Project Management Plan and in  
8 any case by the Final Acceptance Deadline.

9 **6.6.3 Conditions to Issuance by ADOT of Certificate Evidencing**  
10 **Satisfaction of Maintenance Services Conditions Precedent**

11 **6.6.3.1** ADOT will issue a written certificate evidencing satisfaction  
12 of Maintenance Services Conditions Precedent upon satisfaction of all the following:

13 (a) Developer demonstrates to ADOT's reasonable  
14 satisfaction that Developer has completed training of maintenance personnel, which  
15 demonstration shall consist of:

16 (i) Delivery to ADOT of a written certificate, in  
17 form acceptable to ADOT, executed by Developer that it and its Subcontractors are fully  
18 staffed with such trained personnel and are ready, willing and able to perform the  
19 Maintenance Services in accordance with the terms and conditions of the Contract  
20 Documents and Project Management Plan pertaining to the Maintenance Period;

21 (ii) Delivery to ADOT of training records and  
22 course completion certificates issued to each of the subject personnel; and

23 (iii) ADOT's verification that the training program  
24 and number of trained personnel meet the standards in the Hazardous Material  
25 Management Plan and Section DR 420.2.5 of the Technical Provisions;

26 (b) ADOT has approved the Maintenance Management  
27 Plan and Maintenance Quality Management Plan in accordance with Section 8.9 and  
28 Table 110-5 of Section GP 110.03 of the Technical Provisions;

29 (c) ADOT has approved a schedule of all major work  
30 activities or milestones for the Maintenance Period to a work breakdown structure  
31 (WBS) level sufficient to demonstrate activities with a duration no longer than 20  
32 Business D days;

33 (d) Developer has received, and paid all associated fees  
34 for, all applicable Governmental Approvals and other third-party approvals required for  
35 use and operation of the Project, such Governmental Approvals and other third-party  
36 approvals are in full force and effect and there exists no uncured material violation of  
37 the terms and conditions of any such Governmental Approval or other third-party  
38 approvals;

1 (e) All insurance policies required under this Agreement  
2 during the Maintenance Period for the Project have been obtained and are in full force  
3 and effect and Developer has delivered to ADOT verification thereof as required under  
4 Section 11;

5 (f) Any security for Developer's performance and  
6 payment obligations in connection with the Maintenance Services under this  
7 Agreement, including the Maintenance Bonds required under Section 10.2 and any  
8 Maintenance Guaranty required under Section 10.4.4, have been obtained, are in full  
9 force and effect and Developer has delivered the same to ADOT;

10 (g) ADOT has received and approved an update to the  
11 Transportation Management Plan to address the Maintenance Period and Maintenance  
12 Services, which shall be prepared in accordance with and contain the information  
13 required under Section MR 400.2.9 of the Technical Provisions; and

14 (h) Developer has satisfied any other requirements or  
15 conditions for commencement of the Maintenance Services after Substantial  
16 Completion set forth in the Technical Provisions.

17 **6.6.3.2** Developer shall provide ADOT with notice of the date  
18 Developer determines that it will satisfy all of the Maintenance Services Conditions  
19 Precedent as set forth in Section 6.6.3.1, and the Parties shall undertake such actions,  
20 as follows:

21 (a) Developer shall provide ADOT with not less than  
22 30 days' notice of the date Developer expects to satisfy all of the Maintenance Services  
23 Conditions Precedent.

24 (b) During the 30-day period following receipt of such  
25 notice, Developer and ADOT will meet, confer and exchange information on a regular  
26 cooperative basis, and ADOT will conduct such investigation and review of reports, data  
27 and documentation as may be necessary to evaluate whether all of the Maintenance  
28 Services Conditions Precedent have been satisfied.

29 (c) Developer shall provide ADOT a final notice, in a form  
30 reasonably acceptable to ADOT, when Developer determines it has satisfied the  
31 Maintenance Services Conditions Precedent. Developer shall certify in the notice that  
32 Developer has satisfied all the criteria set forth in Section 6.6.3.1. Within five Business  
33 Days after receipt of such final notice, ADOT will either: (i) issue a certificate of  
34 satisfaction of Maintenance Services Conditions Precedent; or (ii) provide notice to  
35 Developer setting forth, as applicable, why the Maintenance Services Conditions  
36 Precedent have not been satisfied. If ADOT provides notice under subsection (ii) of this  
37 clause (c), and Developer does not Dispute ADOT's assessment, then the processes  
38 set forth in clauses (a) and (b) above shall be repeated until (A) ADOT issues a  
39 certificate that the Maintenance Services Conditions Precedent have been satisfied, or  
40 (B) the Parties' disagreement as to whether one or more Maintenance Services

1 Conditions Precedent have been met or the date of satisfaction of Maintenance  
2 Services Conditions Precedent is referred to, and resolved according to, the Dispute  
3 Resolution Procedures.

4 **6.6.4 Final Acceptance**

5 **6.6.4.1** Promptly after achieving Substantial Completion, Developer  
6 shall perform all remaining Construction Work, including completion of all Punch List  
7 items.

8 **6.6.4.2** ADOT will issue a Certificate of Final Acceptance at such  
9 time as all of the following conditions have been satisfied in respect of the Project:

10 (a) ADOT has issued a Certificate of Substantial  
11 Completion for the Project;

12 (b) All Punch List items shall have been completed and  
13 delivered to the reasonable satisfaction of ADOT;

14 (c) ADOT has received the “As-Built Schedule” required  
15 by Section GP 110.06.2.12 of the Technical Provisions;

16 (d) ADOT has received a complete set of the Record  
17 Drawings in form and content required by Section GP 110.10.2.3.4 of the Technical  
18 Provisions, and a complete, indexed set of all Proprietary Intellectual Property pursuant  
19 to Section 23.7.1.2;

20 (e) All Utility Adjustment Work and other work that  
21 Developer is obligated to perform for or on behalf of third parties with respect to the  
22 Project has been accepted by such third parties, and Developer has paid for all work by  
23 third parties that Developer is obligated to pay for, other than disputed amounts and  
24 amounts owed to Utility Companies that have not yet been invoiced to Developer,  
25 despite Developer’s diligent efforts to obtain invoices therefor;

26 (f) All component parts, plans and documentation of the  
27 Project Management Plan required to be prepared, submitted and approved prior to  
28 Final Acceptance have been so prepared, submitted and approved;

29 (g) All Submittals required by the Project Management  
30 Plan or Contract Documents to be submitted to and approved by ADOT prior to Final  
31 Acceptance have been submitted to and approved by ADOT, in the form and content  
32 required by the Project Management Plan or Contract Documents;

33 (h) All personnel, supplies, equipment, waste materials,  
34 rubbish and temporary facilities of each Developer-Related Entity shall have been  
35 removed from the Project ROW, Developer has restored and repaired all damage or  
36 injury arising from such removal to the satisfaction of ADOT, and the Site is in good  
37 working order and condition;

1 (i) Developer has delivered to ADOT a certification  
2 representing that there are no outstanding claims (for purposes of this certification, the  
3 term “claim” shall include all facts which may give rise to a claim) of Developer or claims  
4 or stop notices of any Subcontractor, Supplier, laborer, Utility Company or other  
5 Persons with respect to the D&C Work, other than:

6 (A) any previously submitted unresolved claims of  
7 Developer and any claims or stop notices of a Subcontractor, Supplier, laborer, Utility  
8 Company or other Persons being contested by Developer (in which event the  
9 certification shall include a list of all such matters with such detail as is requested by  
10 ADOT and, with respect to all claims or stop notices of a Subcontractor, Supplier,  
11 laborer, Utility Company and other Person, shall include a representation by Developer  
12 that it is diligently and in good faith contesting such matters by appropriate legal  
13 proceedings which shall operate to prevent the enforcement or collection of the same);  
14 and

15 (B) amounts owed to Utility Companies that have  
16 not yet been invoiced to Developer, despite Developer’s diligent efforts to obtain  
17 invoices therefor;

18 (j) Developer has paid in full all Liquidated Damages,  
19 and Noncompliance Charges that are owing to ADOT pursuant to this Agreement and  
20 are not in Dispute, and has provided to ADOT reasonable security for the full amount of  
21 Liquidated Damages and Noncompliance Charges that may then be the subject of an  
22 unresolved Dispute;

23 (k) There exists no uncured Developer Defaults other  
24 than those that would be cured by the achievement of Final Acceptance;

25 (l) ADOT has received from Developer and accepted the  
26 Final DBE Utilization Summary Report and the Summary Certification of Final DBE  
27 Payments for Professional Services and Construction DBE utilization, as required by  
28 Sections 18.02 and 20.0 of the DBE Special Provisions (Exhibit 7);

29 (m) ADOT has received from Developer and accepted the  
30 Final OJT Summary Report, and, if applicable, Good Faith Effort documentation, as  
31 required by Section 7.0 of the OJT Special Provisions (Exhibit 8); and

32 (n) All of Developer’s other obligations under the Contract  
33 Documents (other than obligations which by their nature are required to be performed  
34 after Final Acceptance) shall have been satisfied in full or waived by ADOT.

35 **6.6.4.3** Developer shall provide ADOT with 30 days’ notice of the  
36 date when Developer expects to achieve all conditions to Final Acceptance other than  
37 issuance by ADOT of a Certificate of Final Acceptance. During the 30-day period  
38 following receipt of such notification, Developer and ADOT will meet and confer and  
39 exchange information on a regular cooperative basis with the goal being the orderly,

1 timely inspection and review of the Project and the Record Drawings, and ADOT's  
2 issuance of a Certificate of Final Acceptance.

3 **6.6.4.4** During such 30-day period, ADOT will conduct an inspection  
4 of the Punch List items, a review of the Record Drawings and such other investigation  
5 as may be necessary to evaluate whether the conditions to Final Acceptance are  
6 satisfied.

7 **6.6.4.5** Within five days after expiration of such 30-day period,  
8 ADOT will either: (i) issue a Certificate of Final Acceptance for the Project; or (ii) notify  
9 Developer setting forth, as applicable, why Final Acceptance has not been achieved. If  
10 ADOT and Developer cannot agree as to the date of Final Acceptance, such Dispute  
11 shall be resolved according to the Dispute Resolution Procedures.

12 **6.7 Nonconforming and Defective Work**

13 **6.7.1** If Nonconforming Work is discovered, ADOT will have the right,  
14 exercisable in its sole discretion, to direct Developer, at Developer's sole cost and  
15 without Claim of any kind against ADOT, to rectify the Nonconforming Work so that it  
16 complies with the Contract Documents. For the avoidance of doubt, ADOT's sole  
17 discretion applies to its decision whether to require rectification of Nonconforming Work;  
18 whether Nonconforming Work has occurred is not a matter within ADOT's sole  
19 discretion.

20 **6.7.2** If, at Developer's request, ADOT elects to accept Nonconforming  
21 Work, ADOT may recover from Developer 100% of the cost savings, if any, of  
22 Developer or the Lead Subcontractor associated with its failure to perform the Work in  
23 accordance with requirements of the Contract Documents (in addition to any other  
24 adjustment of the Price or Monthly Disbursement), plus the net present value of 100%  
25 of any increase in costs ADOT will incur during the term of this Agreement to operate  
26 the Project that is attributable to the Nonconforming Work. In determining Developer's  
27 cost savings, the Parties shall take into account: (a) all avoided costs of Developer,  
28 including avoided design, material, equipment, labor, construction, testing,  
29 commissioning, acceptance and overhead costs and avoided costs due to time savings;  
30 and (b) the net present value of increases, if any, in maintenance and Capital Asset  
31 Replacement Work costs that Developer will incur as a result of the Nonconforming  
32 Work. Developer shall bear the burden of proving such increased costs. Net present  
33 value shall be determined by using as the discount rate the then-applicable yield on  
34 U.S. Treasury bonds having a tenor closest in length to the then-remaining length of the  
35 Term plus 100 basis points. ADOT will have the right to deduct such cost savings from  
36 any sums owed by ADOT to Developer pursuant to this Agreement.

37 **6.7.3** Subject to Sections 20.9 and 20.10, nothing contained in the Contract  
38 Documents shall in any way limit the right of ADOT to assert claims for damages  
39 resulting from patent or latent defects in the Work for the period of limitations prescribed  
40 by applicable Law, and the foregoing shall be in addition to any other rights or remedies  
41 ADOT may have hereunder or under Law.

1 **6.8 Hazardous Materials Management**

2 **6.8.1** Without limiting ADOT's role or responsibilities set forth in  
3 Sections 6.8.6, 6.8.7 and 14.4.8, and except as provided otherwise below, Developer  
4 shall undertake Hazardous Materials Management of all Hazardous Materials and  
5 Recognized Environmental Conditions, including contaminated groundwater, in  
6 accordance with applicable Law, Governmental Approvals, the Hazardous Materials  
7 Management Plan, and all applicable provisions of the Contract Documents.

8 **6.8.2** Developer shall have the following duties to avoid or mitigate adverse  
9 financial and schedule impacts of Hazardous Materials and Recognized Environmental  
10 Conditions.

11 **6.8.2.1** Without cost to ADOT, Developer shall adopt, using Good  
12 Industry Practice, design and construction techniques for the Project that to the  
13 maximum extent possible avoid the need for Hazardous Materials Management.

14 **6.8.2.2** If, having met its obligation under Section 6.8.2.1, Developer  
15 is unable to avoid Hazardous Materials or Recognized Environmental Conditions,  
16 Developer shall use Good Industry Practice, including design modifications and  
17 construction techniques, to minimize costs of Hazardous Materials Management,  
18 including minimization of ADOT's long-term costs for Hazardous Materials  
19 Management.

20 **6.8.2.3** Where Hazardous Materials Management is unavoidable or  
21 is required by applicable Law, Developer shall utilize appropriately trained  
22 Subcontractors or personnel to conduct the Hazardous Materials Management  
23 activities.

24 **6.8.3** If during the course of the Work, Developer encounters Hazardous  
25 Materials or Recognized Environmental Conditions in connection with the Project, the  
26 Site or Work, in an amount, type, quality or location that would require reporting or  
27 notification to any Governmental Entity or other Person or taking any preventive or  
28 remedial action, in each case under applicable Law, Governmental Approvals, the  
29 Hazardous Materials Management Plan or any applicable provision of the Contract  
30 Documents, Developer shall promptly notify ADOT in writing and advise ADOT of any  
31 obligation to notify State or federal agencies under applicable Law. If during the Term  
32 ADOT discovers Hazardous Materials or Recognized Environmental Conditions in  
33 connection with the Project, the Site or the Work, ADOT will promptly notify Developer  
34 in writing of such fact.

35 **6.8.4** The right of ADOT to step in to carry out the Hazardous Materials  
36 Management obligations of Developer are as set forth in Sections 6.8.4.1 and 6.8.4.2,  
37 below.

38 **6.8.4.1** If, within a reasonable time after discovery of Hazardous  
39 Materials or Recognized Environmental Conditions, taking into consideration the nature  
40 and extent of the contamination, the type and extent of action required and the potential

1 impact upon Developer's schedule to perform the Work, Developer has not undertaken  
2 the Hazardous Materials Management required of it under Section 6.8.1, ADOT may  
3 provide Developer with written notice that ADOT will undertake the Hazardous Materials  
4 Management itself. ADOT thereafter may undertake the Hazardous Materials  
5 Management actions in compliance with a remediation plan prepared by ADOT and  
6 approved by applicable Governmental Entities and in compliance with applicable Laws.  
7 Without limiting ADOT's role or responsibilities set forth in Section 6.8.6, Developer  
8 shall reimburse to ADOT on a current basis within ten days of request therefor, the  
9 reasonable costs, including ADOT's Recoverable Costs, that ADOT incurs in carrying  
10 out such Hazardous Materials Management actions. ADOT will have no liability or  
11 responsibility to Developer arising out of ADOT's Hazardous Materials Management  
12 actions and such actions shall in no event constitute the basis of a Relief Event or other  
13 Claim.

14 **6.8.4.2** Notwithstanding the foregoing, if Developer notifies ADOT  
15 that Developer desires to preserve claims against other potentially responsible parties,  
16 then ADOT will undertake all commercially reasonable efforts to preserve such claims  
17 consistent with either the National Oil and Hazardous Substances Pollution Contingency  
18 Plan, 40 CFR § 300, or comparable State regulations and standards; and a reasonable  
19 period of time for Developer to perform the Hazardous Materials Management actions  
20 shall include a sufficient period for Developer to comply with the National Oil and  
21 Hazardous Substances Pollution Contingency Plan or such comparable State  
22 regulations and standards.

23 **6.8.5** Refer to Section 14.4.6 regarding Developer's rights to compensation  
24 and Completion Deadline adjustment with respect to Hazardous Materials.

25 **6.8.6** Off-site disposal of Hazardous Materials is subject to the provisions of  
26 Sections 6.8.6.1 through 6.8.6.3, below.

27 **6.8.6.1** Except as provided otherwise in Section 6.8.7, as between  
28 Developer and ADOT, ADOT will be considered the sole generator and arranger under  
29 40 CFR Part 262 and will sign manifests for the off-site disposal of Hazardous Materials  
30 other than for: (a) Developer Release of Hazardous Materials; (b) Hazardous Materials  
31 that migrate from points of origin located outside the boundaries of the Project ROW  
32 where the source of such Hazardous Materials is a Developer-Related Entity in the  
33 course of performing Work; and (c) Hazardous Materials that Developer handles and  
34 disposes of in violation of any applicable provision of the Contract Documents, of  
35 Governmental Approvals or of Law. Notwithstanding the foregoing, ADOT may elect, by  
36 written notice to Developer, to have another responsible party (instead of ADOT, and  
37 other than a Developer-Related Entity) assume generator and arranger status and  
38 liability, or sign manifests, for which ADOT is otherwise responsible under this  
39 Section 6.8.6.1.

40 **6.8.6.2** Notwithstanding any contrary provision of the Contract  
41 Documents, Developer shall not be entitled to any compensation from ADOT for any

1 ADOT-Caused Delay arising out of or relating to any Dispute over whether Hazardous  
2 Materials are Known or Suspected Hazardous Materials.

3 **6.8.6.3** To the extent permitted by applicable Law, as between  
4 ADOT and Developer, ADOT will take and assume sole responsibility and liability for  
5 third party claims, causes of action and Losses arising out of or resulting from the off-  
6 site disposal of Hazardous Materials for which ADOT is the generator pursuant to this  
7 Section 6.8.6, specifically excluding liability for any actual and threatened Developer  
8 Release of Hazardous Materials and liability for off-site disposal that ADOT elects to  
9 have a responsible party assume as provided in Section 6.8.6.1. It is the intent of the  
10 Parties that Developer have no exposure to any such third party claims, causes of  
11 action and Losses.

12 **6.8.7** Developer shall not be required to engage in Hazardous Materials  
13 Management with respect to Release of Hazardous Materials onto the Project or Project  
14 ROW at any time during the Term by a Person other a Developer-Related Entity in the  
15 course of performing Work (a “third party”), where such Release is from a vehicle  
16 operating or located within the Project ROW or from such vehicle’s cargo.

17 **6.8.8** ADOT has exclusive decision-making authority regarding selection of  
18 the destination facility to which Hazardous Materials will be transported whenever it acts  
19 as generator or arranger. The foregoing shall not preclude or limit any rights or  
20 remedies that ADOT may have against Developer-Related Entities (other than  
21 Developer), Governmental Entities or other third parties, including prior owners,  
22 lessees, licensees and occupants of any parcel of land that is or becomes part of the  
23 Project ROW.

24 **6.8.9** As between Developer and ADOT, Developer shall be considered the  
25 sole generator and arranger and shall sign manifests for: (a) each Developer Release of  
26 Hazardous Materials and (b) Hazardous Materials that migrate from points of origin  
27 located outside the boundaries of the Project ROW where the source of such  
28 Hazardous Materials is a Developer-Related Entity in the course of performing Work.  
29 The foregoing shall not preclude or limit any rights or remedies that Developer may  
30 have against any Governmental Entity or any other third parties, including existing or  
31 prior owners, lessees, licensees and occupants of any parcel of land that is or becomes  
32 part of the Project ROW, excluding, however, the State, ADOT and their respective  
33 agents. To the extent permitted by applicable Law, Developer shall indemnify, save,  
34 protect and defend ADOT from claims, demands, causes of action and Losses arising  
35 out of or resulting from the off-site disposal of such Hazardous Materials for which  
36 Developer is considered the generator or arranger pursuant to this Section 6.8. The  
37 foregoing indemnity shall survive the expiration or termination of this Agreement.

38 **6.8.10** In the event of good-faith and bona fide claims on behalf of Developer  
39 related to Releases of Hazardous Materials by a third party who is not a Developer-  
40 Related Entity, ADOT agrees that, upon receipt of a written request from Developer,  
41 ADOT in its reasonable discretion will assign and subrogate its rights of recovery to  
42 Developer, as such may exist.

1 **6.9 Title**

2 Developer warrants that it owns, or will own, and has, or will have, good and marketable  
3 title to all materials, equipment, tools and supplies furnished, or to be furnished, by it  
4 and its Subcontractors that become part of the Project or are purchased for ADOT for  
5 the operation, maintenance or repair thereof, free and clear of all Liens. Title to all of  
6 such materials, equipment, tools and supplies which are delivered to the Site shall pass  
7 to ADOT, free and clear of all Liens, upon the sooner of: (a) incorporation into the  
8 Project, or (b) payment by ADOT to Developer of invoiced amounts pertaining thereto.  
9 Notwithstanding any such passage of title, Developer shall retain sole care, custody and  
10 control of such materials, equipment, tools and supplies and shall exercise due care  
11 with respect thereto until Substantial Completion or, with respect to such materials,  
12 equipment, tools and supplies which are necessary for Developer to satisfy its  
13 obligations under the Agreement, until such obligations are satisfied or until Developer  
14 is terminated pursuant to Articles 19 or 24.

15 **6.10 Site Security**

16 Commencing upon issuance of NTP 2, Developer shall provide appropriate security for  
17 the Site, and shall take all reasonable precautions and provide protection to prevent  
18 damage, injury, or loss to the D&C Work and materials and equipment to be  
19 incorporated therein, as well as all other property at or on the Site, whether owned by  
20 Developer, ADOT, or any other Person. Developer shall comply with ADOT’s security  
21 requirements and protocols.

22 **6.11 Risk of Loss or Damage**

23 Commencing upon issuance of NTP 2 and continuing thereafter during the Construction  
24 Period, Developer shall be responsible for maintenance of the D&C Work and the Site;  
25 provided, however, that Developer’s maintenance responsibility for portions the D&C  
26 Work owned by third parties shall extend until the control of and maintenance  
27 responsibility for such portions are officially transferred to the respective third parties.

28 **6.12 Aesthetics and Landscaping; Landscape Establishment Period**

29 **6.12.1** Developer shall perform, or cause to be performed, all aesthetics and  
30 landscaping Work for the Project, including landscape establishment, in accordance  
31 with Sections DR 450 and CR 450 of the Technical Provisions, as applicable.

32 **6.12.2** Developer shall be solely responsible for all costs relating to the  
33 aesthetics and landscaping Work for the Project, including landscape establishment,  
34 except for the costs of materials, services and efforts (if any) the Contract Documents  
35 expressly state ADOT or other Persons will perform.

36 **6.12.3 Landscape Establishment; Cost of Watering Plants**

1                   **6.12.3.1** Developer shall meet, or cause to be met, the landscape  
2 establishment requirements, including plant watering, set forth in Sections DR 450 and  
3 CR 450 of the Technical Provisions.

4                   **6.12.3.2** Developer shall pay for and supply, at its sole cost and  
5 expense, water used to meet the landscape establishment requirements set forth in  
6 Sections DR 450 and CR 450 of the Technical Provisions until the Substantial  
7 Completion Date. After Substantial Completion, ADOT will arrange for the City of  
8 Phoenix to provide such water at no cost or expense to Developer; provided, however,  
9 that Developer's use of such water provided by the City of Phoenix shall be subject to  
10 the availability limits established by the City of Phoenix.

11                   **6.12.3.3** On or about 365 days after Substantial Completion, ADOT  
12 will inspect plant materials installed as part of the landscaping Work outside the  
13 Maintenance Service Limits. No later than 60 Days after completing this inspection,  
14 ADOT will prepare a written report describing what (if any) of such installed plant  
15 materials (a) died, (b) failed to establish a root system reasonably expected for plant  
16 materials of a similar type, nature and maturity, and (c) failed to show a growth habit  
17 reasonably expected for plant materials of a similar type, nature and maturity.

18                   **6.12.3.4** If the report described in Section 6.12.3.3 identifies any of  
19 the conditions described in clause (a), (b) or (c) therein, then no later than 30 Days after  
20 receiving the report Developer shall submit a written landscape restoration plan to  
21 ADOT setting forth the actions Developer will take to replace dead and underperforming  
22 plant materials, and to ensure the conditions described in said report do not reoccur.  
23 The landscape restoration plan will be subject to ADOT's reasonable approval.

24                   **6.12.3.5** Developer shall complete all necessary replacement  
25 plantings no later than 180 Days after ADOT approves the landscape restoration plan  
26 described in Section 6.12.3.3.

## 27 **6.13 Clayton Act Assignment**

28 Developer shall assign to ADOT all right, title and interest in and to all claims and  
29 causes of action it may have under Section 4 of the Clayton Act (15 U.S.C. Sec. 15),  
30 arising from purchases of goods, services or materials pursuant to the Contract  
31 Documents or any Subcontract. This assignment shall become automatically effective  
32 when ADOT tenders Final D&C Payment to Developer, without further documentation or  
33 acknowledgment by the Parties.  
34

**ARTICLE 7.**  
**TIME; NOTICES TO PROCEED; PROJECT SCHEDULE AND PROGRESS**

**7.1 Time of Essence**

As a material consideration for entering into this Agreement, Developer hereby commits, and ADOT is relying upon Developer's commitment, to develop the Project in accordance with the time periods set forth in this Agreement. Except where this Agreement expressly provides for an extension of time, the time limitations set forth in the Contract Documents for Developer's performance of its covenants, conditions and obligations are of the essence, and Developer waives any right at law or in equity to tender or complete performance beyond the applicable time period, or to require ADOT to accept such performance.

**7.2 Notices to Proceed**

Authorization allowing Developer to proceed with Work shall be provided through ADOT's issuance of NTPs. Developer acknowledges and agrees that ADOT has no obligation to issue an NTP under this Agreement, and further agrees that unless and until ADOT issues NTP 1 ADOT will have no liability to Developer under this Agreement except as provided otherwise in Section 24.5.1. Developer further acknowledges and agrees that ADOT's liability under this Agreement shall be limited to payment owing for Work authorized under NTPs actually issued. Refer to Sections 14.4.11, 14.4.12 and 14.4.13 regarding Price adjustments to be made for certain delays in issuance of NTP 2 or NTP 3, and to Section 24.5 regarding Developer's right to terminate and termination compensation for certain delays in issuance of NTP 1 or NTP 2.

**7.3 Issuance of NTP 1**

ADOT anticipates issuing NTP 1 concurrently with execution and delivery of this Agreement. Issuance of NTP 1 authorizes Developer to do only the following:

(a) Mobilize, and establish the Project collocation office;

(b) Prepare or continue preparing any or all component parts, plans and documentation of the Project Management Plan relevant to the D&C Work, including: (i) a Quality Management Plan (e.g., for general requirements, Professional Services and Construction Work components); and (ii) a Public Involvement Plan;

(c) Prepare the ROW Activity Plan, Environmental Management Plan, Safety Management Plan and Transportation Management Plan;

(d) Prepare the detailed, resource and cost loaded Project Baseline Schedule;

(e) Prepare the Segments Limit Map;

(f) Prepare the Submittal Schedule;

- 1 (g) Prepare a Schedule of Values for pre-NTP 2 Design Work;
- 2 (h) Prepare the final DBE Utilization Plan;
- 3 (i) Prepare the final OJT Utilization Plan;
- 4 (j) Enter the Project ROW owned or in the possession of ADOT in order to  
5 conduct surveys and site investigations, including geotechnical, Hazardous Materials  
6 and Utilities investigations, provided that Developer (i) shall not conduct any ground-  
7 disturbing activities in the Center Segment, and (ii) shall not conduct any ground-  
8 disturbing activities within or outside other areas of the Schematic ROW until ADOT has  
9 completed its cultural resource investigations and has received and approved, as  
10 provided in the Technical Provisions, the Environmental Management Plan, Public  
11 Involvement Plan, Safety Management Plan, Site Documentation, Storm Water  
12 Pollution Prevention Plan, and Noxious Species Control Plan;
- 13 (k) Commence ROW Services (but only after ADOT approves the ROW  
14 Activity Plan);
- 15 (l) Commence negotiating with the Union Pacific Railroad; and
- 16 (m) Commence negotiating Utility Agreements with Utility Companies;
- 17 (n) At Developer's option, commence Design Work, provided that (i) ADOT  
18 will not pay for or commence review of Design Documents until Developer satisfies all  
19 conditions precedent set forth in Section 7.5, and (ii) ADOT's payment for Design Work  
20 prior to NTP 2 is subject to a cap of \$10,000,000; and
- 21 (o) Prepare the ITS Inventory described in Section DR 466.2.3 of the  
22 Technical Provisions.

## 23 **7.4 Issuance of NTP 2**

24 **7.4.1** ADOT anticipates issuing NTP 2 when all of the following conditions  
25 have been satisfied:

26 (a) If applicable under this Agreement, the Guarantees in favor of  
27 ADOT required under Section 10.4 have been executed, obtained and delivered to  
28 ADOT and are in full force and effect;

29 (b) All insurance policies required under Article 11 have been  
30 obtained and are in full force and effect, and Developer has delivered to ADOT written  
31 binding verifications of coverage from the relevant issuers of such insurance policies;

32 (c) Developer has developed and delivered to ADOT and ADOT  
33 has approved, in accordance with Section 3.4, the component parts, plans and  
34 documentation of the Project Management Plan designated "Required Prior to NTP 2" in  
35 Table 110-5 of Section GP 110.03 of the Technical Provisions;

- 1 (d) ADOT has approved the ROW Activity Plan;
- 2 (e) Developer has delivered to ADOT the Transportation  
3 Management Plan and all ADOT comments thereon have been resolved;
- 4 (f) ADOT has approved the Final Collocated Office Plan;
- 5 (g) ADOT has approved the Network Administration Plan;
- 6 (h) ADOT has approved the Site Documentation;
- 7 (i) ADOT has approved the detailed, resource and cost loaded  
8 Project Baseline Schedule;
- 9 (j) ADOT has approved the Segments Limit Map;
- 10 (k) ADOT has approved the Submittal Schedule;
- 11 (l) ADOT has approved the Basis of Design Report;
- 12 (m) ADOT has approved the final DBE Utilization Plan;
- 13 (n) All representations and warranties of Developer set forth in  
14 Section 2.3 shall be and remain true and correct in all material respects;
- 15 (o) There exists no uncured Developer Default for which Developer  
16 has received written notice from ADOT; and
- 17 (p) Developer has satisfied any other requirements or conditions for  
18 commencing Design Work or any other Work authorized by NTP 2 set forth in the  
19 Technical Provisions.

20 **7.4.2** Subject to the conditions set forth in Section 7.9, issuance of NTP 2  
21 authorizes Developer to perform D&C Work not authorized under Section 7.3 (i.e.,  
22 issuance of NTP 1), and related activities pertaining to the Project, except for  
23 Construction Work and other ground disturbing activities in the Center Segment.

## 24 **7.5 Conditions to Design Work Review and Payment**

25 **7.5.1** Notwithstanding any contrary provision of Sections 3.1.2, ADOT will  
26 have no obligation to commence its review of, or pay Developer for, any Design Work  
27 until all of the following conditions precedent have been satisfied:

- 28 (a) ADOT has issued NTP 1; and
- 29 (b) ADOT has received and approved, as provided in the Technical  
30 Provisions, the Quality Management Plan (general requirements and Professional  
31 Services), final DBE Utilization Plan, a Submittal Schedule covering the first six months

1 after the Effective Date, a Schedule of Values for the first six months of pre-NTP 2  
2 Design Work, and the Basis of Design Report.

3 **7.5.2** ADOT may reject, without review, any Design Document submitted to  
4 ADOT before the date such conditions precedent are satisfied. All time periods  
5 available to ADOT for review or approval of any Design Document submitted to ADOT  
6 before such date shall begin to run on such date and shall be subject to Section 3.1.2.3.

## 7 **7.6 Conditions to Commencement of Construction**

### 8 **7.6.1 Construction Work Generally**

9 Except to the extent expressly permitted in writing by ADOT, in ADOT's sole  
10 discretion, Developer shall not commence or permit or suffer commencement of  
11 construction of the Project or applicable portion thereof until ADOT issues NTP 2 and all  
12 of the following conditions have been satisfied:

13 (a) All Governmental Approvals necessary to begin Construction  
14 Work in the applicable portion of the Project have been obtained, and Developer has  
15 furnished to ADOT fully executed copies of such Governmental Approvals;

16 (b) ADOT has (i) obtained an order for immediate possession,  
17 (ii) closed the acquisition of the parcel, or (iii) otherwise obtained permanent right of  
18 entry through settlement, negotiation, the condemnation process or otherwise for  
19 Project ROW necessary to commence construction of the applicable portion of the  
20 Project;

21 (c) Developer has satisfied for the applicable portion of the Project  
22 all applicable pre-construction requirements contained in the Environmental Approvals  
23 and other Governmental Approvals;

24 (d) Developer has caused to be developed and delivered to ADOT  
25 and ADOT has approved, in accordance with Section 3.4, the component parts, plans  
26 and documentation of the Project Management Plan designated as "Required Prior to  
27 NTP 2" in Table 110-5 of Section GP 110.03 of the Technical Provisions;

28 (e) ADOT has approved the final OJT Utilization Plan;

29 (f) Developer has submitted to ADOT an OJT Schedule containing  
30 all the information specified in Section 7.0 of the OJT Special Provisions;

31 (g) Developer has delivered to ADOT all Submittals relating to the  
32 applicable Construction Work required by the Project Management Plan or Contract  
33 Documents, in the form and content required by the Project Management Plan or  
34 Contract Documents;

35 (h) Developer has adopted written policies establishing ethical  
36 standards of conduct for all Developer-Related Entities, including Developer's

1 supervisory and management personnel in dealing with (i) ADOT and the General  
2 Engineering Consultant and (ii) employment relations, in accordance with Section 9.9;  
3 and

4 (i) Developer has provided to ADOT at least ten days advance  
5 written notification of the date Developer determines that it will satisfy all of the  
6 conditions set forth in this Section 7.6.1.

### 7 **7.6.2 ITS Improvements**

8 ADOT anticipates it will require Developer to construct certain ITS improvements  
9 identified in the ITS Inventory as one or more ADOT-Directed Changes. Accordingly,  
10 Developer shall not commence or permit or suffer commencement of construction of  
11 ITS improvements identified by Developer in the ITS Inventory, until ADOT issues a  
12 corresponding Supplemental Agreement or Directive Letter therefor, pursuant to  
13 Article 15. Developer's entitlement to additional compensation and Completion  
14 Deadline adjustment, if any, for such Work shall be as set forth in Section 14.4.10.

### 15 **7.6.3 Utility Adjustments**

16 Developer shall not commence or permit or suffer commencement of  
17 construction of a Utility Adjustment included in the Construction Work until ADOT issues  
18 NTP 2, all of the conditions set forth in Section 7.6.1 that are applicable to the Utility  
19 Adjustment (reading such provisions as if they referred to the Utility Adjustment) have  
20 been satisfied, and the following additional requirements have been satisfied:

21 (a) Except as otherwise provided in Section 5.10.7.4, the Utility  
22 Adjustment is covered by an executed Utility Agreement;

23 (b) Developer has submitted to ADOT the Submittals described in  
24 Sections DR 430 and CR 430 of the Technical Provisions covering the Utility  
25 Adjustment ; and

26 (c) Developer has obtained ADOT review and approval of any other  
27 matters respecting the Utility Adjustment that are required under any applicable federal  
28 requirements.

### 29 **7.6.4 Center Segment**

30 Developer shall not commence or permit or suffer commencement of any  
31 ground- disturbing activity or Construction Work within the Center Segment until ADOT  
32 issues NTP 3, as set forth in Section 7.7.

## 33 **7.7 Issuance of NTP 3**

34 ADOT anticipates issuing NTP 3 during the NTP 3 Window. Issuance of NTP 3  
35 authorizes Developer to perform all Construction Work and other ground-disturbing  
36 activities in the Center Segment.

1 **7.8 Issuance of Maintenance NTP**

2 ADOT anticipates issuing Maintenance NTP upon Developer’s satisfaction of the  
3 conditions precedent to Substantial Completion set forth in Section 6.6.1 (including  
4 satisfaction of the Maintenance Services Conditions Precedent) and ADOT’s issuance  
5 of the written certificate of Substantial Completion also described in Section 6.6.1.

6 **7.9 Completion Deadlines**

7 **7.9.1 Substantial Completion Deadline**

8 Developer shall achieve Substantial Completion of the Project not later than the  
9 Substantial Completion Deadline.

10 **7.9.2 Final Acceptance Deadline**

11 Developer shall achieve Final Acceptance of the Project not later than the Final  
12 Acceptance Deadline.

13 **7.9.3 No Completion Deadline Adjustment**

14 Except as otherwise specifically provided in Article 15, ADOT will have no  
15 obligation to adjust a Completion Deadline and Developer shall not be relieved of its  
16 obligation to comply with the Project Schedule and to achieve Substantial Completion  
17 and Final Acceptance of the Project by the applicable Completion Deadlines for any  
18 reason.

19 **7.10 Scheduling of Design, Construction and Payment**

20 **7.10.1 Project Schedule**

21 The Work shall be undertaken and completed in accordance with the Project  
22 Schedule prepared in conformance with Section GP 110.06 of the Technical Provisions.  
23 The Project Schedule shall be used by the Parties for planning and monitoring the  
24 progress of the Work and as the basis for determining the amount of monthly progress  
25 payments to be made to Developer.

26 **7.10.2 Float**

27 All Float contained in the Project Schedule, as shown in the initial Project  
28 Baseline Schedule or as generated thereafter, shall be a shared, jointly owned Project  
29 resource available to either Party or both Parties as needed to absorb delay caused by  
30 Relief Events or any other event, achieve schedule milestones, interim completion dates  
31 and Completion Deadlines. All Float and corresponding Controlling Work Items shall be  
32 shown as such in the Project Schedule on each affected schedule path. ADOT will  
33 have the right to examine the identification of (or failure to identify) Float and Controlling  
34 Work Items on the Project Schedule in determining whether to approve the Project

1 Schedule. Once identified, Developer shall monitor, account for and maintain Float in  
2 accordance with critical path methodology.

3 **7.10.3 Progress Payment Scheduling**

4 The Project Schedule shall provide for payment of the D&C Price to be made  
5 solely on the basis of progress by Developer, subject to the cap on cumulative  
6 payments of the D&C Price equal to the then applicable Maximum Allowable  
7 Cumulative Draw.

8 **7.11 Recovery Schedule**

9 **7.11.1** If at any time, the Work on any Critical Path item is delayed for a  
10 period that exceeds the time set forth in Section GP 110.06.2.10 of the Technical  
11 Provisions (including delays for which Developer may be entitled to a Completion  
12 Deadline adjustment under Article 14), then Developer shall prepare and submit to  
13 ADOT for review and approval a Recovery Schedule meeting the requirements set forth  
14 in Section GP 110.06.2.10 of the Technical Provisions.

15 **7.11.2** All costs incurred by Developer in preparing, implementing and  
16 achieving the Recovery Schedule shall be borne by Developer and shall not result in a  
17 change to the Price.

18 **7.11.3** If Developer fails to provide an acceptable Recovery Schedule as  
19 required herein and in Section GP 110.05.2.10, then, in addition to any other rights and  
20 remedies in favor of ADOT arising out of such failure, ADOT will have the right to  
21 withhold 20% of progress payments until such time as Developer has prepared and  
22 ADOT has approved such Recovery Schedule. Any failure or delay in the submittal or  
23 approval of a Recovery Schedule shall not result in any Completion Deadline  
24 adjustment under the Contract Documents.  
25

**ARTICLE 8.**  
**MAINTENANCE SERVICES**

**8.1 General**

**8.1.1 General Obligations**

**8.1.1.1** Throughout the Maintenance Period, Developer shall be responsible for performing Maintenance Services, including Capital Asset Replacement Work, within the Maintenance Services Limits. In addition, Developer shall be responsible for complying with the Handback Requirements for the Project. All costs associated with providing the Maintenance Services are included in the Maintenance Price set forth in Exhibits 2-4.3, 2-4.4, and 2-4.5, as such may be adjusted in accordance with Section 13.5.4.

**8.1.1.2** At all times during the Maintenance Period, Developer shall carry out the Maintenance Services in accordance with:

(a) Good Industry Practice, as it evolves from time to time;

(b) The requirements, terms and conditions set forth in the Contract Documents, as the same may change from time to time;

(c) All Laws;

(d) The requirements, terms and conditions set forth in all Governmental Approvals;

(e) The approved Project Management Plan and all component parts, plans and documentation prepared or to be prepared thereunder, and all approved updates and amendments thereof;

(f) The approved Maintenance Management Plan, and all approved updates and amendments thereof;

(g) The approved Maintenance Quality Management Plan;

(h) Best Management Practices;

(i) The Safety Management Plan; and

(j) All other applicable safety, environmental and other requirements, taking into account the Project ROW limits and other constraints affecting the Project.

1                   **8.1.1.3** If Developer encounters a contradiction between  
2 subsections (a) through (j) above, Developer shall advise ADOT of the contradiction and  
3 ADOT will instruct Developer as to which subsection shall control in that instance. No  
4 such instruction shall be construed as an ADOT-Directed Change. Developer is  
5 responsible for keeping itself informed of and applying current Good Industry Practice.

6                   **8.1.1.4** At all times during the Maintenance Period, Developer shall  
7 provide a Maintenance Manager approved by ADOT who: (a) will have full responsibility  
8 for the prosecution of the Work; (b) will act as agent and be a single point of contact in  
9 all matters on behalf of Developer; and (c) will be available to respond to ADOT or  
10 ADOT's Authorized Representatives.

11                   **8.1.1.5** At its sole cost and expense, unless expressly provided  
12 otherwise in this Agreement, Developer shall comply with all of Section D of the  
13 Technical Provisions ("Maintenance Requirements") during the Maintenance Period.  
14 The Maintenance Table sets forth minimum performance requirements related to the  
15 Maintenance Services. Developer's failure to comply with such requirements shall  
16 entitle ADOT to the rights and remedies set forth in the Contract Documents, including  
17 the assessment of Liquidated Damages, deductions from payments otherwise owed to  
18 Developer, and termination for uncured Developer Default.

19                   **8.1.1.6** In addition to performing all other requirements of the  
20 Contract Documents, Developer shall cooperate with ADOT and Governmental Entities  
21 with jurisdiction in all matters relating to the Maintenance Services, including their  
22 review, inspection and oversight of the maintenance of the Project.

23                   **8.1.2 Changes in Performance and Maintenance Standards;**  
24 **Discriminatory and Non-Discriminatory Maintenance Changes**

25                   **8.1.2.1** ADOT will have the right to adopt at any time, and Developer  
26 acknowledges it must comply with, all Discriminatory Maintenance Changes and Non-  
27 Discriminatory Maintenance Changes. Refer to Article 14 for Developer's rights to  
28 compensation regarding Discriminatory Maintenance Changes and Non-Discriminatory  
29 Maintenance Changes. ADOT will provide Developer with prompt notice of  
30 Discriminatory Maintenance Changes and Non-Discriminatory Maintenance Changes.  
31 Without limiting the foregoing, the Parties anticipate that from time to time after the  
32 Proposal Due Date, ADOT will adopt Non-Discriminatory Maintenance Changes. ADOT  
33 will have the right in its discretion to add Discriminatory Maintenance Changes and Non-  
34 Discriminatory Maintenance Changes to the Technical Provisions by notice to  
35 Developer, whereupon they shall constitute amendments, and become part, of the  
36 Technical Provisions and replace and supersede inconsistent provisions of the  
37 Technical Provisions. ADOT will identify the superseded provisions in its notice to  
38 Developer.

39                   **8.1.2.2** If compliance with a Non-Discriminatory Maintenance  
40 Change requires major repair, reconstruction, rehabilitation, restoration, renewal or

1 replacement of any Element, the following requirements shall apply with respect to such  
2 Work:

3 (a) If ADOT adopts the Non-Discriminatory Maintenance  
4 Change on or after the Substantial Completion Date, Developer shall commence such  
5 Work not later than the first to occur of:

6 (i) the date when Developer next performs Capital  
7 Asset Replacement Work on such Element;

8 (ii) the date when Developer is first obligated to  
9 perform Capital Asset Replacement Work on such Element; or

10 (iii) provided ADOT gives no less than 30 days'  
11 prior notice to Developer, the date on which ADOT commences actions to implement  
12 the Non-Discriminatory Maintenance Change on any Comparable Facility that ADOT  
13 manages or operates, or such other date as may be determined under Section 8.1.2.7.

14 (b) If ADOT adopts the Non-Discriminatory Maintenance  
15 Change before the Substantial Completion Date, ADOT will issue a notice informing  
16 Developer when to commence and complete such Work.

17 (c) Following commencement of such Work, Developer  
18 shall diligently prosecute the Work to comply with the Non-Discriminatory Maintenance  
19 Change until completion, and in any event by any deadline for completion reasonably  
20 required by ADOT for such Work, so long as such deadline is based on the period of  
21 time necessary to complete work of a similar scale, complexity and size.

22 (d) Should Developer dispute the timing for  
23 commencement or completion of such Work, Developer may submit the Dispute for  
24 resolution according to the Dispute Resolution Procedures; provided, however, that  
25 pending such resolution Developer shall prosecute the Work in accordance with  
26 ADOT's direction.

27 **8.1.2.3** If compliance with a Non-Discriminatory Maintenance  
28 Change requires construction or installation of new improvements at, for, or, on the  
29 Project (and not major repair reconstruction, etc. of existing improvements, governed by  
30 Section 8.1.2.2), Developer shall complete construction and installation of the new  
31 improvements according to the implementation period reasonably required by ADOT for  
32 such Non-Discriminatory Maintenance Change. Should Developer dispute the timing  
33 for commencement or completion of such new improvements, Developer may submit  
34 the issue for resolution according to the Dispute Resolution Procedures; pending such  
35 resolution Developer shall diligently prosecute the Work in accordance with ADOT's  
36 direction.

37 **8.1.2.4** Developer shall implement a Discriminatory Maintenance  
38 Change only after ADOT issues a Supplemental Agreement or Directive Letter therefor  
39 pursuant to Article 15. If a Discriminatory Maintenance Change requires major repair,

1 reconstruction, rehabilitation, restoration, renewal or replacement of any Element during  
2 the Maintenance Period, or requires construction or installation of new improvements,  
3 Developer shall perform the major repair, reconstruction, rehabilitation, restoration,  
4 renewal or replacement or the new improvement work according to the schedule  
5 therefor adopted in the Supplemental Agreement for such work. If a Discriminatory  
6 Maintenance Change requires implementation not entailing such work, Developer shall  
7 implement it from and after the date ADOT issues the Supplemental Agreement.

8 **8.1.2.5** In the case of any other Discriminatory Maintenance Change  
9 or Non-Discriminatory Maintenance Change, Developer shall comply from and after the  
10 date it becomes effective and Developer is notified by ADOT. For the avoidance of  
11 doubt, if Developer has notice or knows of the Discriminatory Maintenance Change or  
12 Non-Discriminatory Maintenance Change on or prior to the date Developer commences  
13 maintenance, routine repair or routine replacement of damaged, worn or obsolete  
14 components or materials of the Project, then Developer shall comply with such  
15 changes, additions or replacements in carrying out such maintenance, routine repair or  
16 replacement.

17 **8.1.2.6** Developer may apply for ADOT approval of Deviations from  
18 applicable Technical Provisions regarding Maintenance Services. All applications shall  
19 be in writing. Where Developer requests a Deviation as part of the submittal of a  
20 component plan of the Project Management Plan, Developer shall specifically identify  
21 and label the Deviation. ADOT will consider in its sole discretion, but have no obligation  
22 to approve, any such application, and Developer shall bear the burden of persuading  
23 ADOT that the Deviation sought constitutes sound and safe practices consistent with  
24 Good Industry Practice and achieves or substantially achieves ADOT's applicable  
25 safety requirements. No Deviation shall be deemed approved or be effective unless  
26 and until stated in a writing signed by ADOT's Authorized Representative. ADOT's  
27 affirmative written approval of a component plan of the Maintenance Management Plan  
28 shall constitute: (a) approval of the Deviations expressly identified and labeled as  
29 Deviations therein, unless ADOT takes exception to any such Deviation; and  
30 (b) disapproval of any Deviations not expressly identified and labeled as Deviations  
31 therein. ADOT's lack of issuance of a written Deviation within ten Business Days after  
32 Developer applies therefor in writing shall be deemed a disapproval of such application.  
33 ADOT's denial or disapproval of a requested Deviation shall be final and not subject to  
34 the Dispute Resolution Procedures. ADOT may elect to process the application as a  
35 Change Request under Article 15 rather than as an application for a Deviation.

36 **8.1.2.7** For purposes of Section 8.1.2.2(a)(iii), Developer shall not  
37 be entitled to delay commencement or completion of its work on grounds that ADOT is  
38 delayed in commencing or completing implementing actions on Comparable Facilities  
39 where:

40 (a) ADOT is delayed due to the extensive system of  
41 Comparable Facilities for which ADOT is responsible; or

1 (b) The corresponding change, addition or replacement  
2 to the Technical Provisions applies only upon the occurrence of a condition or  
3 circumstance that has not yet occurred in respect of a Comparable Facility that ADOT  
4 manages or operates.

### 5 8.1.3 Safety and Security

#### 6 8.1.3.1 Safety

7 Developer shall perform the Maintenance Services in a manner that gives  
8 prime importance to the safety of the public, convenience of the traveling public, and a  
9 safe work environment for all maintenance workers. Developer shall perform its traffic  
10 control and operations in accordance with the Contract Documents, including this  
11 Section 8.1.

#### 12 8.1.3.2 Policing

13 (a) Developer acknowledges that the Arizona Department  
14 of Public Safety, the City of Phoenix Police Department and Maricopa County Sheriff's  
15 Department are empowered to enforce all applicable Laws and to enter the Project and  
16 Project ROW at any and all times to carry out their law enforcement duties. No  
17 provision of this Agreement is intended to surrender, waive or limit any police powers of  
18 the Arizona Department of Public Safety, the City of Phoenix Police Department and  
19 Maricopa County Sheriff's Department or any other Governmental Entity, and all such  
20 police powers are hereby expressly reserved.

21 (b) ADOT will not have any liability or obligation to  
22 Developer resulting from, arising out of or relating to the failure of the Arizona  
23 Department of Public Safety, the City of Phoenix Police Department and Maricopa  
24 County Sheriff's Department or any other public law enforcement agency to provide  
25 services, or its negligence or misconduct in providing services.

26 (c) ADOT and third parties with responsibility for traffic  
27 regulation and enforcement shall have the right to install, operate, maintain and replace  
28 cameras or other equipment on the Project that relate to traffic regulation or  
29 enforcement. Developer shall coordinate and cooperate, and require its Subcontractors  
30 to coordinate and cooperate, with any such installation, maintenance and replacement  
31 activities.

#### 32 8.1.3.3 Security and Incident and Emergency Response

33 (a) Developer is responsible for the safety and security of  
34 the Project, Developer-Related Entity personnel and the general public during all  
35 maintenance activities under the control of any Developer-Related Entity.

36 (b) Developer shall comply with all applicable Laws and  
37 all rules, directives and guidance of the U.S. Department of Homeland Security and  
38 comparable State agency. Developer shall coordinate and cooperate with all

1 Governmental Entities providing security, first responder and other public emergency  
2 response services.

3 (c) Developer shall perform and comply with the  
4 provisions of Section D of the Technical Provisions (“Maintenance Requirements”)  
5 concerning Incident and Emergency response, safety and security.

6 **8.1.4 Duration of Hazardous Materials Management**

7 The provisions of Section 6.8 regarding Hazardous Materials Management that  
8 are not specific to the original construction of the Project shall apply throughout the  
9 Maintenance Period.

10 **8.1.5 Utility Accommodation**

11 **8.1.5.1** It is anticipated that from time to time during the course of  
12 the Maintenance Period, Utility Companies will apply for additional utility permits to  
13 install new Utilities that would cross or longitudinally occupy the Project ROW, or to  
14 modify, repair, upgrade, relocate or expand existing Utilities within the Project ROW. In  
15 such circumstances, the provisions of Section 5.10.7 shall apply.

16 **8.1.5.2** Throughout the Maintenance Period, Developer shall  
17 monitor Utilities and Utility Companies within the Maintenance Services Limits, for  
18 compliance with applicable utility permits, Utility Agreements and applicable Laws, and  
19 shall use diligent efforts to obtain the cooperation of each Utility Company having  
20 Utilities within the Maintenance Services Limits. If (a) Developer reasonably believes  
21 that any Utility Company is not complying with the terms of a utility permit, Utility  
22 Agreement or applicable Law affecting a Utility within the Maintenance Services Limits,  
23 or (b) any other dispute arises between Developer and a Utility Company with respect to  
24 a Utility within the Maintenance Services Limits, despite Developer having exercised its  
25 diligent efforts to obtain the Utility Company’s cooperation, Developer shall promptly  
26 provide notice to ADOT, and ADOT and Developer shall work together in the manner  
27 described in Section 5.9.7; provided, however, that the “conditions to assistance” (as  
28 that term is used in Section 5.9.7) are that Developer shall provide evidence reasonably  
29 satisfactory to ADOT that (i) Developer’s position in the dispute is reasonable, (ii)  
30 Developer has made diligent efforts to obtain the Utility Company’s cooperation, and (iii)  
31 the Utility Company is not cooperating.

32 **8.1.6 Accommodation of Third-Party Signage and Lighting**

33 **8.1.6.1** In addition to the warning, regulatory, and guide signs within  
34 the Maintenance Services Limits, Developer shall accommodate within the Maintenance  
35 Services Limits third-party signs, including logo type signs and “Adopt a Highway” signs.  
36 Developer shall coordinate and cooperate with any third party performing such work.  
37 Developer shall review with ADOT all third-party requests for new signs in the  
38 Maintenance Services Limits. Such requests are subject to ADOT’s approval. ADOT  
39 may solicit input from Developer in reviewing applications for new third-party signs, but  
40 will retain sole authority for approving installation of these signs. All costs associated

1 with fabricating and installing third-party signs shall be borne by the sign applicant.  
2 ADOT may require Developer to fabricate or install any of these signs as an ADOT-  
3 Directed Change. Developer shall not be responsible for maintenance of third-party  
4 signs.

5 **8.1.6.2** All third-party requests for lighting within the Project ROW  
6 shall be subject to ADOT approval, and ADOT retains sole authority for approving  
7 installation of such lighting. Developer shall not be responsible for maintenance of such  
8 lighting.

9 **8.1.7 Updates of Record Drawings**

10 Within 30 days after undertaking any Maintenance Services that result in a  
11 significant change to the design or construction of the Project, Developer shall update  
12 the Record Drawings to reflect such change.

13 **8.2 Frontage Roads and Crossroads**

14 **8.2.1** ADOT will be solely responsible, at its expense, for handling requests  
15 and permitting for adjacent property access to frontage roads and crossroads within the  
16 Maintenance Services Limits. Nothing in the Contract Documents shall restrict ADOT  
17 from granting access permits or determining the terms and conditions of such permits.  
18 ADOT will keep Developer regularly informed of access permit applications and will  
19 deliver to Developer a copy of each issued access permit within five days after it is  
20 issued.

21 **8.2.2** Developer shall have no claim for any increase in the Price or other  
22 compensation by reason of ADOT's grant of access permits, the terms and conditions  
23 thereof, the improvements made by, or other actions of permit holders or their  
24 employees, agents, representatives and invitees. For clarity, this provision does not:  
25 (a) require Developer to pay for the permit holder's improvements; or (b) preclude  
26 Developer from pursuing claims against the permit holder for damage to the Project  
27 caused by the permit holder.

28 **8.2.3** Developer at its expense shall cooperate and coordinate with permit  
29 holders to enable the permit holders to safely construct and utilize improvements  
30 allowed under their access permits.

31 **8.3 Capital Asset Replacement Work**

32 **8.3.1 General Requirements**

33 **8.3.1.1** Developer shall diligently perform and complete Capital  
34 Asset Replacement Work when required by the Capital Asset Replacement Work Plan  
35 (including the Capital Asset Replacement Work Schedule) and updates thereto  
36 approved by ADOT, or by the Handback Plan and updates thereto approved by ADOT,  
37 including adjustments and changes thereto resulting from Inspections and Specialty  
38 Inspections. Developer shall perform and complete any Capital Asset Replacement

1 Work required at any earlier time in order to comply with the standards triggering Capital  
2 Asset Replacement Work set forth in Section MR 400.3.6 of the Technical Provisions.

3 **8.3.1.2** Developer shall deliver to ADOT a written report of the  
4 Capital Asset Replacement Work performed in the immediately preceding year as part  
5 of the annual report of Maintenance Services required under Section MR 400.3.4 of the  
6 Technical Provisions. The report shall describe: (a) by location, the Element, as listed  
7 in the Capital Asset Replacement Work Plan or Handback Plan, for which Capital Asset  
8 Replacement Work was performed; (b) the type of Capital Asset Replacement Work  
9 performed; (c) each specific item replaced; (d) any warranty information associated with  
10 any replacement item; (e) the dates of commencement and completion of such Capital  
11 Asset Replacement Work; and (f) such other information as is reasonably requested by  
12 ADOT.

13 **8.3.2 Capital Asset Replacement Work Plan**

14 **8.3.2.1** As part of the Maintenance Management Plan, Developer  
15 shall prepare and submit, for ADOT's review and approval in its good faith discretion, a  
16 Capital Asset Replacement Work Plan for all Capital Asset Replacement Work other  
17 than that to be addressed in the Handback Plan, which shall be prepared in accordance  
18 with Section 400.2.1.2 of the Technical Provisions.

19 **8.3.2.2** As part of the Capital Asset Replacement Work Plan,  
20 Developer shall prepare and submit, for ADOT's review and approval in its good faith  
21 discretion, a resource and cost loaded Capital Asset Replacement Work Schedule,  
22 which shall be prepared in accordance with and contain the same information as  
23 required under Section 110.06.2 of the Technical Provisions pertaining to the Project  
24 Baseline Schedule.

25 **8.3.2.3** Developer shall estimate the Remaining Useful Life of each  
26 Element within the Capital Asset Replacement Work Plan based on:

27 (a) Surveillance and Inspections required under Section  
28 D, Maintenance Requirements, of the Technical Provisions;

29 (b) The applicable standard for triggering Capital Asset  
30 Replacement Work set forth in Section MR 400.3.6 of the Technical Provisions;

31 (c) The age of the Element since its initial construction or  
32 its last Capital Asset Replacement Work;

33 (d) Developer's analysis of the condition of the Element  
34 and how the Element has performed in service over time;

35 (e) Developer's reasonable expectations respecting the  
36 manner of use, levels and mix of traffic, environmental conditions, and wear and tear;  
37 and

1 (f) Developer’s reasonable expectations regarding future  
2 condition and performance of the Element given the foregoing factors.

3 **8.3.2.4** Once every two years, as part of the annual revision to the  
4 Maintenance Management Plan pursuant to Section 400.2.1.2 of the Technical  
5 Provisions and until Developer prepares the Handback Plan, Developer shall prepare  
6 and submit, for ADOT’s review and approval in its good faith discretion, either: (a) a  
7 revised Capital Asset Replacement Work Plan for the upcoming two years, including a  
8 revised Capital Asset Replacement Work Schedule; or (b) the then-existing Capital  
9 Asset Replacement Work Plan, accompanied by a written statement that Developer  
10 intends to continue in effect the then-existing Capital Asset Replacement Work Plan  
11 without revision for the upcoming two years (in either case, referred to as the “updated  
12 Capital Asset Replacement Work Plan”). Developer shall make revisions as reasonably  
13 indicated by experience and then-existing conditions respecting the subject Elements,  
14 the most recent Asset Condition Score Table for each Auditable Section, changes in  
15 technology, changes in Developer’s planned means and methods of performing Capital  
16 Asset Replacement Work, and other relevant factors.

17 **8.3.2.5** If an update contemplates performance of Capital Asset  
18 Replacement Work before the next update, it shall include:

19 (a) Elements and locations to be replaced as a part of the  
20 planned Capital Asset Replacement Work;

21 (b) A construction schedule and construction execution  
22 plan for the planned Capital Asset Replacement Work;

23 (c) A comparison of the planned timing, scope and cost  
24 of the Capital Asset Replacement Work to the timing, scope and cost assumed in the  
25 Capital Asset Replacement Work Breakdown (Exhibit 2-4.5); and

26 (d) A summary of the Maintenance Services performed  
27 and service history (such as repairs or refurbishment that has occurred over the life of  
28 the Element) for each identified Element.

29 **8.3.2.6** At the annual maintenance meeting following ADOT’s receipt  
30 of the updated Capital Asset Replacement Work Plan, ADOT and Developer shall  
31 discuss ADOT’s comments, questions, revisions and clarifications. Within 15 days after  
32 such meeting, Developer shall resubmit the updated Capital Asset Replacement Work  
33 Plan to ADOT. ADOT will either approve or disapprove, in its good faith discretion, the  
34 updated Capital Asset Replacement Work Plan within 15 days, with comments,  
35 objections, recommendations or disapprovals noted in writing. If ADOT disapproves the  
36 updated Capital Asset Replacement Work Plan, within ten days after receiving written  
37 notice of comments, objections, recommendations or disapprovals from ADOT,  
38 Developer shall submit to ADOT a revised updated Capital Asset Replacement Work  
39 Plan rectifying such matters and, for matters with which Developer disagrees, a written  
40 notice setting forth those comments, objections, recommendations and disapprovals

1 that Developer disputes, which notice shall give details of Developer's grounds for  
2 dispute. If Developer fails to give such notice within such time period, it shall be  
3 deemed to have accepted the comments, objections and recommendations and the  
4 updated Capital Asset Replacement Work Plan shall thereupon be deemed revised to  
5 incorporate the comments and recommendations and to rectify the objections or  
6 disapprovals. After timely delivery of any dispute notice by Developer, Developer and  
7 ADOT will endeavor in good faith to reach agreement as to the matters listed in the  
8 notice. If no agreement is reached as to any such matter within 30 days after Developer  
9 delivers its notice, either Party may refer the Dispute to the Disputes Resolution  
10 Procedures.

11 **8.3.2.7** All portions of the updated Capital Asset Replacement Work  
12 Plan that have been agreed to by the Parties shall govern. Until resolution of any  
13 portion of the updated Capital Asset Replacement Work Plan that is in Dispute, the  
14 treatment of that portion in the immediately preceding approved Capital Asset  
15 Replacement Work Plan shall remain in effect and govern.

## 16 **8.4 Traffic Management**

### 17 **8.4.1 Updated Transportation Management Plan**

18 Not later than 90 days before the start of any planned Capital Asset Replacement  
19 Work, Developer shall prepare and submit to ADOT, for ADOT's approval in its good  
20 faith discretion, an updated Transportation Management Plan meeting the requirements  
21 of Section 3.5.1. If, however, Developer believes an updated plan is not necessary to  
22 perform the planned Capital Asset Replacement Work, then, subject to ADOT's  
23 approval in its good faith discretion, Developer may perform such Work in accordance  
24 with the previously approved Transportation Management Plan.

### 25 **8.4.2 Traffic Control**

26 Not later than 30 days before the start of any Maintenance Services (including  
27 Routine Maintenance and Capital Asset Replacement Work) requiring full or partial  
28 Lane Closures, Developer shall prepare and submit to ADOT, for its review and  
29 comment, individual traffic control plans for such Work. Developer shall prepare the  
30 individual traffic control plans in accordance with the requirements set forth in  
31 Section DR 462.2 of the Technical Provisions and the applicable requirements of the  
32 Transportation Management Plan. Resolution of ADOT's comments on an individual  
33 traffic control plan and ADOT's approval of the timing of the corresponding full or partial  
34 Lane Closures are conditions precedent to commencement of the corresponding  
35 Maintenance Services. Developer shall implement the control plans to promote safe  
36 and efficient operation of the Project.

### 37 **8.4.3 Traffic Operation Restrictions**

38 **8.4.3.1** When performing Maintenance Services, Developer shall  
39 keep the number of Lane Closures to a minimum and shall keep each Lane Closure to  
40 the shortest time necessary for safe and efficient operations. The requirements for and

1 restrictions on Lane Closures are set forth in Section DR 462 of the Technical  
2 Provisions. If Developer violates such requirements and restrictions, Developer shall be  
3 subject to Liquidated Damages in accordance with Section 20.2.

4 **8.4.3.2** Should Emergencies occur during Developer’s performance  
5 of Maintenance Services, including vehicle accidents and structural failures, Developer  
6 shall take all actions necessary to open the roadway as soon as possible and shall  
7 repair any damage to the affected Elements.

8 **8.4.3.3** ADOT has the authority to deny a Lane Closure in the case  
9 of an Emergency, evacuation, a special event or any other public activities.

10 **8.4.3.4** ADOT will have at all times, without obligation or liability to  
11 Developer, the right to: (a) issue Directive Letters to Developer regarding traffic  
12 management and control (with which Developer shall comply), or directly assume traffic  
13 management and control of the Project during any period that the Project Director  
14 determines such action will be in the public interest as a result of an Emergency or  
15 natural disaster; and (b) provide on the Project, via message signs or other means  
16 consistent with Good Industry Practice, traveler and driver information, and other public  
17 information (e.g., Amber alerts).

18 **8.5 Lead Maintenance Firm Qualifications**

19 Each Lead Maintenance Firm (if any) shall have the expertise, qualifications,  
20 experience, competence, skills and know-how to perform the Maintenance Services and  
21 related obligations of Developer in accordance with this Agreement.

22 **8.6 Coordination of Maintenance with Other Parties**

23 **8.6.1** Developer recognizes and acknowledges that ADOT will control  
24 operations of the traffic signals, ITS and emergency response for the Project upon  
25 Substantial Completion.

26 **8.6.2** Developer is responsible for coordinating its Maintenance Services on  
27 or for the Project with ADOT’s operation of the Project. Developer and ADOT will  
28 cooperate and coordinate with respect to their respective responsibilities in order to  
29 minimize disruptions of traffic on the Project and ensure that such responsibilities are  
30 carried out in accordance with then-current maintenance standards and then-current  
31 traffic management standards, practices and procedures.

32 **8.6.3** No interference with or disruption of traffic because of activities on, or  
33 the management or condition of, any portion of the Project that is not included in the  
34 Maintenance Services Limits, and no failure by ADOT to meet ADOT’s standards,  
35 practices and procedures, shall entitle Developer to any Claim, Supplemental  
36 Agreement or relief from deductions to any Monthly Disbursement of the Maintenance  
37 Price; provided, however, that if Developer is prevented from implementing a Lane  
38 Closure to perform Maintenance Services that was previously approved by ADOT due  
39 solely to ADOT’s traffic management activities on any portion of the Project that is not

1 included in the Maintenance Services Limits, the applicable cure period for any resulting  
2 Noncompliance Event shall be extended if such Noncompliance Event is not reasonably  
3 capable of being cured within the applicable cure period. The extension shall be for a  
4 reasonable period of time under the circumstances, taking into account the scope of the  
5 efforts necessary to cure, the effect of ADOT's traffic management activities on  
6 Developer's ability to cure, availability of temporary remedial measures, and need for  
7 rapid action due to impact of the Noncompliance Event on safety or traffic movement.

8 **8.7 Developer Inspection, Testing and Reporting**

9 **8.7.1** Developer shall carry out Inspections and Specialty Inspections in  
10 accordance with the Technical Provisions, including Section GP 110.07 of the Technical  
11 Provisions and Section D, Maintenance Requirements, of the Technical Provisions, and  
12 the Project Management Plan. Developer shall use the results of Inspections and  
13 Specialty Inspections to develop and update its schedule for Maintenance Services, to  
14 maintain asset condition and service levels, and to develop programs of maintenance  
15 and Capital Asset Replacement Work to minimize the effect of Maintenance Services on  
16 members of the public. Developer shall deliver to ADOT not less than seven days' prior  
17 notice of any Inspection or Specialty Inspection. ADOT may attend and observe any  
18 Inspection or Specialty Inspection.

19 **8.7.2** Developer shall submit all reports relating to the Maintenance  
20 Services, including the Maintenance Services Annual Reports, in the form, with the  
21 content and within the time required under the Contract Documents.

22 **8.8 Routine Maintenance Activities**

23 The Maintenance Management Plan shall include Developer's plan for performing  
24 Routine Maintenance of all the assets shown in the Maintenance Table for the Term.  
25 The Maintenance Management Plan shall include the timing, frequencies, scope and  
26 nature of the Routine Maintenance activities to meet the Performance Requirements.

27 **8.9 Maintenance Management Plan**

28 **8.9.1** Developer shall submit to ADOT for review and comment a draft  
29 Maintenance Management Plan, including all supplementary and component plans,  
30 attachments and appendices thereto described in Section MR 400.2.1 of the Technical  
31 Provisions, not less than 90 days prior to the date set forth in the Project Schedule for  
32 Substantial Completion. ADOT will review and provide comments to Developer within  
33 30 days after receiving the draft Maintenance Management Plan.

34 **8.9.2** Not later than 40 days after ADOT's receipt of the draft Maintenance  
35 Management Plan, Developer and ADOT will mutually schedule a meeting to address  
36 comments. Developer shall resolve all comments to the satisfaction of ADOT and  
37 submit the final Maintenance Management Plan for ADOT's approval in its good faith  
38 discretion not less than 30 days prior to the date set forth in the Project Schedule for  
39 Substantial Completion. ADOT's approval of the final Maintenance Management Plan

1 shall be one of the Maintenance Services Conditions Precedent, as set forth in  
2 Section 6.6.3.

3 **8.9.3** Developer shall submit revisions to the Maintenance Management  
4 Plan, as required and not less than annually, prior to the annual maintenance meeting  
5 as described in Section MR 420.5.d of the Technical Provisions.

6 **8.10 Safety Compliance; Emergency Repair Work**

7 **8.10.1 Safety Compliance**

8 **8.10.1.1** ADOT is entitled from time to time to issue Safety  
9 Compliance Orders to Developer with respect to the Project to correct a specific safety  
10 condition or risk involving the Project that ADOT has reasonably determined exists  
11 through investigation or analysis.

12 **8.10.1.2** ADOT will use good faith efforts to inform Developer at the  
13 earliest practicable time of any circumstance or information relating to the Project that in  
14 ADOT's reasonable judgment is likely to result in a Safety Compliance Order. Except in  
15 the case of Emergency, ADOT will consult with Developer prior to issuing a Safety  
16 Compliance Order concerning the risk to public or worker safety, alternative compliance  
17 measures, cost impacts, and the availability of Developer resources to fund the Safety  
18 Compliance work.

19 **8.10.1.3** Subject to conducting such prior consultation (unless  
20 excused in the case of Emergency), ADOT may issue Safety Compliance Orders to  
21 Developer at any time from and after the Effective Date.

22 **8.10.1.4** Developer shall implement each Safety Compliance Order  
23 as expeditiously as reasonably possible following its issuance. Developer shall  
24 diligently prosecute the work necessary to achieve such Safety Compliance until  
25 completion. In no event shall Developer be entitled to claim that any Force Majeure  
26 Event relieves Developer from compliance with any Safety Compliance Order except  
27 where Developer's compliance with such Safety Compliance Order is delayed due to an  
28 ongoing Force Majeure Event and only so long as such Force Majeure Event is  
29 continuing.

30 **8.10.1.5** Issuance by ADOT of a Safety Compliance Order shall be  
31 deemed either a Discriminatory Maintenance Change or a Non-Discriminatory  
32 Maintenance Change, as applicable, and Developer shall be entitled to the  
33 corresponding additional compensation or Completion Deadline adjustment in  
34 accordance with the terms of Article 14; provided, however, that for any Safety  
35 Compliance Order that is caused by or arises out of any act or omission of a Developer-  
36 Related Entity, such Safety Compliance Order shall be completed by Developer at its  
37 sole cost and Developer shall not be entitled to any additional compensation or  
38 Completion Deadline adjustment .

39 **8.10.2 Emergency Repair Work**

1                   **8.10.2.1** Developer shall be responsible for procuring and overseeing  
2 temporary and permanent repair work in response to an Emergency for the Project from  
3 and after issuance of NTP 2. Developer shall solicit competitive bids for such work if  
4 FHWA or FEMA regulations, policies or procedures require competitive bidding in order  
5 to obtain reimbursement for eligible costs. ADOT will provide oversight relating to such  
6 Emergency-related repair work in accordance with the Contract Documents.

7                   **8.10.2.2** Developer shall ensure that such repair work is performed in  
8 accordance with the Contract Documents and State and federal Law applicable to such  
9 Emergency-related repair work, including the requirements of the FHWA Emergency  
10 Relief Manual as most recently published by the FHWA  
11 (<http://www.fhwa.dot.gov/reports/erm/>). Further, Developer shall maintain estimates,  
12 cost records and supporting documentation in accordance with such Laws, and in a  
13 form and content to enable ADOT to seek reimbursement for eligible costs from FHWA  
14 or FEMA, if applicable.

## 15 **8.11 Handback Requirements**

### 16 **8.11.1 Handback Condition**

17 Developer shall diligently perform and complete all Capital Asset Replacement  
18 Work and other Maintenance Services necessary to deliver the Project to ADOT at the  
19 end of the Maintenance Period in a condition that complies with the Handback  
20 Requirements. Developer shall perform all such Work at no charge to ADOT in addition  
21 to the Maintenance Price.

### 22 **8.11.2 Handback Inspections**

23 The Parties shall conduct Inspections of the Project at the times and according to  
24 the terms and procedures specified in Sections MR 400.6.8.7 and 501.2.1 of the  
25 Technical Provisions, for the purposes of:

26                   (a) Determining and verifying the condition of all Elements,  
27 comparing the Asset Condition Score to the then Baseline Asset Condition Score, and  
28 Remaining Useful Lives of all Elements;

29                   (b) Adjusting, to the extent necessary based on Inspection,  
30 Specialist Inspection and analysis, Element Remaining Useful Lives, estimated costs of  
31 Capital Asset Replacement Work and timing of Capital Asset Replacement Work;

32                   (c) Determining the Capital Asset Replacement Work necessary to  
33 be performed and completed prior to the end of the Term to satisfy the Handback  
34 Requirements;

35                   (d) Revising and updating the Capital Asset Replacement Work  
36 Schedule to incorporate such adjustments; and

1 (e) Verifying that such Capital Asset Replacement Work and other  
2 Maintenance Services have been properly performed and completed in accordance with  
3 the Handback Requirements.

### 4 8.11.3 Handback Plan

5 Developer shall prepare a Handback Plan that contains the methodologies and  
6 activities to be undertaken or employed to meet the Handback Requirements at the end  
7 of the Term. Developer shall submit the Handback Plan to ADOT for review and  
8 approval at least 60 months before the end of the Term.

### 9 8.11.4 In-Lieu Fees

10 8.11.4.1 Section MR 501.2.1 of the Technical Provisions sets forth  
11 specific categories of the Project that are eligible for Developer to pay an in-lieu fee to  
12 ADOT as an exception to the obligation to undertake Capital Asset Replacement Work  
13 necessary to deliver the category with the required Remaining Useful Life at the end of  
14 the Maintenance Period. For each excepted category, ADOT will estimate the  
15 Remaining Useful Life expected to exist at the end of the Maintenance Period, as part of  
16 its Asset Condition Scoring during year 25 of the Maintenance Period described in  
17 Section MR 501.2.1 of the Technical Provisions. If Developer chooses to pay an *in-lieu*  
18 fee for any excepted categories, ADOT will reassess the Remaining Useful Life for  
19 these categories annually for the remaining Maintenance Period.

20 8.11.4.2 Within 30 days after ADOT estimates the Remaining Useful  
21 Life at the end of the Maintenance Period for each excepted category, Developer shall  
22 deliver to ADOT written notice indicating interest, if any, in paying in-lieu fees. If ADOT  
23 does not receive such written notice of interest within such 30-day period, then it shall  
24 be conclusively presumed that Developer has elected not to pay in-lieu fees. If  
25 Developer delivers such written notice of interest within such time period, then  
26 Developer shall include in the notice a preliminary analysis of the amount of in-lieu fees,  
27 by excepted category identified in the notice. For each such excepted category, the  
28 analysis shall:

29 (a) State the required Remaining Useful Life at the end of  
30 the Maintenance Period as set forth in MR 501.3.1 of the Technical Provisions (factor  
31 "A");

32 (b) State ADOT's estimate of what the actual Remaining  
33 Useful Life will be at the end of the Maintenance Period absent Capital Asset  
34 Replacement Work (factor "B");

35 (c) Set forth a detailed estimate of the total price,  
36 including hard and soft costs, that a qualified contractor would charge ADOT to perform  
37 Capital Asset Replacement Work at the end of the Remaining Useful Life as estimated  
38 by ADOT in order to bring the excepted category into the condition that it will have a  
39 new useful life equal to the required Remaining Useful Life at the end of the

1 Maintenance Period as set forth in MR 501.3.1 of the Technical Provisions (“estimated  
2 total price”); and

3 (d) Set forth Developer’s calculation of the in-lieu fee,  
4 which shall equal:

$$\textit{estimated total price} \times [(A - B)/A].$$

5 **8.11.4.3** Such analysis shall be subject to ADOT’s review and  
6 approval in its good faith discretion. ADOT may conduct its own analysis to verify  
7 Developer’s analysis. As necessary, the Parties shall meet and confer to discuss the  
8 analysis and reconcile any differences. At the conclusion of such process, ADOT shall  
9 promptly issue its determination of the in-lieu fee for each excepted category included in  
10 Developer’s notice of interest.

11 **8.11.4.4** Developer shall exercise its option to pay an in-lieu fee, in  
12 the amount determined by ADOT, by delivering to ADOT, not later than 30 days after  
13 ADOT delivers to Developer ADOT’s determination of the in-lieu fees, written notice  
14 unconditionally accepting the in-lieu fee amount determined by ADOT and electing to  
15 pay such in-lieu fee. Developer may exercise its option as to any one or more of the  
16 excepted categories that were included in Developer’s notice of interest. If ADOT does  
17 not receive such written notice within such 30-day period, then it shall be conclusively  
18 presumed that Developer has elected not to pay in-lieu fees.

19 **8.11.4.5** For each excepted category for which Developer has  
20 exercised its option to pay an in-lieu fee, ADOT will annually conduct Surveillance and,  
21 at ADOT’s election, Inspections to update the condition of the excepted category and  
22 re-analyze the estimated Remaining Useful Life that will exist at the end of the  
23 Maintenance Period. ADOT also may re-analyze construction costs and other cost  
24 components of the estimated total price. ADOT will adjust the in-lieu fees annually as  
25 necessary to take into account any change in the estimated Remaining Useful Life at  
26 the end of the Maintenance Period and any change in the estimated total price. ADOT  
27 will deliver written notice to Developer of each such adjustment promptly after it is  
28 determined. Not later than six months before the end of the Maintenance Term, ADOT  
29 shall conclude its final update and notify Developer of the final, adjusted in-lieu fees.

30 **8.11.4.6** Any Dispute regarding any such adjustments shall be  
31 resolved according to the Dispute Resolution Procedures; provided, however, that until  
32 the Dispute is resolved ADOT’s determination shall control. Any portion of the  
33 adjustment determined to be refundable to Developer pursuant to the Dispute  
34 Resolution Procedures will be paid within 20 days following resolution of the Dispute,  
35 together with interest thereon in accordance with this Agreement.

## 36 **8.12 Requirements Applicable to Design and Construction Work**

37 To the extent that Developer performs any design or construction work as part of the  
38 Maintenance Services, Developer shall comply with the requirements and specifications

1 for design and construction set forth in the Technical Provisions and in the applicable  
2 sections of this Agreement, except as otherwise set forth herein or approved in advance  
3 by ADOT.

4 **8.13 Future Improvements**

5 The scope of this Agreement is limited to the performance of the Work set out in the  
6 Contract Documents and does not pertain to the development, design, construction,  
7 financing, operation or maintenance of any Project reconfiguration, expansion or  
8 extension. Developer acknowledges that any Project reconfiguration, expansion or  
9 extension shall be undertaken by ADOT in its discretion and that contracts for the  
10 design, construction, financing, operation, maintenance or rehabilitation of any such  
11 Project reconfiguration, expansion or extension may be awarded to Persons other than  
12 Developer pursuant to such process as ADOT may determine. Notwithstanding the  
13 foregoing, Developer shall perform its obligations under this Agreement and work  
14 cooperatively with ADOT with a view to minimizing the cost to ADOT of integrating and  
15 coordinating such work with the Work.

16 **8.14 Maintenance and Rehabilitation of Future Improvements**

17 Notwithstanding Section 8.13, ADOT may issue a Supplemental Agreement to  
18 Developer requiring Developer to take over the maintenance and rehabilitation of any  
19 Project reconfiguration, expansion or extension and upon the issuance thereof all such  
20 work shall be Maintenance Services for all purposes of this Agreement and shall be  
21 performed by Developer in accordance with the terms and conditions of the Contract  
22 Documents and Supplemental Agreement, which shall provide for any necessary and  
23 appropriate negotiated change to the Maintenance Price.  
24

**ARTICLE 9.**  
**SUBCONTRACTING AND LABOR PRACTICES**

**9.1 Non-Discrimination; Equal Employment Opportunity**

**9.1.1** Developer shall not, and shall cause the Subcontractors to not, discriminate on the basis of race, color, national origin or sex in the performance of the Work under the Contract Documents.

**9.1.2** Developer shall include Section 9.1.1 in every Subcontract with a Subcontractor that may further subcontract any portion of its Work, so that such provisions will be binding upon each Subcontractor.

**9.2 DBE Requirements and Small Business Opportunity**

**9.2.1** ADOT has established goals for DBE utilization (“DBE Goals”) for different parts of the Work on the Project. DBE Goals for the Project, which Developer commits to achieve or use Good Faith Efforts to achieve, are calculated and shall be credited in relation to the portion of the total D&C Price or price of the Capital Replacement Work, as applicable, allocated to the components of the Work as listed below, in this Section 9.2.1.

**9.2.1.1** Professional Services DBE Goal – 16.63% of the total D&C Price allocated to Professional Services

**9.2.1.2** Construction DBE Goal – 10.93% of the total D&C Price allocated to Construction Work.

**9.2.1.3** Capital Asset Replacement Work DBE Goal – 6.08% of the total price for each Capital Asset Replacement Work interval.

**9.2.2** For purposes of Sections 9.2.1.1 and 9.2.1.2, the D&C Price shall be allocated between Professional Services and Construction Work according to the allocations in the ADOT-approved Project Baseline Schedule; and the sum of such allocations shall equal the total D&C Price.

**9.2.3** ADOT strongly encourages Developer to use additional DBEs above the DBE Goals in an effort to help ADOT meet its overall DBE goals and help ADOT meet the maximum feasible portion of its DBE goals through race neutral means as outlined in 49 CFR Part 26.

**9.2.4** ADOT’s DBE Special Provisions, applicable to the Project, are set forth in Exhibit 7. The purpose of ADOT’s DBE Special Provisions is to ensure that DBEs shall have an equal opportunity to participate in the performance of contracts financed in whole or in part with federal funds. Developer shall comply with all applicable requirements set forth in ADOT’s DBE Special Provisions and the provisions in Developer’s approved DBE Utilization Plan.

1           **9.2.5**       Within 30 days after issuance of NTP 1, Developer shall (a) revise and  
2 convert its Preliminary DBE Utilization Plan, included in Developer's Proposal, into a  
3 more detailed, final DBE Utilization Plan and (b) submit it to ADOT for approval in  
4 ADOT's good faith discretion.

5                   **9.2.5.1**   The final DBE Utilization Plan shall affirmatively respond to  
6 ADOT's comments on and revisions to the draft final DBE Utilization Plan.

7                   **9.2.5.2**   The final DBE Utilization Plan shall include the following  
8 components:

9                           (a)   Updated Proposal Forms H-3 and H-4 listing  
10 additional DBEs secured to work on the Project, including a complete list of all DBE  
11 Professional Services firms identified to meet the Professional Services DBE Goal.

12                           (b)   Professional Services DBE Intended Participation  
13 Affidavits, in the form attached to the DBE Special Provisions, from each DBE identified  
14 to work on the Project's Design Work.

15                           (c)   DBE Subcontractor Intended Participation Affidavits,  
16 in the form attached to the DBE Special Provisions, for each DBE identified to work on  
17 the Project's Construction Work.

18                           (d)   Updated Proposal Forms H-6 and H-7 identifying  
19 additional scopes of Work for future DBE participation, with more detailed information.

20                           (e)   Expanded description of types of proactive DBE and  
21 small business bid-specific marketing, recruitment, outreach and community  
22 engagement efforts that will be implemented during the Project design, construction and  
23 Capital Asset Replacement Work in order to include DBEs and small businesses on the  
24 Project. Include process for timely communications, outreach methods that will be  
25 used, and a process for keeping track of potential DBEs, small businesses and other  
26 Subcontractors on the Project. Include proposed innovative methods for (i) involving  
27 new and emerging DBEs, and (ii) identifying firms that might potentially be certified as  
28 DBEs and assisting them to become DBE-certified and be involved in the Project.  
29 Discuss how these efforts will flow through tiers of Subcontractors on the Project.

30                           (f)   Description of efforts Developer has made and will  
31 make to recruit and utilize non-engineering design and construction related DBE firms  
32 such as graphic design and printing, marketing, outreach, training, employment services  
33 and catering companies to help meet the DBE Goals.

34                           (g)   Description of proposed DBE capacity-building efforts  
35 to be implemented throughout the D&C Work, including methods to assist DBEs with  
36 record-keeping and compliance, bonding, financing, access to supplies and other  
37 capabilities.

1 (h) Description of the estimated DBE participation  
2 schedule for each phase/segment of the D&C Work that Developer identifies pursuant  
3 to the Preliminary Project Baseline Schedule, including anticipated Subcontracts and  
4 estimated dollar amounts to be awarded to DBEs in each phase/segment. Include a  
5 table/diagram of a high-level estimated schedule that illustrates projected work  
6 sequencing of DBE utilization in each phase/segment. Every effort should be made to  
7 uniformly distribute DBE utilization for Professional Services and for Construction Work  
8 throughout the D&C Work.

9 (i) Description of processes and procedures that  
10 Developer will use to monitor, track, document and report DBE progress and DBE  
11 utilization, and to maintain and adjust the DBE participation schedule to help ensure  
12 achievement of the DBE Goals. Include time intervals at which these processes and  
13 procedures will be employed.

14 (j) Description of specific measures that Developer will  
15 undertake throughout the term of this Agreement to help achieve the DBE Goals,  
16 including training workshops, technical and financial assistance, support services,  
17 mentor/protégé relationships, recruiting and encouraging potential DBEs to get certified,  
18 etc. Include proposed schedule of events/activities.

19 (k) Description of Developer's data collection and  
20 monitoring systems. Include how DBE recruitment and awards will be tracked during  
21 each phase/segment of the Project, and how DBE payments and utilization will be  
22 reported to ADOT. Include brief information about the expected frequency and  
23 comprehensiveness of the efforts.

24 (l) Description of how Developer will manage DBEs and  
25 small business Subcontractors on the Project, including processes for project  
26 management, technical performance reviews, feedback and dispute resolution to  
27 quickly resolve issues that may arise.

28 (m) Description of other procedures and processes for  
29 meeting DBE requirements, such as documenting and submitting affidavits for  
30 additional DBEs committed to the Project to meet or exceed the DBE Goals, prompt pay  
31 requirements and substitution/replacement of DBEs.

32 (n) Description of any other innovative or additional Good  
33 Faith Efforts activities already undertaken or ones Developer plans to undertake that are  
34 not listed above or listed in 49 CFR Part 26.

35 (o) Description of Developer's approach in addressing the  
36 Capital Asset Replacement Work DBE Goal.

37 **9.2.5.3** Authorization for Developer to commence the D&C Work is  
38 conditioned on first obtaining ADOT's approval of the final DBE Utilization Plan. The  
39 approved DBE Utilization Plan shall be considered a specification of the Contract  
40 Documents.

1           **9.2.6**     Developer shall provide information and documentation that  
2 demonstrates its continued Good Faith Efforts throughout the D&C Work and Capital  
3 Asset Replacement Work, as applicable, to meet the DBE Goals in accordance with 49  
4 CFR Part 26, Appendix A and the ADOT-approved DBE Utilization Plan. The efforts  
5 employed must at a minimum include those that one could reasonably expect a  
6 contractor to take if the contractor were actively and aggressively trying to obtain DBE  
7 participation sufficient to meet the DBE Goals. (See 49 CFR Part 26, Appendix A.)

8           **9.2.7**     Developer shall not cancel or terminate any Subcontract with a DBE  
9 firm except in accordance with all requirements and provisions applicable to  
10 cancellation or termination of Subcontracts with DBE firms set forth in ADOT's DBE  
11 Special Provisions in Exhibit 7.

12           **9.2.8**     For purposes of measuring achievement of or Good Faith Efforts to  
13 achieve the DBE Goals, Supplemental Agreements that adjust the D&C Price or the  
14 Capital Asset Replacement Work Payments shall:

15                     (a)     Increase the total D&C Price or total Capital Asset Replacement  
16 Work Payments, as applicable, to the extent that scopes of Work in DBE Subcontracts  
17 or intended for performance by DBE Subcontractors are increased;

18                     (b)     Reduce the total D&C Price or total Capital Asset Replacement  
19 Work Payments, as applicable, to the extent that scopes of Work in DBE Subcontracts  
20 or intended for performance by DBE Subcontractors are reduced; and;

21                     (c)     Not otherwise be added to or subtracted from the total D&C  
22 Price or total Capital Asset Replacement Work Payments.

23           **9.2.9**     Developer shall carry out, and shall cause the Subcontractors to carry  
24 out, applicable requirements of 49 CFR Part 26 in the award and administration of  
25 USDOT assisted contracts. Failure by Developer to carry out these requirements is a  
26 material breach of this Agreement, which may result in such remedies as ADOT deems  
27 appropriate (subject to Developer's rights to notice and opportunity to cure set forth in  
28 this Agreement). Remedies ADOT deems appropriate are more particularly provided in  
29 this Agreement, which may include:

30                     (a)     Withholding certain monthly progress payments;

31                     (b)     Assessing sanctions;

32                     (c)     Liquidated damages;

33                     (d)     Termination of this Agreement; and

34                     (e)     Disqualifying Developer and its Affiliates from future bidding as  
35 non-responsible.

1           **9.2.10** Pursuant to 49 Code of Federal Regulations Part 26.39 ADOT's DBE  
2 program includes an element to incorporate contracting requirements to facilitate  
3 participation by Small Business Concerns (SBCs) in federally funded contracts. SBCs  
4 are for-profit businesses registered to do business in Arizona and that meet the Small  
5 Business Administration size standards for average annual revenue criteria for its  
6 primary North American Industry Classification System code. While the SBC  
7 component of ADOT's DBE program does not require utilization goals on projects,  
8 ADOT strongly encourages Developer to utilize small businesses that are registered in  
9 AZ UTRACS, in addition to DBEs meeting the certification requirement. Visit AZ  
10 UTRACS at //adot.dbesystem.com/ to search for registered SBCs that can be used on  
11 the Project. SBC utilization on the Project must also be tracked and reported to ADOT  
12 on a monthly basis along with required DBE outreach efforts and utilization.

### 13 **9.3 On-the-Job Training**

14           **9.3.1** ADOT has established goals for OJT participation in the Construction  
15 Work ("OJT Goals"). The OJT Goals for the Project, which Developer commits to  
16 achieve or use Good Faith Efforts to achieve, are:

17                           (a) Minimum of 142,800 OJT Trainee hours on the Project;

18                           (b) Minimum of 51 OJT Trainees must each complete at least 2,000  
19 hours on the Project in the same trade or work classification; and

20                           (c) Minimum of ten OJT Trainees must complete hours solely on  
21 the Project necessary to achieve journey-level status (a minimum of 2,000 must be  
22 completed by these OJT Trainees solely on the Project).

23           **9.3.2** ADOT's OJT Special Provisions, applicable to the Project, are set forth  
24 in Exhibit 8. The purpose of ADOT's OJT Special Provisions is to ensure that  
25 inexperienced and untrained workers have a substantial opportunity to participate in the  
26 performance of the Construction Work through apprenticeships, training and similar  
27 measures to maintain and grow a diverse, skilled work force. Developer shall perform  
28 and comply with all requirements set forth in the OJT Special Provisions and the  
29 provisions in Developer's approved OJT Utilization Plan.

30           **9.3.3** Within 30 days after issuance of NTP 1, Developer shall: (a) revise and  
31 convert its Preliminary OJT Utilization Plan, included in the Proposal, into a more  
32 detailed, final OJT Utilization Plan; and (b) submit this plan to ADOT for approval in  
33 ADOT's good faith discretion.

34                           **9.3.3.1** The OJT Utilization Plan shall affirmatively respond to  
35 ADOT's comments on and revisions to the draft final OJT Utilization Plan.

36                           **9.3.3.2** The OJT Utilization Plan shall include the following  
37 components:

1 (a) Overview of Developer's understanding of the  
2 Project's OJT requirements and Developer's commitment to meeting or using Good  
3 Faith Efforts to meet the OJT Goals and all other OJT requirements. Also include  
4 Developer's overall OJT implementation strategy.

5 (b) Updated description of Developer's OJT team/staff  
6 that will be working on the Project. Include names, experience and responsibilities of  
7 Developer's OJT compliance team members (including the DBE/OJT Outreach and  
8 Compliance Manager included in the Proposal) responsible for implementing and  
9 complying with the OJT Utilization Plan and all OJT requirements. Include an updated  
10 description of how the DBE/OJT Outreach and Compliance Manager and his/her staff  
11 plans to work with ADOT's Compliance Oversight Committee.

12 (c) Description of the types of proactive OJT marketing,  
13 recruitment, outreach and community engagement efforts Developer made prior to the  
14 Effective Date and will make throughout the period up to Substantial Completion to  
15 secure the participation of women, minority, veteran and disadvantaged trainees for the  
16 Project. Include information about Developer's OJT Trainee screening, hiring and  
17 processes to retain OJT Trainees.

18 (d) Description of specific Good Faith Efforts measures  
19 that Developer will undertake throughout the period up to Substantial Completion to  
20 achieve the OJT Goals.

21 (e) Description and itemization of Developer's OJT  
22 program, which Developer will use to train and educate women, minority, veteran and  
23 disadvantaged individuals in various construction related crafts during each  
24 phase/segment of the Construction Work, as such phase/segment is identified in the  
25 Preliminary Project Baseline Schedule. Developer's OJT program shall include training  
26 goals and details for on-site and off-site/classroom training, estimated training schedule  
27 timeframes specific to each job classification, number of trainees per classification and  
28 the estimated start dates for each classification. Include efforts to recruit Native  
29 American workers, as this Project is near an Indian reservation.

30 (f) An estimated OJT participation schedule for each  
31 phase/segment of the Construction Work, and a description of processes and  
32 procedures Developer will use to document changes/adjustments to the OJT  
33 participation schedule to achieve the OJT Goals. Include time intervals at which these  
34 processes and procedures will be employed.

35 (g) Description of Developer's data collection and  
36 monitoring systems, including tracking of OJT Trainee recruits and reporting of OJT  
37 hours and trainee completion/graduation/termination to ADOT for each phase/segment  
38 of the Construction Work. Include information about the expected frequency and  
39 comprehensiveness of these efforts.

1                   **9.3.3.3** Authorization to commence Construction Work is  
2 conditioned on first obtaining such ADOT approval. The approved OJT Utilization  
3 Plan shall be considered a specification of the Contract Documents

4                   **9.3.4** No earlier than ADOT's approval of the final OJT Utilization Plan, and  
5 no later than 30 days prior to the start of construction, Developer shall complete and  
6 submit to ADOT for review and approval OJT Trainee Enrollment Forms in the form  
7 attached as Attachment A to Exhibit 8 (OJT Special Provisions) for all OJT Trainees  
8 then identified to work on the Project. Thereafter, Developer shall submit to ADOT for  
9 review and approval completed OJT Trainee Enrollment Forms in the form attached as  
10 Attachment A to Exhibit 8 (OJT Special Provisions) for each subsequent OJT Trainee  
11 hired during the course of the Construction Work, by no later than the 15<sup>th</sup> day of every  
12 month together with the OJT Monthly Progress Report. Developer shall submit such  
13 form no later than seven days before the trainee begins work on the Project. In  
14 addition, Developer shall submit to ADOT an OJT Trainee Completion/Termination  
15 Form, in the form attached as Attachment B to Exhibit 8 after an OJT trainee completes  
16 2,000 or more hours of training on the same craft, graduates to journey level status, or  
17 ceases employment on the Project, by the 15<sup>th</sup> of every month together with the OJT  
18 Monthly Progress Report. Failure to submit the required documentation within the  
19 specified deadline shall be cause to deny credit for any work performed by the OJT  
20 trainee prior to approval and delay approval of Developer's monthly progress payment.

21                   **9.3.5** Some of the same individual OJT Trainees can be used to satisfy each  
22 of the OJT Goals. Developer shall distribute the number of OJT Trainees among work  
23 classifications on the basis of Developer's need and the availability of journey persons  
24 in the various classifications. Developer will be credited for each Trainee employed on  
25 the Project in an ADOT or State approved apprenticeship program.

## 26 **9.4 Subcontracts**

27                   **9.4.1** Developer shall retain or cause to be retained only Subcontractors that  
28 are qualified, experienced and capable in the performance of the portion of the Work  
29 assigned. Developer shall assure that each Subcontractor has at the time of execution  
30 of the corresponding Subcontract, and maintains at all times during performance of the  
31 assigned Work, all licenses required by applicable Laws. Developer shall retain,  
32 employ and utilize the firms and organizations specifically listed in the Project  
33 Management Plan to fill the corresponding Key Subcontractor positions listed therein.  
34 For Key Subcontractors not known as of the Effective Date, Developer's selection  
35 thereof shall be subject to ADOT's prior approval.

36                   **9.4.2** Developer shall comply with the following Subcontractor reporting  
37 requirements:

38                   **9.4.2.1** For each Subcontract (regardless of tier), Developer shall  
39 submit to ADOT a completed Professional Services Subcontractor Request Form or  
40 Construction Subcontractor Request Form, as applicable, not later than seven days  
41 before the Subcontractor commences work. The Professional Services Subcontractor

1 Request Form and Construction Subcontractor Request Form are provided in  
2 Exhibits 5-1 and 5-2, respectively.

3 **9.4.2.2** For each Subcontractor (regardless of tier) that performs  
4 Construction Work, Developer shall submit to ADOT written notice of the  
5 Subcontractor's start date not later than 48 hours before the Subcontractor commences  
6 work or, for those Subcontractors identified in the Proposal and starting on or within 48  
7 hours of the Effective Date, not later than 48 hours after the start date.

8 **9.4.2.3** Except for DBE Subcontracts, Developer shall submit to  
9 ADOT a copy of each executed Subcontract (regardless of tier) not later than 60 days  
10 after the Subcontractor commences work. For each DBE Subcontractor, however,  
11 Developer shall submit to ADOT a copy of the executed Subcontract, not later than  
12 when required in Section 12.03 of the DBE Special Provisions.

13 **9.4.2.4** Not later than the 15th day of every month, Developer shall  
14 submit complete and accurate payrolls to ADOT's web-based certified payroll tracking  
15 system (LCPtracker) for all Work performed by Subcontractors (regardless of tier)  
16 during the previous month. If ADOT does not receive all such payrolls by this deadline  
17 ADOT will identify in a written notice to Developer any missing payrolls and other  
18 discrepancies or inaccuracies, and the following shall apply:

19 (a) If Developer does not submit the missing or corrected  
20 payrolls within ten days of the notice date, ADOT will have the right to withhold  
21 \$2,500.00 per missing or inaccurate payroll, as applicable, from each subsequent  
22 progress payment until Developer cures.

23 (b) If Developer cures within 90 days of the notice date,  
24 ADOT will pay any corresponding, accumulated withholdings with the next progress  
25 payment.

26 (c) If Developer does not cure within 90 days after the  
27 notice date, then, with respect to each missing or inaccurate payroll, ADOT will have the  
28 right to retain the accumulated withholdings as Liquidated Damages. These Liquidated  
29 Damages shall be in addition to any other rights or remedies ADOT may have  
30 hereunder or under Law.

31 **9.4.3** The retention of Subcontractors by Developer will not relieve  
32 Developer of its responsibility hereunder or for the quality of the Work or materials  
33 provided by it. Developer shall supervise and be fully responsible to ADOT for the acts,  
34 omissions, negligence, intentional misconduct, or breach of applicable Law, contract or  
35 Governmental Approval by any Developer-Related Entity or by any member or  
36 employee of Developer or any Developer-Related Entity, as though Developer directly  
37 employed all such individuals. No Subcontract entered into by Developer will impose  
38 any obligation or liability upon ADOT to any such Subcontractor or any of its employees.  
39 Nothing in this Agreement will create any contractual relationship between ADOT and  
40 any Subcontractor of Developer.

1           **9.4.4**       The following requirements shall apply to Subcontracts:

2                   (a)     Developer shall, prior to soliciting any bids for performance of  
3 work or labor or rendering of services relating to the design or construction of the  
4 Project or for special fabrication and installation of a portion of the Work, submit to  
5 ADOT for its review and approval a procedure for the conduct of the bidding and  
6 approval process applicable to Subcontracts. Developer may use procedures set forth  
7 in the ADOT Standard Specifications or may submit alternative procedures to ADOT for  
8 approval. Developer shall not enter into any Subcontract except in accordance with the  
9 foregoing procedure; provided, however, that this Section 9.4.4(a) shall not apply to  
10 Subcontracts entered between Developer and a Subcontractor identified in Developer's  
11 Proposal and listed in Exhibit 9-1.

12                   (b)     As soon as Developer identifies a potential Subcontractor for a  
13 potential Subcontract, but in no event later than five days after executing the  
14 Subcontract, Developer shall provide in writing to ADOT the Subcontractor's name,  
15 address, phone number and license number with the Register of Contractors, the name  
16 of the Subcontractor's authorized representative, and a description of work to be  
17 performed by such Subcontractor.

18           **9.4.5**       The following additional requirements shall apply to Key  
19 Subcontractors:

20                   (a)     Developer shall not terminate a Key Subcontract, or permit or  
21 suffer any substitution or replacement of a Key Subcontractor (as applicable), unless  
22 the Key Subcontractor:

23                           (i)    Is no longer in business, is unable to fulfill its legal,  
24 financial, or business obligations, or can no longer meet the terms of the teaming  
25 agreement with Developer;

26                           (ii)   Voluntarily removes itself from Developer's team;

27                           (iii) Fails to provide a sufficient number of qualified personnel  
28 to fulfill the duties identified during the Proposal stage;

29                           (iv) Fails to timely cure a material default under the applicable  
30 Key Subcontract; or

31                           (v)   Solely for any Key Subcontractor for which a teaming  
32 agreement instead of a Subcontract was provided as of the Effective Date, such Key  
33 Subcontractor fails to negotiate in good faith in a timely manner in accordance with  
34 provisions established in such teaming agreement.

35                   (b)     If Developer makes changes to a Key Subcontractor in violation  
36 of Section 9.4.5(a), Developer shall pay to ADOT 100% of any cost savings resulting  
37 from the change.

1           **9.4.6**       Each Subcontract shall:

2                   (a)       Set forth a standard of professional responsibility or a standard  
3 for commercial practice equal to the requirements of the Contract Documents and Good  
4 Industry Practice for work of similar scope and scale and shall set forth effective  
5 procedures for claims and change orders.

6                   (b)       Require the Subcontractor to carry out its scope of work in  
7 accordance with the Contract Documents, the Governmental Approvals and applicable  
8 Law, including the applicable requirements of the DBE Performance Plan.

9                   (c)       Include Form FHWA-1273.

10                  (d)       Incorporate the general wage decisions applicable to the Project  
11 and set forth in Attachment 3 to Exhibit 4 (Federal Prevailing Wage Rates).

12                  (e)       Without cost to Developer or ADOT, expressly permit  
13 assignment to ADOT or its successor, assign or designee of all Developer's rights under  
14 the Subcontract, contingent only upon delivery of request from ADOT following  
15 termination of this Agreement, allowing ADOT or its successor, assign or designee to  
16 assume the benefit of Developer's rights with liability only for those remaining  
17 obligations of Developer accruing after the date of assumption, such assignment to  
18 include the benefit of all Subcontractor warranties, indemnities, guarantees and  
19 professional responsibility.

20                  (f)       Expressly state that any acceptance of assignment of the  
21 Subcontract to ADOT or its successor, assign or designee shall not operate to make the  
22 assignee responsible or liable for any breach of the Subcontract by Developer or for any  
23 amounts due and owing under the Subcontract for work or services rendered prior to  
24 assumption (but without restriction on the Subcontractor's rights to suspend work or  
25 demobilize due to Developer's breach).

26                  (g)       Expressly include a covenant to recognize and attorn to ADOT  
27 upon receipt of notice from ADOT that it has exercised its rights under this Agreement,  
28 without necessity for consent or approval from Developer or to determine whether  
29 ADOT validly exercised its rights, and Developer's covenant to waive and release any  
30 claim or cause of action against the Subcontractor arising out of or relating to its  
31 recognition and attornment in reliance on any such notice.

32                  (h)       Not be assignable by the Subcontractor to any Person other  
33 than ADOT (or its assignee) without Developer's prior consent.

34                  (i)       Expressly include requirements that the Subcontractor will:  
35 (i) maintain usual and customary Books and Records for the type and scope of business  
36 operations in which it is engaged (e.g., constructor, equipment Supplier, designer,  
37 service provider); (ii) permit audit thereof with respect to the Project or Work by each of  
38 Developer and ADOT pursuant to Section 23.5 and; (iii) provide progress reports to

1 Developer appropriate for the type of work it is performing sufficient to enable Developer  
2 to provide the reports it is required to furnish ADOT under this Agreement.

3 (j) Include the right of Developer to terminate the Subcontract in  
4 whole or in part upon any Termination for Convenience of this Agreement without  
5 liability of Developer or ADOT for the Subcontractor's lost profits or business  
6 opportunity, except, if applicable, the lost profit under Section 24.2(c).

7 (k) Expressly require the Subcontractor to participate in meetings  
8 between Developer and ADOT, upon ADOT's request, concerning matters pertaining to  
9 such Subcontract or its work, provided that all direction to such Subcontractor shall be  
10 provided by Developer, and provided further that nothing in this clause (k) shall limit the  
11 authority of ADOT to give such direction or take such action which, in its sole opinion, is  
12 necessary to remove an immediate and present threat to the safety of life or property.

13 (l) Include an agreement by the Subcontractor to give evidence in  
14 any dispute resolution proceeding pursuant to Article 22, if such participation is  
15 requested by either ADOT or Developer.

16 (m) Expressly include a provision prohibiting cross-contract offset  
17 between the parties thereto, meaning that if a Subcontractor is performing work on  
18 multiple contracts for the other party to the Subcontract or the other party's affiliates, the  
19 other party or its affiliate shall not withhold payment from the Subcontractor on its  
20 Subcontract because of disputes or claims on another contract.

21 (n) Expressly include Section 9.1.1;

22 (o) Expressly include in every Subcontract (including purchase  
23 orders and in every Subcontract of any Developer-Related Entity for the Work),  
24 provisions to effectuate the DBE requirements and shall require that they be included in  
25 all Subcontracts at lower tiers, so that such provisions will be binding upon each  
26 Subcontractor. All Subcontracts of any tier, including those with Suppliers and DBE  
27 firms, shall include the DBE Special Provisions and require compliance with 49 CFR  
28 Part 26. The foregoing shall not apply to Subcontracts at any tier with ADOT or  
29 Governmental Entities.

30 (p) Expressly include in every Subcontract for Construction Work  
31 (including purchase orders and in every Subcontract of any Developer-Related Entity for  
32 Construction Work), provisions to effectuate the OJT requirements, and shall require  
33 that they be included in all Subcontracts at lower tiers, so that such provisions will be  
34 binding upon each such Subcontractor. All Subcontracts for Construction Work of any  
35 tier, including those with Suppliers and DBE firms, shall include the OJT Special  
36 Provisions and require compliance with the provisions of Form FHWA-1273, 23 USC  
37 § 140(a) and 23 CFR §230.111. The foregoing shall not apply to Subcontracts at any  
38 tier with ADOT or Governmental Entities.

1 (q) Expressly require the Subcontractor to make payments to sub-  
2 Subcontractors, and be liable for interest payments to sub-Subcontractors, in the same  
3 manner as set forth in Sections 13.7.1 and 13.7.2, respectively.

4 (r) Contain no waiver of the prompt payment protections for the  
5 Subcontractor provided under Section 13.7 and Sections 28-411(C), (D) and (E),  
6 Arizona Revised Statutes, except Developer, at its option, may require a waiver from  
7 the Lead Subcontractor under the Lead Subcontract.

8 (s) Expressly provide that all claims and charges of the  
9 Subcontractor and its subcontractors at any time shall not attach to any interest of  
10 ADOT in the Project or the Project ROW.

11 (t) With respect to Key Subcontracts, expressly include a covenant,  
12 expressly stated to survive termination of the Key Subcontract, to promptly execute and  
13 deliver to ADOT a new contract between the Key Subcontractor and ADOT on the same  
14 terms and conditions as the Key Subcontract, in the event: (i) the Key Subcontract is  
15 rejected by Developer in bankruptcy or otherwise wrongfully terminated by Developer;  
16 and (i) ADOT delivers request for such new contract following termination or expiration  
17 of this Agreement.

18 (u) Be consistent in all other respects with the terms and conditions  
19 of the Contract Documents to the extent such terms and conditions are applicable to the  
20 scope of work of such Subcontractors, and include all provisions required by this  
21 Agreement.

22 **9.4.7** Developer shall not amend any Subcontract with respect to any of the  
23 foregoing matters without the prior consent of ADOT.

24 **9.4.8** Developer shall not enter into any Subcontracts with any Person then  
25 debarred or suspended from submitting bids by any agency of the State.

26 **9.4.9 Additional Requirements for Lead and Maintenance Services**  
27 **Subcontracts**

28 **9.4.9.1** Before entering into the Lead Subcontract or Maintenance  
29 Services Subcontract or any supplement or amendment thereto, Developer shall submit  
30 a true and complete copy of the proposed Design-Build Subcontract or Maintenance  
31 Services Subcontract to ADOT for review and comment. ADOT may disapprove only if  
32 the Lead Subcontract or Maintenance Services Subcontract, as applicable, (i) does not  
33 comply, or is inconsistent, in any material respect with the applicable requirements of  
34 the Contract Documents, including that it does not comply or is inconsistent with this  
35 Section 9 or with the applicable requirements of Section 24 regarding maintenance of  
36 Books and Records, does not incorporate the applicable Federal Requirements set forth  
37 in Exhibit 4, or is inconsistent with the requirements of the relevant scope of Work,  
38 (ii) increases ADOT's liability or (iii) adversely affects ADOT's step-in rights.

1                   **9.4.9.2** The Lead Subcontract and Maintenance Services  
2 Subcontract also shall expressly require the personal services of and not be assignable  
3 by the Lead Subcontractor or Lead Maintenance Firm without Developer's and ADOT's  
4 prior consent, each in its sole discretion, provided that this provision shall not prohibit  
5 the subcontracting of portions of the Work.

6                   **9.4.10 Additional Requirements for Independent Quality Firm**  
7 **Subcontract(s)**

8                   **9.4.10.1** Developer shall directly subcontract all Independent Quality  
9 Firm ("IQF") services, described in Sections GC 110.07.2.1 and 110.08.3 of the  
10 Technical Provisions, to one or more IQF Subcontractors.

11                   **9.4.10.2** At no time during the Term shall any IQF Subcontractor be  
12 an Affiliate of Developer, unless so authorized in writing by ADOT in its sole discretion.

13                   **9.4.10.3** Developer shall not terminate any Subcontract with an IQF  
14 Subcontractor, or permit or suffer any substitution or replacement of any IQF  
15 Subcontractor, unless so authorized in writing by ADOT in its sole discretion.

16 **9.5 Responsibility for Developer-Related Entities**

17 Developer shall supervise and be responsible for the acts, omissions, negligence,  
18 intentional misconduct, or breach of applicable Law, contract or Governmental Approval  
19 by any Developer-Related Entity, as though Developer directly employed all such  
20 Persons.

21 **9.6 Key Personnel**

22                   **9.6.1 Availability of Key Personnel**

23                   **9.6.1.1** Developer acknowledges and agrees that ADOT's award of  
24 this Agreement to Developer was based, in large part, on the qualifications and  
25 experience of the Key Personnel and Developer's commitment that such Key Personnel  
26 are available to undertake and perform the Work.

27                   **9.6.1.2** Except as provided in Section 9.6.4.1, (a) Developer  
28 represents, warrants and covenants that all Key Personnel are available for and will  
29 perform the roles identified for them in the Proposal, and (b) Developer shall not replace  
30 or permit replacement of any individual filling a Key Personnel position without ADOT's  
31 prior written approval.

32                   **9.6.1.3** Developer shall cause the individuals filling Key Personnel  
33 positions to maintain active involvement in the prosecution and performance of the  
34 Work sufficient for satisfactory performance of the tasks to be performed by such Key  
35 Personnel. In addition to the foregoing, ADOT has the right to require a greater time  
36 commitment, up to full time commitment, from any individual filling a Key Personnel  
37 position during the Construction Period or Maintenance Period, as applicable, if ADOT,

1 in its good faith discretion, determines such additional commitment of time is necessary  
 2 for satisfactory prosecution and performance of the Work.

3 **9.6.1.4** Developer shall provide phone, e-mail addresses and mobile  
 4 telephone numbers for all Key Personnel. ADOT requires the ability to contact all Key  
 5 Personnel 24 hours per day, seven days per week.

6 **9.6.2 Liquidated Damages for Unavailability of Key Personnel**

7 **9.6.2.1** If an individual filling a Key Personnel position is not  
 8 available to perform the role identified for that individual in the Proposal, or does not  
 9 maintain active involvement in the prosecution and performance of the Work, Developer  
 10 acknowledges ADOT, the Work and the Project will suffer significant and substantial  
 11 Losses due to the unavailability of that individual.

12 **9.6.2.2** Developer also acknowledges it is impracticable and  
 13 extremely difficult to determine the actual Losses that would accrue to ADOT in the  
 14 event of such unavailability of Key Personnel. Accordingly, and subject to  
 15 Section 9.6.3.1, if at any time during the D&C Period or Maintenance Period, as  
 16 applicable, an individual filling a Key Personnel position is not available to perform the  
 17 role identified for that individual in the Proposal, or not actively involved in the  
 18 prosecution and performance of the Work (regardless of whether the individual is  
 19 replaced by another individual approved by ADOT), Developer shall pay ADOT  
 20 Liquidated Damages in the amount set forth in this Section 9.6.2.2 based on the  
 21 individual's Key Personnel position.  
 22

Key Personnel Position	Liquidated Damages
<b>D&amp;C Period</b>	
Project Manager	\$370,000.00
Construction Manager	\$300,000.00
Design Manager	\$280,000.00
Quality Manager	\$270,000.00
Safety Manager	\$150,000.00
Public Relations Officer	\$200,000.00
ROW Acquisition Manager	\$150,000.00
Utility Adjustment Coordinator	\$220,000.00
Environmental Compliance Manager	\$240,000.00

DBE/OJT Outreach and Compliance Manager	\$150,000.00
<b>Maintenance Period</b>	
Maintenance Manager	\$170,000.00

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**9.6.2.3** Developer understands and agrees that any Liquidated Damages payable under Section 9.6.2.2 are not a penalty and that such sums are reasonable under the circumstances existing as of the Effective Date.

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**9.6.2.4** ADOT will have the right to deduct Liquidated Damages owing from Developer to ADOT under Section 9.6.2.2 from amounts owing from ADOT to Developer under the Agreement, or to collect such Liquidated Damages from any letter of credit, bond or Guaranty furnished under this Agreement.

9

10

**9.6.3 Limitations on Liquidated Damages for Unavailability of Key Personnel**

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**9.6.3.1** Developer shall not be liable for Liquidated Damages under Section 9.6.2.2 under the following conditions:

13

14

(a) Developer removes or replaces an individual filling a Key Personnel position at ADOT's direction;

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(b) An individual filling a Key Personnel position is unavailable because of death, retirement, injury or termination of employment with the applicable Developer-Related Entity (except where the individual moves to an affiliated company); provided, however, that in each such case, Developer shall promptly propose to ADOT a replacement individual for the Key Personnel position, which individual shall be subject to ADOT's approval; or

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(c) An individual filling a Key Personnel position is unavailable because of ADOT's failure to issue NTP 1 within 210 days of the Proposal Due Date for a reason other than the acts, omissions, negligence, intentional misconduct, or breach of applicable Law, contract or Governmental Approval of any Developer-Related Entity.

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**9.6.3.2** Developer may replace individuals filling the positions of Public Relations Officer, Utility Adjustment Coordinator and DBE/OJT Outreach and Compliance Manager one time during the D&C Period without incurring Liquidated Damages under Section 9.6.2.2. However, subsequent replacements of individuals filling any of these three positions shall be subject to Liquidated Damages under Section 9.6.2.2.

1                   **9.6.3.3** Developer may replace the Maintenance Manager not more  
2 frequently than every three years during the Maintenance Period without incurring  
3 Liquidated Damages under Section 9.6.2.2, but only if Developer replaces the outgoing  
4 Maintenance Manager with an ADOT-approved replacement before the outgoing  
5 Maintenance Manager vacates the position.

6                   **9.6.3.4** If ADOT does not issue NTP 1 within 180 days after the  
7 Proposal Due Date, through no act, omission, negligence, intentional misconduct, or  
8 breach of applicable Law, contract or Governmental Approval of any Developer-Related  
9 Entity, then Developer shall have 30 days after issuance of NTP 1 to identify  
10 replacements (if any) in Key Personnel without incurring Liquidated Damages under  
11 Section 9.6.2.2. Upon ADOT's approval of the replacement individual(s), such  
12 individual(s) shall be considered Key Personnel under this Agreement, including for  
13 purposes of Section 9.6.2.2 relative to Liquidated Damages.

14                   **9.6.4        Failure to Timely Replace Key Personnel**

15                   ADOT will have the right to withhold a percentage of progress payments or  
16 Monthly Disbursements (as applicable) owing to Developer if Developer does not fill  
17 vacated Key Personnel positions within certain deadlines after the positions are  
18 vacated, regardless of why vacated, as specified in Sections 9.6.5.1 and 9.6.5.2.

19                   **9.6.4.1** ADOT may withhold 5% of progress payments owing to  
20 Developer if at any time during the D&C Period the position of Project Manager,  
21 Construction Manager, Design Manager, Quality Manager or Environmental  
22 Compliance Manager is vacated and remains unfilled for:

23                               (a) 60 days after the position is vacated because of the  
24 individual's death, retirement, injury or termination of employment by the applicable  
25 Developer-Related Entity (except where the individual moves to an affiliated company);  
26 or

27                               (b) 30 days after the position is vacated for any other  
28 reason (including where the individual moves to an affiliated company).

29                   **9.6.4.2** ADOT may withhold 2% of progress payments or Monthly  
30 Disbursements owing to Developer if at any time during the D&C Period or Maintenance  
31 Period, as applicable, any Key Personnel position not listed in Section 9.6.5.1 is  
32 vacated and remains unfilled for:

33                               (a) 60 days after the position is vacated because of the  
34 individual's death, retirement, injury or termination of employment by the applicable  
35 Developer-Related Entity (except where the individual moves to an affiliated company);  
36 or

37                               (b) 30 days after the position is vacated for any other  
38 reason (including where the individual moves to an affiliated company).

1                   **9.6.4.3** ADOT's right to withhold progress payments or Monthly  
2 Disbursements under Sections 9.6.5.1 and 9.6.5.2 will end when the Key Personnel  
3 position is filled with an ADOT-approved replacement. Developer may include such  
4 withheld amounts in the next month's Draw Request after Developer fills the position  
5 with an ADOT-approved replacement.

6 **9.7 Subcontracts with Affiliates**

7                   **9.7.1** Developer shall have the right to have Work and services performed by  
8 Affiliates only under the following terms and conditions (in addition to all other general  
9 requirements for Subcontracts set forth in this Agreement):

10                   (a) Developer shall execute a written Subcontract with the Affiliate;

11                   (b) The Subcontract shall comply with all applicable provisions of  
12 this Section 9, be consistent with Good Industry Practice, and be in form and substance  
13 substantially similar to Subcontracts then being used by Developer or Affiliates for  
14 similar Work or services with unaffiliated Subcontractors;

15                   (c) The Subcontract shall set forth the scope of Work and services  
16 and all the pricing, terms and conditions respecting the scope of Work and services;

17                   (d) The pricing, scheduling and other terms and conditions of the  
18 Subcontract shall be no less favorable to Developer than those that Developer could  
19 reasonably obtain in an arms' length, competitive transaction with an unaffiliated  
20 Subcontractor. Developer shall bear the burden of proving that the same are no less  
21 favorable to Developer; and

22                   (e) No Affiliate shall be engaged to perform any Work or services  
23 which any Contract Documents or the Project Management Plan or any component  
24 part, plan or other documentation thereunder indicates are to be performed by an  
25 independent or unaffiliated party (such as IQF services). No Affiliate shall be engaged  
26 to perform any Work or services which would be inconsistent with Good Industry  
27 Practice.

28                   **9.7.2** Before entering into a written Subcontract with an Affiliate or any  
29 supplement or amendment thereto, Developer shall submit a true and complete copy of  
30 the proposed Subcontract to ADOT for review and comment. ADOT will have 20 days  
31 after receipt to deliver its comments to Developer.

32                   **9.7.3** Developer shall make no payments to Affiliates for work or services in  
33 advance of provision of such work or services, except for reasonable mobilization  
34 payments or other payments consistent with arm's length, competitive transactions of  
35 similar scope.

1 **9.8 Labor Standards**

2 **9.8.1** In the performance of its obligations under the Contract Documents,  
3 Developer at all times shall comply, and require by Subcontract that all Subcontractors  
4 and Suppliers comply, with all applicable federal and State labor, occupational safety  
5 and health standards, rules, regulations and federal and State orders.

6 **9.8.2** All individuals performing Work shall have the skill and experience and  
7 any licenses required to perform the Work assigned to them.

8 **9.8.3** If any individual employed by Developer or any Subcontractor is not  
9 performing the Work in a proper, safe and skillful manner, then Developer shall, or shall  
10 cause such Subcontractor to, remove such individual and such individual shall not be  
11 re-employed on the Work. If, after notice and reasonable opportunity to cure, such  
12 individual is not removed or if Developer fails to ensure that skilled and experienced  
13 personnel are furnished for the proper performance of the Work, then ADOT may  
14 suspend the affected portion of the Work by delivery of notice of such suspension to  
15 Developer. Such suspension shall be considered a suspension for cause and shall in  
16 no way relieve Developer of any obligation contained in the Contract Documents or  
17 entitle Developer to any additional compensation or Completion Deadline adjustment  
18 hereunder.

19 **9.9 Ethical Standards**

20 **9.9.1** Within 90 days after the Effective Date, Developer shall adopt written  
21 policies establishing ethical standards of conduct applicable to all Developer-Related  
22 Entities, including Developer's supervisory and management personnel, in dealing with:  
23 (a) ADOT and the General Engineering Consultant; and (b) employment relations.  
24 Such policy shall be subject to review and comment by ADOT prior to adoption. Such  
25 policy shall include standards of ethical conduct concerning the following:

26 (a) Restrictions on gifts and contributions to, and lobbying of,  
27 ADOT, the Arizona State Transportation Board, the General Engineering Consultant  
28 and any of their respective commissioners, directors, officers and employees;

29 (b) Protection of employees from unethical practices in selection,  
30 use, hiring, compensation or other terms and conditions of employment, or in firing,  
31 promotion and termination of employees;

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

37 (d) Restrictions on directors, members, officers or supervisory or  
38 management personnel of any Developer-Related Entity engaging in any transaction or  
39 activity, including receiving or offering a financial incentive, benefit, loan or other

1 financial interest, that is, or to a reasonable person appears to be, in conflict with or  
2 incompatible with the proper discharge of duties or independence of judgment or action  
3 in the performance of duties, or adverse to the interests of the Project or employees;

4 (e) Restrictions on use of office or job position for a purpose that is,  
5 or would to a reasonable person appear to be, primarily for the private benefit of a  
6 director, member, officer or supervisory or management person, rather than primarily for  
7 the benefit of Developer or the Project, or primarily to achieve a private gain or an  
8 exemption from duty or responsibility for a director, member, officer or supervisory or  
9 management person; and

10 (f) Restrictions on directors, members, officers or employees of  
11 any Developer-Related Entity performing any of the Work if the performance of such  
12 services would be prohibited under ADOT's published conflict of interest rules and  
13 policies applicable to the Project, or would be prohibited under applicable Laws.

14 **9.9.2** Developer shall cause its directors, members, officers and supervisory  
15 and management personnel, and include contract provisions requiring those of all other  
16 Developer-Related Entities, to adhere to and enforce the adopted policy on ethical  
17 standards of conduct. Developer shall establish reasonable systems and procedures to  
18 promote and monitor compliance with the policy.

19 **9.10 Prevailing Wages**

20 **9.10.1** Developer shall pay or cause to be paid to all applicable workers  
21 employed by it or its Subcontractors to perform the Work not less than the prevailing  
22 rates of wages, as provided in the statutes and regulations applicable to public work  
23 contracts, including the Davis-Bacon Act, and as provided in Attachment 3 to Exhibit 4  
24 ("prevailing wages"); provided, however, that the minimum prevailing wages that Lead  
25 Maintenance Firm shall be required to pay to all applicable workers for the Maintenance  
26 Services shall be the lesser of: (i) the prevailing wages in effect on the commencement  
27 date of the Maintenance Term then in effect and (ii) the prevailing wages set forth in  
28 Attachment 3 to Exhibit 4 adjusted multiplied by a fraction the numerator of which is the  
29 CPI most recently published prior to the commencement date of the Maintenance Term  
30 and the denominator of which is the Base CPI. Developer shall comply and cause its  
31 Subcontractors to comply with all Laws pertaining to prevailing wages. For the purpose  
32 of applying such Laws, the Project shall be treated as a public work paid for in whole or  
33 in part with public funds (regardless of whether public funds are actually used to pay for  
34 the Project). The foregoing shall not apply to Subcontracts at any tier with ADOT or  
35 Governmental Entities.

36 **9.10.2** It is Developer's sole responsibility to determine the wage rates  
37 required to be paid. In the event rates of wages and benefits change while this  
38 Agreement is in effect, Developer shall bear the cost of such changes and shall have no  
39 Claim against ADOT on account of such changes. Without limiting the foregoing, no  
40 Claim will be allowed which is based upon Developer's lack of knowledge or a

1 misunderstanding of any such requirements or Developer's failure to include in the Price  
2 adequate increases in such wages over the duration of this Agreement.

3           **9.10.3** Developer shall comply and cause its Subcontractors to comply with all  
4 Laws regarding notice and posting of intent to pay prevailing wages, of prevailing wage  
5 requirements and of prevailing wage rates.

6 **9.11 Uniforms**

7 Any uniforms, badges, logos and other identification worn by personnel of Developer-  
8 Related Entities shall bear colors, lettering, design or other features to assure clear  
9 differentiation from those of ADOT and its employees.  
10

**ARTICLE 10.**  
**PERFORMANCE AND PAYMENT BONDS; GUARANTEES**

**10.1 Provision of Bonds during Construction Period and Warranty Term**

Developer has provided or shall provide to ADOT performance and payment bonds securing Developer's obligations during the Construction Period and Warranty Term, and Developer shall maintain such bonds in full force and effect as described in this Section 10.1.

**10.1.1 D&C Performance Bond**

**10.1.1.1** On or before the Effective Date, Developer delivered or shall deliver to ADOT the D&C Performance Bond in the amount of \$250,000,000.00.

**10.1.1.2** ADOT will provide a release of the D&C Performance Bond provided that (and upon such date thereafter that) all of the following have occurred:

- (a) Final Acceptance has occurred;
- (b) there exists no Developer Default;
- (c) no event has occurred that with the giving of notice or passage of time, or both, would constitute a Developer Default; and
- (d) Developer has delivered to ADOT a Warranty Bond bonding performance of Developer's Warranty obligations. The Warranty Bond must be (i) in form and substance acceptable to ADOT, (ii) in the face amount of \$10,000,000.00 and (iii) issued by a Surety meeting the requirements set forth in Section 10.1.3. The Warranty Bond shall remain in effect for the duration of the Warranty Term and thereafter until satisfaction of any amount due ADOT as set forth in Section 12.1.3 and the end of any warranty period for re-done work as set forth in Section 12.2.

**10.1.1.3** If Developer elects not to provide a Warranty Bond, then ADOT will provide a release of the D&C Performance Bond on the date that is one year after Final Acceptance, provided that (and upon such date thereafter that) all of the following have occurred:

- (a) there exists no Developer Default;
- (b) no event has occurred that with the giving of notice or passage of time, or both, would constitute a Developer Default; and
- (c) the Warranty Term has ended, Developer has satisfied any amount due ADOT as set forth in Section 12.1.3 and any warranty period for re-done work as set forth in Section 12.2 has ended.

**10.1.2 D&C Payment Bond**

1                   **10.1.2.1** On or before the Effective Date, Developer delivered or shall  
2 deliver to ADOT the D&C Payment Bond in the amount of \$250,000,000.00.

3                   **10.1.2.2** ADOT will provide a release of the D&C Payment Bond  
4 upon:

5                                 (a) Receipt of (i) evidence satisfactory to ADOT that all  
6 Persons eligible to file a claim against the D&C Payment Bond have been fully paid, and  
7 (ii) unconditional releases of claims and stop notices from all Subcontractors who filed  
8 preliminary notices of a claims against the D&C Payment Bond (or evidence satisfactory  
9 to ADOT that any such claims and stop notices have been separately bonded around);  
10 and

11                                (b) Expiration of the statutory period for Subcontractors to  
12 file a claim against the D&C Payment Bond, if no claims have been filed.

13                   **10.1.3** Each D&C Performance Bond and D&C Payment Bond required  
14 hereunder, and any Warranty Bond, shall be issued by a Surety that is: (a) licensed and  
15 authorized to do business in the State; (b) listed on the “Department of the Treasury’s  
16 Listing of Approved Surety’s (Department Circular 570)” (found at  
17 [www.fiscal.treasury.gov/fsreports/ref/suretybnd/c570.htm](http://www.fiscal.treasury.gov/fsreports/ref/suretybnd/c570.htm)); and (c) rated “A” or higher by  
18 at least two nationally-recognized rating agencies (Fitch Ratings, Moody’s Investor  
19 Service and Standard & Poor’s) or rated at least A minus (“A-”) or better and Class VIII  
20 or better according to A.M. Best and Company’s Financial Strength Rating and  
21 Financial Size Category, or as otherwise approved by ADOT in its discretion. If any  
22 bond previously provided becomes ineffective, or if the Surety that provided the bond no  
23 longer meets the foregoing requirements, Developer shall provide a replacement bond  
24 in the same form and, if applicable, with the same multiple obligee rider, issued by a  
25 surety meeting the foregoing requirements, or other assurance satisfactory to ADOT in  
26 its discretion.

27                   **10.1.4** If the D&C Price is increased in connection with a Supplemental  
28 Agreement, ADOT may, in its sole discretion, require a corresponding and proportionate  
29 increase in the amount of each D&C Performance Bond and D&C Payment Bond, or  
30 alternative security.

31                   **10.2 Provision of Bonds during Maintenance Period**

32 As a Maintenance Services Condition Precedent pursuant to Section 6.6.3, Developer  
33 shall provide to ADOT Maintenance Bonds securing Developer’s performance and  
34 payment obligations during the Maintenance Period, and Developer shall maintain such  
35 Maintenance Bonds in full force and effect in accordance with this Section 10.2.

36                   **10.2.1 Maintenance Performance Bonds**

37                                **10.2.1.1** Developer shall deliver by the time set forth in this  
38 Section 10.2 and shall maintain in place a performance bond in the form attached

1 hereto as Exhibit 10-1 (the “Maintenance Performance Bond”) in compliance with the  
2 provisions set forth herein until the date that is one year after the Term.

3 **10.2.1.2** The initial amount of the Maintenance Performance Bond  
4 shall be required as of the Substantial Completion Date and an adjusted amount  
5 required as of each five-year anniversary of the Substantial Completion Date based on  
6 the higher of the following calculations:

7 (a) 100% of the escalated amounts of Monthly  
8 Disbursements scheduled for the applicable five-year period, as set forth in Exhibit 2-  
9 4.2; and

10 (b) 100% of the estimated costs of Capital Asset  
11 Replacement Work scheduled to be completed during the applicable five-year period,  
12 as determined before each five-year period in accordance with Sections 8.3 and 8.11.2  
13 and the Handback Requirements; plus 100% of the escalated amounts of Annual  
14 Routine Maintenance Payments scheduled for such five-year period, as set forth in  
15 Exhibit 2-4.3; plus 100% of all in-lieu fees, if any, owing from Developer to ADOT under  
16 Section 8.11.4.

17 **10.2.1.3** For the purposes of determining the escalated amounts of  
18 the Monthly Disbursements and Annual Routine Maintenance Payments described in  
19 clauses (a) and (b) of Section 10.2.1.2, the corresponding payments set forth in  
20 Exhibits 2-4.2 and 2-4.3 for the applicable five-year period shall be escalated to the date  
21 that is 60 days prior to the date the Maintenance Performance Bond is required, using  
22 CPI and CCI, as applicable, in the same manner applied to the Maintenance Price in  
23 Section 13.5.6, and then at an annual rate of 3% for each succeeding year.

24 **10.2.1.4** ADOT will provide a release of a Maintenance Performance  
25 Bond on the later of:

26 (a) the date that is six years after the end of the term of  
27 the Maintenance Performance Bond; or

28 (b) the date that all outstanding Developer Defaults, and  
29 Claims made against Developer within six years after the end of the term of the  
30 Maintenance Performance Bond, arising out of the obligations guaranteed by the  
31 Maintenance Performance Bond, have been finally resolved.

32 **10.2.2 Maintenance Payment Bonds**

33 **10.2.2.1** Developer shall deliver to ADOT a payment bond in the  
34 same amount and at the same times as required for the Maintenance Performance  
35 Bond pursuant to Section 10.2.1 in the form attached hereto as Exhibit 10-2 (the  
36 “Maintenance Payment Bond”).

37 **10.2.2.2** ADOT will provide a release of a Maintenance Payment  
38 Bond upon the first to occur of:

1 (a) receipt of (i) evidence satisfactory to ADOT that all  
2 Persons eligible to file a claim against the Maintenance Payment Bond have been fully  
3 paid, and (ii) unconditional releases of claims and stop notices from all Subcontractors  
4 who filed a preliminary notice of a claim against the Maintenance Payment Bond (or  
5 evidence satisfactory to ADOT that any such claims and stop notices have been  
6 separately bonded around); or

7 (b) expiration of the statutory period for Subcontractors to  
8 file a claim against the Maintenance Payment Bond, if no claims have been filed;  
9 provided, however, that if no statute applies, then this clause (b) shall be disregarded.

10 **10.2.3** Each Maintenance Bond required hereunder shall have a term of at  
11 least five years, except if a shorter term is sufficient at the end of the Term.

12 **10.2.4** Each Maintenance Bond shall be issued by a Surety authorized to do  
13 business in the State with a rating of at least A minus (A-) or better and Class VIII or  
14 better by A.M. Best Company, or rated in the top two categories by two nationally  
15 recognized rating agencies, or as otherwise approved by ADOT in its discretion.

16 **10.2.5** If the Maintenance Price is increased in connection with a  
17 Supplemental Agreement, ADOT may, in its sole discretion, require a corresponding  
18 and proportionate increase in the amount of each Maintenance Bond, or alternative  
19 security.

20 **10.2.6 Replacement Maintenance Bonds**

21 **10.2.6.1** Developer shall deliver to ADOT replacement Maintenance  
22 Bonds meeting the requirements set forth in this Section 10.2:

23 (a) no later than 20 days prior to the first to occur of  
24 (i) the expiration of the then current Maintenance Bond, or (ii) the date on which an  
25 adjustment to the amount of such Maintenance Bond is required pursuant to  
26 Section 10.2.1 or 10.2.5; and

27 (b) no later than ten days after (i) any Maintenance Bond  
28 previously provided becomes ineffective, or (ii) the Surety that provided such  
29 Maintenance Bond no longer meets the requirements set forth in Section 10.2.4.

30 **10.2.6.2** If Developer fails to timely provide a replacement  
31 Maintenance Bond meeting the applicable requirements of this Section 10.2, or the  
32 Maintenance Guaranty meeting the requirements set forth in Section 10.4, Developer  
33 shall have an additional 120 days after the applicable date set forth in Section 10.2.6.1  
34 to cure such failure, but only if Developer delivers to ADOT, by such applicable date, a  
35 letter of credit or cash collateral in lieu of the replacement Maintenance Bonds. The  
36 letter of credit collateral shall be in an amount equal to the total Maintenance Payments  
37 scheduled to be paid during the 120-day cure period, commencing on the date that (a)  
38 the then current Maintenance Performance Bond will expire, (b) the adjusted amount is

1 required, (c) the Maintenance Bond previously provided becomes ineffective, or (d) the  
2 Surety no longer meets the requirements hereof, as applicable.

3 **10.2.6.3** ADOT will have the same rights to draw upon any letter of  
4 credit or cash collateral provided in lieu of Maintenance Bonds to the same extent it  
5 could draw on the Maintenance Bonds. ADOT will return to Developer any cash  
6 collateral not so utilized by ADOT within the 120-day cure period described in  
7 Section 10.2.6.2 upon the earlier of: (a) delivery by Developer of replacement  
8 Maintenance Bonds meeting the applicable requirements of this Section 10.2 and the  
9 Maintenance Guaranty (if required) in accordance with Sections 10.4, and (b) the date  
10 on which the Maintenance Bonds would otherwise be released in accordance with this  
11 Section 10.2.

12 **10.2.6.4** Failure of Developer to provide replacement Maintenance  
13 Bonds within the 120-Day cure period described in Section 10.2.6.2 shall constitute an  
14 Event of Default.

15 **10.2.7 Party Providing Maintenance Bonds; Multiple Obligees**

16 **10.2.7.1** Developer may elect to:

17 (a) Procure the Maintenance Bonds directly, so that they  
18 are security, as applicable, for Developer's (i) performance obligations under the  
19 Contract Documents respecting the Maintenance Services, and (ii) Developer's  
20 payment obligations to the designated Persons supplying labor or materials respecting  
21 the Maintenance Services; or

22 (b) Subject to this Section 10.2, deliver Maintenance  
23 Bonds from each Lead Maintenance Firm and other Subcontractors having a direct  
24 Subcontract with Developer for performance of any portion of the Maintenance  
25 Services, so that each such Maintenance Bond, as applicable, is security for  
26 (i) performance of the Lead Maintenance Firm's or such other Subcontractor's  
27 obligations under its Subcontract for Maintenance Services, and (ii) payment to the  
28 designated Persons supplying labor or materials.

29 **10.2.7.2** If Developer makes the election under clause (b) of  
30 Section 10.2.7.1, then:

31 (a) Developer shall provide multiple obligee riders, in the  
32 forms attached as Exhibits 10-3 and 10-4, respectively, in which ADOT is named as an  
33 additional obligee and all rights of Developer are subordinated to ADOT;

34 (b) The language of the bond form set forth in  
35 Exhibits 10-1 and 10-2 shall be adjusted to reflect this election, but only as necessary to  
36 (i) identify the Subcontract for Maintenance Services as the bonded contract, (ii) identify  
37 the Lead Maintenance Firm or other firm, as applicable, as the principal, and (iii) change  
38 the obligee to Developer; and

1 (c) Such bonds shall otherwise conform to the  
2 requirements set forth in this Section 10.2.

3 **10.2.7.3** If Developer makes the election under clause (b) of  
4 Section 10.2.7.1 and there are two or more parties providing the Maintenance Bonds,  
5 then the aggregate sum of the Maintenance Bonds shall equal the required bond  
6 amount set forth in Section 10.2.1 and the size of each bond shall be in proportion to  
7 the scope and cost of the Maintenance Services to be provided under each bonded  
8 Subcontract.

### 9 **10.3 No Relief of Liability**

10 Notwithstanding any other provision set forth in the Contract Documents, performance  
11 by a Surety or Guarantor of any of the obligations of Developer that meets the  
12 requirements of the Agreement shall not relieve Developer of any of its other obligations  
13 hereunder, including the payment of Liquidated Damages.

### 14 **10.4 Guaranty**

15 **10.4.1** *[DELETE THIS PROVISION UNLESS A D&C GUARANTY IS*  
16 *REQUIRED AS OF THE EFFECTIVE DATE]* [ ] are  
17 the D&C Guarantors guaranteeing Developer's obligations under the Contract  
18 Documents as set forth in Section 10.4.2 as of the Effective Date and have provided a  
19 guaranty in accordance with the form attached as Exhibit 11-1.

20 **10.4.2** If Developer is required to provide a Guaranty guaranteeing its  
21 obligations under the Contract Documents respecting the D&C Work (the "D&C  
22 Guaranty"), the D&C Guaranty shall be in the form set forth in Exhibit 11-1 and shall  
23 guarantee Developer's obligations with respect to the D&C Work under the Contract  
24 Documents.

25 **10.4.3** *[DELETE THIS PROVISION UNLESS A MAINTENANCE*  
26 *GUARANTY IS PROVIDED IN PROPOSAL]* [ ] are  
27 the Maintenance Guarantors guaranteeing Developer's obligations under the Contract  
28 Documents as set forth in Section 10.4.4 as of the Effective Date and have provided a  
29 guaranty in accordance with the form attached as Exhibit 11-2.

30 **10.4.4** Developer shall be required to provide a Guaranty guaranteeing  
31 Developer's obligations under the Contract Documents during the Maintenance Period  
32 in the form set forth in Exhibit 11-2 (the "Maintenance Guaranty") from a Guarantor  
33 approved by ADOT as of and as a condition to Substantial Completion. If a  
34 Maintenance Guaranty was provided as of the Effective Date and such Maintenance  
35 Guaranty satisfies the requirements of this Section 10.4 and is in effect on the  
36 Substantial Completion Date, then Developer shall not be required to provide an  
37 additional Maintenance Guaranty at the Substantial Completion Date.

38 **10.4.5** Developer shall report to ADOT, on a quarterly basis during the Term,  
39 the Tangible Net Worth of Developer and each Guarantor. The report shall state the

1 Tangible Net Worth and be certified as true and complete by the chief financial officer of  
2 the entity reporting. The entity may mark the report “confidential.”

3 **10.4.6** If at any time during the course of this Agreement the total combined  
4 Tangible Net Worth of Developer and either the D&C Guarantors or the Maintenance  
5 Guarantors, as applicable, is less than \$200,000,000.00, Developer shall provide one or  
6 more guarantees so that the combined Tangible Net Worth of Developer and the  
7 applicable Guarantors is at least \$200,000,000.00. This minimum Tangible Net Worth  
8 amount of \$200,000,000.00 shall be adjusted annually on the first anniversary of the  
9 Effective Date and continuing on each anniversary thereafter during the Term to equal  
10 \$200,000,000.00 multiplied by a fraction the numerator of which is the CCI most  
11 recently published prior to the applicable anniversary and the denominator of which is  
12 the Base CCI, and then rounded to the nearest \$100,000.00. However, provided there  
13 exists no Developer Default as of the anniversary of the Effective Date occurring  
14 immediately after the first five years of the Maintenance Period, the Tangible Net Worth  
15 requirement on such anniversary, and each anniversary of the Effective Date thereafter,  
16 shall equal 50% of what it would otherwise be under the foregoing escalation provisions.

17 **10.4.7** If this Agreement is executed by a Developer that is a joint venture and  
18 each joint venture member has agreed to be held jointly and severally liable for any and  
19 all of the duties and obligations of Developer under the Contract Documents, then the  
20 Tangible Net Worth of each joint venture member will be counted toward the Tangible  
21 Net Worth requirement.

22 **10.4.8** Each Guaranty shall be in the applicable form attached as Exhibit 11  
23 together with appropriate evidence of authorization, execution, delivery and validity  
24 thereof, and shall guarantee the Guaranteed Obligations. ADOT may require opinions  
25 from the Guarantor’s legal counsel, in form and substance acceptable to ADOT, on due  
26 authorization, execution, delivery, validity and enforceability of the Guaranty.

27 **10.4.9** Developer may replace an existing Guaranty with a new Guaranty  
28 upon prior approval by ADOT. Any new Guaranty shall be provided in the applicable  
29 form attached as Exhibit 11-1 or 11-2 together with appropriate evidence of  
30 authorization, execution, delivery and validity thereof, and with legal opinions as  
31 required by ADOT, and shall guarantee the Guaranteed Obligations. The Guaranty  
32 being replaced shall remain in effect until the approved replacement Guaranty becomes  
33 effective.  
34

1 **ARTICLE 11.**  
2 **INSURANCE; CLAIMS AGAINST THIRD PARTIES**

3 Developer shall procure and keep in effect, or cause to be procured and kept in effect,  
4 the insurance policies in accordance with the requirements in this Article 11 and  
5 Exhibit 12.

6 **11.1 General Insurance Requirements**

7 **11.1.1 Qualified Insurers**

8 Each of the insurance policies required hereunder shall be procured from an  
9 insurance carrier or company that, at the time coverage under the applicable policy  
10 commences is: (a) authorized to do business in the State and has a current  
11 policyholder's management and financial size category rating of not less than "A -, VII"  
12 according to A.M. Best's Insurance Reports Key Rating Guide; or (b) otherwise  
13 approved by ADOT.

14 **11.1.2 Premiums, Deductibles and Self-Insured Retentions**

15 Developer shall timely pay, or cause to be paid, the premiums for all insurance  
16 required under this Agreement. Subject to Section 11.3 and Articles 14 and 15,  
17 Developer shall be responsible for and ADOT will have no liability for any deductibles,  
18 self-insured retentions and amounts in excess of the coverage provided. In the event  
19 that any required coverage is provided under a self-insured retention, Developer shall  
20 ensure that the entity responsible for the self-insured retention has an authorized  
21 representative issue a letter to ADOT, at the same time the insurance policy is to be  
22 procured, stating that it shall protect and defend ADOT to the same extent as if a  
23 commercial insurer provided coverage for ADOT.

24 **11.1.3 Primary Coverage**

25 Each insurance policy shall provide that the coverage is primary and  
26 noncontributory coverage with respect to any other insurance available to ADOT and  
27 the other Indemnified Parties, except for coverage that by its nature cannot be written  
28 as primary. For each property policy, such policy shall provide that the coverage  
29 thereof is primary and noncontributory with respect to all insureds as their interest may  
30 appear. Any insurance or self-insurance beyond that specified in this Agreement that is  
31 maintained by an insured or any such additional insured shall be excess of such  
32 insurance and shall not contribute with it.

33 **11.1.4 Project-Specific Insurance**

34 Except as expressly provided otherwise in Exhibit 12, all insurance policies  
35 required hereunder shall be purchased specifically and exclusively for the Project and  
36 extend to all aspects of the Work, with coverage limits devoted solely to the Project.  
37 Insurance coverages under corporate insurance programs with dedicated Project-  
38 specific limits and identified allocation of premiums to the Project are acceptable,

1 provided that they otherwise meet all requirements described in this Section 11.1 and  
2 Exhibit 12.

3 **11.1.5 Verification of Coverage**

4 **11.1.5.1** At each time Developer is required to initially obtain or cause  
5 to be obtained each insurance policy, and thereafter not later than ten days prior to the  
6 expiration date of each insurance policy, Developer shall deliver to ADOT a certificate of  
7 insurance. Each required certificate must meet the requirements of ADOT and, to the  
8 extent permitted under applicable Laws, state the identity of all carriers, named insureds  
9 and additional insureds required under the Contract Documents, state the type and  
10 limits of coverage, deductibles and cancellation provisions of the policy, include as  
11 attachments all additional insured and waiver of subrogation endorsements required  
12 under the Contract Documents, and be signed by an authorized representative of the  
13 insurance company shown on the certificate or its agent or broker. Each required  
14 certificate of insurance evidencing coverage must be signed by a representative or  
15 agent of the insurance company shown on the evidence with proof that the signer is an  
16 authorized representative or agent of such insurance company and is authorized to bind  
17 it to the coverage, limits and termination provisions shown on the evidence. Each such  
18 certificate of insurance shall be accompanied by a letter signed by Developer confirming  
19 that the insurances represented in the certificate of insurance fully comply with all  
20 provisions of this Article 11 and Exhibit 12.

21 **11.1.5.2** In addition, within a reasonable time after availability (but not  
22 to exceed 30 days), Developer shall deliver to ADOT: (i) a complete certified copy of  
23 each such insurance policy or modification, or renewal or replacement insurance policy  
24 and all endorsements thereto and (ii) satisfactory evidence of payment of the premium  
25 therefor.

26 **11.1.5.3** If Developer has not provided ADOT with the foregoing proof  
27 of coverage and payment within five days after ADOT delivers to Developer written  
28 request therefor or notice of a Developer Default under Section 19.1.1 and demand for  
29 the foregoing proof of coverage, ADOT may, in addition to any other available remedy,  
30 without obligation or liability and without further inquiry as to whether such insurance is  
31 actually in force: (a) obtain such an insurance policy; and Developer shall reimburse  
32 ADOT for the cost thereof upon demand, and (b) suspend all or any portion of Work for  
33 cause and close the Project until ADOT receives from Developer such proofs of  
34 coverage in compliance with this Section 11.1 (or until ADOT obtains an insurance  
35 policy, if it elects to do so).

36 **11.1.6 Subcontractor Insurance Requirements**

37 **11.1.6.1** Developer's obligations regarding Subcontractor's insurance  
38 are set forth in Exhibit 12. Developer shall cause each Subcontractor to provide such  
39 insurance in the manner and in the form consistent with the requirements contained in  
40 this Agreement.

1                   **11.1.6.2** If any Subcontractor fails to procure and keep in effect the  
2 insurance required of it under Exhibit 12 and ADOT asserts the same as a Developer  
3 Default hereunder, Developer may, within the applicable cure period, cure such  
4 Developer Default by: (i) causing such Subcontractor to obtain the requisite insurance  
5 and providing to ADOT proof of insurance; (ii) procuring the requisite insurance for such  
6 Subcontractor and providing to ADOT proof of insurance; or (iii) terminating the  
7 Subcontractor and removing its personnel from the Site.

8                   **11.1.7 Policies with Insureds in Addition to Developer**

9                   All insurance policies that are required to insure Persons (whether as named or  
10 additional insureds) in addition to Developer shall be endorsed to comply with the  
11 following provisions:

12                   (a) The insurance policy shall be written or endorsed so that no  
13 acts or omissions of an insured shall vitiate coverage of the other insureds. Without  
14 limiting the foregoing, any failure on the part of a named insured to comply with  
15 reporting provisions or other conditions of the insurance policies, any breach of  
16 warranty, any action or inaction of a named insured or others, or any change in  
17 ownership of all or any portion of the Project shall not affect coverage provided to the  
18 other named insureds or additional insureds (and their respective members, directors,  
19 officers, employees, agents and, if applicable, ADOT Consultants).

20                   (b) The insurance shall apply separately to each named insured  
21 and additional insured against which a claim is made or suit is brought, except with  
22 respect to the limits of the insurer's liability.

23                   (c) All endorsements adding ADOT and the other additional  
24 insureds as required by the Contract Documents to the required insurance policies shall  
25 contain no limitations, conditions, restrictions or exceptions to coverage in addition to  
26 those that apply under the insurance policy generally, and shall state that the interests  
27 and protections of each such additional insured shall not be affected by any  
28 misrepresentation, act or omission of a named insured or any breach by a named  
29 insured of any provision in the policy that would otherwise result in forfeiture or  
30 reduction of coverage.

31                   **11.1.8 Additional Terms and Conditions**

32                   **11.1.8.1** Each insurance policy shall be endorsed to state that  
33 coverage cannot be canceled, voided, suspended, adversely modified, or reduced in  
34 coverage or in limits (including for non-payment of premium) except after 30 days' prior  
35 notice (or ten days in the case of cancellation for non-payment of premium) by  
36 registered or certified mail, return receipt requested, has been given to, at a minimum,  
37 ADOT, Developer and, as applicable, the Lead Subcontractor or Lead Maintenance  
38 Firm; provided, however, that (a) no such notice from the insurer shall be required for  
39 reduction in limits due to claims payments, and (b) Developer may obtain as  
40 comparable an endorsement as possible if it establishes unavailability of this

1 endorsement as set forth in Section 11.1.12. Such endorsement shall not include any  
2 limitation of liability of the insurer for failure to provide such notice.

3 **11.1.8.2** The commercial general liability insurance policy shall cover  
4 liability arising out of the acts or omissions of Developer’s employees engaged in the  
5 Work as well as employees of Subcontractors if Subcontractors are covered by a  
6 Developer-controlled insurance program. If any Subcontractor is not covered by such  
7 Developer-controlled insurance program, then Subcontractor shall provide commercial  
8 general liability to cover liability arising out of the activities of Subcontractor’s employees  
9 engaged in the Work.

10 **11.1.8.3** If Developer’s or any Subcontractor’s activities involve  
11 transportation of Hazardous Materials, the automobile liability insurance policy for  
12 Developer or such Subcontractor shall be endorsed to include for private, non-  
13 commercial vehicles Motor Carrier Act Endorsement-Hazardous Materials Clean Up  
14 (MCS-90).

15 **11.1.8.4** Each insurance policy shall provide coverage on an  
16 “occurrence” basis and not a “claims made” basis (with the exception of any  
17 professional liability policy).

18 **11.1.9 Waivers of Subrogation**

19 Subject to the self-insurance provision below, ADOT waives all rights against the  
20 Developer-Related Entities, and Developer waives all rights against the Indemnified  
21 Parties, for any claims to the extent covered by insurance obtained pursuant to this  
22 Article 11, except such rights as the Parties may have to the proceeds of such  
23 insurance. For the avoidance of doubt, and subject to the self-insurance provision  
24 below, such mutual waivers shall not apply to claims denied by the insurer, or otherwise  
25 not covered by insurance obtained pursuant to this Section 11.1.9. If Developer is  
26 deemed to self-insure a claim or loss under Section 11.2.4, then Developer’s waiver  
27 shall apply as if it carried the required insurance. Developer shall require all  
28 Subcontractors to provide similar waivers in writing each in favor of all other Persons  
29 enumerated above. Subject to Section 11.1.12, each policy, including workers’  
30 compensation if permitted under the applicable worker’s compensation insurance laws,  
31 shall include a waiver of any right of subrogation against the Indemnified Parties or the  
32 insurer’s consent to the insured’s waiver of recovery in advance of loss. However, no  
33 waiver of subrogation rights under any policy providing professional liability coverage to  
34 the insureds shall be required of any party.

35 **11.1.10 No Recourse**

36 There shall be no recourse against ADOT for payment of premiums or other  
37 amounts with respect to the insurance required to be provided by Developer hereunder,  
38 except to the extent of ADOT’s obligation to pay the Price or to the extent such costs  
39 are recoverable under Section 11.1.3 or Articles 14 or 15.

40 **11.1.11 Support of Indemnifications**

1 The insurance coverage provided, or caused to be provided, hereunder by  
2 Developer is not intended to limit Developer's indemnification obligations under the  
3 Contract Documents.

#### 4 **11.1.12 Inadequacy or Unavailability of Required Coverages**

5 **11.1.12.1** ADOT makes no representation that the limits of liability  
6 specified for any insurance policy to be carried pursuant to this Agreement or approved  
7 variances therefrom are adequate to protect Developer against its undertakings under  
8 the Contract Documents, to ADOT, or any other Person. No such limits of liability or  
9 approved variances therefrom shall preclude ADOT from taking any actions as are  
10 available to it under the Contract Documents or otherwise at Law.

11 **11.1.12.2** If Developer demonstrates to ADOT's reasonable  
12 satisfaction that it has used diligent efforts in the global insurance and reinsurance  
13 markets to maintain the insurance coverages Developer is required to provide  
14 hereunder, and if, despite such diligent efforts and through no fault of Developer, any of  
15 such coverages (or any of the required terms of such coverages, including insurance  
16 policy limits) become unavailable during the Term at commercially reasonable rates,  
17 ADOT will consider in good faith granting Developer an interim written variance from  
18 such requirements under which Developer shall obtain and maintain or cause to be  
19 obtained and maintained alternative insurance packages and programs that provide risk  
20 coverage as comparable to that contemplated in this Article 11 as is commercially  
21 reasonable under then-existing insurance market conditions. For purposes of this  
22 Section 11.1.12, commercially reasonable rates are rates equal to or less than 200% of  
23 the benchmark for the insurance policy at issue as described in Section 11.1.13. If the  
24 required insurance coverage is available in the market, ADOT's decision to approve or  
25 disapprove a variance from the requirements of this Article 11 shall be final and not  
26 subject to the Dispute Resolution Procedures. For the avoidance of doubt, no increase  
27 in insurance premiums attributable to particular conditions of the Project, or to claims or  
28 loss experience of any Developer-Related Entity or Affiliate, whether under an  
29 insurance policy required by this Article 11 or Exhibit 12 or in connection with any  
30 unrelated work or activity of Developer-Related Entities or Affiliate, shall be considered  
31 in determining whether required insurance is commercially unavailable.

32 **11.1.12.3** Developer shall not be entitled to any extension of the  
33 Completion Deadlines resulting from the unavailability of coverage and the requirement  
34 to provide acceptable alternatives. Developer shall be entitled to an increase in the  
35 Price resulting from the unavailability of coverage and the requirement to provide  
36 acceptable alternatives solely in the manner set forth in Section 11.1.13 for increased  
37 costs of the insurance policies required to be maintained at any time during the  
38 Maintenance Period pursuant to this Article 11 and Exhibit 12.

39 **11.1.12.4** ADOT will be entitled to a reduction in the Price

40 (a) If it agrees to accept alternative policies providing less  
41 than equivalent coverage and Developer is not obligated to self-insure for such risks,

1 with the amount to be determined by extrapolation using the insurance quotes included  
2 in the DPDs (or based on other evidence of insurance premiums as of the Proposal Due  
3 Date if the DPDs do not provide adequate information), and

4 (b) Solely with respect to the insurance policies required  
5 to be maintained at any time during the Maintenance Period, in the manner set forth in  
6 Section 11.1.13.

7 **11.1.13 Insurance Premium Benchmarking**

8 **11.1.13.1** Except as otherwise provided in Section 11.1.12 and this  
9 Section 11.1.13, Developer shall bear the full risk of any insurance premium increases  
10 from the Effective Date until the Substantial Completion Date, and shall not be entitled  
11 to any Claim for relief for such increases. Solely with respect to insurance policies  
12 required to be maintained at any time during the Maintenance Period under this  
13 Article 11 and Exhibit 12, ADOT will allocate the risk of significant increases in  
14 insurance premiums through an insurance benchmarking process as set forth in this  
15 Section 11.1.13. In no event shall ADOT participate in any insurance premium risk  
16 associated with either deductibles less than the maximum deductibles set forth in, or  
17 additional or extended coverages beyond those required under, this Article 11 or  
18 Exhibit 12, or changes in premiums that are not the result of market-based factors.

19 **11.1.13.2** The benchmarking process will occur at each insurance  
20 renewal period, but no less than triennially, through the following:

21 (a) Not later than 60 days after the Substantial  
22 Completion Date and 45 days prior to each insurance renewal period (but no less than  
23 triennially), Developer shall submit a report (“Insurance Review Report”) to ADOT that  
24 includes the following elements:

25 (i) Firm quotes from three established and  
26 recognized insurance providers for the Insurance Policies required, without any  
27 variation, in Exhibit 12 to be maintained during the Maintenance Period (“Required  
28 Minimum Insurance Policies”). The quotes shall represent the current and fair market  
29 cost of providing the Required Minimum Insurance Policies;

30 (ii) The written binders of insurance in the form  
31 and content required under this Article 11 and Exhibit 12 with the premium invoices and,  
32 in the case of corporate policies, premium allocations for the actual insurance policies  
33 required hereunder and thereunder for the subject annual insurance period as obtained  
34 by Developer (“Actual Insurance Policies”);

35 (iii) For any allocation to the Project of premiums  
36 for corporate policies, (A) a comprehensive explanation of the methodology applied to  
37 make the allocations, in compliance with Section 11.1.13.6, (B) detailed calculations  
38 that follow such methodology, and (C) written certification from an authorized officer of  
39 each of Developer and the corporate entity placing the policies certifying that the

1 allocated amount has been fairly and accurately determined in compliance with  
2 Section 11.1.13.6; and

3 (iv) Except with respect to the initial Insurance  
4 Review Report, a comprehensive written explanation of any effect that Developer's loss  
5 experience has had on the premiums for the Required Minimum Insurance Policies and  
6 the Actual Insurance Policies. The explanation shall include: (A) an assessment by  
7 Developer's independent insurance broker addressing industry trends in premiums for  
8 the Required Minimum Insurance Policies and analysis (if applicable) of any Project-  
9 specific reasons for the increase in premiums; and (B) detailed analysis of any claims  
10 (paid or reserved) since the last review period, with claim date(s), description of  
11 incident(s), claims amount(s), and the level of deductibles provided.

12 (b) ADOT, at its discretion, may independently assess  
13 the accuracy of the information in the Insurance Review Report and retains the right to  
14 perform its own independent insurance review, which may include retaining advisors,  
15 obtaining independent quotes for the Required Minimum Insurance Policies, performing  
16 its own calculation of corporate policy premium allocations consistent with Section  
17 11.1.13.6, or performing its own assessment as to the impact of claims history on  
18 renewal costs.

19 **11.1.13.3** The Starting Maintenance Period Insurance Benchmarking  
20 Premiums shall be calculated based on the greater of:

21 (a) Premium information obtained from the initial  
22 Insurance Review Report;

23 (b) Premium information included in the Detailed Pricing  
24 Documents; or

25 (c) If ADOT deems appropriate in its reasonable  
26 discretion, from information obtained pursuant to Section 11.1.13.2(b).

27 **11.1.13.4** The Starting Maintenance Period Insurance Benchmarking  
28 Premiums shall be used in the benchmarking process for the remainder of the Term in  
29 accordance with the following procedures:

30 (a) 60 days prior to each renewal date (but no less than  
31 triennially), Developer shall provide an updated Insurance Review Report, with the  
32 information specified in Section 11.1.13.2(a). ADOT will determine the change in  
33 premium costs on a coverage-by-coverage basis for the Required Minimum Insurance  
34 Policies calculated based on the information obtained from the initial Insurance Review  
35 Report or, if ADOT deems appropriate in its reasonable discretion, from information  
36 obtained pursuant to Section 11.1.13.2(b).

37 (b) ADOT will use the Starting Maintenance Period  
38 Insurance Benchmarking Premiums to measure changes in premium costs at each  
39 renewal period (but no less than triennially) for each of the Required Minimum

1 Insurance Policies. The Starting Maintenance Period Insurance Benchmarking  
2 Premiums shall be escalated by applying a fixed 5.0% annual increase (“Escalated  
3 Benchmark Maintenance Period Insurance Premiums”). Broker’s fees and agent’s  
4 commissions will not be considered as part of the benchmarking exercise described in  
5 this Section 11.1.13, and are the exclusive responsibility of Developer.

6 (c) The subsequent Insurance Review Reports shall be  
7 used to establish the renewal premiums for the Required Minimum Insurance Policies  
8 for purposes of the benchmarking process described in this Section 11.1.13. In no  
9 event shall premium increases that are caused by Project-specific losses, changes in  
10 deductibles, switches from a corporate policy to a project-specific policy or vice versa,  
11 or matters within the control of Developer or any Developer-Related Entity be subject to  
12 the benchmarking exercise or risk sharing described in this Section 11.1.13. Developer  
13 may voluntarily choose to procure an insurance package that varies from (but complies  
14 with) the Required Minimum Insurance Policies (with for example lower deductibles,  
15 higher coverage amounts, fewer exclusions, etc.), in which case both Parties recognize  
16 that: (a) the actual variations in Developer’s insurance premiums may not necessarily  
17 reflect the variations in the minimum insurance requirements and (b) ADOT will  
18 disregard the actual insurance package and will rely upon the analysis from the  
19 Insurance Review Report and its own independent analysis of the effect on the  
20 minimum insurance requirements. Any insurance beyond the Required Minimum  
21 Insurance Policies shall not be subject to the insurance benchmarking process and  
22 Maintenance Payment adjustment described in Section 11.1.13.

23 (d) If ADOT, in its discretion, elects to retain its own  
24 insurance advisor to analyze the extent of eligible premium increases, Developer shall  
25 cooperate in good faith with any reasonable requests for additional information from  
26 ADOT’s insurance advisor. No later than 30 days after Developer’s submission of the  
27 Insurance Review Report, ADOT will make its determination of the eligible premium  
28 increases subject to the risk-allocation described in Section 11.1.13.5. In the event of a  
29 dispute, ADOT’s determination shall be subject to the Dispute Resolution Procedures.

30 **11.1.13.5** If the annual insurance premiums for the Actual Insurance  
31 Policies, as such premiums may be adjusted pursuant to Section 11.1.13.4(c), are in  
32 excess of 130% of the applicable Escalated Benchmark Maintenance Period Insurance  
33 Premiums, ADOT will increase the Maintenance Price for the applicable year an amount  
34 equal to 85% of such premiums that are in excess of 130% of the applicable Escalated  
35 Benchmark Maintenance Period Insurance Premiums until the next benchmarking  
36 period. If the annual insurance premiums for the Actual Insurance Policy, as such  
37 premiums may be adjusted pursuant Section 11.1.13(d)(iii), are below 70% of the  
38 applicable Escalated Benchmark Maintenance Period Insurance Premiums, ADOT will  
39 reduce the Maintenance Price for the applicable year in an amount equal to 85% of the  
40 difference between such premiums and 70% of the applicable Escalated Benchmark  
41 Insurance Premiums until the next benchmarking period.

42 **11.1.13.6** If any insurance coverage is provided via dedicated Project-  
43 specific limits under corporate insurance programs, Developer shall account to ADOT

1 for the portion of premiums allocated to the Project for the purpose of applying these  
2 insurance benchmarking provisions. Developer shall consistently apply the corporate  
3 methodology used for premium allocation to all calculations necessary to determine  
4 whether any increase or decrease in the Maintenance Price is to be made under this  
5 Section 11.1.13; and all corporate conditions, facts and circumstances that are the basis  
6 for Developer's original determination of premium allocations to the Project as disclosed  
7 in its Proposal shall be assumed to hold constant at all times, without regard to changes  
8 over time in such conditions, facts and circumstances.

9 **11.1.14 Defense Costs**

10 No defense costs shall be included within or erode the limits of coverage of any  
11 of the insurance policies, except that (a) litigation and mediation defense costs may be  
12 included within the limits of coverage of professional and pollution liability policies, (b)  
13 investigation and expert defense costs may also be included within the limits of  
14 coverage of professional liability policies, and other defense costs may be included  
15 within the limits of coverage of professional and pollution liability policies with ADOT's  
16 prior written approval.

17 **11.1.15 Contesting Denial of Coverage**

18 If any insurance carrier under an insurance policy denies coverage with respect  
19 to any claims reported to such carrier, upon Developer's request, ADOT and, to the  
20 extent necessary, the other Indemnified Parties shall cooperate in good faith to  
21 establish whether and to what extent to contest, and how to fund the cost of contesting,  
22 the denial of coverage; provided, however, that if the reported claim is a matter covered  
23 by an indemnity in favor of an Indemnified Party, then Developer shall bear all costs of  
24 contesting the denial of coverage.

25 **11.1.16 Umbrella and Excess Policies**

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

31 **11.1.17 Additional Insurance Policies**

32 If Developer carries insurance coverage in addition to that required under this  
33 Agreement, then Developer shall include ADOT and its members, directors, officers,  
34 employees, agents and ADOT Consultants as additional insureds thereunder, if and to  
35 the extent they have an insurable interest, unless ADOT grants an exception in writing.  
36 The additional insured endorsements shall be as described in Section 11.1.7(c); and  
37 Developer shall provide to ADOT the proofs of coverage and copy of the policy  
38 described in Section 11.1.5. The provisions of Sections 11.1.5, 11.1.7, 11.1.9, 11.1.10,  
39 11.1.15 and 11.2 shall apply to all such policies of insurance coverage.

1                   **11.1.18 Adjustments in Coverage Amounts**

2                   **11.1.18.1** At least once every three years during the Maintenance  
3 Period (commencing initially on the Substantial Completion Date), ADOT and Developer  
4 shall review and increase, as appropriate, the per occurrence and aggregate limits or  
5 combined single limits for the insurance policies required under this Agreement that  
6 have stated dollar amounts set forth in Exhibit 12. At the same frequency ADOT and  
7 Developer shall review and adjust, as appropriate, the deductibles for such policies.

8                   **11.1.18.2** Developer shall retain a qualified and reputable insurance  
9 broker or independent, unaffiliated advisor not involved in the Project, experienced in  
10 insurance brokerage and underwriting practices for major bridge, highway or other  
11 relevant transportation facility projects, to analyze and recommend adjustments, if any,  
12 to such limits and adjustments to deductibles. Developer shall deliver to ADOT, not  
13 later than 90 days before each three-year adjustment date, a written report including  
14 such analysis and recommendations for ADOT’s approval. ADOT will have 45 days  
15 after receiving such report to approve or disapprove the proposed adjustments to limits  
16 and adjustments to deductibles or self-insured retentions.

17                   **11.1.18.3** In determining adjustments to limits and adjustments to  
18 deductibles, Developer and ADOT will take into account: (a) claims and loss experience  
19 for the Project, provided that premium increases due to adverse claims experience shall  
20 not be a basis for justifying increased deductibles; (b) the condition of the Project,  
21 including records of Asset Condition Scores, (c) the Capital Asset Replacement Work  
22 record for the Project, (d) the Noncompliance Points record for the Project; and (v) then-  
23 prevailing Good Industry Practice for insuring comparable transportation projects.

24                   **11.1.18.4** Any Dispute regarding adjustments to limits or adjustments  
25 to deductibles or self-insured retentions shall be resolved according to the Dispute  
26 Resolution Procedures.

27                   **11.1.19 Contractor-Controlled Insurance Program**

28                   Nothing in this Agreement, including in Exhibit 12, is intended or shall be  
29 construed to preclude use of a contractor-controlled insurance program to fulfill the  
30 insurance requirements under this Agreement.

31                   **11.1.20 Special Provisions for Builder’s Risk Insurance**

32                   **11.1.20.1** ADOT may elect, in its discretion, to place builder’s risk  
33 insurance instead of Developer, where it determines the coverage can be obtained at  
34 lower premium than the premium Developer would pay. Developer shall share with  
35 ADOT the premiums Developer expects to pay to assist ADOT in deciding whether to  
36 place the builder’s risk insurance.

37                   **11.1.20.2** If ADOT places the builder’s risk insurance, then:

1 (a) ADOT will meet all the policy requirements for the  
2 builder's risk insurance set forth in Exhibit 12;

3 (b) ADOT will be the first named insured. Developer  
4 shall also be a named insured on the policy. If Developer elects to include other  
5 Subcontractors as named insureds, then ADOT will include them as named insureds as  
6 their respective interests appear;

7 (c) ADOT will promptly provide to Developer the  
8 verifications of coverage described in Sections 11.1.5.1 and 11.1.5.2;

9 (d) ADOT will pay directly all required insurance  
10 premiums;

11 (e) ADOT will receive a credit against the D&C Price or  
12 the Maintenance Price, as applicable, equal to the amount of the insurance premium  
13 that Developer would have paid if it placed the builder's risk insurance;

14 (f) Developer will continue to have primary responsibility  
15 for prosecution of claims under the builder's risk policy as provided in Section 11.2; and

16 (g) All other provisions of this Article 11 and Exhibit 12  
17 pertaining to the builder's risk insurance shall continue to apply without change.

## 18 **11.2 Prosecution of Claims**

19 **11.2.1** Unless otherwise directed by ADOT in writing with respect to ADOT's  
20 insurance claims, Developer shall be responsible for reporting and processing all  
21 potential claims by ADOT or Developer against the insurance policies required  
22 hereunder. Developer agrees to report timely to the insurer(s) under such insurance  
23 policies any and all matters that may give rise to an insurance claim by Developer or  
24 ADOT or another Indemnified Party, and to promptly and diligently pursue such  
25 insurance claims in accordance with the claims procedures specified in such insurance  
26 policies, whether for defense or indemnity or both. Developer shall enforce all legal  
27 rights against the insurer under the applicable insurance policies and applicable Laws in  
28 order to collect thereon, including pursuing necessary litigation and enforcement of  
29 judgments, provided that Developer shall be deemed to have satisfied this obligation if a  
30 judgment is not collectible through the exercise of lawful and diligent means.

31 **11.2.2** Developer shall immediately notify ADOT, and thereafter keep ADOT  
32 fully informed, of any incident, potential claim, claim or other matter of which Developer  
33 becomes aware that involves or could conceivably involve an Indemnified Party.

34 **11.2.3** ADOT agrees to promptly notify Developer of ADOT's incidents,  
35 potential claims against ADOT, and matters that may give rise to an insurance claim  
36 against ADOT, to tender to the insurer ADOT's defense of the claim under such  
37 insurance policies, and to cooperate with Developer as necessary for Developer to fulfill  
38 its duties hereunder.

1           **11.2.4** If in any instance Developer has not performed its obligations  
2 respecting insurance coverage set forth in this Agreement or is unable to enforce and  
3 collect any such insurance for failure to assert claims in accordance with the terms of  
4 the insurance policies or to prosecute claims diligently, then for purposes of determining  
5 Developer’s liability and the limits thereon or determining reductions in compensation  
6 due from ADOT to Developer on account of available insurance, Developer shall be  
7 treated as if it has elected to self-insure up to the full amount of insurance coverage that  
8 would have been available had Developer performed such obligations and not  
9 committed such failure. Nothing in the Contract Documents shall be construed to treat  
10 Developer as electing to self-insure where Developer is unable to collect due to the  
11 bankruptcy or insolvency of any insurer that at the time the insurance policy is written  
12 meets the rating qualifications set forth in this Article 11.

13           **11.2.5** ADOT has the right, but not the obligation, to report directly to insurers  
14 and process any claims by ADOT or any other Indemnified Parties against applicable  
15 insurance policies.

16           **11.2.6** If in any instance Developer has not promptly performed its obligation  
17 to report to applicable insurers and process any potential insurance claim tendered by  
18 ADOT or another Indemnified Party, then ADOT or the other Indemnified Party may, but  
19 is not obligated to: (a) notify Developer of ADOT’s intent to report the claim directly with  
20 the insurer and thereafter process the claim; and (b) proceed with reporting and  
21 processing the claim if ADOT or the other Indemnified Party does not receive from  
22 Developer, within ten days after so notifying Developer, written proof that Developer has  
23 reported the claim directly to the insurer. ADOT or the other Indemnified Party may  
24 dispense with such notice to Developer if ADOT or the other Indemnified Party has a  
25 good faith belief that more rapid reporting is needed to preserve the claim.

26           **11.2.7** Developer shall keep ADOT promptly and fully informed of payments  
27 made by insurers under the insurance policies that provide coverage pursuant to this  
28 Agreement, and of the balance of the coverage limit remaining available after each such  
29 payment.

30           **11.3 Risk of Loss or Damage to Project; Use of Insurance Proceeds**

31           **11.3.1** Throughout the Term, Developer shall rebuild, repair, restore or  
32 replace all loss, damage or destruction to the Project, or to materials, equipment,  
33 supplies and maintenance equipment purchased for permanent installation in, or for use  
34 during construction or maintenance of, the Project, whether within or outside the Project  
35 ROW, regardless of who has title thereto under the Contract Documents and regardless  
36 of the cause of the loss, damage or destruction; provided, however, that, upon  
37 acceptance by a third party, Developer shall not be responsible for rebuilding, repairing,  
38 restoring or replacing Project-related property that will be maintained by such third  
39 party, unless such property is damaged due to negligent or willful acts of a Developer-  
40 Related Entity.

1           **11.3.2** Developer shall ensure that ADOT (a) is named as loss payee under  
2 all builder's risk insurance policies as required by this Agreement and (b) will have the  
3 exclusive right to receive claims payments from the insurers under such policies  
4 (including any policies ADOT obtains pursuant to Section 11.1.20). ADOT will hold all  
5 insurance proceeds it receives as loss payee or otherwise for any insured loss under  
6 such policies in a separate insurance proceeds account for the purposes of, and to be  
7 applied in accordance with, this Section 11.3. If loss, damage or destruction to the  
8 Project is deemed to be self-insured by Developer under Section 11.2.4, then, within 30  
9 days after ADOT's written request, Developer shall pay to ADOT, as loss payee, the  
10 amount of insurance proceeds deemed owing. ADOT will hold and dispense such  
11 payment from Developer in the same manner it would hold proceeds from a third party  
12 insurer.

13           **11.3.3** If the loss, damage or destruction to the Project is from a risk or event  
14 covered by a builder's risk policy required by this Agreement or by deemed self-  
15 insurance under Section 11.2.4 and the loss, damage or destruction is not attributable  
16 to a Relief Event, then:

17           (a) ADOT will arrange for available insurance proceeds to  
18 reimburse Developer for Extra Work Costs and Delay Costs of the repair or replacement  
19 Work to the Project performed by Developer, to the extent that ADOT has not previously  
20 paid for such Extra Work Costs and Delay Costs; provided, however, that release of  
21 such insurance proceeds to Developer shall not be a condition precedent to Developer's  
22 obligation to perform such repair or replacement Work or indicate that such repair or  
23 replacement Work has been approved and accepted by ADOT. ADOT will reimburse  
24 Developer on a monthly basis, in accordance with Article 13, as Developer completes  
25 the applicable repair or replacement Work, provided that Developer submits the  
26 documentation, as applicable, required under Section 13.2;

27           (b) If there are any insurance proceeds available after paying such  
28 Extra Work Costs and Delay Costs, ADOT will next apply such available insurance  
29 proceeds to reimburse Developer for its costs to repair or replace the items of property  
30 described in Section 11.3.7; and

31           (c) Developer shall bear the Extra Work Costs and Delay Costs of  
32 repair or replacement Work not covered by available insurance proceeds, including the  
33 amount of deductibles or self-insured retentions and any costs in excess of insurance  
34 coverage limits.

35           **11.3.4** If the loss, damage or destruction to the Project is from a risk or event  
36 covered by a builder's risk policy required by this Agreement or by deemed self-  
37 insurance under Section 11.2.4 and the loss, damage or destruction is caused by a  
38 Relief Event, then:

39           (a) ADOT will reimburse Developer for Extra Work Costs and Delay  
40 Costs of the repair or replacement Work to the Project performed by Developer and  
41 owing pursuant to the terms and conditions of this Agreement and the applicable

1 Supplemental Agreement, regardless of the amount of insurance proceeds or the timing  
2 of claims payments by the insurers, subject, however, to (i) any Claim Deductibles and  
3 (ii) ADOT's right to set off such reimbursements by any deemed self-insurance that  
4 Developer fails to pay to ADOT;

5 (b) If there are any insurance proceeds available after paying or  
6 reimbursing ADOT for such Extra Work Costs and Delay Costs (excluding any Claim  
7 Deductible), ADOT will next apply such available insurance proceeds to reimburse  
8 Developer for its costs to repair or replace the items of property described in  
9 Section 11.3.7, subject, however, to ADOT's right to set off such reimbursements by  
10 any deemed self-insurance that Developer fails to pay to ADOT; and

11 (c) ADOT will bear the Extra Work Costs and Delay Costs of the  
12 repair or replacement work to the Project not covered by available insurance proceeds  
13 or deemed self-insurance under Section 11.2.4, including the amount of deductibles or  
14 self-insured retentions and any costs in excess of insurance coverage limits.

15 **11.3.5** If the loss, damage or destruction to the Project is from a risk or event  
16 that this Agreement does not require to be covered by a builder's risk policy and the  
17 loss, damage or destruction is not attributable to a Relief Event, then Developer shall  
18 bear all schedule risk and all Extra Work Costs and Delay Costs for the repair or  
19 replacement Work to the Project, subject, however, to Developer's rights under  
20 Section 11.4.

21 **11.3.6** If the loss, damage or destruction to the Project is from a risk or event  
22 that this Agreement does not require to be covered by a builder's risk policy and the  
23 loss, damage or destruction is attributable to a Relief Event, then:

24 (a) Developer shall bear the Extra Work Costs and Delay Costs for  
25 the repair or replacement Work to the Project up to any applicable Claim Deductible;

26 (b) Subject to the terms and conditions of Article 14, ADOT will bear  
27 all further Extra Work Costs and Delay Costs for the repair or replacement Work to the  
28 Project; and

29 (c) Developer shall bear all the costs described in Section 11.3.7.

30 **11.3.7** Except to the extent there are available insurance proceeds as  
31 provided in Section 11.3.3(b) or 11.3.4(b), Developer shall bear all costs, including Extra  
32 Work Costs and Delay Costs, to repair or replace, and shall not be entitled to any  
33 compensation for delay due to, any loss, damage or destruction caused by a Relief  
34 Event or other event (except ADOT's gross negligence, recklessness or willful  
35 misconduct) to:

36 (a) Any tools, machinery, equipment facilities, protective fencing,  
37 job trailers, scaffolding or other items of any Developer-Related Entity used in the  
38 performance of the Work but not intended for permanent installation into the Project;

1 (b) Any machinery, equipment, facilities, materials, inventory,  
2 supplies and other property of any Developer-Related Entity outside the Project ROW;  
3 or

4 (c) Any machinery, equipment, facilities, materials, inventory,  
5 supplies and other property of any Developer-Related Entity while in transit to the Site.

6 **11.3.8** Developer's rights, if any, to Completion Deadline adjustment in the  
7 event of loss, damage or destruction to the Project shall be limited to situations where  
8 the loss, damage or destruction is caused by a Relief Event and shall be subject to the  
9 applicable provisions of Article 14.

## 10 **11.4 Claims against Third Parties**

11 **11.4.1** In connection with Developer's performance of its obligations under the  
12 Contract Documents, including repair of damage to the Project caused by collision (e.g.,  
13 motor vehicle, aircraft or railroad train), vandalism or other acts of destruction or  
14 damage by third parties, Developer shall have the right, in its reasonable discretion, to  
15 lawfully pursue claims against such third parties for damage caused to the Project.

16 **11.4.2** If ADOT receives payment pursuant to a third-party claim regarding  
17 damage to the Project caused by the third party, ADOT will hold and use such funds in  
18 the same manner as provided for holding and using insurance proceeds under Section  
19 11.3.

## 20 **11.5 ADOT's Right to Remedy Developer Breach Regarding Insurance**

21 If Developer or any Subcontractor fails to provide insurance as required herein, ADOT  
22 will have the right, but not the obligations, to purchase such insurance or to suspend  
23 Developer's right to proceed with the Work until proper evidence of insurance is  
24 provided. ADOT's costs in respect thereof, at ADOT's option, shall be deducted from  
25 amounts payable to Developer or reimbursed by Developer upon demand from ADOT.  
26 Nothing herein shall preclude ADOT from exercising its rights and remedies under  
27 Article 19 as a result of the failure of Developer or any Subcontractor to satisfy its  
28 insurance obligations herein.

## 29 **11.6 Disclaimer**

30 Developer and each Subcontractor have the responsibility to make sure that their  
31 insurance programs fit their particular needs, and it is their responsibility to arrange for  
32 and secure any insurance coverage that they deem advisable, whether or not specified  
33 herein.  
34

1 **ARTICLE 12.**  
2 **WARRANTIES**

3 **12.1 Warranties**

4 **12.1.1 Warranty**

5 **12.1.1.1** With respect to all elements of the Project that Developer is  
6 not obligated to maintain during the Maintenance Period (“Non-Maintained Elements”),  
7 Developer warrants that:

8 (a) All Non-Maintained Elements shall be free of Defects;

9 (b) All materials and equipment furnished under the  
10 Contract Documents for the Non-Maintained Elements shall be of good quality and new;  
11 and

12 (c) All Non-Maintained Elements shall meet all of the  
13 requirements of the Contract Documents (collectively, the “Warranty” or “Warranties”).

14 **12.1.1.2** This Warranty sets forth the sole warranties of Developer to  
15 and in favor of ADOT with respect to the Work for the Non-Maintained Elements, to the  
16 exclusion of any and all implied warranties of Developer.

17 **12.1.2 Warranty Term**

18 Subject to extension under Section 12.2, the Warranties regarding all Non-  
19 Maintained Elements of the Project will commence upon Final Acceptance and shall  
20 remain in effect until one year after Final Acceptance (“Warranty Term”). The Warranty  
21 Term for the Non-Maintained Elements that will be owned by Persons other than ADOT  
22 shall commence as of the date of acceptance thereof by such Persons and shall end  
23 one year thereafter. If ADOT determines that any of the D&C Work for the Non-  
24 Maintained Elements has not met the standards set forth in this Section 12.1 at any time  
25 within the applicable Warranty Term, then Developer shall correct such D&C Work as  
26 specified in this Article 12, even if the performance of such corrective D&C Work  
27 extends beyond the applicable Warranty Term. ADOT and Developer shall conduct a  
28 walkthrough of the Project prior to expiration of the Warranty Term and shall produce a  
29 punch list of those items requiring corrective work.

30 **12.1.3 Warranty Work**

31 Within seven days after Developer receives notice from ADOT specifying a  
32 failure of any of the Work to satisfy the Warranties, or of the failure of any Subcontractor  
33 representation, warranty, guarantee or obligation pertaining to Non-Maintained  
34 Elements which Developer is responsible to enforce, Developer and ADOT will mutually  
35 agree when and how Developer shall remedy such failure; provided, however, that in  
36 case of an emergency requiring immediate curative action or a situation which poses a  
37 significant safety risk, Developer shall implement such action as it deems necessary

1 and shall notify ADOT of the urgency of a decision. Developer and ADOT will promptly  
2 meet in order to agree on a remedy. If Developer does not use its best efforts to  
3 proceed to effectuate such remedy within the agreed time, or should Developer and  
4 ADOT fail to reach such an agreement within such seven-day period (or immediately in  
5 the case of emergency conditions), ADOT will have the right, but not the obligation, to  
6 perform or have performed by third parties the necessary remedy, and the costs thereof  
7 shall be borne by Developer. Reimbursement therefor shall be payable to ADOT within  
8 ten days after Developer's receipt of an invoice therefor. Alternatively, ADOT may  
9 deduct the amount of such costs and expenses from any sums owed by ADOT to  
10 Developer pursuant to this Agreement. ADOT may agree to accept Nonconforming  
11 Work in accordance with Section 6.7.2.

#### 12 **12.1.4 Permits and Costs**

13 Developer shall be responsible for obtaining any required encroachment permits  
14 and required consents from any other Persons in connection with the performance of  
15 Work addressed under this Section 12.1. Developer shall bear all costs of such Work,  
16 including additional testing and inspections, and shall reimburse ADOT or pay ADOT's  
17 expenses made necessary thereby, including any costs incurred by ADOT for  
18 independent quality assurance or quality control with respect to such Work. Developer  
19 shall pay such amounts to ADOT within ten days after Developer's receipt of invoices  
20 therefor (including, subject to the limitations in Sections 20.9 and 20.10, any Liquidated  
21 Damages arising from or relating to such Work). Alternatively, ADOT may deduct the  
22 amount of such costs and expenses from any sums owed by ADOT to Developer  
23 pursuant to this Agreement.

#### 24 **12.2 Applicability of Warranties to Re-Done Work**

25 The Warranties shall apply to all Work on Non-Maintained Elements re-done, repaired,  
26 corrected or replaced pursuant to the terms of this Agreement. Following acceptance  
27 by ADOT of re-done, repaired, corrected or replaced Work, the Warranties as to each  
28 re-done, repaired, corrected or replaced portion of the Non-Maintained Elements shall  
29 extend beyond the original Warranty Term in order that each portion of the Non-  
30 Maintained Elements shall have at least a one-year term (but not to exceed two years  
31 after the commencement of the applicable Warranty Term).

#### 32 **12.3 Subcontractor Warranties**

##### 33 **12.3.1 Warranty Requirements**

34 **12.3.1.1** Without in any way derogating the Warranties and  
35 Developer's own representations and warranties and other obligations with respect to all  
36 of the Work, Developer shall obtain from all Subcontractors for the D&C Work, for  
37 periods at least coterminous with the Warranties, appropriate representations,  
38 warranties, guarantees and obligations with respect to design, materials, workmanship,  
39 equipment, tools and supplies furnished by such Subcontractors to effectuate the  
40 provisions in this Article 12.

1                   **12.3.1.2** Developer shall cause Subcontractor warranties to be  
2 extended to ADOT and any third parties for whom Work is being performed or  
3 equipment, tools, supplies or software is being supplied by such Subcontractor;  
4 provided, however, that the foregoing requirement shall not apply to standard, pre-  
5 specified manufacturer warranties of mass-marketed materials, products (including  
6 software products), equipment or supplies where the warranty cannot be extended to  
7 ADOT using commercially reasonable efforts. ADOT agrees to forebear from exercising  
8 remedies under any such warranty so long as Developer is diligently pursuing remedies  
9 thereunder.

10                   **12.3.1.3** All representations, warranties, guarantees and obligations  
11 of Subcontractors shall be written so as to survive all ADOT inspections, tests and  
12 approvals. Developer hereby assigns to ADOT all of Developer's rights and interests in  
13 all extended warranties for periods exceeding the applicable Warranty Term which are  
14 received by Developer from any of its Subcontractors. To the extent that any  
15 Subcontractor warranty would be voided by reason of Developer's negligence or failure  
16 to comply with the Contract Documents in incorporating material or equipment into the  
17 Work, Developer shall be responsible for correcting such defect.

## 18                   **12.3.2 Enforcement**

19                   Upon receipt from ADOT of notice of a failure of any of the Work to satisfy any  
20 Subcontractor warranty, representation, guarantee or obligation, Developer shall  
21 enforce or perform any such representation, warranty, guarantee or obligation, in  
22 addition to Developer's other obligations hereunder. ADOT's rights under this Section  
23 12.3.2 shall commence at the time such representation, warranty, guarantee or  
24 obligation is furnished and shall continue until the expiration of the Warranty Term  
25 (including extensions thereof under Section 12.2). Until such expiration, the cost of any  
26 equipment, material, labor (including re-engineering) or shipping shall be for the account  
27 of Developer if such cost is covered by such a representation, warranty, guarantee or  
28 obligation, and Developer shall be required to replace or repair defective equipment,  
29 material or workmanship furnished by Subcontractors.

## 30                   **12.4 Effect of ADOT or Third Party Activities on Warranties**

31 Developer acknowledges and agrees that ADOT and third parties may perform certain  
32 operations or maintenance work on or adjacent to the Project during the period in which  
33 the Warranties are in effect and agrees that the Warranties shall apply notwithstanding  
34 such activities; provided, however, that Developer does not hereby waive any rights,  
35 claims or remedies to which it may be entitled as a result of such activities.

## 36                   **12.5 No Limitation of Liability or Remedies**

37 Subject to Sections 20.9 and 20.10, the Warranties and Subcontractor warranties:

38                   (a) Are in addition to all rights and remedies available under the Contract  
39 Documents or applicable Law or in equity;

1 (b) Shall not limit Developer’s liability or responsibility imposed by the  
2 Contract Documents or applicable Law or in equity with respect to the Work, including  
3 liability for design defects, latent construction defects, strict liability, breach, negligence,  
4 intentional misconduct or fraud; and

5 (c) Do not constitute a contractual or other limitation or repose period on any  
6 claims, rights or remedies available to ADOT for patent or latent errors, defects or  
7 deficiencies in design, construction or other Work of Developer, which claims, rights and  
8 remedies are subject only to applicable statutes of limitation and statutes of repose.

9 **12.6 Damages for Breach of Warranty**

10 Subject to Sections 20.9 and 20.10 and in addition to ADOT’s other rights and remedies  
11 hereunder, at law or in equity, Developer shall be liable for actual damages resulting  
12 from any breach of Warranty or any defect in the Work on the Non-Maintained  
13 Elements, including the cost of performance of such obligations by others.  
14

**ARTICLE 13.**  
**PAYMENT FOR SERVICES**

**13.1 D&C Price**

**13.1.1 Amount**

As full compensation for the D&C Work and all related obligations to be performed by Developer under the Contract Documents, ADOT will pay to Developer the lump sum “D&C Price.” The D&C Price as used herein shall mean the lump sum amount of \$***[INSERT D&C PRICE FROM PROPOSAL]***, subject to adjustment from time to time to account for adjustments in Supplemental Agreements. The D&C Price shall be increased or decreased only by a Supplemental Agreement issued in accordance with Article 14 or 15. The D&C Price shall be paid in accordance with Sections 13.2 and 13.4.

**13.1.2 Items Included in D&C Price**

**13.1.2.1** Developer acknowledges and agrees that, subject only to Developer’s rights under Article 14, the D&C Price includes:

(a) All designs, equipment, materials, labor, insurance and bond premiums, home office, jobsite and other overhead, profit and services relating to Developer’s performance of its obligations under the Contract Documents (including all D&C Work, equipment, materials, labor and services provided by Subcontractors and intellectual property rights necessary to perform the D&C Work);

(b) Performance of each and every portion of the D&C Work;

(c) The cost of obtaining all Governmental Approvals (except as specified in Section 6.1) related to the D&C Work and incurred prior to the Substantial Completion Date;

(d) All costs of compliance with and maintenance of the Governmental Approvals and compliance with Laws related to the D&C Work, except to the extent compliance with or maintenance of Governmental Approvals is the responsibility of Utility Companies;

(e) Payment of any taxes, duties, permit and other fees or royalties imposed with respect to the D&C Work and any equipment, materials, labor or services included therein; and

(f) Compensation for all risks and contingencies assigned to Developer under the Contract Documents;

1 provided, however, that all of the costs set forth in clauses (a) through (f) above are  
2 included in the D&C Price solely to the extent such costs relate to the D&C Work and  
3 are incurred by Developer prior to Final Acceptance.

## 4 **13.2 Invoicing and Payment for the D&C Price**

5 The following process shall apply to invoicing and payment of (a) the D&C Price, and,  
6 as applicable, (b) Extra Work Costs and Delays Costs reimbursable to Developer for  
7 repair or replacement Work under Section 11.3.3(a):

### 8 **13.2.1 NTP 1 Work**

9 **13.2.1.1** Developer acknowledges and agrees that the amount of  
10 funds available to pay for Work prior to issuance of NTP 2 is limited to the total amount  
11 set forth under “NTP Work Effort” in Exhibit 2-4.1 plus Developer’s costs of bonds and  
12 insurance prior to NTP 2. Accordingly, ADOT has no obligation to make any payments  
13 to Developer in excess of such amount until such time (if any) as NTP 2 is issued.

14 **13.2.1.2** Any Design Work that Developer performs prior to  
15 satisfaction of the conditions precedent set forth in Section 7.5 shall be at Developer’s  
16 risk, as ADOT will not pay for or review any Design Work prior to satisfaction of such  
17 conditions precedent.

18 **13.2.1.3** Subject to Sections 13.2.1.1 and 13.2.1.2, ADOT will pay  
19 Developer for work authorized by NTP 1 up to but not exceeding each of the respective  
20 amounts set forth under “NTP Work Effort” in Exhibit 2-4.1. ADOT will pay such  
21 amounts not more often than monthly, based on approved Draw Requests, as follows:

22 (a) For NTP1 mobilization, in two equal installments with  
23 the first two Draw Requests after NTP1, as set forth in Sections 13.3.6.1(a) and (b);

24 (b) For each item that is a Submittal, other than Design  
25 Documents, in the next Draw Request after ADOT approves the Submittal;

26 (c) For Design Work, monthly according to a Draw  
27 Request for progress made and the approved Schedule of Values for pre-NTP 2 Design  
28 Work;

29 (d) For the premiums for bonds and insurance associated  
30 with NTP 1 Work, in accordance with Section 13.3.6.2; and

31 (e) For all other items, monthly according to actual  
32 documented costs incurred and included in a Draw Request, with any balance of the bid  
33 item total remaining at issuance of NTP 2 payable in the next Draw Request thereafter.

34 **13.2.1.4** Invoices for work authorized by NTP 1 shall comply with the  
35 provisions of this Section 13.2. Invoices for premiums for bonds and insurance for NTP  
36 1 Work shall comply with the provisions of Section 13.3.6.

1           **13.2.2     Draft Draw Request Package for D&C Work and Progress Meeting**

2           **13.2.2.1** On or about the 15th day of each month following the  
3 issuance of NTP 1 and continuing through the Draw Request for the Final D&C  
4 Payment, Developer shall deliver to ADOT a draft Draw Request for the prior monthly  
5 period, in the form required by ADOT, together with drafts of all materials, reports,  
6 schedules, certifications and other submittals for that month listed in Section 13.2.3.2.

7           **13.2.2.2** At each Progress Meeting, Developer’s and ADOT’s  
8 Authorized Representatives shall ascertain the progress of the Work and verify the  
9 quantities for any unit priced Work. Each Progress Meeting shall be attended by  
10 Developer and ADOT and its consultants. Developer’s and ADOT’s Authorized  
11 Representatives shall review the draft Draw Request reflecting the value of Work  
12 completed as of the date of the Progress Meeting. They shall determine and calculate  
13 the value of Work completed:

14                           (a) As provided in Section 13.2.1.3 for NTP 1 Work;

15                           (b) Based on quantities and unit prices for unit priced Work;

16                           (c) Based on time and materials for Force Account Work; and

17                           (d) For all other Work, based on the percentage completion of  
18 Project Schedule activities and the values distributed to such activities in the Progress  
19 Schedule.

20           **13.2.2.3** Developer’s and ADOT’s Authorized Representatives shall  
21 sign the draft Draw Request, indicating the portions of it that have been approved and  
22 setting forth the proposed total payment amount, which shall be the approved value of  
23 the Work then completed less progress payments previously made.

24           **13.2.3     Delivery of Draw Request for Payment of D&C Price**

25           **13.2.3.1** Within seven days after each Progress Meeting, Developer  
26 shall submit to ADOT five copies of a Draw Request for the Work performed under the  
27 Contract Documents during the immediately preceding month, in a form acceptable to  
28 ADOT and meeting all the requirements specified herein, except as otherwise approved  
29 by ADOT. Each Draw Request shall be based upon and use the amounts set forth in  
30 the approved draft Draw Request and may not include any amounts not approved by  
31 ADOT in the Progress Meeting reviewing such draft Draw Request.

32                           **13.2.3.2    Contents of Draw Request**

33                           (a) Each Draw Request must contain the following items:

34   (i) Draw Request cover sheet;

- 1 (ii) An updated Schedule Narrative as described in  
2 Section GP 110.06.2.4 of the Technical Provisions;
- 3 (iii) An approved Monthly Progress Schedule as  
4 described in Section GP 110.06.2.7 of the Technical Provisions;
- 5 (iv) Certification by Developer that all D&C Work  
6 that is the subject of the Draw Request fully complies with the requirements of the  
7 Contract Documents subject to any exceptions identified in the certification;
- 8 (v) Monthly report of personnel hours;
- 9 (vi) Draw Request data sheet(s) and supporting  
10 documents, as required by ADOT to support and substantiate the amount requested  
11 (based on invoices, receipts and other evidence establishing the number of units  
12 delivered for unit priced Work; based on Section 1.2 of Exhibit 14 for force account  
13 Work; based on actual costs as evidenced by invoices for items to be paid from any  
14 allowance; and based on the Project Schedule for all other D&C Work) and showing the  
15 maximum amount payable based on the then applicable Maximum Allowable  
16 Cumulative Draw;
- 17 (vii) DBE Monthly Utilization Progress Report in a  
18 format reasonably satisfactory to ADOT as required in Section 18.02.2 of the DBE  
19 Special Provisions;
- 20 (viii) OJT Monthly Progress Report, OJT Trainee  
21 Status Report and supplemental or revised OJT Schedule, each in the form and content  
22 specified in the OJT Special Provisions.
- 23 (ix) Cash flow curves and comparison to the  
24 Maximum Allowable Cumulative Draw; and
- 25 (x) If the Draw Request includes Utility Work, a  
26 summary narrative of the Utility Work performed during the applicable month; and
- 27 (xi) Such other items as ADOT reasonably  
28 requests.
- 29 (b) In addition to the requirements set forth in  
30 Section 13.2.3.2(a), no Draw Request shall be considered complete unless it:
- 31 (i) Describes in detail the status of completion as  
32 it relates to the Project Schedule;
- 33 (ii) Sets forth separately and in detail the related  
34 payments that are then due in accordance with the Project Schedule and the payments  
35 that are then due in accordance with the Maximum Allowable Cumulative Draw, as of  
36 the end of the prior month;

1 (iii) Sets forth in detail the amounts paid to  
2 Subcontractors (including Suppliers and Subcontractors at lower tiers) from the  
3 payments made by ADOT to Developer with respect to the Draw Request submitted two  
4 months prior;

5 (iv) Includes affidavits of payment and  
6 unconditional waivers of claims in form satisfactory to ADOT executed by Developer  
7 and each Subcontractor with respect to all amounts paid in connection with the Draw  
8 Request submitted two months prior; and

9 (v) Sets forth separately and in detail the total  
10 amount due from Utility Companies for: (A) Utility Betterments; and (B) any other Work  
11 for which the Utility Company has cost responsibility.

12 **13.2.3.3** Developer acknowledges that ADOT will obtain funding for  
13 portions of the Work from various sources, and agrees to segregate billings for all such  
14 Work in a format reasonably requested by ADOT and with detail and information as  
15 reasonably requested by ADOT.

#### 16 **13.2.4 Draw Request Cover Sheet Contents**

17 The Draw Request cover sheet shall include the following: (a) Project number  
18 and title; (b) Request number (numbered consecutively starting with “1”); (c) Total  
19 amount earned to date for the Project; and (d) Authorized signature, title of signer, and  
20 date of signature.

#### 21 **13.2.5 Certification by Professional Services Quality Control Manager** 22 **and Construction Quality Acceptance Firm**

23 Each Draw Request shall include a certificate signed and sealed by the  
24 Professional Services Quality Manager and the Construction Independent Quality  
25 Manager, as appropriate, in a form acceptable to ADOT, certifying that:

26 (a) Except as specifically noted in the certification, all Work that is  
27 the subject of the Draw Request, including that of Professional Services firms,  
28 Subcontractors, and Suppliers, has been checked or inspected by the Professional  
29 Services Quality Manager, with respect to Professional Services, and the Construction  
30 Independent Quality Manager, with respect to the Construction Work;

31 (b) Except as specifically noted in the certification, all Work that is  
32 the subject of the Draw Request conforms to the requirements of the Contract  
33 Documents;

34 (c) The Professional Services Quality Program and the  
35 Construction Quality Program and all of the measures and procedures provided therein  
36 are functioning properly and are being followed;

1 (d) The Professional Services percentages and construction  
2 percentages indicated are accurate and correct; and

3 (e) All quantities for which payment is requested on a unit price  
4 basis are accurate.

### 5 **13.2.6 Payment by ADOT**

6 **13.2.6.1** Within ten Business Days after ADOT receives the Draw  
7 Request (including all materials and reports required under Section 13.2.3.2) and the  
8 related Draw Request Certificate, ADOT will review the Draw Request and all  
9 attachments thereto for consistency with the draft Draw Request package prepared at  
10 the most recent Progress Meeting and conformity with all requirements of the Contract  
11 Documents, and shall notify Developer of the amount approved for payment and specify  
12 the reason for disapproval of any remaining invoiced amounts. Developer may include  
13 such disapproved amounts in the next month's Draw Request after correction of the  
14 deficiencies noted by ADOT (all such disapproved amounts shall be deemed in Dispute  
15 unless otherwise agreed).

16 **13.2.6.2** No later than the Contractor Cycle Key Date first occurring  
17 after the ten Business Day period described in Section 13.2.6.1, ADOT will pay  
18 Developer the amount of the Draw Request approved for payment less any amounts  
19 that ADOT is otherwise entitled to withhold or deduct.

20 **13.2.6.3** For Work authorized by NTP 1, ADOT will not have any  
21 obligation to pay Developer any amount: that (a) is inconsistent with Section 13.2.1.3;  
22 (b) was not approved during the Progress Meeting reviewing the draft invoice for such  
23 month; or (c) would result in aggregate payments in excess of the Maximum Allowable  
24 Cumulative Draw for the month in which the Payment Request is received.

25 **13.2.6.4** For Work authorized by NTP 2 and NTP 3, in no event shall  
26 ADOT have any obligation to pay Developer any amount that: (a) would result in  
27 payment for any activity in excess of the value of the activity times the completion  
28 percentage of such activity (for non-unit priced Work); (b) was not approved during the  
29 Progress Meeting reviewing the draft invoice for such month; or (c) would result in  
30 aggregate payments hereunder in excess of (i) the overall completion percentage for  
31 the Project multiplied by the Contract Price (for non-unit priced Work); or (ii) the  
32 Maximum Allowable Cumulative Draw for the month in which the Payment Request is  
33 received.

## 34 **13.3 Limitations, Deductions and Exclusions**

### 35 **13.3.1 Maximum Allowable Cumulative Draw**

36 **13.3.1.1** The aggregate amount of progress payments to Developer  
37 out of the D&C Price (including mobilization payments) shall not exceed at any time the  
38 then applicable Maximum Allowable Cumulative Draw, as it may be modified by

1 Supplemental Agreement or amendment, without the prior written approval of ADOT in  
2 its sole discretion.

3 **13.3.1.2** The determination of whether progress payments out of the  
4 D&C Price will exceed the then applicable Maximum Allowable Cumulative Draw shall  
5 be determined as if there are no deductions therefrom under Section 13.3.3.

6 **13.3.1.3** The Maximum Allowable Cumulative Draw shall not limit  
7 payment for Supplemental Agreement Work unless otherwise specified in the  
8 Supplemental Agreement. The Maximum Allowable Cumulative Draw shall be revised  
9 from time to time, as appropriate, to account for any changes in the D&C Price as  
10 evidenced by Supplemental Agreements. In addition, if Developer and ADOT mutually  
11 agree in writing to a different cumulative expenditure rate at any time other than the  
12 Maximum Allowable Cumulative Draw, then the Parties shall amend Exhibit 6  
13 accordingly and such revised rate shall thereafter be the Maximum Allowable  
14 Cumulative Draw.

15 **13.3.1.4** If Developer satisfactorily performs D&C Work which entitles  
16 it to payment from the D&C Price but payment of any portion earned is deferred due to  
17 the then applicable Maximum Allowable Cumulative Draw, then Developer may include  
18 the deferred portion in any subsequent Draw Request, the payment of which will be  
19 subject to the then applicable Maximum Allowable Cumulative Draw.

20 **13.3.1.5** If Developer satisfactorily performs D&C Work which entitles  
21 it to payment from the D&C Price but payment of any portion earned is deferred due to  
22 the then applicable Maximum Allowable Cumulative Draw, then, upon Developer's  
23 request, ADOT will provide reasonable certification of such deferred amount.  
24 Notwithstanding any other provision in this Agreement, Developer may assign all or any  
25 portion of its rights, title and interests in and to payment of such amounts certified by  
26 ADOT, or to any other payment made or owed by ADOT under this Agreement, to any  
27 Person from which Developer obtains financing to complete any portion of the Work.

28 **13.3.2 Retainage**

29 ADOT will retain from the final progress payment prior to Substantial Completion  
30 \$5,000,000.00 until certification of Final Acceptance.

31 **13.3.3 Deductions and Withholdings**

32 **13.3.3.1** ADOT may deduct (1) from each payment of the D&C Price,  
33 including the Final D&C Payment, any of the following applicable to the D&C Work or  
34 accruing prior to Final Acceptance, and (2) from each payment of the Maintenance  
35 Price, any of the following applicable to the Maintenance Services or accruing during  
36 the Maintenance Period:

37 (a) Any ADOT or third party Losses for which Developer  
38 is responsible hereunder and which are not covered by insurance proceeds, except in

1 the case where the underlying claim against Developer is still the subject of a legitimate  
2 Dispute;

3 (b) Any Liquidated Damages or Noncompliance Charges  
4 that have accrued as of the date of the application for payment or for D&C Work that are  
5 anticipated to accrue based on the Substantial Completion and Final Acceptance dates  
6 shown in the current Project Schedule;

7 (c) Any sums expended by or owing to ADOT as a result  
8 of Developer's failure to maintain the Record Drawings;

9 (d) Any sums expended by ADOT in performing any of  
10 Developer's obligations under the Contract Documents which Developer has failed to  
11 perform; and

12 (e) Any other sums that ADOT is entitled to recover or  
13 withhold from Developer under the terms of this Agreement, including any carry-over  
14 deductions (including for Noncompliance Charges and Liquidated Damages) or other  
15 adjustments from prior months not yet paid by Developer.

16 **13.3.3.2** ADOT may deduct from payments of the D&C Price,  
17 including the Final D&C Payment, the costs to acquire any parcel or partial parcel, or to  
18 acquire any Temporary Construction Easement on any parcel or partial parcel, identified  
19 in Exhibit 2-3, or identified pursuant to Section 5.6, for which Developer receives credit  
20 for avoiding but ultimately cannot avoid in completing the D&C Work. In such a case,  
21 the amount deducted shall cover the costs to acquire the parcel or partial parcel or  
22 Temporary Construction Easement, as applicable, up to the amount of the credit  
23 received by Developer plus, in the case of those identified in Exhibit 2-3, 50% of any  
24 additional costs in excess of the credit. Such costs to acquire shall include: (a) the  
25 acquisition or condemnation price; (b) severance damages; (c) relocation costs; and (d)  
26 demolition costs, if part of the prior credit received by Developer. Developer shall not  
27 be entitled to any Completion Deadline adjustment for failure to avoid parcels or partial  
28 parcels identified in Exhibit 2-3 or identified pursuant to Section 5.6. The provisions of  
29 this Section 13.3.3.2 do not apply, however, where the parcel or partial parcel or  
30 Temporary Construction Easement thereon is required as ADOT Additional Property.

31 **13.3.3.3** The failure by ADOT to deduct any of the sums set forth in  
32 Sections 13.3.3.1 or 13.3.3.2 from a payment shall not constitute a waiver of ADOT's  
33 right to such sums. Notwithstanding the foregoing, any Liquidated Damages or offsets  
34 related to the D&C Work shall be deducted solely from the D&C Price and any  
35 Liquidated Damages or offsets related to the Maintenance Services shall be deducted  
36 solely from the O&M Price.

#### 37 **13.3.4 Unincorporated Materials; Long Lead Items**

38 **13.3.4.1** ADOT will not pay Developer for materials not yet  
39 incorporated in the Work unless all of the following conditions are met:

1 (a) Material shall be: (i) delivered to the Site; (ii) delivered  
2 to Developer and promptly stored by Developer in bonded storage at a location  
3 approved by ADOT in its discretion; or (iii) stored at a Supplier's fabrication site, which  
4 must be a bonded commercial location approved by ADOT, in its discretion. Developer  
5 shall submit certified bills for such materials with the Draw Request, as a condition to  
6 payment for such materials. ADOT will allow only such portion of the amount  
7 represented by these bills as, in its discretion, is consistent with the reasonable cost of  
8 such materials. If such materials are stored at any site not approved by ADOT,  
9 Developer shall accept responsibility for and pay all personal and property taxes that  
10 may be levied against ADOT by any state or subdivision thereof on account of such  
11 storage of such material.

12 (b) All such materials that meet the requirements of the  
13 Contract Documents shall be and become the property of ADOT. Developer at its own  
14 cost shall promptly execute, acknowledge and deliver to ADOT proper bills of sale or  
15 other instruments in writing in a form acceptable to ADOT conveying and assuring to  
16 ADOT title to such material included in any Draw Request, free and clear of all Liens.  
17 Developer, at its own cost, shall conspicuously mark such material as the property of  
18 ADOT, shall not permit such materials to become commingled with non-ADOT-owned  
19 property or with materials that do not conform with the Contract Documents, and shall  
20 take such other steps, if any, as ADOT may require or regard as necessary to vest title  
21 to such material in ADOT free and clear of Liens.

22 **13.3.4.2** For the avoidance of doubt, ADOT will not pay Developer for  
23 long lead items ordered for the Project unless such items meet the requirements set  
24 forth in Section 13.3.4.1.

### 25 **13.3.5 Mobilization Payments; Bond and Insurance Premiums**

26 **13.3.5.1** Developer shall be entitled to payment for mobilization in an  
27 amount equal to the lesser of (1) the bid item price for mobilization set forth in Exhibit 2-  
28 4.1 or (2) 5% of the D&C Price. This amount shall be fixed (i.e. not adjusted by any  
29 Claim or Supplemental Agreement), and shall be paid in installments as follows:

30 (a) The first payment for mobilization shall be in an  
31 amount not to exceed 10% of the total payment for mobilization, payable as part of the  
32 first Draw Request following NTP 1.

33 (b) The second payment for mobilization shall be in an  
34 amount not to exceed 10% of the total payment for mobilization, payable as part of the  
35 second Draw Request following NTP 1.

36 (c) The third payment for mobilization shall be in an  
37 amount not to exceed 30% of the total payment for mobilization, payable as part of the  
38 first Draw Request following NTP 2.

1 (d) The fourth payment for mobilization shall be in an  
2 amount not to exceed 25% of the total payment for mobilization, payable as part of the  
3 first draft request after 5% of the D&C Price is earned on items other than mobilization.

4 (e) The fifth payment for mobilization shall be in the  
5 remaining amount of the total payment for mobilization, payable as part of the first draft  
6 request after 10% of the D&C Price is earned on items other than mobilization.

7 **13.3.5.2** The amounts paid under Section 13.3.5.1 shall be taken into  
8 account in assessing whether cumulative payments are within the then applicable  
9 Maximum Allowable Cumulative Draw.

10 **13.3.5.3** ADOT will pay Developer as part of the first Draw Request  
11 following NTP 1 the portion of the D&C Price allocable to bond and insurance  
12 premiums, as set forth in the Proposal, to reimburse Developer for bond and insurance  
13 premiums actually paid, without markup. The amounts paid under this Section 13.3.5.3  
14 shall be taken into account in assessing whether cumulative payments are within the  
15 then applicable Maximum Allowable Cumulative Draw.

## 16 **13.3.6 Equipment**

17 ADOT will not pay for direct costs of equipment. Costs of equipment, whether  
18 new, used or rented, and to the extent not included in the mobilization payments under  
19 Section 13.3.5, shall be allocated to and paid for as part of the activities with which the  
20 equipment is associated, in a manner which is consistent with the requirements of  
21 Section 1.2.3 of Exhibit 14.

## 22 **13.4 Final D&C Payment**

23 Final D&C Payment for all D&C Work will be made as follows.

### 24 **13.4.1 Application for Final D&C Payment**

25 **13.4.1.1** On or about the date of Final Acceptance, Developer shall  
26 prepare and submit a proposed Application for Final D&C Payment to ADOT showing  
27 the proposed total amount due Developer as of the date of Final Acceptance, including  
28 the retainage described in Section 13.3.2 and any amounts owing from Supplemental  
29 Agreements.

30 **13.4.1.2** In addition to meeting all other requirements for Draw  
31 Requests hereunder, the Application for Final D&C Payment shall propose a schedule  
32 of payments that do not exceed the Maximum Cumulative Allowable Draw.

33 **13.4.1.3** The Application for Final D&C Payment shall list all  
34 outstanding Relief Event Notices and Relief Requests, stating the amount at issue  
35 associated with each such Relief Event Notice and Relief Request.

1                   **13.4.1.4** The Application for Final D&C Payment shall also be  
2 accompanied by:

3                   (a) Evidence regarding the status of all existing or  
4 threatened claims and stop notices of Subcontractors, Suppliers, laborers, Utility  
5 Companies and or other third parties against Developer, ADOT or the Project;

6                   (b) Consent of any Guarantors and Surety to the  
7 proposed payment schedule;

8                   (c) Such other documentation as ADOT may reasonably  
9 require; and

10                  (d) The release described in Section 13.4.4, executed by  
11 Developer.

12                   **13.4.1.5** Prior applications and payments shall be subject to  
13 correction in the Application for Final D&C Payment. Relief Event Notices and Relief  
14 Requests filed concurrently with the Application for Final D&C Payment must be  
15 otherwise timely and meet all requirements under Article 14.

16                   **13.4.2** ADOT's obligation to make payment to Developer based on the  
17 Application for Final D&C Payment is conditioned on ADOT's receipt of an executed  
18 release meeting the requirements of Section 13.4.4 and otherwise satisfactory in form  
19 and content to ADOT. The payment amount will be reduced by any amounts deductible  
20 under Section 13.3.3.

21                   **13.4.3** ADOT may withhold from the Final D&C Payment such amount as  
22 ADOT deems advisable to cover any amounts owing or which may become owing to  
23 ADOT by Developer, including costs to complete or remediate uncompleted Work or  
24 Nonconforming Work.

25                   **13.4.4** The executed release from Developer shall be from any and all Claims  
26 of Developer arising from the D&C Work, and shall release and waive any Claims  
27 against the Indemnified Parties, excluding only those matters identified in any Relief  
28 Event Notices and Relief Requests that have been timely delivered and are listed as  
29 outstanding in the Application for Final D&C Payment. The release shall be  
30 accompanied by an affidavit from Developer certifying that:

31                   (a) All D&C Work has been performed in strict accordance with the  
32 requirements of the Contract Documents;

33                   (b) Developer has resolved any claims made by Subcontractors,  
34 Suppliers, Utility Companies , laborers, or other third parties against Developer, ADOT  
35 or the Project (except those listed by Developer in accordance with Section 13.4.1.4(a));

1 (c) Developer has no reason to believe that any Person has a valid  
2 claim against Developer, ADOT or the Project which has not been communicated in  
3 writing by Developer to ADOT as of the date of the certificate; and

4 (d) All guarantees, Warranties, the D&C Payment Bond, the D&C  
5 Performance Bond (or, if applicable, Warranty Bond), the Maintenance Payment Bond,  
6 and the Maintenance Performance Bond are in full force and effect.

7 **13.4.5** Prior Relief Requests that are not in Dispute shall be subject to  
8 correction in the Final Application for D&C Payment.

9 **13.4.6** ADOT will review Developer's proposed Application for Final D&C  
10 Payment, and within 20 Business Days after receipt will deliver to Developer any  
11 changes or corrections, including deductions and withholding described in Section  
12 13.3.3. Any changes or corrections made pursuant to this Section 13.4.6 will be  
13 reflected in an updated payment schedule showing the net amount owed to Developer  
14 by applicable period.

15 **13.4.7** ADOT will fulfill its payment obligations in respect of the D&C Work  
16 under this Agreement by paying the amounts identified in Section 13.4.6, in accordance  
17 with the schedule described in Section 13.4.6.

## 18 **13.5 Maintenance Price**

19 **13.5.1** During the Maintenance Period, in full consideration for the  
20 performance by Developer of its duties and obligations related to the Maintenance  
21 Services, ADOT will pay the Maintenance Price in the amounts determined as set forth  
22 in Sections 13.5.3 and 13.5.4, subject only to such additions to and deductions from the  
23 compensation as may be provided for pursuant to this Article 13 and Section 9.6.2.2,  
24 and Articles 14, 15, 17 and 20, including deductions for Liquidated Damages and  
25 Noncompliance Charges. The term "Maintenance Price" as used herein shall mean (a)  
26 the sum of the Annual Routine Maintenance Payments set forth in the Routine  
27 Maintenance Breakdown (Exhibit 2-4.4), plus (b) the sum of the Annual Capital Asset  
28 Replacement Work Payments set forth in the Capital Asset Replacement Work  
29 Breakdown (Exhibit 2-4.5), each as adjusted pursuant to Section 13.5.6.

30 **13.5.2** ADOT will pay the Maintenance Price in accordance with this  
31 Section 13.5 and Section 13.6. Except for the adjustments and deductions to the  
32 Maintenance Price otherwise described herein, the Maintenance Price (and the  
33 individual components thereof) shall be increased or decreased only by a Supplemental  
34 Agreement issued in accordance with Article 14 or 15 or by an amendment to this  
35 Agreement. The obligation of ADOT to pay the Maintenance Price to Developer shall  
36 commence upon the start of the Maintenance Period and no portion of the Maintenance  
37 Price shall be payable on account of services provided: (a) as part of the D&C Work;  
38 (b) prior to the Substantial Completion Date; or (c) after the termination or expiration this  
39 Agreement.

1           **13.5.3** Each of year 1 through 30 as listed in Exhibits 2-4.4 and 2-4.5 means  
2 the 12-month period beginning on the Substantial Completion Date and each  
3 anniversary of the Substantial Completion Date thereafter during the Maintenance  
4 Period. If the Maintenance Period is less than 30 years because the Substantial  
5 Completion Date occurs later than the Substantial Completion Deadline, then the  
6 Annual Routine Maintenance Price Payments in the Routine Maintenance Price  
7 Breakdown falling beyond the end of the Maintenance Period shall be null and void and  
8 shall not be owing to Developer.

9           **13.5.4** If Developer performs Capital Asset Replacement Work in a year other  
10 than the year for such Work and payment therefor listed in Exhibit 2-4.5, ADOT will pay  
11 the applicable Annual Capital Asset Replacement Work Payment in the year or years in  
12 which such Work is actually performed, escalated as provided in Section 13.5.6 to the  
13 year or years of payment. If the Capital Asset Replacement Work must be performed  
14 earlier than the year listed and as a result further Capital Asset Replacement Work that  
15 is not scheduled for payment in Exhibit 2-4.5 must be performed by Developer later in  
16 the Maintenance Period to meet the requirements of the Contract Documents, ADOT  
17 will have no obligation to make additional payments therefor, except to the extent  
18 compensable under Article 14.

19           **13.5.5** Every month during the Maintenance Period, subject to deductions as  
20 permitted herein, ADOT will pay Developer for Maintenance Services performed under  
21 this Agreement a “Monthly Disbursement” composed of the sum of:

22                   (a) The amount equal to one-twelfth of the Annual Routine  
23 Maintenance Payment shown as owing to Developer in the applicable year; plus

24                   (b) Subject to Section 13.6.6, the amount equal to the value of the  
25 Capital Asset Replacement Work (if any) actually completed during the prior month,  
26 which value shall be determined based on (i) the percentage completion of the  
27 corresponding Capital Asset Replacement Work, and (ii) the pricing for the applicable  
28 Capital Asset Replacement Work.

29 Such Monthly Disbursements shall be payable pursuant to Maintenance Draw Requests  
30 submitted in accordance with Section 13.6.

31           **13.5.6** The annual payments of the Maintenance Price will be escalated or  
32 reduced as described in this Section 13.5.6. The Parties shall document such  
33 escalations or reductions annually in a Supplemental Agreement, or as otherwise  
34 mutually agreed.

35                   (a) Each Annual Routine Maintenance Payment will be escalated or  
36 reduced based on changes in CPI, as follows:

$$\begin{aligned} \text{Adjusted Annual Routine Maintenance Payment}_{\text{Year Y}} \\ &= \text{Annual Routine Maintenance Payment}_{\text{Year Y}} \\ &\times \left( \frac{\text{CPI}}{\text{BCPI}} \right) \end{aligned}$$

1           Where:

2           *Annual Routine Maintenance Payment*<sub>Year Y</sub> = the applicable year's  
3           Annual Routine Maintenance Payment as listed in Exhibit 2-4.4;

4           "CPI" = the CPI for the month that is three months prior to the month in  
5           which Year "Y" commenced; and

6           BCPI = Base CPI.

7           If the CPI is not published for a designated month above, then the Parties shall use the  
8           next earlier month for which it is published.

9                         (b)     Each Annual Capital Asset Replacement Work Payment will be  
10           escalated or reduced based on changes in CCI, as follows:

$$\begin{aligned} \text{Adjusted Annual Capital Asset Replacement Work Payment}_{\text{Year Y}} \\ &= \text{Annual Capital Asset Replacement Work Payment}_{\text{Year Y}} \\ &\times \left( \frac{\text{CCI}}{\text{BCCI}} \right) \end{aligned}$$

11           Where:

12           *Annual Capital Asset Replacement Work Payment*<sub>Year Y</sub> = the applicable  
13           year's Annual Capital Asset Replacement Work Payment as listed in  
14           Exhibit 2-4.5;

15           "CCI" = the CCI for the month that is three months prior to the beginning of  
16           each year in which expenditure of the applicable year's Annual Capital  
17           Asset Replacement Work Payment actually occurs; and

18           BCCI = Base CCI.

19           If the CCI is not published for a designated month above, then the Parties shall use the  
20           next earlier month for which it is published.

21                         (c)     For increases in either an Annual Routine Maintenance  
22           Payment or an Annual Capital Asset Replacement Work Payment pursuant to  
23           Section 14.1.5.2, such increases will be escalated or reduced in the same manner,

1 except that the BCPI or BCCI, as applicable, shall be the month and year in which the  
2 Parties establish such increase in a Supplemental Agreement.

### 3 **13.6 Invoicing and Payment for the Maintenance Price**

4 The process described in this Section 13.5 shall apply solely to invoicing and payment  
5 of the Maintenance Price.

6 **13.6.1** On or about the 25<sup>th</sup> day of each month, Developer shall submit to  
7 ADOT five copies of a Maintenance Draw Request in the form required by ADOT for a  
8 Monthly Disbursement for Maintenance Services performed for the preceding month  
9 and meeting all requirements specified herein, including any Capital Asset Replacement  
10 Work for which Developer seeks payment pursuant to Sections 13.5. Each  
11 Maintenance Draw Request shall be executed by Developer's Authorized  
12 Representative and Maintenance Quality Manager. Developer acknowledges that  
13 ADOT may obtain funding for portions of the Maintenance Services from the federal  
14 government, local agencies and other third parties, and Developer agrees to segregate  
15 Maintenance Draw Requests for all such Maintenance Services in a format reasonably  
16 requested by ADOT and with detail and information as reasonably requested by ADOT.  
17 Each Maintenance Draw Request shall be organized to account for applicable  
18 reimbursement requirements and to facilitate the reimbursement process. In addition,  
19 the Maintenance Draw Request for a Monthly Disbursement must be accompanied by  
20 an attached report containing information that ADOT can use to verify the Maintenance  
21 Draw Request and Monthly Disbursement and all components of the Liquidated  
22 Damages and Noncompliance Charges for the prior month. Such attached report shall  
23 include:

24 (a) A description of any Capital Asset Replacement Work for which  
25 Developer is claiming payment pursuant to Section 13.5 and additional materials  
26 supporting the amount of payment requested thereunder;

27 (b) A description of any Noncompliance Events, Noncompliance  
28 Points assessed during the prior month and any Noncompliance Charges owed for  
29 assessed Noncompliance Points;

30 (c) A description of any other Liquidated Damages assessed  
31 against Developer during the prior month in relation to the Maintenance Services,  
32 including the date and time of occurrence and a description of the events and duration  
33 of the events for which the Liquidated Damages were assessed;

34 (d) Any adjustments to reflect previous over-payments or under-  
35 payments;

36 (e) A detailed calculation of any interest payable in respect of any  
37 amounts owed; and

38 (f) Any other amount due and payable from Developer to ADOT or  
39 from ADOT to Developer under this Agreement, including any deductions related to the

1 Maintenance Services that ADOT is entitled to make and any carry-over deductions or  
2 other adjustments from prior months not yet paid by Developer.

3 **13.6.2** ADOT will not be required to pay any Monthly Disbursement unless  
4 and until Developer also submits to ADOT, in addition to the Maintenance Draw  
5 Request:

6 (a) The then applicable report(s) and update(s) regarding  
7 Maintenance Services required under Section MR 400.3.4 of the Technical Provisions;

8 (b) The Asset Condition Score report then required under  
9 Section MR 400.6 of the Technical Provisions;

10 (c) The Noncompliance Events report then required under  
11 Section MR 500 of the Technical Provisions;

12 (d) Whenever the Monthly Disbursement is to include a payment for  
13 Capital Asset Replacement Work, the Monthly Progress Report, DBE Monthly Utilization  
14 Progress Report and other information required under Section 18.0 of the DBE Special  
15 Provisions; and

16 (e) If applicable, the monthly update on the status of disputes with  
17 Subcontractors as required under Section 13.7.6.

18 **13.6.3** Developer's resolution of all punchlist items regarding Capital Asset  
19 Replacement Work or Routine Maintenance necessary to satisfy the Handback  
20 Requirements is a condition of final acceptance and the final Monthly Disbursement. If  
21 any items of punchlist Work remain incomplete at the end of the Maintenance Term or  
22 any continuation as ADOT may allow, then ADOT has the right to complete it at  
23 Developer's expense and adjust the final Monthly Disbursement accordingly.

24 **13.6.4** Within ten Business Days after ADOT's receipt of a complete  
25 Maintenance Draw Request and the then-required reports, updates and information,  
26 ADOT will review the Maintenance Draw Request and all attachments and certificates  
27 thereto, and shall notify Developer of the amount approved for payment and the reason  
28 for disapproval of any remaining invoiced amounts or of any other information set forth  
29 in the Maintenance Draw Request. Developer may include such disapproved amounts  
30 in the next month's O&M Draw Request after correction of the deficiencies noted by  
31 ADOT and satisfaction of the requirements of the Contract Documents related thereto.

32 **13.6.5** Within ten Business Days after ADOT approves a Maintenance Draw  
33 Request, ADOT will pay Developer the Monthly Disbursement in the amount of the  
34 Maintenance Draw Request approved for payment less any amounts that ADOT is  
35 otherwise entitled to withhold or deduct. No payment by ADOT will, at any time,  
36 preclude ADOT from showing that such payment was incorrect, or from recovering any  
37 money paid in excess of those amounts due hereunder.

1           **13.6.6** Developer’s resolution of all punchlist items regarding Capital Asset  
2 Replacement Work or Routine Maintenance necessary to satisfy the Handback  
3 Requirements is a condition of final acceptance and the final Monthly Disbursement. If  
4 any items of punchlist Work remain incomplete at the end of the Maintenance Term or  
5 any continuation as ADOT may allow, then ADOT has the right to complete it at  
6 Developer’s expense and adjust the final Monthly Disbursement accordingly.

7           **13.6.7** If Developer is obligated to pay in-lieu fees to ADOT pursuant to  
8 Section 8.11.4, then ADOT shall have the right to collect the in-lieu fees by deducting  
9 the amount thereof (a) first, from each Monthly Disbursement of the Annual Capital  
10 Asset Replacement Work Payment occurring after Developer exercises its option to pay  
11 in-lieu fees, and (b) second, to the extent necessary, from each Monthly Disbursement  
12 of the Annual Routine Maintenance Payment occurring after Developer exercises its  
13 option to pay in-lieu fees. No failure of ADOT to make such deductions, and no  
14 insufficiency of Monthly Disbursements to cover the in-lieu fees, shall excuse Developer  
15 from the obligation to pay the in-lieu fees, and all the in-lieu fees shall be due and  
16 payable in full not later than 90 days before the end of the Term.

17           **13.6.8** If Developer has not been paid any portion of the Capital Asset  
18 Replacement Work Payment scheduled in Exhibit 2-4.5 for Capital Asset Replacement  
19 Work to satisfy the Handback Requirements, then ADOT shall pay such portion to  
20 Developer, less deductions under Section 13.6.6 for punch list items, less deductions  
21 under Section 13.6.7 for any in-lieu fee payments, and less any other amounts that  
22 ADOT is otherwise entitled to withhold or deduct, as part of the final Monthly  
23 Disbursement at the maturity of the Term.

24           **13.6.9** The Annual Capital Asset Replacement Work Payments and Annual  
25 Routine Maintenance Payments payable for any partial month or payable for any partial  
26 year shall be prorated.

27           **13.6.10** ADOT will have the right to dispute, in good faith, any amount specified  
28 in a Maintenance Draw Request submitted pursuant to this Section 13.6. ADOT will pay  
29 the amount of the Maintenance Draw Request in question that is not in Dispute.  
30 Developer and ADOT will use their reasonable efforts to resolve any such Dispute  
31 within 30 days after the Dispute arises. If they fail to resolve the Dispute within that  
32 period, then the Dispute shall be resolved according to the Dispute Resolution  
33 Procedures.

34           **13.6.11** Any amount determined to be due pursuant to the Dispute Resolution  
35 Procedures will be paid within 20 days following resolution of the Dispute, together with  
36 interest thereon in accordance with this Agreement.

### 37 **13.7 Prompt Payment to Subcontractors**

38           **13.7.1** Upon receipt of payment from ADOT, Developer shall pay each  
39 Subcontractor with which it holds a direct Subcontract, and shall cause the Lead  
40 Subcontractor and Lead Maintenance Firm to pay each of its Subcontractors, within

1 seven days after Developer receives payment from ADOT, out of the amount paid to  
2 Developer on account of such Subcontractor's portion of the Work, the amount to which  
3 such Subcontractor is entitled, less any retainage provided for in the Subcontract.  
4 Developer shall pay retainage, if any, on a Subcontractor's Work within ten days after  
5 satisfactory completion of all of the Subcontractor's Work. For the purpose of this  
6 Section 13.7.1, satisfactory completion shall have been accomplished when:

7 (a) The Subcontractor has fulfilled the Subcontract requirements  
8 and the requirements under the Contract Documents for the subcontracted Work,  
9 including the submission of all submittals required by the Subcontract and Contract  
10 Documents; and

11 (b) The Work done by the Subcontractor has been inspected and  
12 approved by Developer and the final quantities of the Subcontractor's Work have been  
13 determined and agreed upon.

14 **13.7.2** If Developer fails to pay a Subcontractor within the time periods set  
15 forth in Section 13.7.1, Developer shall pay the Subcontractor interest on the unpaid  
16 balance, beginning on the eighth day or tenth day, as applicable, at a rate of 1% per  
17 month or fraction of a month.

18 **13.7.3** Sections 28-411(C), (D) and (E), Arizona Revised Statutes shall apply  
19 to all Work. For purposes of this Section 13.7, Subcontractors of the Lead  
20 Subcontractor shall be treated and recognized as Subcontractors under Subcontracts  
21 with Developer and entitled to all the protections of ARS Sections 28-411(C), (D) and  
22 (E).

23 **13.7.4** If Developer submits work to ADOT for payment, the invoice  
24 constitutes a representation that the work of the Subcontractors included in the invoice  
25 was satisfactorily performed.

26 **13.7.5** Except for retainage, if any, Developer may withhold payments to a  
27 Subcontractor only if the Subcontractor's work is deficient, incomplete or otherwise not  
28 in compliance with the terms of the Contract Documents applicable to the  
29 Subcontractor's work. If any Subcontractor is not paid promptly, Developer shall  
30 provide to the Subcontractor and to ADOT via the comment section of ADOT's DBE  
31 System a written explanation of the reasons and when payment can be expected.  
32 Developer shall provide such explanation within seven days after the time the  
33 Subcontractor was otherwise entitled to payment.

34 **13.7.6** If there is a dispute with a Subcontractor regarding prompt payment or  
35 withholding thereof, Developer shall immediately provide to ADOT written verifiable  
36 explanation of the matter in dispute and update ADOT monthly on the status of the  
37 dispute until it is resolved. Developer shall implement and use, and cause the Lead  
38 Subcontractor to implement and use, the dispute resolution process in the applicable  
39 Subcontract to resolve payment disputes as quickly as possible.

1           **13.7.7** ADOT reserves the right to request and receive documents from  
2 Developer, all Subcontractors of any tier, and Suppliers in order to determine whether  
3 prompt payment requirements were met.  
4

1 **ARTICLE 14.**  
2 **RELIEF EVENTS**

3 This Article 14 sets forth the requirements for obtaining monetary and schedule relief  
4 under the Contract Documents due to Relief Events. Developer hereby acknowledges  
5 and agrees that the D&C Price and Maintenance Price provide for full compensation for  
6 performance of all the Work, and the Completion Deadlines provide reasonable and  
7 adequate time to perform the Work required within the Completion Deadlines, subject  
8 only to those exceptions specified in this Article 14. The compensation amounts,  
9 Completion Deadline adjustment and performance relief specified in this Section 14  
10 shall represent the sole and exclusive right against ADOT, the State and their  
11 respective successors, assigns, agencies, divisions, officeholders, officers, directors,  
12 commissioners, agents, representatives, consultants and employees to compensation,  
13 damages, deadline extension and performance relief for the adverse financial and  
14 schedule effects of any event affecting the Work, the Project or Developer. No award of  
15 compensation or damages shall be duplicative. Developer unconditionally and  
16 irrevocably waives the right to any claim against ADOT, the State and their respective  
17 successors, assigns, agencies, divisions, officeholders, officers, directors,  
18 commissioners, agents, representatives, consultants and employees for any monetary  
19 compensation, Completion Deadline adjustment or other relief except to the extent  
20 specifically provided in this Article 14. The foregoing waiver encompasses all theories  
21 of liability, whether in contract, tort (including negligence), strict liability, equity, *quantum*  
22 *meruit* or otherwise, and encompasses all theories to extinguish contractual obligations,  
23 including impracticability, mutual or unilateral mistake, and frustration of purpose.  
24 Notwithstanding anything to the contrary herein, no liability of Developer that arose  
25 before the occurrence of the Relief Event giving rise to a claim under this Article 14 shall  
26 be excused as a result of the occurrence. Nothing in the Technical Provisions shall  
27 have the intent or effect or shall be construed to create any right of Developer to any  
28 claim for additional monetary compensation, Completion Deadline adjustment or other  
29 relief, any provision in the Technical Provisions to the contrary notwithstanding. The  
30 provisions of this paragraph shall not affect Developer's remedies under the Contract  
31 Documents in the event of an ADOT Default or upon termination of this Agreement prior  
32 to the stated expiration of the Term.

33 **14.1 Relief Event Claim Process**

34 **14.1.1 General Provisions**

35 **14.1.1.1** This Section 14.1 applies to all Relief Events, except Relief  
36 Events that are an ADOT-Directed Change. The process for ADOT-Directed Changes  
37 shall be through a Supplemental Agreement or Directive Letter pursuant to  
38 Sections 15.1 and 15.3, respectively.

39 **14.1.1.2** ADOT acknowledges that Developer may enter into  
40 Subcontracts pursuant to which additional costs directly attributable to the occurrence of  
41 a Relief Event, or the Relief Event's impact on schedule or performance of the Work,  
42 may be borne by a Subcontractor subject to the right to claim relief from Developer to

1 the extent Developer obtains relief from ADOT under this Agreement. For purposes of  
2 evaluating the merits of any Relief Event Notice, Relief Request or Claim against ADOT  
3 for such Relief Event, such costs or impact on schedule or performance of Work will be  
4 deemed to be directly incurred by Developer.

5 **14.1.2 Relief Event Notice**

6 **14.1.2.1** If at any time Developer determines that a Relief Event has  
7 occurred or is imminent, Developer shall submit a written Relief Event Notice to ADOT.  
8 ADOT will promptly acknowledge receipt of each Relief Event Notice.

9 **14.1.2.2** The Relief Event Notice shall include, to the maximum extent  
10 of the information then available:

11 (a) A description of the Relief Event and its date of  
12 occurrence or inception in reasonable detail;

13 (b) Developer's preliminary good faith estimate of the  
14 anticipated adverse and beneficial effects (including cost impacts) of the Relief Event  
15 and the basis for such estimate;

16 (c) Developer's preliminary good faith estimate of the  
17 Critical Path impact directly attributable to the Relief Event and the basis for such  
18 estimate;

19 (d) Developer's initial analysis of any adverse effect of  
20 the Relief Event on its ability to perform its obligations under this Agreement;

21 (e) The actions Developer has taken prior to the Relief  
22 Event Notice to prevent, and proposes to take thereafter to mitigate, the cost, delay, and  
23 other consequences of the Relief Event; and

24 (f) The type and amount of insurance that may be  
25 applicable and amounts that have been or are anticipated to be collected under such  
26 insurance.

27 **14.1.2.3** The nature and scope of the potential claim stated in the  
28 Relief Event Notice shall remain consistent (except for reductions) for the remainder of  
29 the Relief Event claim process and, if applicable, during any subsequent Dispute  
30 Resolution Procedures, except with respect to consequences of a Relief Event that:  
31 (a) are of a different nature or scope; (b) first arise or occur after Developer delivers the  
32 Relief Event Notice to ADOT; and (c) could not have been anticipated through the  
33 exercise of reasonable diligence and Good Industry Practice prior to delivering the  
34 Relief Event Notice to ADOT. If any such new consequences arise or occur prior to  
35 submission of the Relief Request, Developer shall report them to ADOT by a  
36 supplemental Relief Event Notice.

1                   **14.1.2.4** Developer shall submit the Relief Event Notice on a  
2 standardized form approved by ADOT.

3                   **14.1.2.5** Developer shall assign an exclusive identification number for  
4 each Relief Event Notice, determined by chronological sequencing. The exclusive  
5 identification number shall be used on each of the following corresponding documents:  
6 (a) Relief Request; (b) supplemental Notices and submissions pertaining to the Relief  
7 Event Notice; and (c) final documentation of the Relief Event claim.

8                   **14.1.2.6** If a single Relief Event is a continuing cause of delay, only  
9 one Relief Event Notice shall be necessary.

10                   **14.1.3     Relief Request**

11                   **14.1.3.1** Developer shall, within a further 45 days after the date of the  
12 Relief Event Notice, submit to ADOT a Relief Request that provides Developer's  
13 complete reasoning for additional compensation for Extra Work Costs or Delay Costs,  
14 Completion Deadline adjustments and other requested relief relating to the Relief Event.  
15 ADOT will promptly acknowledge receipt of each Relief Request. The Relief Request  
16 shall include the following information, to the maximum extent then available:

17                   (a) Full details of the Relief Event, including its nature,  
18 the date of its occurrence, its duration (to the extent that the Relief Event and the effects  
19 thereof have ceased, or estimated duration to the extent that the Relief Event and the  
20 effects thereof have not ceased), affected locations, and items of Work affected.  
21 Impacts to the Maintenance Services, if any, shall be stated by Fiscal Year;

22                   (b) Identification of all pertinent documents and the  
23 substance of any oral communications between ADOT and Developer, if any, relating to  
24 the Relief Event and the name of the person or persons making such material oral  
25 communications;

26                   (c) Identification of the specific provisions of the Contract  
27 Documents that Developer claims entitles Developer to the relief sought, and a  
28 statement that explains the reasons why the provisions entitle Developer to that relief. If  
29 Developer seeks relief for ADOT's alleged breach of the Contract Documents, then  
30 Developer shall identify the specific provisions of the Contract Documents that ADOT  
31 allegedly breached and the actions constituting the breach;

32                   (d) Where Developer makes a request for a Completion  
33 Deadline adjustment, a Critical Path time impact analysis of the Project Schedule that:  
34 (i) identifies Controlling Work Items and Critical Path (with activity durations,  
35 predecessor and successor activities and resources, including total Float), and  
36 illustrates the effect of schedule changes or disruptions on the Completion Deadlines;  
37 and (ii) complies with the requirements of Section GP 110.06.2.11 of the Technical  
38 Provisions;

1 (e) A detailed, itemized estimate of all amounts claimed  
2 for Extra Work Costs and Delay Costs to the extent such amounts are eligible for  
3 compensation under this Article 14 for the Relief Event in question. All such amounts  
4 shall be broken down in terms of the eligible direct costs for labor (including hourly wage  
5 rates, fringe benefits rates and burden), materials, equipment, third party fees and  
6 charges, extra insurance and performance and payment security (e.g., bonds and  
7 letters of credit), as applicable, and other direct costs, including expenses and profit,  
8 and any other cost category or categories ADOT reasonably specifies. The estimate  
9 shall include, to the extent applicable, the Extra Work Costs for future Maintenance  
10 Services, stated by Fiscal Year and in present value dollars as of the time of the  
11 estimate (i.e., as if the future Maintenance Services were to be performed and the Extra  
12 Work Costs thereof paid for in the year of the estimate);

13 (f) The effect of the Relief Event on Developer's ability to  
14 perform any of its obligations under this Agreement, including details of the relevant  
15 obligations, the effect on each such obligation, and the likely duration of that effect;

16 (g) An explanation of the measures that Developer has  
17 previously taken to prevent, and proposes to undertake to mitigate, the costs, delay and  
18 other consequences of the Relief Event; and

19 (h) The type and amount of insurance that may be  
20 applicable and amounts that have been or are anticipated to be collected under such  
21 insurance.

22 **14.1.3.2** Developer shall submit the Relief Request on a standardized  
23 form approved by ADOT.

24 **14.1.3.3** If, following issuance of any Relief Request, Developer  
25 receives or becomes aware of any further information or estimates relating to the Relief  
26 Event and its impact on cost, schedule, Closures or performance of Work, including  
27 information on new consequences as described in Section 14.1.2.3, Developer shall  
28 submit such further information to ADOT as soon as possible. ADOT may request from  
29 Developer any further information that ADOT may reasonably require, and Developer  
30 shall supply the same within a reasonable period after such request.

31 **14.1.3.4** Neither the fact that Developer submits to ADOT a Relief  
32 Request, nor the fact that ADOT keeps account of the costs of labor, materials, or  
33 equipment or time, shall in any way be construed as establishing the validity of the  
34 Relief Request or the Claims therein or method of computing any compensation or  
35 extension of Completion Deadlines.

36 **14.1.4 ADOT Evaluation and Response to Relief Request; Negotiations**

37 **14.1.4.1** ADOT will evaluate the information presented in the Relief  
38 Request and provide a written response to Developer within 45 days after its receipt. If  
39 Developer complies with the notice and information requirements in Sections 14.1.2 and  
40 14.1.3, but ADOT does not provide Developer a written response within such 45-day

1 period, then, except as provided otherwise in Section 14.1.7, Developer shall have the  
2 right to assert a Claim against ADOT for the relevant Relief Event and have such Claim  
3 determined according to the Dispute Resolution Procedures.

4 **14.1.4.2** If Developer timely complies with the notice and information  
5 requirements in Sections 14.1.2 and 14.1.3 and ADOT provides a written response  
6 within such 45-day period indicating that there are any matters in Dispute regarding the  
7 Relief Request, then the Parties shall commence good faith negotiations to determine  
8 the matters in Dispute.

9 **14.1.4.3** If ADOT or Developer determines after engaging in good  
10 faith negotiations that continuation of such negotiations is not likely to resolve the  
11 matters in Dispute, then, except as provided otherwise in Section 14.1.7, Developer  
12 may initiate the Dispute Resolution Procedures.

13 **14.1.5 Final Documentation of Relief Event Claim**

14 **14.1.5.1** Within 30 days of the completion of work related to a Relief  
15 Event that is the subject of a Relief Request, Developer shall submit to ADOT the full  
16 and final documentation of the Relief Event claim. Pertinent information, references,  
17 arguments, and data to support the Relief Event claim shall be included in the full and  
18 final documentation, including updated analyses, descriptions, actual amounts and  
19 impacts, specific dates for Completion Deadline adjustments, and other documentation  
20 covering the same scope of information as required for the Relief Request.

21 **14.1.5.2** Without limiting the foregoing, if Developer claims  
22 compensation under Section 14.2, and except to the extent that said compensation is  
23 the subject of a previous written agreement by the Parties to be paid as a negotiated  
24 fixed price, Developer shall provide an itemized accounting of the actual direct costs  
25 broken down in terms of labor (including burden), materials, equipment, third party fees  
26 (e.g., permit fees, plan check fees and charges) and other direct costs and indirect  
27 costs, field office overhead and profit, and any other cost category reasonably  
28 requested by ADOT. The documentation also shall include, to the extent applicable, the  
29 Extra Work Costs for future Maintenance Services, stated by Fiscal Year and in present  
30 value dollars as of the time of the estimate (i.e. as if the future Maintenance Services  
31 were to be performed and the Extra Work Costs thereof paid for in the year of the  
32 estimate). The labor, materials, and equipment cost categories shall account for the  
33 following items:

34 (a) Labor. A listing of individuals, classifications, regular  
35 hours and overtime hours worked, dates worked, and other pertinent information related  
36 to the requested payment of labor costs.

37 (b) Materials. Invoices, purchase orders, location of  
38 materials either stored or incorporated into the Project, dates materials were transported  
39 to the Site or incorporated into the Project, and other pertinent information related to the  
40 requested payment of material costs.

1 (c) Equipment. Listing of detailed description (make,  
2 model, and serial number), hours of use, dates of use, and equipment rates. Equipment  
3 rates shall be determined pursuant to Section 1.2.3 of Exhibit 14 as of the first date  
4 when the affected work related to the Relief Event claim was performed.

5 (d) Developer shall submit the full and final  
6 documentation of the Relief Event claim on a standardized form approved by ADOT,  
7 and shall certify the Relief Event claim to be accurate, truthful, and complete.  
8 Information submitted subsequent to the full and final documentation submittal will not  
9 be considered. No full and final documentation of Relief Event claim will be considered  
10 that does not have the same nature, scope (except for reductions) and circumstances,  
11 and basis of the Relief Event claim, as those specified in the Relief Event Notice and  
12 any supplements submitted in accordance with Section 14.1.2.3 and in the Relief  
13 Request.

14 **14.1.6 ADOT Response to Final Documentation; Supplemental**  
15 **Agreement**

16 **14.1.6.1** ADOT's failure to respond to a full and final documentation  
17 of a Relief Event claim arising out of a Relief Event within 45 days after receipt shall  
18 constitute ADOT's rejection of the Relief Event claim, which shall thereafter constitute a  
19 Claim subject to the Dispute Resolution Procedures.

20 **14.1.6.2** If ADOT finds the Relief Event claim or any part thereof to be  
21 valid, or if the Relief Event claim or any part thereof is deemed to be valid as a result of  
22 completion of the Dispute Resolution Procedures, ADOT will:

23 (a) Deliver to Developer notice authorizing such partial or  
24 whole Relief Event claim;

25 (b) Pay such Relief Event claim to the extent deemed  
26 valid (as to Extra Work Costs and Delay Costs, by one of the methods set forth in  
27 Section 14.2.2); and

28 (c) Grant a commensurate Completion Deadline  
29 adjustment, if applicable, as provided in the Contract Documents.

30 (d) The Parties shall thereafter promptly execute a  
31 Supplemental Agreement documenting the Relief Event claim or part thereof that ADOT  
32 finds to be valid or that is upheld through the Dispute Resolution Procedures.

33 **14.1.7 Waiver**

34 Time is of the essence in Developer's delivery of its written Relief Event Notice,  
35 supplemental Relief Event Notice and Relief Request. Accordingly:

1                   **14.1.7.1** If for any reason Developer fails to deliver such written Relief  
2 Event Notice or supplement thereto in substantial compliance with all applicable  
3 requirements:

4                   (a) Within 45 days following the date (for purposes of this  
5 Section 14.1.7, the “starting date”) on which Developer first became aware (or should  
6 have been aware, using all reasonable due diligence) of the Relief Event (or, in the case  
7 of a supplement, the new consequences described in Section 14.1.2.3), Developer shall  
8 be deemed to have irrevocably and forever waived and released the portion of any  
9 Claim or right to relief for adverse effect attributable to the Relief Event accruing after  
10 such 45-day deadline and until the date Developer submits the written Relief Event  
11 Notice or supplement thereto; and

12                   (b) Within 90 days following the starting date, Developer  
13 shall be deemed to have irrevocably and forever waived and released any and all Claim  
14 or right to relief for any adverse effect attributable to such Relief Event.

15                   **14.1.7.2** If for any reason Developer fails to deliver such written Relief  
16 Request in substantial compliance with all applicable requirements in Section 14.1.3  
17 within 45 days after the date of the Relief Event Notice, Developer shall be deemed to  
18 have irrevocably and forever waived and released any and all Claim or right to relief  
19 (including extension of the Term) for any adverse effect attributable to such Relief  
20 Event.

21                   **14.1.8 Open Book Basis**

22                   Developer shall share with ADOT all data, documents and information, and shall  
23 conduct all discussions and negotiations, pertaining to a claimed Relief Event on an  
24 Open Book Basis.

25                   **14.2 Payment for Extra Work Costs and Delay Costs**

26                   **14.2.1** Except as provided otherwise in this Agreement, ADOT will  
27 compensate Developer for Extra Work Costs and Delay Costs directly attributable to  
28 occurrence of a Relief Event.

29                   **14.2.2** ADOT will compensate Developer for amounts due for Extra Work  
30 Costs and Delay Costs: (a) to the extent permitted by Law, as a lump sum payment;  
31 (b) as progress payments invoiced as Work is completed; or (c) through any  
32 combination of the above, as determined by ADOT in its sole discretion but subject to  
33 Section 14.2.4. Subject to Section 14.3, ADOT will pay for any Extra Work Costs and  
34 Delay Costs resulting from ADOT-Directed Changes as progress payments invoiced as  
35 Work is completed.

36                   **14.2.3** ADOT will provide Developer with a notice of the method chosen for  
37 paying Developer for the amounts of Extra Work Costs and Delay Costs owed.

1           **14.2.4** Following receipt of complete and conforming Claim documentation  
2 pursuant to Sections 14.1.1 and 14.1.2, if ADOT chooses to compensate Extra Work  
3 Costs or Delay Costs, as applicable, owed under this Section 14.2:

4           (a) As a lump sum payment other than a negotiated fixed price,  
5 then payment of all undisputed amounts will be due and owing not later than the  
6 Contractor Cycle Key Date first occurring after ADOT's receipt of all pertinent data,  
7 documents and information on an Open Book Basis with respect to such Extra Work  
8 Costs or Delay Costs, as applicable;

9           (b) As a lump sum payment that is a negotiated fixed price, then  
10 payment(s) of all undisputed amounts will be due and owing not later than the  
11 Contractor Cycle Key Date first occurring after ADOT receives from Developer all  
12 documentation required pursuant to the negotiated fixed price terms in order to receive  
13 scheduled payments under the negotiated fixed price terms with respect to such Extra  
14 Work Costs or Delay Costs, as applicable; and

15           (c) As progress payments invoiced as Work is completed, then  
16 payment of all undisputed amounts shall be due and owing not later than the Contractor  
17 Cycle Key Date first occurring after each date ADOT receives from Developer an  
18 invoice, not more often than monthly, of such Extra Work Costs or Delay Costs incurred,  
19 as applicable, for such Work during the previous month, which invoice shall be itemized  
20 as set forth in Section 14.1.5 and by the components of Extra Work Costs or Delay  
21 Costs, as applicable, allowable under Exhibit 14.

22           **14.2.5** Subject to the provisions of Section 14.2.2, if any portion of the Extra  
23 Work Costs and Delay Costs consist of costs of design or construction to be performed,  
24 or other future capital expenditures, then ADOT will have no obligation to make advance  
25 payments and shall have the right to pay such portion in monthly progress payments  
26 according to ADOT's standard practices and procedures for paying its contractors and  
27 applicable Laws.

28           **14.2.6** If ADOT elects to make monthly or other periodic payments, at any  
29 later time it may choose to complete compensation through a lump sum payment of the  
30 present value of the remaining Extra Work Costs and Delay Costs.

31           **14.2.7** For the purpose of any discounting of future cost impacts, the Parties  
32 shall use as the discount rate the then-applicable yield on U.S. Treasury bonds having a  
33 tenor closest in length to the then-remaining length of the Term plus 100 basis points.

34           **14.2.8** Extra Work Costs and Delay Costs attributable to a Relief Event shall:

35                   **14.2.8.1** Exclude:

36                   (a) Third-party entertainment costs, lobbying and political  
37 activity costs, costs of alcoholic beverages, costs for first class travel in excess of  
38 prevailing economy travel costs, and costs of club memberships, in each case to the

1 extent that such costs would not be reimbursed to an employee of ADOT in the regular  
2 course of business; and

3 (b) Unallowable costs under the following provisions of  
4 the federal Contract Cost Principles, 48 CFR §§ 31.205: 31.205-8 (contributions or  
5 donations), 31.205-13 (employee morale, health, welfare, food service, and dormitory  
6 costs and credits), 31.205-14 (entertainment costs), 31.205-15 (fines, penalties, and  
7 mischarging costs), 31.205-27 (organization costs), 31.205-34 (recruitment costs),  
8 31.205-35 (relocation costs), 31.205-43 (trade, business, technical and professional  
9 activity costs), 31.205-44 (training and education costs), and 31.205-47 (costs related to  
10 legal and other proceedings).

11 **14.2.8.2** Exclude amounts paid or to be paid to Affiliates in excess of  
12 the pricing Developer could reasonably obtain in an arms' length, competitive  
13 transaction with an unaffiliated Subcontractor;

14 **14.2.8.3** Exclude those costs incurred in investigating, analyzing,  
15 asserting, pursuing or enforcing any Claim or Dispute, including legal, accounting,  
16 financial advisory, and technical advisory fees and expenses, and including such costs  
17 in connection with preparing Relief Event Notices, Relief Requests, and final  
18 documentation of Claims in respect of Relief Events;

19 **14.2.8.4** Take into account any savings in costs or time resulting from  
20 the Relief Event;

21 **14.2.8.5** Be subject to Developer's obligation to prevent and to  
22 mitigate cost increases and augment cost decreases in accordance with Section 14.8;  
23 and

24 **14.2.8.6** Exclude any amounts covered by applicable insurance  
25 required in Exhibit 12 or deemed self-insurance, as more particularly provided in  
26 Section 14.5.

27 **14.2.9** ADOT, at its election, may offset any amounts owing to Developer in  
28 respect of Relief Events against any amounts due and owing to ADOT from Developer  
29 pursuant to this Agreement, such offset rights being in addition to ADOT's offset rights  
30 under Section 19.2.4.

### 31 **14.3 Claim Deductible**

32 **14.3.1** Except as provided in this Section 14.3, each separate occurrence of a  
33 Relief Event for which a Claim is made seeking the recovery of Extra Work Costs and  
34 Delay Costs, as applicable, shall be subject to the Claim Deductible. The Claim  
35 Deductible reflects the Parties' agreement that: (a) Developer shall bear the financial  
36 risks for Extra Work Costs and Delay Costs, as applicable, for each separate  
37 occurrence of a Relief Event, up to the Claim Deductible; and (b) except as otherwise  
38 provided in this Article 14, ADOT will compensate Developer for Extra Work Costs and

1 Delay Costs, as applicable, in excess of the Claim Deductible; provided, however, that  
2 each Claim complies with Section 14.1.

3 **14.3.2** The Claim Deductible shall not apply to a Claim seeking recovery for:

4 (a) An ADOT-Directed Change; and

5 (b) A Relief Event set forth in clauses (a), (c), (d), (e), (i) (but only  
6 as to ADOT Releases of Hazardous Materials), (o) or (q) of the definition of Relief  
7 Event.

8 **14.3.3** The Claim Deductible for Extra Work Costs shall be adjusted annually  
9 at the beginning of each Fiscal Year to equal the original amount of the Claim  
10 Deductible for Extra Work Costs multiplied by a fraction the numerator of which is the  
11 CCI most recently published prior to the beginning of the applicable Fiscal Year and the  
12 denominator of which is the Base CCI.

13 **14.4 Other Deductibles; Special Provisions**

14 Developer's rights and remedies respecting certain Relief Events and Losses are  
15 subject to the provisions of this Section 14.4. The provisions of this Section 14.4  
16 supersede any contrary provisions of this Agreement.

17 **14.4.1 Necessary Schematic ROW Changes**

18 **14.4.1.1** A Necessary Schematic ROW Change shall arise only  
19 where all the following criteria are satisfied:

20 (a) ADOT determines, in ADOT's good faith discretion,  
21 that it is not physically possible, including through commercially reasonable design  
22 modifications, for Developer to deliver the Basic Configuration within the Schematic  
23 ROW. Commercial reasonableness will be determined by ADOT exercising good faith  
24 business judgment, provided, however, that it is not commercially reasonable to require  
25 as a design modification: (i) retaining walls where retaining walls are not shown in the  
26 Schematic Design; (ii) an added structure not shown in the Schematic Design; or (iii) cut  
27 slopes in the Center Segment steeper than 3/4:1.

28 (b) A Necessary Schematic ROW Change shall not  
29 include areas outside the Schematic ROW for Temporary Construction Easements.

30 (c) A Necessary Schematic ROW Change shall not  
31 include areas outside the Schematic ROW necessary to accommodate the specific  
32 portions of the Basic Configuration that ADOT identified in Exhibit 16.

33 **14.4.1.2** With respect to a Necessary Schematic ROW Change:

34 (a) Developer shall be entitled to Delay Costs and  
35 Completion Deadline adjustment only if (i) Developer notifies ADOT, by Relief Event

1 Notice, of the Necessary Schematic ROW Change, including a reasonable identification  
2 of the subject property, within 360 days after NTP 1, (ii) ADOT is unable to deliver  
3 access to the necessary additional ROW for demolition and clearing within 180 days  
4 after approving the corresponding Condemnation Package, and (iii) the delay affects the  
5 Critical Path. The percentage of Delay Costs and Completion Deadline adjustment to  
6 which Developer shall be entitled, however, shall vary based on when Developer  
7 delivers to the appropriate Relief Event Notice, as follows:

8 (i) 100% if Developer notifies ADOT within  
9 120 days, inclusive, of NTP 1;

10 (ii) 75% if Developer notifies ADOT within  
11 240 days, inclusive, of NTP 1;

12 (iii) 50% if Developer notifies ADOT within  
13 360 days, inclusive, of NTP 1; and

14 (iv) no compensation for Delay Costs and no  
15 Completion Deadline adjustment if Developer notifies ADOT on or after the 361st day  
16 after NTP 2.

17 (b) Developer shall bear Extra Work Costs for ROW  
18 Services and any re-design and construction costs for the necessary additional ROW,  
19 net of any savings in design and construction costs; and ADOT will bear Extra Work  
20 Costs for environmental approvals, demolition and clearing, Utility Adjustments,  
21 Hazardous Materials Management and purchase price, severance damages, relocation  
22 assistance and title insurance for the necessary additional ROW.

23 **14.4.2 Non-Discriminatory Maintenance Change**

24 **14.4.2.1** If ADOT requires a Non-Discriminatory Maintenance Change  
25 in order to comply with or implement a Change in Law or revised air quality requirement,  
26 then, subject to Section 14.4.2.3, Developer shall be entitled to compensation for capital  
27 and non-capital Extra Work Costs of Maintenance Services, and Delay Costs, directly  
28 attributable to the Non-Discriminatory Maintenance Change.

29 **14.4.2.2** If ADOT requires a Non-Discriminatory Maintenance Change  
30 for reasons other than to comply with or implement a Change in Law or revised air  
31 quality requirement, Developer shall not be entitled to compensation for increases in the  
32 costs of Maintenance Services (i.e., Extra Work Costs or Delay Costs), except for the  
33 capital costs of required major new improvements or required major repair,  
34 reconstruction, rehabilitation, restoration, renewal or replacement of any affected  
35 Element, subject to Section 14.4.2.3.

36 **14.4.2.3** Developer shall be entitled to Extra Work Costs for increases  
37 in capital costs only if ADOT directs Developer to implement the Non-Discriminatory  
38 Maintenance Changes prior to the date when Developer performs or is scheduled to  
39 perform the Capital Asset Replacement Work (if any) on the affected Element or,

1 otherwise, outside the ordinary course of performing the Maintenance Services.  
2 Developer shall not be entitled to any Extra Work Costs for implementing Non-  
3 Discriminatory Maintenance Changes if Developer replaces the affected Element during  
4 the ordinary course of performing the Maintenance Services.

5 **14.4.2.4** ADOT will be entitled to a credit from Developer for capital  
6 and non-capital costs, if any, that Developer would have incurred if not for the Non-  
7 Discriminatory Maintenance Change.

8 **14.4.3 Project ROW Acquisition**

9 If a Relief Event occurs under clause (e) of the definition of Relief Event  
10 (concerning ADOT-Caused Delay) where the ADOT-Caused Delay is under clause (d)  
11 of such definition (concerning a time period to make available to Developer parcels  
12 being acquired) and such Relief Event concerns Developer-Designated ROW, then  
13 Developer shall have no Claim to compensation, Completion Deadline adjustment or  
14 Supplemental Agreement on account of, and Developer shall have the sole risk arising  
15 out of:

16 (a) The refusal of any Governmental Entity that owns or controls  
17 Developer-Designated ROW to grant necessary rights of access, entry, and use to  
18 ADOT after ADOT makes diligent efforts to negotiate acquisition of such Developer-  
19 Designated ROW; or

20 (b) The holding by the court in any condemnation action for the  
21 taking of Developer-Designated ROW to the effect that: (i) ADOT's power of eminent  
22 domain does not extend to such Developer-Designated ROW; or (ii) the proposed  
23 condemnation does not satisfy legal requirements for necessity of the taking.

24 **14.4.4 Utility Company Delay**

25 **14.4.4.1** Developer shall not be entitled to any Claim for Extra Work  
26 Costs relating to Utility Company Delay, except for Extra Work Costs allowable under  
27 Section 14.8.3 to mitigate Delay Costs.

28 **14.4.4.2** Developer shall be entitled to Completion Deadline  
29 adjustment for delay to the Critical Path that is directly attributable to Utility Company  
30 Delay.

31 **14.4.4.3** Developer shall not be entitled to any Claim for Delay Costs  
32 relating to a Utility Company Delay described in clause (c) of the definition of Utility  
33 Company Delay unless the applicable Utility Agreement precludes an adequate  
34 damages remedy to Developer for Utility Company delays. In all other cases,  
35 Developer's recourse for the costs of such delays shall be limited to remedies against  
36 the Utility Company.

37 **14.4.5 Inaccurate Utility Information**

1 The following limitations apply to the Relief Event set forth in clause (h) of the  
2 definition thereof (concerning Inaccurate Utility Information).

3 **14.4.5.1** Developer's compensation for Extra Work Costs shall be  
4 limited to the aggregate Extra Work Costs of the Utility Work (including reimbursements  
5 payable to Utility Companies) that Developer would not have incurred if the Utility  
6 Information had been reasonably accurate.

7 **14.4.5.2** Developer shall be entitled to compensation for reasonable  
8 and necessary costs to acquire Replacement Utility Property Interests for Adjustment of  
9 a Utility only where:

10 (a) Both the Utility Information and public and private  
11 records fail to indicate that the Utility Company holds or is assumed to hold Prior Rights  
12 Documentation with respect to the subject Utility;

13 (b) It is not physically possible, including through  
14 commercially reasonable design modifications as described in Section 14.4.1.1(a), to  
15 perform the subject Utility Adjustment within the Schematic ROW or to use Protection in  
16 Place; and

17 (c) The Utility Company is not legally responsible under  
18 Law for the acquisition costs, such as in the case of a Replacement Utility Property  
19 Interest that is a Betterment.

20 **14.4.5.3** Developer shall be entitled to Delay Costs only if:

21 (a) The subject Utility is not a Service Line; and

22 (b) either (i) the applicable Utility Information does not  
23 indicate that the subject Utility exists anywhere within the portion the Schematic ROW  
24 covered by the Utility Information, or (ii) both the Utility Information and public and  
25 private records fail to indicate that the Utility Company holds or is assumed to hold Prior  
26 Rights Documentation with respect to the subject Utility.

27 **14.4.5.4** Developer shall not be entitled to any Completion Deadline  
28 adjustment unless Developer is also entitled to compensation for Delays Costs, as  
29 provided in Section 14.4.5.3.

## 30 **14.4.6 Hazardous Materials**

31 **14.4.6.1** This Section 14.4.6 supersedes any Relief Event other than  
32 that under clauses (i) and (j) of the definition of Relief Event that might otherwise be  
33 triggered by the presence, existence or Release of Hazardous Materials.

34 **14.4.6.2** If there occurs any Relief Event under clause (i) or (j) of the  
35 definition of Relief Event, and if Developer timely satisfies the terms and conditions for  
36 asserting a Relief Event set forth in Section 14.1, then ADOT will pay the applicable

1 Extra Work Costs directly attributable to the handling, containment, storage, treatment,  
2 transport, removal, remediation and disposal of such Hazardous Materials, subject to  
3 each of the following:

4 (a) Such Extra Work Costs shall be limited as set forth in  
5 Section 14.4.6.3 and shall be subject to adjustment as provided in Section 14.5.

6 (b) If (i) the Hazardous Materials are contained in soils or  
7 other solid materials or objects that may be returned to trenches or other areas of  
8 excavation within or adjacent to the Project ROW pursuant to regulations, policies or  
9 approvals of applicable Governmental Entities, and (ii) the excavation of such  
10 contaminated soils or other solid materials or objects is undertaken for any purpose or  
11 reason other than the fact of contamination, then the Extra Work Costs shall be limited  
12 to the reasonable out-of-pocket costs of handling such contaminated soils, materials  
13 and objects in excess of the out-of-pocket costs Developer would incur to handle the  
14 same if they were not contaminated.

15 (c) If the Hazardous Materials are contained in soils or  
16 other solid materials or objects that are removed from the Site for any purpose or  
17 reason other than the fact of contamination, then the Extra Work Costs for which ADOT  
18 is liable shall be limited to the incremental increase in out-of-pocket cost to excavate,  
19 handle, contain, haul, transport, remove, remediate and dispose of the soils or other  
20 solid materials or objects over the out-of-pocket cost to excavate, handle, contain, haul,  
21 transport, remove, remediate and dispose of such soils or other solid materials or  
22 objects if they did not contain Hazardous Materials.

23 (d) If avoidance or remediation of such Hazardous  
24 Materials is capable of being accomplished under applicable Laws and Governmental  
25 Approvals through measures less costly than excavation, removal and off-site disposal  
26 of contaminated soil and groundwater, or less costly than return to trenches and other  
27 areas of excavation, then ADOT will only be liable for the least costly alternative. Such  
28 alternate, less costly measures may include (i) design modifications and construction  
29 techniques to avoid such Hazardous Materials or reduce the quantities to be excavated,  
30 handled, contained, hauled, transported, removed, remediated and disposed of off-site,  
31 and (ii) on-site containment and institutional controls. If, however, Developer  
32 demonstrates that the total cost of alternate measures, including Delay Costs to be  
33 borne by Developer, will exceed the total cost of excavation, removal and off-site  
34 disposal or return to trenches and other areas of excavation, including Delay Costs to  
35 be borne by Developer, then Developer shall not be obligated to implement the  
36 alternate measure. Developer shall respond to all reasonable requests by ADOT for  
37 supporting information regarding such cost comparison.

38 (e) The Extra Work Costs available under this  
39 Section 14.4.6.2 are subject to the Claim Deductible, except with respect to ADOT  
40 Releases of Hazardous Materials.

1                   **14.4.6.3**   None of the following liabilities, costs, expenses and Losses  
2 shall be chargeable against or reimbursable by ADOT:

3                   (a)   Liabilities, costs, expenses and Losses to the extent  
4 attributable to Developer Releases of Hazardous Materials;

5                   (b)   Extra Work Costs arising out of Releases of  
6 Hazardous Materials from vehicles operating within the Project ROW, unless operated  
7 by ADOT;

8                   (c)   Liabilities, costs, expenses and Losses that could be  
9 avoided by the exercise of Good Industry Practice to mitigate and reduce cost, including  
10 exercise of Developer’s duties to avoid and mitigate set forth in Section 6.8.2;

11                   (d)   Costs and expenses to investigate and characterize  
12 Hazardous Materials (including phase 1 and phase 2 environmental site assessments),  
13 except with respect to Hazardous Materials of an unexpected and extraordinary quantity  
14 or toxicity;

15                   (e)   Administrative and overhead expenses and profit of  
16 Developer or its Subcontractors arising out of or relating to Hazardous Materials, except  
17 for that of the Subcontractor directly performing investigation, characterization and  
18 remediation of the Hazardous Materials;

19                   (f)   Developer Releases of Hazardous Materials;

20                   (g)   Liabilities, costs, expenses and Losses incurred  
21 attributable to acts or omissions of any Developer-Related Entity that exacerbates  
22 release of, or costs to excavate, handle, contain, haul, transport, remove, remediate or  
23 dispose of Hazardous Materials or ADOT Releases of Hazardous Materials;

24                   (h)   Liabilities, costs, expenses and Losses incurred if  
25 ADOT is not afforded the opportunity to inspect sites containing Hazardous Materials or  
26 ADOT Releases of Hazardous Materials before Developer takes any action which would  
27 inhibit ADOT’s ability to ascertain, based on a site inspection, the nature and extent of  
28 the Hazardous Materials, except for Developer’s Emergency actions necessary to  
29 stabilize and contain a sudden release or otherwise required by Law to immediately  
30 address the Emergency;

31                   (i)   Liabilities, costs, expenses and Losses with respect to  
32 Hazardous Materials in, on or under Developer-Designated ROW, Replacement Utility  
33 Property Interests (except if Section 14.4.5.2 applies) or Developer’s Temporary Work  
34 Areas; and

35                   (j)   Liabilities, costs, expenses and Losses with respect to  
36 Hazardous Materials in, on or under locations Developer is required to avoid pursuant to  
37 the Technical Provisions.

1                   **14.4.6.4** Extra Work Costs for off-site disposal of soils contaminated  
2 with Hazardous Materials for which ADOT is liable under this Section 14.4.6 shall be  
3 determined by applying the same unit price (per ton or cubic yard) that applies to  
4 Developer under the Lead Subcontract with respect to off-site disposal of Hazardous  
5 Materials of similar character for which Developer is not compensated by ADOT. If no  
6 such unit price is stated in the Lead Subcontract, then the unit price shall not exceed the  
7 unit price ADOT could obtain through competitive low bid from a qualified contractor for  
8 such work.

9                   **14.4.7 Differing Site Conditions**

10                   Developer's entitlement to Extra Work Costs, Delay Costs and Completion  
11 Deadline adjustment for Differing Site Conditions shall be subject to the following  
12 conditions:

13                   (a) During progress of the D&C Work, if Differing Site Conditions  
14 are encountered, Developer shall immediately notify ADOT thereof telephonically or in  
15 person, to be followed immediately by notification. Developer shall be responsible for  
16 determining the appropriate action to be undertaken, subject to concurrence by ADOT.  
17 In the event that any Governmental Approvals specify a procedure to be followed,  
18 Developer shall follow the procedure set forth in the Governmental Approvals.

19                   (b) Developer shall bear the burden of proving that a Differing Site  
20 Condition exists and that Developer could not reasonably have worked around the  
21 Differing Site Condition so as to avoid additional cost or delay.

22                   (c) Each Relief Event Notice and Relief Request relating to a  
23 Differing Site Condition shall include a statement setting forth all relevant assumptions  
24 made by Developer with respect to the condition of the affected area, justifying the basis  
25 for such assumptions, explaining exactly how the existing conditions differ from those  
26 assumptions, and stating the efforts Developer undertook to find alternative design or  
27 construction solutions to eliminate or minimize the problem and the associated costs.

28                   (d) Unless Developer proves that a Differing Site Condition exists in  
29 an affected area, Developer shall not be entitled to additional compensation or  
30 Completion Deadline adjustment in connection with work stoppages in the affected area  
31 during the period of time Developer investigates conditions in the affected area.

32                   (e) Developer shall not be entitled to any Extra Work Costs, Delay  
33 Costs or Completion Deadline adjustment for Differing Site Conditions in, on or under  
34 Developer-Designated ROW, Replacement Utility Property Interests (except if  
35 Section 14.4.5.2 applies) or Developer's Temporary Work Areas.

36                   **14.4.8 Change in Law**

37                   **14.4.8.1** New or revised State statutes adopted after the Setting Date  
38 that change, add to or replace applicable standards, criteria, requirements, conditions,  
39 procedures and specifications, including Safety Standards relating to the D&C Work, as

1 well as revisions to the Technical Provisions to conform to such new or revised State  
2 statutes, shall be treated as a Change in Law (clause (n) of the definition of Relief  
3 Event) rather than an ADOT-Directed Change to Technical Provisions; provided,  
4 however, that changes in Adjustment Standards caused by new or revised State  
5 statutes shall constitute neither a Change in Law nor an ADOT-Directed Change.

6 **14.4.8.2** New or revised State statutes adopted after the Setting Date  
7 that change, add to or replace applicable standards, criteria, requirements, conditions,  
8 procedures and specifications, including Safety Standards, relating to Maintenance  
9 Services, as well as revisions to the Technical Provisions to conform to such new or  
10 revised State statutes, shall be treated as a Non-Discriminatory Maintenance Change,  
11 as provided in Section 14.4.2.

12 **14.4.9 Change in Adjustment Standards**

13 Developer shall not be entitled to any Claim for Delay Costs due to a Change in  
14 Adjustment Standards.

15 **14.4.10 ADOT-Directed Changes for ITS Improvements**

16 Developer's entitlement to additional compensation or Completion Deadline  
17 adjustment for ADOT-Directed Changes to construct ITS improvements described in  
18 Section 7.6.2 shall be as follows:

19 (a) If ADOT issues the corresponding Supplemental Agreement or  
20 Directive Letter within 30 days after ADOT receives the ITS Inventory from Developer,  
21 then Developer shall be entitled to the Extra Work Costs to complete the ITS  
22 improvements but shall not be entitled to any Delay Costs or Completion Deadline  
23 adjustment therefor; or

24 (b) If ADOT issues the corresponding Supplemental Agreement or  
25 Directive Letter later than 30 days after ADOT receives the ITS Inventory from  
26 Developer, then Developer shall be entitled to the Extra Work Costs to complete the ITS  
27 improvements as well as any Delay Costs and Completion Deadline adjustment directly  
28 attributable to the delayed issuance of the Supplemental Agreement or Directive Order.

29 **14.4.11 D&C Price Adjustment Due to Delay in NTP1**

30 **14.4.11.1** If ADOT does not issue NTP 1 within 180 days after the  
31 Proposal Due Date, and this delay is not caused in whole or in part by an act, omission,  
32 negligence, intentional misconduct, or breach of applicable Law, contract or  
33 Governmental Approval by any Developer-Related Entity, the D&C Price shall be  
34 subject to adjustment, as described in this Section 14.4.11.

35 **14.4.11.2** The D&C Price adjustment shall be applied to the period  
36 beginning on the date of issuance of NTP 1.

1                   **14.4.11.3** The D&C Price for D&C Work performed on and after the  
2 date of issuance of NTP 1 will be adjusted pursuant to a Supplemental Agreement  
3 solely by adding to the D&C Price the “adjustment amount” (or “Δ”), calculated in  
4 accordance with this Section 14.4.11.3, and without the right to any additional  
5 compensation pursuant to the Supplemental Agreement.

$$\Delta = N \times \text{D\&C Price} \times (([A-B]/B)/T)$$

7                   where:

8                   “Δ” is the adjustment amount distributed on a *pro rata* basis over  
9 the remaining payments on Exhibit 6;

10                   “N” is the number of days in the period starting on the 186th day  
11 after the Proposal Due Date and ending on the effective date of NTP 1;

12                   “A” is the CCI value published for the month in which the effective  
13 date of NTP 1 occurs;

14                   “B” is the CCI published for the month which contains the day which  
15 is N +15 days prior to the 15th day of the month which contains the effective date of  
16 NTP 1; and

17                   “T” is the number of days between the 15th of the month for which  
18 the CCI value for “A” was taken and the 15th of the month for which the CCI value for  
19 “B” was taken.

20                   **14.4.11.4** In the event of a delay to NTP 1 as described in this  
21 Section 14.4.11, Developer will be entitled to request a Supplemental Agreement to  
22 extend a Completion Deadline in accordance with Section 14.6.

## 23                   **14.4.12 D&C Price Adjustment Due to Delay in NTP 2**

24                   **14.4.12.1** If ADOT does not issue NTP 2 within ten Business Days  
25 after Developer satisfies the conditions precedent to issuance of NTP 2 set forth in  
26 Section 7.4.1, and this delay is not caused in whole or in part by an act, omission,  
27 negligence, intentional misconduct, or breach of applicable Law, contract or  
28 Governmental Approval by any Developer-Related Entity (including Developer’s failure  
29 to satisfy any particular condition(s) to NTP 2), the D&C Price shall be subject to  
30 adjustment, as described in this Section 13.1.4.

31                   **14.4.12.2** The D&C Price adjustment shall be applied to the period  
32 beginning on the date of issuance of NTP 2.

33                   **14.4.12.3** The D&C Price for D&C Work performed on and after the  
34 date of issuance of NTP 2 will be adjusted pursuant to a Supplemental Agreement  
35 solely by adding to the D&C Price the “adjustment amount” (or “Δ”), calculated in

1 accordance with this Section 13.1.4.3, and without the right to any additional  
2 compensation pursuant to the Supplemental Agreement.

3 
$$\Delta = N \times (\text{D\&C Price} - C) \times (([A-B]/B)/T)$$

4 where:

5 “ $\Delta$ ” is the adjustment amount distributed on a *pro rata* basis  
6 over the remaining payments on Exhibit 6;

7 “C” is the amount paid or owing from ADOT to Developer for  
8 D&C Work performed prior to issuance of NTP 2;

9 “N” is the number of days in the period starting on the later of  
10 the 11th Business Day after Developer satisfies the conditions precedent to issuance of  
11 NTP 2 set forth in Section 7.4.1;

12 “A” is the CCI value published for the month in which the  
13 effective date of NTP 2 occurs;

14 “B” is the CCI published for the month which contains the  
15 day which is N +15 days prior to the 15th day of the month which contains the effective  
16 date of NTP 2; and

17 “T” is the number of days between the 15th of the month for  
18 which the CCI value for “A” was taken and the 15th of the month for which the CCI  
19 value for “B” was taken.

20 **14.4.12.4** In the event of a delay to NTP 2 as described in this  
21 Section 13.1.4, Developer will be entitled to request a Supplemental Agreement to  
22 extend a Completion Deadline in accordance with Section 14.6.

23 **14.4.13 D&C Price Adjustment in Connection with Issuance of NTP 3**

24 **14.4.13.1** If ADOT issues NTP 3 prior to the NTP 3 Window, the  
25 D&C Price will be decreased by the sum of the applicable dollar amount per diem set  
26 forth in Exhibit 2-4.2 for each day NTP 3 is issued prior to the start date of the NTP 3  
27 Window, up to a cap of 180 days before the start date of the NTP 3 Window. For each  
28 day, if any, that NTP 3 is issued before the 180th day prior to the start date of the NTP 3  
29 Window, the D&C Price will be further reduced by the amount of the decrease in  
30 Developer’s costs attributable thereto, including savings from schedule acceleration and  
31 from efficiency gains. The Parties shall negotiate the amount of such decrease in  
32 Developer’s costs in accordance with Section 15.1.6, as applicable. The Parties shall  
33 document any decrease in the D&C Price in a Supplemental Agreement for a reductive  
34 ADOT-Directed Change.

35 **14.4.13.2** If ADOT issues NTP 3 after the NTP 3 Window, the D&C  
36 Price will be increased by the sum of the applicable dollar amount per diem set forth in

1 Exhibit 2-4.2 for each day NTP 3 is issued after the end date of the NTP 3 Window, up  
2 to a cap of 180 days after the end date of the NTP 3 Window. For each day, if any, that  
3 NTP 3 is issued after the 180th day following the end date of NTP 3 Window, the D&C  
4 Price will be further increased by the amount of the Delay Costs attributable to such  
5 further period of delay. The Parties shall negotiate the amount of such Delay Costs in  
6 accordance with Section 2 of Exhibit 14, as applicable. The Parties shall document any  
7 increase in the D&C Price in a Supplemental Agreement.

8 **14.4.13.3** If ADOT issues NTP 3 anytime within the NTP 3 Window,  
9 inclusive, there shall be no adjustment to the D&C Price in connection with the issuance  
10 of NTP 3.

## 11 **14.5 Insurance Adjustments**

12 **14.5.1** Application of insurance proceeds in the event of any loss, damage or  
13 destruction to the Project is governed by Section 11.3.

14 **14.5.2** In all other circumstances, each Claim seeking the recovery of  
15 compensation for Extra Work Costs and Delay Costs, as applicable, shall be net of all  
16 insurance available to Developer, or deemed to be self-insured by Developer under  
17 Section 11.2.4, with respect to the Relief Event giving rise to the Extra Work Costs or  
18 Delay Costs. The amount of such insurance or deemed self-insurance shall be netted  
19 out before determining the amount of Extra Work Costs and Delay Costs to be charged  
20 against the Claim Deductible.

## 21 **14.6 Effect of Relief Events on Completion Deadlines, Performance, Developer** 22 **Default, Noncompliance Points and Deductions**

23 **14.6.1** Subject to satisfaction of any conditions or requirements set forth in the  
24 Contract Documents, including in Section 14.4, Developer shall be entitled to extension  
25 of applicable Completion Deadlines by the period that the end of the Critical Path  
26 extends beyond the original Completion Deadline due to any Relief Event Delay that  
27 (a) is not concurrent with any other delay which is not caused by a Relief Event and  
28 (b) Developer cannot reasonably avoid through mitigation as required under  
29 Section 14.8.

30 **14.6.2** Developer shall not be excused from timely payment of monetary  
31 obligations under this Agreement due to the occurrence of a Relief Event. Developer  
32 shall not be excused from compliance with the Contract Documents or applicable Laws  
33 due to the occurrence of a Relief Event, except temporary inability to comply due solely  
34 and directly to the Relief Event.

35 **14.6.3** Developer shall be entitled to rely upon the occurrence of a Relief  
36 Event as a defense against a Developer Default where the occurrence of the Relief  
37 Event causes such Developer Default.

1           **14.6.4** Refer to Section 17.5 regarding the effect of a Relief Event on the  
2 accrual of Noncompliance Events and Noncompliance Points and assessment of  
3 Liquidated Damages for Noncompliance Events.

#### 4   **14.7 Exclusive Relief; Release of Claims**

5 The relief provided through agreement or pursuant to Dispute Resolution Procedures for  
6 a Relief Event shall represent the sole right to compensation, damages, and other relief  
7 from the adverse effects of a Relief Event. As a condition precedent to ADOT's  
8 obligation to pay any compensation amount or grant or abide by such relief, Developer  
9 shall execute a full, unconditional, irrevocable waiver and release, in form reasonably  
10 acceptable to ADOT, of any other Claims, Losses or rights to relief associated with such  
11 Relief Event that is not the subject of a Dispute.

#### 12   **14.8 Prevention and Mitigation**

13           **14.8.1** Developer shall be entitled to the relief and protection provided under  
14 this Section 14 only if the occurrence of a Relief Event and the effects of such  
15 occurrence:

16                   (a) Are beyond the reasonable control of Developer-Related  
17 Entities;

18                   (b) Are not due to any act, omission, negligence, recklessness,  
19 willful misconduct, fault, breach of contract, or breach of the requirements of the Contact  
20 Documents, or violation of Law or a Governmental Approval of or by any of the  
21 Developer-Related Entities; and

22                   (c) Could not have been avoided by the exercise of caution, due  
23 diligence or reasonable efforts by Developer-Related Entities.

24           **14.8.2** Developer shall take all steps reasonably necessary to mitigate the  
25 consequences of any Relief Event, including all steps that would generally be taken in  
26 accordance with Good Industry Practice.

#### 27           **14.8.3 Re-sequencing and Re-scheduling of Work**

28                   **14.8.3.1** Without limiting Section 14.8.2, Developer shall not be  
29 entitled to submit a claim for Extra Work Costs, Delay Costs, Completion Deadline  
30 adjustment or other relief for impacts that could have been avoided through re-  
31 sequencing and re-scheduling of the Work or other work-around measures the cost of  
32 which is justified by equal or greater savings in Extra Work Costs and Delay Costs.

33                   **14.8.3.2** Whenever a Relief Event occurs and Developer submits an  
34 original or supplemental Relief Event Notice for Extra Work Costs or Delay Costs,  
35 Developer shall concurrently submit to ADOT an analysis of potential re-sequencing, re-  
36 scheduling and other work-around measures and a comparison of the estimated costs

1 thereof to the estimated savings in the Extra Work Costs or Delay Costs that would  
2 result.

3 **14.8.3.3** Developer shall cooperate with ADOT thereafter to identify  
4 the re-sequencing, re-scheduling and other work around measures that will maximize  
5 mitigation of costs to ADOT taking into account the cost of potential re-sequencing, re-  
6 scheduling and other work-around measures.

7 **14.8.3.4** ADOT will compensate Developer for the reasonable costs  
8 of re-sequencing, re-scheduling and other work-around measures authorized in writing  
9 by ADOT pursuant to this provision, in the same manner it compensates for Extra Work  
10 Costs and Delay Costs under Section 14.2.

11 **14.8.4** Without limiting Section 14.8.3, if any claim is asserted or  
12 administrative proceeding, litigation or other legal action is brought against Developer  
13 by any third party (other than a Developer-Related Entity) seeking relief that would or  
14 could entitle Developer to Extra Work Costs, Delay Costs or Completion Deadline  
15 adjustment if determined adversely to Developer, then Developer, at its expense, shall  
16 defend against such claim, administrative proceeding, litigation or other legal action  
17 diligently and professionally, shall not interfere with or resist ADOT's intervention in the  
18 claim negotiations or administrative proceeding, litigation or other legal action, and shall  
19 actively assist and cooperate with ADOT in its defense against the claim, administrative  
20 proceeding, litigation or other legal action. At the request of either Party, both Parties  
21 shall enter into, or cause their respective legal counsel to enter into, a joint defense  
22 agreement setting forth terms for their joint cooperation and defense. The Parties also  
23 may mutually choose, but are not obligated, to be jointly represented by legal counsel in  
24 such administrative proceeding, litigation or other legal action.

25 **14.8.5** For further mitigation obligations of Developer respecting Hazardous  
26 Materials and Recognized Environmental Conditions, refer to Section 6.8.2.

27

1 **ARTICLE 15.**

2 **ADOT-DIRECTED CHANGES; DEVELOPER CHANGES; DIRECTIVE LETTERS**

3 **15.1 ADOT-Directed Changes**

4 **15.1.1 ADOT's Right to Issue Supplemental Agreement**

5 **15.1.1.1** ADOT may, at any time and from time to time, without notice  
6 to any Surety, authorize or require, pursuant to a Supplemental Agreement, changes in  
7 the Work (including reductions in the scope of the D&C Work or Maintenance Services)  
8 or in terms and conditions of the Technical Provisions (including changes in the  
9 standards applicable to the Work).

10 **15.1.1.2** ADOT also shall have the right to issue a Supplemental  
11 Agreement for any other event that the Contract Documents expressly state shall be  
12 treated as an ADOT-Directed Change.

13 **15.1.1.3** Such alterations and changes shall be documented through  
14 issuance of an ADOT-Directed Change or Directive Letter. No document, including any  
15 field directive, shall be valid, effective or enforceable as a Supplemental Agreement  
16 unless expressly identified as a "Supplemental Agreement" and signed by the ADOT  
17 project director, by the ADOT construction manager for Supplemental Agreements less  
18 than \$350,000, or by other ADOT individual identified in a written notice from the project  
19 director or construction manager to Developer as having authority to execute  
20 Supplemental Agreements.

21 **15.1.2 Request for Change Proposal**

22 **15.1.2.1** If ADOT desires to issue an ADOT-Direct Change or to  
23 evaluate whether to initiate such a change, then ADOT may, at its discretion, issue a  
24 Request for Change Proposal. The Request for Change Proposal shall set forth the  
25 nature, extent and details of the proposed ADOT-Directed Change.

26 **15.1.2.2** Within five Business Days after Developer receives a  
27 Request for Change Proposal, or such longer period to which the Parties may mutually  
28 agree, ADOT and Developer shall consult to define the proposed scope of the change.  
29 Within five Business Days after the initial consultation, or such longer period to which  
30 the Parties may mutually agree, ADOT and Developer shall consult concerning the  
31 estimated financial, schedule and other impacts.

32 **15.1.3 Response to Request for Change Proposal**

33 As soon as possible through the exercise of diligent efforts, and in any event  
34 within 60 days, following ADOT's delivery to Developer of the Request for Change  
35 Proposal, Developer shall provide ADOT with a detailed assessment of the cost,  
36 schedule, and other impacts of the proposed ADOT-Directed Change, including the  
37 following:

1 (a) Developer's detailed estimate of the impacts on costs of  
2 carrying out the proposed ADOT-Directed Change, including any Extra Work Costs or  
3 Delay Costs;

4 (b) If the Change Notice is issued prior to the Final Acceptance  
5 Date, the effect of the proposed ADOT-Directed Change on the Project Schedule,  
6 including achievement of the Completion Deadlines, taking into consideration  
7 Developer's duty to mitigate any delay;

8 (c) The effect (if any) of the proposed ADOT-Directed Change on  
9 Performance Requirements, the Capital Asset Replacement Work Schedule, and  
10 Handback Requirements; and

11 (d) Any other relevant information related to carrying out the  
12 proposed ADOT-Directed Change.

#### 13 **15.1.4 Negotiation and Directed Changes**

14 **15.1.4.1** Following ADOT's receipt of Developer's detailed  
15 assessment and of such further assessment by ADOT and its consultants of the cost,  
16 schedule and other impacts of the proposed ADOT-Directed Change, ADOT and  
17 Developer shall exercise good faith efforts to negotiate a mutually acceptable  
18 Supplemental Agreement, including: (a) if applicable, adjustment of the Completion  
19 Deadlines; and (b) either (i) if applicable, any Extra Work Costs or Delay Costs to which  
20 Developer is entitled, and the timing and method for payment of any Extra Work Costs  
21 or Delay Costs (in accordance with Section 14.2.4) or (ii) if applicable, any net cost  
22 savings and schedule savings to which ADOT is entitled under Section 15.1.6 and the  
23 timing and method for realizing such cost savings.

24 **15.1.4.2** If ADOT and Developer are unable to reach agreement on a  
25 Supplemental Agreement, ADOT may, in its sole discretion, resolve the Dispute  
26 according to the Dispute Resolution Procedures without issuing a Directive Letter, or  
27 deliver to Developer a Directive Letter pursuant to Section 15.3.1 directing Developer to  
28 proceed with the performance of the Work in question notwithstanding such  
29 disagreement. Upon receipt of such Directive Letter, pending final resolution of the  
30 relevant Supplemental Agreement according to the Dispute Resolution Procedures: (a)  
31 Developer shall implement and perform the Work in question as directed by ADOT; and  
32 (b) ADOT will make interim payment(s) to Developer on a monthly progress payment  
33 basis for the reasonable documented Extra Work Costs and Delay Costs in question,  
34 subject to subsequent adjustment through the Dispute Resolution Procedures.

#### 35 **15.1.5 Payment and Schedule Adjustment**

36 ADOT will be responsible for payment of the Extra Work Costs or Delay Costs  
37 agreed upon or determined through the Dispute Resolution Procedures (through one of  
38 the payment mechanisms set forth in Section 14.2.4), and the Project Schedule and  
39 Completion Deadlines shall be adjusted as agreed upon or determined through the

1 Dispute Resolution Procedures, and in accordance with Section 14.6, to reflect the  
2 effects of the Supplemental Agreement.

3 **15.1.6 Reductive ADOT-Directed Changes**

4 **15.1.6.1** In addition to a Request for Change Proposal, ADOT may  
5 deliver to Developer a written notice that, in ADOT's opinion, the ADOT-Directed  
6 Change will reduce Developer costs, or save time. In such event, ADOT may prepare  
7 an analysis and a detailed assessment of the advantageous cost and schedule impacts  
8 of the proposed ADOT-Directed Change, either independently of or in reply to  
9 Developer's written response, including the following:

10 (a) ADOT's detailed estimate of the advantageous  
11 impacts on costs of carrying out the proposed ADOT-Directed Change;

12 (b) If the written notice is issued prior to the Final  
13 Acceptance Date, the effect of the proposed ADOT-Directed Change on shortening the  
14 Project Schedule and Completion Deadlines;

15 (c) The effect (if any) of the proposed ADOT-Directed  
16 Change on the Capital Asset Replacement Work Schedule and Handback  
17 Requirements; and

18 (d) Any other relevant information related to carrying out  
19 the proposed ADOT-Directed Change.

20 **15.1.6.2** Developer and ADOT thereafter shall cooperate in good faith  
21 to mutually determine the estimated net cost savings and time savings, if any,  
22 attributable to the Request for Change Proposal. Any Dispute regarding such savings  
23 shall be resolved according to the Dispute Resolution Procedures.

24 **15.1.6.3** ADOT will be entitled to 100% of the estimated net cost  
25 savings, if any, attributable to any reductive ADOT-Directed Change. Such net cost  
26 savings shall include the net reduction, if any, in labor, material, equipment and  
27 overhead costs associated with the ADOT-Directed Change. Developer shall pay such  
28 savings to ADOT: (a) as periodic payments over the Term; (b) as an adjustment to the  
29 Monthly Disbursement over the Term; (c) through a reduction in the Term; or (d)  
30 through any combination of the above, as selected by ADOT. ADOT also may take  
31 such reduction in labor, material, equipment and overhead costs as a credit against  
32 ADOT's liability for Extra Work Costs and Delay Costs during the Term. If ADOT  
33 selects periodic payments over the Term, such payments shall be due and owing to  
34 ADOT monthly on the last day of each month.

35 **15.1.6.4** ADOT will be entitled to 100% of the effect of the proposed  
36 ADOT-Directed Change on shortening the Project Schedule and Completion Deadlines.

37 **15.2 Developer Changes**

1           **15.2.1** By submittal of a written Change Request using a form approved by  
2 ADOT, Developer may request ADOT to approve:

3                   (a) Modifications to the Technical Provisions;

4                   (b) Modifications to Developer's Proposal commitments as set forth  
5 in Exhibit 2; or

6                   (c) Adjustments to the Project ROW or Temporary Construction  
7 Easements not already indicated in Developer's Schematic Design.

8 The Change Request shall set forth Developer's detailed estimate of net impacts  
9 (positive and negative) on costs and schedule attributable to the requested change,  
10 consistent with applicable provisions of this Agreement.

11           **15.2.2** ADOT, in its sole discretion (and, if it so elects, after receiving a  
12 comprehensive report, at no cost to ADOT, from an independent engineer regarding the  
13 proposed Change Request), may accept or reject any Change Request proposed by  
14 Developer. If ADOT accepts such Change Request, Developer shall execute a  
15 Supplemental Agreement and shall implement such change in accordance with the  
16 Supplemental Agreement, applicable Technical Provisions, the Project Management  
17 Plan, Good Industry Practice and all applicable Laws. No acceptance shall be deemed  
18 to take effect unless documented in a written Supplemental Agreement signed by  
19 ADOT's Authorized Representative or by his/her designee appointed in writing. No  
20 such Supplemental Agreement shall constitute an ADOT-Directed Change regardless of  
21 its title, designation or wording.

22           **15.2.3** Developer shall solely bear the risk of any increase in the costs of the  
23 D&C Work or other costs, and for any additional risks, resulting from a Change Request  
24 accepted by ADOT. Developer shall not be entitled to any extension of the Project  
25 Schedule and Completion Deadlines for delays or other impacts resulting from a  
26 Change Request accepted by ADOT.

27           **15.2.4** Without limiting the foregoing, Developer shall compensate ADOT for  
28 any incremental increase in ADOT's overhead, administrative and out-of-pocket costs  
29 resulting from a Change Request accepted by ADOT. Developer shall make payment  
30 in the amount and at the time or times agreed upon in the Supplemental Agreement or  
31 determined through the Dispute Resolution Procedures.

32           **15.2.5** To the extent a Change Request accepted by ADOT results in a net  
33 cost savings to Developer, ADOT will be entitled to 50% of such savings that the  
34 analysis indicates will occur in the first five years after approval of the Change Request,  
35 and 100% of such savings that the analysis indicates will occur thereafter. ADOT will  
36 obtain its share of the savings in the manner described in Section 15.1.6.3.

37           **15.2.6** Developer may implement and permit a Utility Company to implement,  
38 without a Change Request or Supplemental Agreement, changes to a Utility Adjustment  
39 design that do not vary from the Technical Provisions.

1           **15.2.7** No Change Request shall be required to implement any change to the  
2 Work that is not a Deviation and is not specifically regulated or addressed by the  
3 Contract Documents or applicable Law.

4           **15.2.8** Certain minor changes without significant cost savings may be  
5 approved in writing by ADOT as Deviations, as described in Sections 6.2.4 and 8.1.2.6,  
6 and in such event shall not require a Supplemental Agreement. Any other change in  
7 the requirements of the Contract Documents shall require a Supplemental Agreement.

### 8 **15.3 Directive Letters**

9           **15.3.1** ADOT may at any time issue a Directive Letter to Developer regarding  
10 any matter for which a Supplemental Agreement can be issued or in the event of any  
11 Dispute regarding the scope of the Work or whether Developer has performed in  
12 accordance with the requirements of the Contract Documents. No document, including  
13 any field directive, shall be valid, effective or enforceable as a Directive Letter unless  
14 expressly identified as a “Directive Letter” and signed by the ADOT project director, by  
15 the ADOT construction manager for Supplemental Agreements less than \$350,000, or  
16 by other ADOT individual identified in a written notice from the project director or  
17 construction manager to Developer as having authority to execute Supplemental  
18 Agreements.

19           **15.3.2** The Directive Letter will state that it is issued under this Section 15.3,  
20 will describe the Work in question and, if the Directive Letter concerns a matter for  
21 which a Supplemental Agreement can or will be issued, will provide for, as applicable,  
22 payment of Extra Work Costs and Delay Costs, if any, or reductions in compensation, if  
23 any, and schedule adjustment, if any, directly attributable to such matters.

24           **15.3.3** Developer shall proceed immediately as directed in the Directive  
25 Letter, pending the execution of a formal Supplemental Agreement (or, if the Directive  
26 Letter states that the Work is within Developer’s original scope of Work or is necessary  
27 to comply with the requirements of the Contract Documents, Developer shall proceed  
28 with the Work as directed but shall have the right to assert a Claim that an ADOT-  
29 Directed Change has occurred).

30           **15.3.4** The fact that a Directive Letter was issued by ADOT will not be  
31 considered evidence that in fact an ADOT-Directed Change occurred. The  
32 determination whether an ADOT-Directed Change in fact occurred shall be based on an  
33 analysis of the original requirements of the Contract Documents and a determination as  
34 to whether the Directive Letter in fact constituted a change in those requirements.  
35

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**ARTICLE 16. NOT USED**

1 **ARTICLE 17.**  
2 **NONCOMPLIANCE EVENTS AND NONCOMPLIANCE POINTS**

3 **17.1 Noncompliance Points System**

4 **17.1.1** The Noncompliance Event Tables identify the Noncompliance Events  
5 and the applicable cures period (if any) available to Developer for each such  
6 Noncompliance Event occurring during the D&C Period and Maintenance Period, as  
7 applicable. Noncompliance Points are a system to measure Developer performance  
8 levels and trigger the remedies set forth or referenced in this Section 17. The inclusion  
9 in the Noncompliance Event Tables of a breach or failure to perform bears no  
10 implication as to whether the breach or failure is material. For purposes of this  
11 Section 17.1, references to cure periods shall be in the context of Noncompliance  
12 Events, as indicated in the Noncompliance Event Tables.

13 **17.1.2** The Noncompliance Event Tables contain a representational, but not  
14 exhaustive, list of Noncompliance Events possible under the Contract Documents.  
15 Accordingly, subject to Section 17.1.3, ADOT may from time to time add an entry to the  
16 Noncompliance Event Tables describing a Noncompliance Event under the existing  
17 Contract Documents that was not previously included, establishing the Noncompliance  
18 Points applicable to such Noncompliance Event by assigning to it one of the  
19 Noncompliance Event assessment categories (A, B and C) as set forth in  
20 Section 17.2.3, establishing the Noncompliance Charges (if any) applicable to such  
21 Noncompliance Event, and setting a cure period therefor (or no cure period). ADOT will  
22 notify Developer in writing whenever ADOT separately proposes to make such additions  
23 to the Noncompliance Event Tables. Developer shall have 15 days after receipt of any  
24 recommended additions or adjustments to deliver written comments. Thereafter, ADOT  
25 will render its decision regarding whether and on what terms to incorporate the  
26 proposed additions to the Noncompliance Event Tables by written notice to Developer.  
27 ADOT's right to make additions or adjustments to the Noncompliance Event Tables  
28 shall not be exercised in a manner to expand, nor shall it be deemed to expand,  
29 Developer's existing contractual obligations as set forth in the Contract Documents, but  
30 rather to add existing contractual obligations with greater detail as set forth in the  
31 Contract Documents to the list of Noncompliance Events for which Noncompliance  
32 Points may be assessed in accordance herewith.

33 **17.1.3** ADOT's right to add existing contractual obligations to the  
34 Noncompliance Event Tables is limited such that the total number of Noncompliance  
35 Points and total Noncompliance Charges set forth in each Noncompliance Event Table,  
36 as it exists on the Effective Date, shall not increase. ADOT may elect to remove  
37 contractual obligations and reduce Noncompliance Points allocated to listed contractual  
38 obligations through re-categorization between the Noncompliance Event assessment  
39 categories (A, B and C), and may elect to remove or reduce Noncompliance Charges  
40 allocated to listed contractual obligations, in order to avoid a net increase. Further,  
41 ADOT will have no right to assess Noncompliance Points or Noncompliance Charges  
42 on account of a Noncompliance Event that occurs prior to the addition of existing  
43 contractual obligations to the Noncompliance Event Tables.

1 **17.2 Assessment Notification and Cure Process**

2 **17.2.1 Notification Initiated by Developer**

3 **17.2.1.1** As an integral part of Developer’s self-monitoring obligations,  
4 Developer shall establish and maintain in the Maintenance Information System an  
5 electronic data base of each Noncompliance Event specified in the Noncompliance  
6 Event Tables, as they may be revised from time to time; and Developer shall enter each  
7 Noncompliance Event into the data base in real time upon discovery. The format and  
8 design of the data base shall be subject to ADOT’s reasonable approval. At a  
9 minimum, the data base shall provide the following information:

- 10 (a) Description of the Noncompliance Event including its  
11 item number set forth in the first column of the applicable Noncompliance Event Table;
- 12 (b) Date and time the Noncompliance Event commenced;
- 13 (c) Location of the Noncompliance Event (if applicable);
- 14 (d) Applicable cure period (if any);
- 15 (e) Determination whether the Noncompliance Event was  
16 cured during the applicable cure period (if any);
- 17 (f) Date and time of cure (if any);
- 18 (g) Status of Noncompliance Event;
- 19 (h) For each Noncompliance Event, indicate the number  
20 of Noncompliance Points (if any) to be assessed; and
- 21 (i) For each Noncompliance Event, indicate the amount  
22 of Noncompliance Charges (if any) to be assessed.

23 **17.2.1.2** Developer shall retain each Noncompliance Event entry into  
24 the database until at least four years after the date of cure or, if no cure is possible, at  
25 least four years after the date of occurrence.

26 **17.2.1.3** Commencing on the Effective Date and until Maintenance  
27 NTP, Developer shall prepare and deliver to ADOT a monthly report of all  
28 Noncompliance Events occurring during the preceding month. Developer shall deliver  
29 this monthly report to ADOT by the 15th day of the next succeeding month. In addition,  
30 each Maintenance Services Monthly Report to ADOT shall include a report of all  
31 Noncompliance Events occurring during the preceding month. Developer shall deliver  
32 the Maintenance Services Monthly Report to ADOT by the 25th day of the next  
33 succeeding month. The monthly report prior to the Maintenance NTP and the  
34 Maintenance Services Monthly Report shall include all the same information required in  
35 the electronic data base and shall identify each Noncompliance Event for which the cure

1 has not yet occurred. Within a reasonable time after receiving the applicable report,  
2 ADOT will deliver to Developer a written notice setting forth, for each Noncompliance  
3 Event:

4 (a) ADOT's determination whether the Noncompliance  
5 Event was cured during the applicable cure period (if any); and

6 (b) The Noncompliance Points and Noncompliance  
7 Charges (if any) to be assessed with respect thereto (a "Notice of Determination").

## 8 **17.2.2 Notification Initiated by ADOT**

9 If ADOT believes there has occurred any Noncompliance Event specified in the  
10 Noncompliance Event Tables, as they may be revised from time to time, ADOT may  
11 deliver to Developer a Notice of Determination, in writing or via electronic email  
12 describing the following:

13 (a) Description of the Noncompliance Event including its item  
14 number set forth in the first column of the applicable Noncompliance Event Table;

15 (b) Date and time the Noncompliance Event commenced;

16 (c) Location of the Noncompliance Event (if applicable);

17 (d) Applicable cure period (if any);

18 (e) Determination whether the Noncompliance Event was cured  
19 during the applicable cure period (if any);

20 (f) Date and time of cure (if any);

21 (g) ADOT's opinion of the current status of Noncompliance Event;

22 (h) For each Noncompliance Event, indicate the number of  
23 Noncompliance Points (if any) to be assessed.

## 24 **17.2.3 Cure Periods**

25 **17.2.3.1** If a cure period is available for a Noncompliance Event, as  
26 set forth in the applicable Noncompliance Event Table, Developer shall cure such  
27 Noncompliance Event by the end of the applicable cure period.

28 **17.2.3.2** For each Noncompliance Event identified by the assessment  
29 category "A" in the Noncompliance Event Tables, Developer's cure period (if any) with  
30 respect to the Noncompliance Event shall be deemed to start upon the date Developer  
31 first obtained knowledge or had reason to know of the Noncompliance Event. For this  
32 purpose, if the notice of the Noncompliance Event is initiated by ADOT, Developer shall

1 be deemed to first obtain knowledge of the Noncompliance Event not later than the date  
2 of delivery of the notice to Developer.

3 **17.2.3.3** For each Noncompliance Event identified by the assessment  
4 category “B” in the Noncompliance Event Tables, Developer’s cure period shall be  
5 deemed to start upon the date the Noncompliance Event occurred, regardless of  
6 whether ADOT has delivered a notice to Developer.

7 **17.2.3.4** Each of the cure periods set forth in the Noncompliance  
8 Event Tables shall be the only cure period for Developer applicable to the  
9 Noncompliance Event; and in the event it differs from any cure period set forth in  
10 Section 19.1.2 that might otherwise apply to the Noncompliance Event, it shall control.

11 **17.2.4 Notification of Cure**

12 **17.2.4.1** When Developer determines that it has completed cure of  
13 any Noncompliance Event for which it is being assessed Noncompliance Points,  
14 Developer shall enter in the electronic data base, as well as in the next monthly report  
15 prior to Maintenance NTP or in the Maintenance Services Monthly Report (as  
16 applicable), Notice identifying the Noncompliance Event, stating that Developer has  
17 completed cure and briefly describing the cure, including any modifications to the  
18 Project Management Plan to protect against future similar Noncompliance Events.

19 **17.2.4.2** Thereafter, ADOT will have the right, but not the obligation,  
20 to inspect to verify completion of the cure. If satisfied that the Noncompliance Event is  
21 fully cured, ADOT will deliver to Developer a certification of cure either in a separate  
22 writing or electronic mail within a reasonable time from the date ADOT has completed  
23 its inspection to verify completion of the cure.

24 **17.2.4.3** ADOT may reject any Developer notice of cure if ADOT  
25 determines that Developer has not fully cured the Noncompliance Event. Upon making  
26 this determination, ADOT will deliver a written notice of rejection to Developer either in a  
27 separate writing or electronic mail. Any Dispute regarding rejection of cure shall be  
28 resolved according to the Dispute Resolution Procedures.

29 **17.3 Assessment of Noncompliance Points**

30 If either: (a) the electronic data base, monthly report prior to Maintenance NTP or  
31 Maintenance Services Monthly Report indicates, or ADOT is notified or otherwise  
32 becomes aware of, a Noncompliance Event; or (b) ADOT serves Notice of  
33 Determination under Section 17.2.2, ADOT may assess Noncompliance Points in  
34 accordance with Exhibit 15, subject to the following terms and conditions.

35 **17.3.1** For each Noncompliance Event identified by the assessment category  
36 “A” in the Noncompliance Event Tables, provided that the Noncompliance Event is not  
37 cured, the Noncompliance Points shall first be assessed at the end of the first cure  
38 period, and shall be assessed again at the end of each subsequent cure period, as  
39 described in Section 17.3.7.

1           **17.3.2** For each Noncompliance Event identified by the assessment category  
2 “B” in the Noncompliance Event Tables, the Noncompliance Points shall first be  
3 assessed on the date the Noncompliance Event occurred (the start of the first cure  
4 period). Provided that the Noncompliance Event is not then cured, Noncompliance  
5 Points shall be assessed again at the end of the first and each subsequent cure period,  
6 as described in Section 17.3.7.

7           **17.3.3** For each Noncompliance Event identified by the assessment category  
8 “C” in the Noncompliance Event Tables (no applicable cure period), the Noncompliance  
9 Points shall first be assessed on the date of the initial notification under Section 17.2.  
10 Continuation of such Noncompliance Event shall not be treated as a new or separate  
11 breach or failure.

12           **17.3.4** ADOT will not be entitled to assess Noncompliance Points under more  
13 than one assessment category for any particular Noncompliance Event

14           **17.3.5** A failure by Developer to report to ADOT a Noncompliance Event as  
15 and when required under Section 17.2.1.1 or 17.2.1.2, on the one hand, and the subject  
16 Noncompliance Event, on the other hand, constitute separate and distinct breaches and  
17 failures to perform for the purpose of assessing Noncompliance Points.

18           **17.3.6** The number of points listed in the Noncompliance Event Tables for any  
19 particular Noncompliance Event is the maximum number of Noncompliance Points that  
20 may be assessed for each event or circumstance that is a Noncompliance Event.  
21 ADOT may, but is not obligated to, assess less than the maximum.

22           **17.3.7** If a Noncompliance Event for which a cure period is provided in the  
23 Noncompliance Event Tables is not fully and completely cured within the applicable  
24 cure period, then continuation of such Noncompliance Event beyond such cure period  
25 shall be treated as a new and separate Noncompliance Event, without necessity for  
26 further notice, for the purpose of assessing Noncompliance Points and Noncompliance  
27 Charges. Accordingly, without further notice: (a) a new cure period equal to the prior  
28 cure period shall commence upon expiration of the prior cure period; and (b) if  
29 applicable, additional Noncompliance Charges shall be assessed against Developer in  
30 accordance with Section 20.4 and deducted from the applicable Monthly Disbursement  
31 of the D&C Price or Maintenance Price, as applicable, in accordance with Section 13.  
32 Regardless of the continuing assessment of Noncompliance Points under this  
33 Section 17.3, ADOT will be entitled to exercise its step-in rights in accordance with  
34 Section 19.5 and, if applicable, its work suspension rights in accordance with Section  
35 18, after expiration of the initial cure period available to Developer.

## 36 **17.4 Trigger Points for Persistent Developer Default**

37           **17.4.1** A “Persistent Developer Default”, entitling ADOT to require submittal of  
38 Developer’s remedial plan under Section 19.2.2, shall exist on any date when:  
39 (a) 28 Noncompliance Points, cured or uncured, have been assessed in any  
40 consecutive 365-day period during the D&C Period; (b) 14 Noncompliance Points, cured

1 or uncured, have been assessed in any consecutive 365-day period during the  
2 Maintenance Period; (c) 47 Noncompliance Points, cured or uncured, have been  
3 assessed in any consecutive 1,095-day period during the D&C Period; or  
4 (d) 23 Noncompliance Points, cured or uncured, have been assessed in any  
5 consecutive 1,095-day period during the Maintenance Period.

6 **17.4.2** The number of cured Noncompliance Points that would otherwise then  
7 be counted under Section 17.4.1 is subject to reduction in accordance with  
8 Section 19.2.2.3.

9 **17.5 Special Provisions for Certain Noncompliance Events**

10 **17.5.1** The provisions of this Section 17.5 apply to a Noncompliance Event  
11 that has an assessment category of A or B as set forth in the Noncompliance Event  
12 Tables and is directly attributable to:

13 (a) A Relief Event;

14 (b) A traffic accident on the Project ROW not caused by the  
15 negligence, willful misconduct, breach of contract, or violation of Law or Governmental  
16 Approval by any Developer-Related Entity; or

17 (c) Unexpected loss, disruption, break, explosion, leak or other  
18 damage of a Utility serving or in the vicinity of the Project but not within the maintenance  
19 responsibility of Developer.

20 **17.5.2** If a Noncompliance Event set forth in Section 17.5.1 occurs, then the  
21 provisions in Sections 17.5.2.1 through 17.5.2.2 shall apply.

22 **17.5.2.1** The applicable cure period for any such Noncompliance  
23 Event shall be extended if such Noncompliance Event is not reasonably capable of  
24 being cured within the applicable cure period solely due to any of the occurrences set  
25 forth in Section 17.5.1. The extension shall be for a reasonable period of time under the  
26 circumstances, taking into account the scope of the efforts necessary to cure, the effect  
27 of such occurrence on Developer's ability to cure, availability of temporary remedial  
28 measures, and need for rapid action due to impact of the Noncompliance Event on  
29 safety or traffic movement;

30 **17.5.2.2** It shall not be counted toward a Persistent Developer Default  
31 for purposes of Section 17.4, provided the Noncompliance Event is cured within the  
32 applicable cure period, as it may be extended pursuant to Section 17.5.2.1;

33 **17.5.2.3** Regardless of which Party initiates notification of such  
34 Noncompliance Event, no Noncompliance Points shall be assessed if Developer cures  
35 such Noncompliance Event within the applicable cure period, as it may be extended  
36 pursuant to Section 17.5.2.1; and

1                   **17.5.2.4** Such Noncompliance Event shall not result in  
2 Noncompliance Charges under Section 20.4 if the Noncompliance Event is cured within  
3 the applicable cure period, as it may be extended pursuant to Section 17.5.2.1.

#### 4 **17.6 Special Provisions for ADOT Step-in**

5                   **17.6.1** If ADOT exercises a suspension right under Section 18 or a step-in  
6 right under Section 19.5, with respect to any portion of the Project (the “affected Project  
7 portion”), then:

8                   (a) During the period that ADOT is in control of the Work for the  
9 affected Project portion (the “step-in or suspension period”), neither the condition of the  
10 affected Project portion nor the performance of or failure to perform Work respecting the  
11 affected Project portion shall result in a new Noncompliance Event, assessment of new  
12 Noncompliance Points or new Noncompliance Charges under Section 20.4.

13                   (b) All cure periods that are available for Noncompliance Events  
14 respecting the affected Project portion and that arose prior to and are pending as of the  
15 date the step-in or suspension period commences shall be deemed forfeited by  
16 Developer.

17                   (c) During the step-in or suspension period for the affected Project  
18 portion, Section 17.3.7 shall not be applied to Noncompliance Events that arose prior to  
19 the date such step-in or suspension period commences.

20                   (d) The step-in or suspension period for the affected Project portion  
21 shall be disregarded for purposes of determining a Persistent Developer Default under  
22 Section 17.4. For avoidance of doubt, this means that (i) such step-in or suspension  
23 period shall not be included in counting the consecutive time periods set forth in  
24 Section 17.4 and (ii) such consecutive time periods shall be treated as consecutive  
25 notwithstanding the intervening step-in or suspension period.

26                   **17.6.2** Refer to Section 19.5.3 for ADOT’s right to damages and to offset the  
27 payments to Developer under this Agreement if ADOT incurs costs arising out of  
28 exercise of its step-in right under Section 19.5.

#### 29 **17.7 Provisions Regarding Dispute Resolution**

30                   **17.7.1** Developer may object to the assessment of Noncompliance Points or  
31 the starting point for or duration of the cure period respecting any Noncompliance Event  
32 by delivering to ADOT notice of such objection not later than five days after ADOT  
33 delivers its Notice of Determination. Such notice also shall constitute notice for  
34 purposes of Section 22.2.

35                   **17.7.2** Developer may object to ADOT’s rejection of any certification of  
36 completion of a cure given pursuant to Section 17.2.4.3 by delivering to ADOT notice of  
37 such objection not later than 15 days after ADOT delivers its notice of rejection. Such  
38 notice also shall constitute notice for purposes of Section 22.2.



**ARTICLE 18.**  
**SUSPENSION**

**18.1 Suspensions for Convenience**

**18.1.1** ADOT may, at any time and for any reason, by notice, order Developer to suspend all or any part of the Work required under the Contract Documents for the period of time that ADOT deems appropriate for the convenience of ADOT. Developer shall promptly comply with any such suspension order. Developer shall promptly recommence the Work upon receipt of notice from ADOT directing Developer to resume work.

**18.1.2** Any such suspension for convenience shall be considered an ADOT-Directed Change; provided, however, that ADOT will have the right to direct suspensions for convenience (a) not exceeding 48 hours each up to a total of 96 hours during the Construction Period, and (b) not exceeding 48 hours each up to a total of 480 hours during the Maintenance Period, neither of which shall be considered an ADOT-Directed Change. Price adjustments and Completion Deadline adjustments shall be available to Developer for such ADOT-Directed Changes, subject to Developer's compliance with the terms and conditions set forth in Article 14.

**18.2 Suspensions for Cause**

**18.2.1** Upon ADOT's delivery of notice of a Developer Default for any of the following breaches or failures to perform, ADOT will have the right and authority to suspend for cause any affected portion of the Work by order to Developer, regardless of whether an Event of Default has been declared or any cure period (other than any cure period provided below in this Section 18.2.1) has not yet lapsed:

(a) The existence of conditions unsafe for workers, other Project personnel or the general public, including failure to comply with any provision of the Safety Management Plan;

(b) Failure to comply with any Law or Governmental Approval (including failure to implement protective measures for endangered and threatened species, failure to handle, preserve and protect archeological, paleontological or historic resources, or failure to handle Hazardous Materials, in accordance with applicable Laws and Governmental Approvals, including the NEPA Approval);

(c) Performance of Construction Work prior to NTP 2, or performance of any ground disturbing activity or Construction Work in the Center Segment prior to NTP 3;

(d) Discovery of Nonconforming Work or of any activity that is proceeding or about to proceed that would constitute or cause Nonconforming Work, where the Nonconforming Work or activity is not substantially cured within 15 days after ADOT delivers written notice thereof to Developer, unless Developer demonstrates to ADOT's reasonable satisfaction that full and complete cure of the Nonconforming Work,

1 and verification of such cure, will remain practicable despite continuation of Work  
2 without suspension;

3 (e) Developer's failure to pay in full when due sums owing any  
4 Subcontractor for services, materials or equipment, except only for retainage provided  
5 in the relevant Subcontract and amounts in dispute;

6 (f) Failure to carry out and comply with Directive Letters, where  
7 such failure is not substantially cured within 15 days after ADOT delivers written notice  
8 thereof to Developer;

9 (g) Failure to replace or remove personnel as set forth in  
10 Sections 9.6 and 9.8.3, as applicable, where such failure is not substantially cured  
11 within 30 days after ADOT delivers written notice thereof to Developer;

12 (h) Failure to provide proof of required insurance coverage as set  
13 forth in Section 11.1.5 (which suspension is also available in the case of such failure  
14 following a written request rather than notice of a Developer Default, as set forth in  
15 Section 11.1.5);

16 (i) Other failure to perform the Work in compliance with, or other  
17 breach of, the Contract Documents, except Noncompliance Events where no Persistent  
18 Developer Default exists, where such failure is not substantially cured within 15 days  
19 after ADOT delivers notice thereof to Developer;

20 (j) Failure to deliver or maintain the D&C Payment Bond, D&C  
21 Performance Bond, Maintenance Performance Bond, Maintenance Payment Bond and  
22 any other bonds or other security required hereunder;

23 (k) Failure to comply with any provision of the Quality Management  
24 Plan, where such failure is not substantially cured within 15 days after ADOT delivers  
25 written notice thereof to Developer; or

26 (l) If at any time ADOT gives Developer notice of ADOT's  
27 determination that Developer is in violation of any of its DBE or OJT commitments and  
28 obligations, that Developer's DBE or OJT utilization and Good Faith Efforts to meet the  
29 DBE Goals or OJT Goals are inconsistent with Developer's DBE or OJT commitments  
30 and obligations, or that Developer is failing to undertake Good Faith Efforts with respect  
31 to either the DBE Goals or OJT Goals, and the matter is not cured or the determination  
32 is not reversed upon any administrative reconsideration pursuant to Section 9.2.7.

33 **18.2.2** Developer shall promptly comply with any such suspension order, even  
34 if Developer disputes the grounds for suspension. ADOT will lift the suspension order  
35 promptly after Developer fully cures and corrects the applicable breach or failure to  
36 perform or all other reasons for the suspension order cease to apply. Developer shall  
37 promptly recommence the Work upon receipt of notice from ADOT directing Developer  
38 to resume work. ADOT will have no liability to Developer, and Developer shall have no  
39 right to additional compensation or Completion Deadline adjustment in connection with

1 any suspension of Work properly founded on any of the grounds set forth in  
2 Section 18.2.1. If ADOT orders suspension of Work on one of the foregoing grounds  
3 but it is finally determined under the Dispute Resolution Procedures that such grounds  
4 did not exist, the suspension shall be treated as a suspension for ADOT's convenience  
5 under Section 18.1.

### 6 **18.3 Responsibilities of Developer during Suspension Periods**

7 During periods in which Work is suspended, Developer shall make passable, place in a  
8 maintainable condition and shall open to traffic such portions of the Project and  
9 temporary roadways as may be agreed upon between ADOT and Developer for  
10 temporary accommodation of traffic during the anticipated period of suspension.  
11 Additionally, Developer shall continue other Work that has been or can be performed at  
12 the Site or offsite during the period that Work is suspended.  
13

**ARTICLE 19.**  
**DEFAULT; REMEDIES**

**19.1 Default of Developer**

**19.1.1 Events and Conditions Constituting Default**

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

(a) Developer (i) fails to begin Work authorized by NTP 1 or NTP 2 within 30 days following issuance of NTP 1 or NTP 2, or (ii) fails to satisfy all conditions to commencement of the Construction Work, and commence the Construction Work with diligence and continuity.

(b) Developer fails to achieve Substantial Completion or Final Acceptance by the applicable Completion Deadline, as the same may be extended pursuant to this Agreement.

(c) Developer fails to perform the Work in accordance with the Contract Documents, including conforming to applicable standards set forth therein in design and construction of the Project, or refuses to correct, remove and replace Nonconforming Work.

(d) Developer suspends, ceases, stops or abandons the Work or fails to continuously and diligently prosecute the Work (exclusive of work stoppage (i) due to termination by ADOT, or (ii) due to and during the continuance of a Force Majeure Event or suspension by ADOT, (iii) due to and during the continuance of any work stoppage under Section 19.7).

(e) Developer fails to comply with applicable Governmental Approvals and Laws, including the Federal Requirements.

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

(g) Developer makes or attempts to make or suffers a voluntary or involuntary assignment or transfer of all or any portion of this Agreement in violation of Section 25.4.

(h) Developer fails, absent a valid dispute, to make payment when due for labor, equipment, materials or property in accordance with its agreements with Subcontractors, Suppliers and Utility Companies and in accordance with applicable Laws, or fails to make payment to ADOT when due of any amounts owing to ADOT under this Agreement.

1 (i) Developer fails to timely observe or perform or cause to be  
2 observed or performed any other covenant, agreement, obligation, term or condition  
3 required to be observed or performed by Developer under the Contract Documents.

4 (j) Any representation or warranty in the Contract Documents  
5 made by Developer or any Guarantor, or any certificate, schedule, report, instrument or  
6 other document delivered by or on behalf of Developer to ADOT pursuant to the  
7 Contract Documents is false or materially misleading or inaccurate when made or omits  
8 material information when made.

9 (k) Developer commences a voluntary case seeking liquidation,  
10 reorganization or other relief with respect to itself or its debts under any U.S. or foreign  
11 bankruptcy, insolvency or other similar Law now or hereafter in effect, seeks the  
12 appointment of a trustee, receiver, liquidator, custodian or other similar official of it or  
13 any substantial part of its assets; becomes insolvent, or generally does not pay its debts  
14 as they become due; admits in writing its inability to pay its debts; makes an assignment  
15 for the benefit of creditors; or takes any action to authorize any of the foregoing.

16 (l) An involuntary case is commenced against Developer seeking  
17 liquidation, reorganization, dissolution, winding up, a composition or arrangement with  
18 creditors, a readjustment of debts or other relief with respect to Developer or  
19 Developer's debts under any U.S. or foreign bankruptcy, insolvency or other similar Law  
20 now or hereafter in effect; seeking the appointment of a trustee, receiver, liquidator,  
21 custodian or other similar official of Developer or any substantial part of Developer's  
22 assets; seeking the issuance of a writ of attachment, execution, or similar process; or  
23 seeking like relief, and such involuntary case shall not be contested by Developer in  
24 good faith or shall remain undismissed and unstayed for a period of 60 days.

25 (m) In any voluntary or involuntary case seeking liquidation,  
26 reorganization or other relief with respect to Developer or its debts under any U.S. or  
27 foreign bankruptcy, insolvency or other similar Law now or hereafter in effect, this  
28 Agreement or any of the other Contract Documents is rejected, including a rejection  
29 pursuant to 11 USC § 365 or any successor statute.

30 (n) Any Guarantor revokes or attempts to revoke its obligations  
31 under its guarantee or otherwise takes the position that such instrument is no longer in  
32 full force and effect.

33 (o) Any final judgment is issued holding Developer or any  
34 Guarantor liable for an amount in excess of \$100,000 based on a finding of intentional  
35 or reckless misconduct or violation of a state or federal false Claims act.

36 (p) Developer fails to resume performance that has been  
37 suspended or stopped, within the time specified in the originating notification after  
38 receipt of notice from ADOT to do so or (if applicable) after cessation of the event  
39 preventing performance.

1 (q) After exhaustion of all rights of appeal, there occurs any  
2 disqualification, suspension or debarment (distinguished from ineligibility due to lack of  
3 financial qualifications), or there goes into effect an agreement for voluntary exclusion,  
4 from bidding, proposing or contracting with any federal or State department or agency of  
5 (a) Developer, (b) any affiliate of Developer (as “affiliate” is defined in 29 CFR § 105 or  
6 successor regulation of similar import), (c) any Equity Member, or (d) any Key  
7 Subcontractor whose work is not completed.

8 (r) There occurs any Persistent Developer Default, ADOT delivers  
9 to Developer notice of the Persistent Developer Default, and either: (a) Developer fails  
10 to deliver to ADOT, within 45 days after such notice is delivered, a remedial plan  
11 meeting the requirements for approval set forth in Section 19.2.2; or (b) Developer fails  
12 to fully comply with the schedule or specific elements of, or actions required under, the  
13 approved remedial plan.

14 (s) There occurs any closure of the Facility or any portion thereof,  
15 or any lane closure, except as expressly permitted otherwise or expressly excused  
16 under this Agreement, the Technical Provisions and the ADOT-approved Traffic  
17 Management Plan.

18 (t) Developer fails to comply with ADOT’s written suspension of  
19 Work order issued in accordance with Section 18.2.1 within the time reasonably allowed  
20 in such order.

21 (u) There occurs any use of the Project or Airspace or any portion  
22 thereof in violation of this Agreement, the Technical Provisions, Governmental  
23 Approvals or Laws (except violations of Law by Persons other than Developer-Related  
24 Entities).

25 (v) There occurs a change in any Key Personnel that is not  
26 otherwise permitted under Section 9.6.3.1.

27 **19.1.2 Notice and Opportunity to Cure**

28 For Developer breaches or failures listed in the Noncompliance Event Tables, the  
29 cure periods set forth therein shall exclusively govern for the sole purpose of assessing  
30 Noncompliance Points and Noncompliance Charges. For the purpose of ADOT’s  
31 exercise of other remedies, and subject to remedies that this Section 19 expressly  
32 states may be exercised before lapse of a cure period, Developer shall have the  
33 following cure periods with respect to the following Developer Defaults:

34 (a) Respecting a Developer Default under clause (t) of  
35 Section 19.1.1, a period of five days after ADOT delivers to Developer written notice of  
36 the Developer Default;

37 (b) Respecting a Developer Default under clauses (a), (d), (f)  
38 through (h), (p) and (s) of Section 19.1.1, a period of 15 days after ADOT delivers to  
39 Developer notice of the Developer Default; provided, however, that with respect to a

1 Developer Default under clause (f) of Section 19.1.1, (i) ADOT will have the right, but  
2 not the obligation, to effect cure, at Developer's expense, if such Developer Default  
3 under clause (f) of Section 19.1.1 continues beyond five days after such notice is  
4 delivered, and (ii) Developer may effect a temporary cure of failure to deliver  
5 replacement Maintenance Bonds, and obtain an additional 120 days to effect full cure,  
6 by providing interim security as and when provided in Section 10.2.6.2;

7 (c) Respecting a Developer Default under clauses (c), (e), (i), (j),  
8 (q), (u) and (v) of Section 19.1.1, a period of 30 days after ADOT delivers to Developer  
9 notice of the Developer Default; provided, however, that: (i) if the Developer Default is of  
10 such a nature that the cure cannot with diligence be completed within such time period  
11 and Developer has commenced meaningful steps to cure immediately after receiving  
12 the default notice, Developer shall have such additional period of time, up to a  
13 maximum cure period of 60 days, as is reasonably necessary to diligently effect cure;  
14 and (ii) as to clause (i), cure will be regarded as complete when the adverse effects of  
15 the breach are cured;

16 (d) Respecting a Developer Default under clauses (b), (k), (l), (m),  
17 (n), (o) and (r) of Section 19.1.1, no cure period, and there shall be no right to notice of  
18 a Developer Default under clauses (b), (k), (l), (m), (n), (o) and (r) of Section 19.1.1; and

### 19 **19.1.3 Declaration of Event of Default**

20 If any event or condition described in Section 19.1.1 is not subject to cure or is  
21 not cured within the period (if any) specified in Section 19.1.2, ADOT may declare that  
22 an "Event of Default" has occurred. The declaration of an Event of Default shall be in  
23 writing and given to Developer and the Surety.

## 24 **19.2 ADOT Remedies for Developer Default**

### 25 **19.2.1 Termination for Default**

26 **19.2.1.1** Subject to Section 19.3, in the event of any Developer  
27 Default that is or becomes an Event of Default, ADOT may terminate this Agreement or  
28 a portion thereof for default, including Developer's rights of entry upon and control of the  
29 Project. Such termination shall be effective upon delivering notice of termination or any  
30 other date specified in such notice, which notice may be included in the declaration of  
31 the Event of Default. If this Agreement or a portion thereof is so terminated for an Event  
32 of Default, ADOT will have the following rights without further notice and without waiving  
33 or releasing Developer from any obligations and Developer shall have the following  
34 obligations (as applicable):

35 (a) ADOT may deduct from any amounts (including  
36 interest thereon as permitted under this Agreement) payable by ADOT to Developer  
37 such amounts payable by Developer to ADOT, including reimbursements owing,  
38 Liquidated Damages and Noncompliance Charges, amounts ADOT deems advisable to  
39 cover any existing or threatened claims and stop notices of Subcontractors, laborers or  
40 other Persons, amounts of any Losses that have accrued, the cost to complete or

1 remediate uncompleted Work or Nonconforming Work, interest owing ADOT under this  
2 Agreement, or other damages or amounts that ADOT has determined are or may be  
3 payable to ADOT under the Contract Documents.

4 (b) ADOT will have the right, but not the obligation, to pay  
5 such amount or perform such act as may then be required from Developer under the  
6 Contract Documents or Subcontracts.

7 (c) ADOT may appropriate any or all materials, supplies  
8 and equipment on the Site as may be suitable and acceptable and may direct the  
9 Surety to complete this Agreement or may enter into an agreement for the completion of  
10 this Agreement according to the terms and provisions hereof with another contractor or  
11 the Surety, or use such other methods as may be required for the completion of the  
12 Work and the requirements of the Contract Documents, including completion of the  
13 Work by ADOT.

14 (d) If ADOT exercises any right to perform any  
15 obligations of Developer, in the exercise of such right ADOT may, but is not obligated  
16 to, among other things: (1) perform or attempt to perform, or cause to be performed,  
17 such Work; (2) spend such sums as ADOT deems necessary and reasonable to employ  
18 and pay such architects, engineers, consultants and contractors and obtain materials  
19 and equipment as may be required for the purpose of completing such Work; (3)  
20 execute all applications, certificates and other documents as may be required for  
21 completing the Work; (4) modify or terminate any contractual arrangements; (5) take  
22 any and all other actions that it may in its discretion consider necessary to complete the  
23 Work; and (6) prosecute and defend any action or proceeding incident to the Work.

24 **19.2.1.2** Developer and each Guarantor shall be jointly and severally  
25 liable to ADOT for all costs reasonably incurred by ADOT or any Person acting on  
26 ADOT's behalf in completing the Work or having the Work completed by another Person  
27 (including any re-procurement costs, throw away costs for unused portions of the  
28 completed Work, and increased financing costs). ADOT will be entitled to withhold all or  
29 any portion of further payments to Developer until such time as ADOT is able to  
30 determine (a) how much, if any, remains payable to Developer and (b) the amount  
31 payable by Developer to ADOT in connection with ADOT's damages and Claims  
32 against Developer-Related Entities or as otherwise required by the Contract  
33 Documents. Promptly following the date set forth in the preceding sentence, the total  
34 cost of all completed Work shall be determined, and ADOT will notify Developer and  
35 each Guarantor of the amount, if any, that Developer and each Guarantor shall pay  
36 ADOT or ADOT will pay Developer or its Surety with respect thereto. ADOT's  
37 Recoverable Costs will be deducted from any moneys due or which may become due  
38 Developer or its Surety. If such expense exceeds the sum which would have been  
39 payable to Developer under this Agreement, then Developer and each Guarantor shall  
40 be liable and shall pay to ADOT the amount of such excess.

41 **19.2.1.3** In lieu of the provisions of this Section 19.2.1 for terminating  
42 this Agreement for default and completing the Work, ADOT may, in its discretion, pay

1 Developer for the parts already done according to the provisions of the Contract  
2 Documents and Developer may treat the parts remaining undone as if they had never  
3 been included or contemplated by this Agreement. No Claim under this  
4 Section 19.2.1.3 will be allowed for prospective profits on, or any other compensation  
5 relating to, Work uncompleted by Developer.

6 **19.2.1.4** If ADOT determines under Section 19.2.1.2 that amounts are  
7 owed by ADOT to Developer or its Surety related to the D&C Work or ADOT elects to  
8 pay Developer the amount owed for D&C Work completed in accordance with  
9 Section 19.2.1.3, such amounts shall be payable by ADOT solely in accordance with  
10 the Maximum Allowable Cumulative Draw.

11 **19.2.1.5** If this Agreement is terminated for grounds which are later  
12 determined not to justify a termination for default, such termination shall be deemed to  
13 constitute a Termination for Convenience pursuant to Section 24.

14 **19.2.2 Remedial Plan Delivery and Implementation Upon Persistent**  
15 **Developer Default**

16 **19.2.2.1** Developer recognizes and acknowledges that a pattern or  
17 practice of continuing, repeated or numerous Noncompliance Events, whether such  
18 Noncompliance Events are cured or not, will undermine the confidence and trust  
19 essential to the success of the public-private arrangement under this Agreement and  
20 will have a material, cumulative adverse impact on the value of this Agreement to  
21 ADOT. Developer acknowledges and agrees that measures for determining the  
22 existence of such a pattern or practice described in the definition of Persistent  
23 Developer Default are a fair and appropriate objective basis to conclude that such a  
24 pattern or practice will continue.

25 **19.2.2.2** Upon the occurrence of a Persistent Developer Default (refer  
26 to the trigger points in Section 17.4), Developer shall, within 45 days after notice of the  
27 Persistent Developer Default, prepare and submit a remedial plan for ADOT approval.  
28 The remedial plan shall set forth a schedule and specific actions to be taken by  
29 Developer to improve its performance and reduce: (i) Developer's cumulative number of  
30 Noncompliance Points assessed under Section 17.4 to the point that such Persistent  
31 Developer Default will not continue; and (ii) the cumulative number of Uncured  
32 Noncompliance Points outstanding by at least 50%. ADOT may require that such  
33 actions include improving Developer's quality management practices, plans and  
34 procedures, revising and restating the Project Management Plan, as applicable,  
35 changing organizational and management structure, increasing monitoring and  
36 inspections, changing Key Personnel and other important personnel, replacement of  
37 Subcontractors, and delivering security to ADOT.

38 **19.2.2.3** If (i) Developer complies in all material respects with the  
39 schedule and specific elements of, and actions required under, the approved remedial  
40 plan; (ii) as a result thereof Developer achieves the requirements set forth in  
41 Sections 19.2.2.2(i) and (ii); and (iii) as of the date it achieves such requirements there

1 exist no other uncured Developer Defaults for which a Notice was given, then ADOT will  
2 reduce the number of cured Noncompliance Points that would otherwise then be  
3 counted toward Persistent Developer Default by 25%. Such reduction shall be taken  
4 from the earliest assessed Noncompliance Points that would otherwise then be counted  
5 toward Persistent Developer Default.

6 **19.2.2.4** Developer’s failure to deliver to ADOT the required remedial  
7 plan within such 45-day period shall constitute a material Developer Default that may  
8 result in issuance of a notice thereof by ADOT triggering a five-day cure period. Failure  
9 to comply in any material respect with the schedule or specific elements of, or actions  
10 required under, the remedial plan shall constitute a material Developer Default that may  
11 result in issuance of a notice thereof by ADOT triggering a 30-day cure period. If either  
12 of the events remains uncured within the period specified in this subclause (d), ADOT  
13 may declare that an “Event of Default” has occurred in accordance with Section 19.1.3.

14 **19.2.3 Developer Defaults Related to Safety**

15 Notwithstanding anything to the contrary in this Agreement, if in the good faith  
16 judgment of ADOT a Developer Default results in an Emergency or danger to persons  
17 or property, and if Developer is not then diligently taking all necessary steps to rectify or  
18 deal with such Emergency or danger, ADOT may, without notice and without awaiting  
19 lapse of the period to cure any breach, and in addition and without prejudice to its other  
20 remedies, (but is not obligated to): (a) immediately take such action as may be  
21 reasonably necessary to rectify the Emergency or danger, in which event Developer  
22 shall pay to ADOT on demand the cost of such action, including ADOT’s Recoverable  
23 Costs; or (b) suspend the Work or close or cause to be closed any and all portions of  
24 the Project affected by the Emergency or danger. So long as ADOT undertakes such  
25 action in good faith, even if under a mistaken belief in the occurrence of such failure or  
26 existence of an Emergency or danger as a result thereof, such action shall not be  
27 deemed unlawful or a breach of this Agreement, shall not expose ADOT to any liability  
28 to Developer and shall not entitle Developer to any other remedy, it being  
29 acknowledged that ADOT has a high priority, paramount public interest in protecting  
30 public and worker safety at the Project and adjacent and connecting areas. ADOT’s  
31 good faith determination of the existence of such a failure, Emergency or danger shall  
32 be deemed conclusive in the absence of clear and convincing evidence to the contrary.  
33 Immediately following rectification of such Emergency or danger, as determined by  
34 ADOT, acting reasonably, ADOT will allow the Work to continue or such portions of the  
35 Project to reopen, as the case may be.

36 **19.2.4 Damages; Offset**

37 **19.2.4.1** Subject to Section 20, ADOT will be entitled to recover any  
38 and all damages available at Law (subject to the duty at Law to mitigate damages) on  
39 account of the occurrence of a Developer Default. Developer shall owe any such  
40 damages that accrue after the occurrence of the Developer Default and the delivery of  
41 notice thereof, if any, required by this Agreement regardless of whether the Developer  
42 Default is subsequently cured or ripens into an Event of Default.

1                   **19.2.4.2** Developer, Sureties and Guarantors shall not be relieved of  
2 liability for continuing Liquidated Damages or Noncompliance Charges on account of a  
3 Developer Default nor by ADOT’s declaration of an Event of Default, or by actions taken  
4 by ADOT under this Section 19.2.

5                   **19.2.4.3** ADOT’s remedies with respect to Nonconforming Work shall  
6 include the right to accept such Work and receive payment as provided in Section 6.7  
7 in lieu of the remedies specified in this Section 19.2.

8                   **19.2.4.4** Where this Agreement is not terminated, damages include:  
9 (a) costs ADOT incurs to complete the Design Work and Construction Work in excess of  
10 the D&C Price and amounts due under Supplemental Agreements, not previously paid  
11 to Developer; (b) compensation and reimbursements due but unpaid to ADOT under the  
12 Contract Documents; (c) costs to remedy any defective part of the Work; and (d) costs  
13 to rectify any breach or failure to perform by Developer or to bring the condition of the  
14 Project to that required by the Contract Documents.

15                   **19.2.4.5** If the amount of damages owing ADOT is not liquidated or  
16 known with certainty at the time a payment is due from ADOT to Developer, ADOT may  
17 deduct and offset up to 105% of the amount it reasonably estimates will be due, subject  
18 to ADOT’s obligation to adjust such deduction or offset when the amount of damages  
19 owing ADOT is liquidated or becomes known with certainty.

20                   **19.2.5     Performance Security**

21                   Upon the occurrence of an Event of Default and without waiving or releasing  
22 Developer from any obligations, ADOT will be entitled to make demand upon and  
23 enforce any bond, and make demand upon, draw on and enforce and collect any letter  
24 of credit, guaranty or other performance security available to ADOT under this  
25 Agreement with respect to the Event of Default in question. Where access to a bond,  
26 letter of credit or other performance security is to satisfy damages owing, ADOT will be  
27 entitled to make demand, draw, enforce and collect, regardless of whether the Event of  
28 Default is subsequently cured. ADOT will apply the proceeds of any such action to the  
29 satisfaction of Developer’s obligations under this Agreement, including payment of  
30 amounts due ADOT. The foregoing does not limit or affect ADOT’s right to give notice  
31 to or make demand upon and enforce any bond, and make demand upon, draw on and  
32 enforce and collect any letter of credit, guaranty or other performance security,  
33 immediately after ADOT is entitled to do so under the bond, letter of credit, guaranty or  
34 other performance security.

35                   **19.2.6     Other Rights and Remedies; Cumulative Remedies**

36                   Subject to Sections 20.10 and 20.11, ADOT will also be entitled to exercise any  
37 other rights and remedies available under this Agreement, or available at law or in  
38 equity, and each right and remedy of ADOT hereunder shall be cumulative and shall be  
39 in addition to every other right or remedy provided herein or now or hereafter existing at  
40 law or in equity or by statute or otherwise, and the exercise or beginning of the exercise

1 by ADOT of any one or more of any of such rights or remedies shall not preclude the  
2 simultaneous or later exercise by ADOT of any or all other such rights or remedies.

3 **19.3 Event of Default Due Solely to Developer’s Failure to Achieve Completion**  
4 **Deadlines**

5 **19.3.1** If an Event of Default consists solely of Developer’s failure to achieve  
6 Substantial Completion or Final Acceptance by the applicable Completion Deadline,  
7 then ADOT agrees not to exercise rights and remedies respecting the delay except its  
8 right to Liquidated Damages so long as: (x) the ADOT-approved Project Schedule  
9 demonstrates that Developer is capable of meeting such Completion Deadline within  
10 180 days of the Substantial Completion Deadline or 90 days of the Final Acceptance  
11 Deadline, as applicable; and (y) Developer diligently performs the Work in accordance  
12 with said schedule. Nothing in this Section 19.3 shall prejudice any other rights or  
13 remedies that ADOT may have due to any other Event of Default during such 180-day  
14 period or 90-day period, as applicable.

15 **19.3.2** If Substantial Completion or Final Acceptance of the Project has not  
16 occurred within 180 days or 90 days, respectively, of the applicable Completion  
17 Deadline, ADOT will have the right to: (a) terminate this Agreement; (b) continue to  
18 assess Liquidated Damages subject only to the limitations set forth in Section 20.1; or  
19 (c) exercise any other right or remedy under this Agreement, at law or in equity.

20 **19.4 Immediate ADOT Entry to Cure Wrongful Use or Closure**

21 **19.4.1** Without prior notice and without awaiting lapse of the period to cure, if  
22 any Developer Default occurs under clause (s) or (u) of Section 19.1.1, ADOT may  
23 enter and take control of the relevant portion of the Project to reopen and continue  
24 traffic operations for the benefit of the public and restore the permitted uses, until such  
25 time as such Developer Default is cured or ADOT terminates this Agreement.

26 **19.4.2** Developer shall pay to ADOT on demand ADOT’s Recoverable Costs  
27 in connection with such action.

28 **19.4.3** So long as ADOT undertakes such action in good faith, even if under a  
29 mistaken belief in the occurrence of such a Developer Default, such action shall not be  
30 deemed unlawful or a breach of this Agreement, shall not expose ADOT to any liability  
31 to Developer and shall not entitle Developer to any other remedy except if ADOT’s  
32 action constitutes gross negligence, recklessness or willful misconduct. Developer  
33 acknowledges that ADOT has a high priority, paramount public interest in maintaining  
34 continuous public access to the Project and maintaining the authorized uses of the  
35 Project. ADOT’s good faith determination that such action is needed shall be deemed  
36 conclusive in the absence of clear and convincing evidence to the contrary.

37 **19.4.4** Immediately following rectification of such Developer Default, as  
38 determined by ADOT, acting reasonably, ADOT will relinquish control of the relevant  
39 portion of the Project back to Developer.

1           **19.4.5** Notwithstanding the foregoing, ADOT will rely solely on Liquidated  
2 Damages under Section 20.2 or 20.3 (as applicable) for an unpermitted lane closure  
3 occurring and lasting not more than one hour after the expiration of the time period for a  
4 permitted lane closure under Section DR 462.3.2 or DR 462.3.3 of the Technical  
5 Provisions.

6           **19.5 ADOT Step-in Rights**

7           **19.5.1** ADOT may exercise its step-in rights on the terms and conditions set  
8 forth in this Section 19.5:

9                   (a) If a Developer Default has occurred;

10                   (b) If the cure period, if any, available to Developer under  
11 Section 19.1.2, or any shorter period specified in Section 19.1.2, has expired without full  
12 and complete cure by Developer; and

13                   (c) Without necessity for declaration of an Event of Default.

14           **19.5.2** ADOT will have the right, but not the obligation, to pay and perform all  
15 or any portion of Developer's obligations and the Work that are the subject of such  
16 Developer Default, as well as any other then-existing Developer Defaults or failures to  
17 perform for which Developer received prior written notice from ADOT but has not  
18 commenced or does not continue diligent efforts to cure. Exercise of such cure rights  
19 shall not waive or release Developer from any obligations.

20           **19.5.3** ADOT may, to the extent reasonably required for or incident to curing  
21 the Developer Default or such other Developer Defaults or failures to perform:

22                   (a) Perform or attempt to perform, or caused to be performed, such  
23 Work;

24                   (b) Employ security guards and other safeguards to protect the  
25 Project;

26                   (c) Spend such sums as ADOT deems reasonably necessary to  
27 employ and pay such architects, engineers, consultants and contractors and obtain  
28 materials and equipment as may be required to perform such Work, without obligation  
29 or liability to Developer or any Subcontractors for loss of opportunity to perform the  
30 same Work or supply the same materials and equipment;

31                   (d) In accordance with Section 19.2.5, draw on and use proceeds  
32 from the D&C Payment Bond and D&C Performance Bond and any other available  
33 security to the extent such instruments provide recourse to pay such sums;

34                   (e) Execute all applications, certificates and other documents as  
35 may be required;

1 (f) Make decisions respecting, assume control over and continue  
2 Work as may be reasonably required;

3 (g) Modify or terminate any contractual arrangements in ADOT's  
4 good faith discretion, without liability for termination fees, costs or other charges;

5 (h) Meet with, coordinate with, direct and instruct contractors and  
6 suppliers, process invoices and applications for payment from contractors and  
7 suppliers, pay contractors and suppliers, and resolve claims of contractors,  
8 subcontractors and suppliers, and for this purpose Developer irrevocably appoints  
9 ADOT as its attorney-in-fact with full power and authority to act for and bind Developer  
10 in its place and stead;

11 (i) Take any and all other actions it may in its sole discretion  
12 consider necessary to effect cure and perform the Work; and

13 (j) Prosecute and defend any action or proceeding incident to the  
14 Work.

15 **19.5.4** Developer shall reimburse ADOT, within 30 days of receiving an  
16 invoice, for ADOT's Recoverable Costs in connection with the performance of any act or  
17 Work authorized by this Section 19.5. In lieu of reimbursement, ADOT may elect, in its  
18 discretion, to deduct such amounts from any amounts payable to Developer under this  
19 Agreement. Developer acknowledges that amounts owing from Developer to ADOT as  
20 Noncompliance Charges are not intended to liquidate such ADOT's Recoverable Costs.

21 **19.5.5** Neither ADOT nor any of its Authorized Representatives, contractors,  
22 subcontractors, vendor and employees shall be liable to Developer in any manner for  
23 any inconvenience or disturbance arising out of its entry onto the Project, Project ROW  
24 or Developer's Temporary Work Areas in order to perform under this Section 19.5,  
25 unless caused by the gross negligence, recklessness, intentional misconduct or bad  
26 faith of such Person. If any Person exercises any right to pay or perform under this  
27 Section 19.5, it nevertheless shall have no liability to Developer for the sufficiency or  
28 adequacy of any such payment or performance, or for the manner or quality of design,  
29 construction, operation or maintenance, unless caused by the gross negligence,  
30 recklessness, intentional misconduct or bad faith of such Person.

31 **19.5.6** ADOT's rights under this Section 19.5 are subject to the right of any  
32 Surety under payment and performance bonds to assume performance and completion  
33 of all bonded work.

34 **19.5.7** In the event ADOT takes action described in this Section 19.5 and it is  
35 later finally determined that ADOT lacked the right to do so because there did not occur  
36 a Developer Default and expiration, without full and complete cure, of the cure period, if  
37 any, available to Developer, then ADOT's action shall be treated as a Directive Letter  
38 for an ADOT-Directed Change.

39 **19.6 DBE and OJT Special Remedies**

1           **19.6.1** Notwithstanding any contrary provision in any other Section of this  
2 Article 19, if ADOT determines at any time that Developer is in violation of any of its  
3 DBE or OJT commitments and obligations, that Developer's DBE or OJT utilization and  
4 Good Faith Efforts to meet the DBE Goals or OJT Goals are inconsistent with  
5 Developer's DBE or OJT commitments and obligations, or that Developer is failing to  
6 undertake Good Faith Efforts with respect to either the DBE Goals or OJT Goals, then:

7           (a) ADOT may require Developer to submit in writing corrective  
8 action documentation for ADOT's approval, which ADOT may require to include a  
9 revised plan for achieving the DBE Goals or OJT Goals if the violation jeopardizes  
10 achievement, and Developer shall diligently undertake the approved corrective action;

11           (b) If Developer does not submit such documentation within ten  
12 Business Days of request, if the proposed corrective action is disapproved as  
13 inadequate, or if Developer fails to diligently carry out the approved corrective action,  
14 then ADOT will have the right to withhold (i) in the case of DBE, 1% of progress  
15 payments or 1% of monthly Monthly Disbursements, as applicable, until cure, and (ii) in  
16 the case of OJT, \$10,000 for each of the first two progress payments thereafter, and  
17 \$50,000 for each subsequent progress payment thereafter, until cure. Developer may  
18 include such withheld amounts in the next month's Draw Request after Developer  
19 effects cure;

20           (c) Except as provided in Sections 19.6.2, 19.6.3, 19.6.4 and 20.5,  
21 before exercising other remedies, ADOT will provide Developer an opportunity for  
22 administrative reconsideration, by an official who did not take part in the original  
23 determination. Developer shall have the right to provide written documentation to such  
24 official to support its case no later than ten Business Days after ADOT gives written  
25 notice of its determination and, upon request, to meet in person with such official at a  
26 date and time the official sets to present its case. ADOT will then consider the findings  
27 and opinions of such official and issue a written decision on reconsideration to  
28 Developer within 30 days after receiving Developer's written documentation and  
29 conclusion of any meeting with such official. ADOT's decision is not administratively  
30 appealable to the USDOT; and

31           (d) If as a result of such administrative process ADOT does not  
32 reverse its determination, then ADOT may issue a notice of Developer Default, withhold  
33 (or continue to withhold) progress payments or Monthly Disbursements, as applicable,  
34 issue an order to suspend Work and, if Developer's failure continues without cure within  
35 the applicable cure period, terminate this Agreement for an Event of Default. In  
36 addition, if ADOT does not reverse its determination, and if the Event of Default is  
37 egregious, then ADOT may elect to pursue proceedings to disqualify or debar  
38 Developer and the Lead Subcontractor from future bidding as non-responsible, as well  
39 as any Subcontractor or Supplier that has violated or participated in violation of DBE or  
40 OJT requirements.

41           **19.6.2** If Developer fails to (a) timely deliver to ADOT in complete form any  
42 Monthly Progress Report required under Section 18.01 of the DBE Special Provisions,

1 (b) enter the same information by the 15th day of each month into ADOT’s web-based  
2 DBE System, or (c) correctly complete and submit any other required reports, forms and  
3 documentation required by the DBE Special Provisions within the applicable time  
4 specified therein, and Developer does not cure such failure within ten Business Days  
5 after ADOT delivers to Developer notice of such failure, then ADOT will have the right to  
6 withhold 1% of progress payments thereafter or 1% of Monthly Disbursements  
7 thereafter, as applicable, until cure. Developer may include such withhold amounts in  
8 the next month’s Draw Request after Developer effects cure.

9 **19.6.3** If Developer fails to (a) timely deliver to ADOT in complete form any  
10 OJT Monthly Progress Report and updated OJT Schedule required under Section 7.0 of  
11 the OJT Special Provisions, or (b) correctly complete and submit any other required  
12 reports, forms and documentation required by the OJT Special Provisions within the  
13 applicable time specified therein, and Developer does not cure such failure within ten  
14 Business Days after ADOT delivers to Developer notice of such failure, then ADOT will  
15 have the right to withhold \$10,000 for each of the first two progress payments  
16 thereafter, and \$50,000 for each subsequent progress payment thereafter, until cure.  
17 Developer may include such withheld amounts in the next month’s Draw Request after  
18 Developer effects cure.

19 **19.6.4** If at any time during the course of the Construction Work the use of  
20 OJT Trainees is not in conformance with the schedule or supplemental schedule as  
21 submitted and approved pursuant to the OJT Special Provisions, then ADOT will have  
22 the right to withhold \$10,000 for each of the first two progress payments thereafter, and  
23 \$50,000 for each subsequent progress payment thereafter until Developer conforms to  
24 the schedule or supplemental schedule. Conformance with the schedule or  
25 supplemental schedule will be considered acceptable when the OJT Trainee utilization  
26 to date is at least 90% of that shown on the schedule or supplemental schedule, for the  
27 Construction work performed to date.

28 **19.7 Right to Stop Work for Failure by ADOT to Make Undisputed Payment**

29 Developer shall have the right to stop Work if ADOT fails to make an undisputed  
30 payment due hereunder (including failure due to non-appropriation) within 15 Business  
31 Days after ADOT’s receipt of notice of nonpayment from Developer. Any such work  
32 stoppage shall be considered a suspension for convenience under Section 18.1 and  
33 shall be considered an ADOT-Directed Change. Developer shall not have the right to  
34 terminate this Agreement for default as the result of any failure by ADOT to make an  
35 undisputed payment due hereunder; provided, however, that if such nonpayment  
36 continues for more than 90 days after ADOT’s receipt of such notice, upon notice from  
37 Developer to ADOT, the nonpayment may be deemed a Termination for Convenience  
38 pursuant to Section 24. Upon such termination, the Parties’ rights and obligations shall  
39 be as set forth in Section 24.  
40

**ARTICLE 20.**  
**LIQUIDATED DAMAGES, NONCOMPLIANCE CHARGES**  
**AND LIMITATION OF LIABILITY**

**20.1 Liquidated Damages Respecting Delays**

**20.1.1** Developer shall be liable for and pay to ADOT Liquidated Damages with respect to any failure to achieve Substantial Completion or Final Acceptance of the Project by the applicable Completion Deadline, as the same may be extended pursuant to this Agreement. The amounts of such Liquidated Damages are as follows, respectively:

(a) \$54,100.00 for each day that Substantial Completion is delayed beyond the Substantial Completion Deadline, not to exceed 365 days; and

(b) \$10,800.00 for each day that Final Acceptance is delayed beyond the Final Acceptance Deadline, not to exceed 180 days.

**20.1.2** The Liquidated Damages described in this Section 20.1 shall commence on the applicable Completion Deadline, as the same may be extended pursuant to this Agreement, and shall continue to accrue until the date of the applicable Substantial Completion or Final Acceptance, completion of the Work described in Section 6.6.4, or until termination of this Agreement. Such Liquidated Damages shall constitute ADOT's sole right to damages for such delay.

**20.1.3** Developer agrees and acknowledges that:

(a) If Developer fails to achieve Substantial Completion or Final Acceptance of the Project by the applicable Completion Deadline, ADOT will incur substantial damages;

(b) As of the Effective Date, the amounts of Liquidated Damages under this Section 20.1 represent good faith estimates and evaluations by the Parties as to the actual potential damages that ADOT would incur as a result of late Substantial Completion or late Final Acceptance of the Project, as applicable, and do not constitute a penalty;

(c) Such actual potential damages include loss of use, enjoyment and benefit of the Project and connecting ADOT transportation facilities by the general public, injury to the credibility and reputation of ADOT's transportation improvement program with policy makers and with the general public who depend on and expect availability of service of the Project by the Substantial Completion Deadline, and additional costs of administering this Agreement (including engineering, legal, accounting, overhead and other administrative costs);

(d) The Parties have agreed to Liquidated Damages in order to fix and limit Developer's costs and to avoid later Disputes over what amounts of damages are properly chargeable to Developer;

1 (e) Such sums are reasonable in light of the anticipated or actual  
 2 harm caused by delayed Substantial Completion or delayed Final Acceptance of the  
 3 Project, the difficulties of the proof of loss, and the inconvenience or infeasibility of  
 4 otherwise obtaining an adequate remedy; and

5 (f) Liquidated Damages are not intended to, and do not, liquidate  
 6 Developer’s liability under the indemnification provisions of Section 21.1, even though  
 7 third party claims against Indemnified Parties may arise out of the same event, breach  
 8 or failure that gives rise to the Liquidated Damages.

9 **20.2 Liquidated Damages Respecting Construction Period Lane Closures**

10 **20.2.1** For any full or partial Lane Closure that occurs on Interstate 10 during  
 11 the Construction Period and is not allowed under Section DR 462.3.3 of the Technical  
 12 Provisions, Developer shall be liable for and pay to ADOT Liquidated Damages in the  
 13 following amounts for every 15-minute interval, or portion thereof, that the unpermitted  
 14 Lane Closure persists:

		Type of Lane Closure									
		HOV Lane Closed		Three Lanes Open		Two Lanes Open		One Lane Open		All Lanes Closed	
Direction		EB	WB	EB	WB	EB	WB	EB	WB	EB	WB
<b>Amount</b>		\$2,600	\$800	\$5,200	\$1,500	\$10,300	\$3,000	\$32,600	\$9,500	\$57,000	\$16,800

15

16 **20.2.2** Developer acknowledges and agrees that the Liquidated Damages  
 17 described in this Section 20.2 are reasonable in order to compensate ADOT for  
 18 damages ADOT will incur by reason of the matters that result in Liquidated Damages for  
 19 Lane Closures. Such damages include loss of use, enjoyment and benefit of the  
 20 Project, and connection to ADOT transportation facilities, by the general public, injury to  
 21 the credibility and reputation of ADOT’s Transportation Facilities Construction Program  
 22 with policy makers and with the general public who depend on and expect availability of  
 23 service, and additional costs of administering this Agreement (including engineering,  
 24 legal, accounting, overhead and other administrative costs). Developer further  
 25 acknowledges that these damages are incapable of accurate measurement because of,  
 26 among other things, the unique nature of the Project and the unavailability of a  
 27 substitute for it.

28 **20.2.3** Assessment of such Liquidated Damages shall not preclude ADOT’s  
 29 exercise of its right to remove an unpermitted lane closure at Developer’s expense  
 30 under Section 19.4.

1 **20.3 Liquidated Damages Respecting Maintenance Period Lane Closures**

2 **20.3.1** For any full or partial Lane Closure on the Project or Interstate 10 that  
 3 occurs during the Maintenance Period and is not allowed under Section DR 462.3.3 of  
 4 the Technical Provisions, Developer shall be liable for and pay to ADOT Liquidated  
 5 Damages in the following amounts for every five-minute interval, or portion thereof, that  
 6 the unpermitted Lane Closure persists:

		<b>Type of Lane Closure</b>									
		<b>HOV Lane Closed</b>		<b>Three Lanes Open</b>		<b>Two Lanes Open</b>		<b>One Lane Open</b>		<b>All Lanes Closed</b>	
<b>Direction</b>		EB	WB	EB	WB	EB	WB	EB	WB	EB	WB
<b>Amount</b>		\$2,600	\$800	\$5,200	\$1,500	\$10,300	\$3,000	\$32,600	\$9,500	\$57,000	\$16,800

7 **20.3.2** The Liquidated Damages set forth in Section 20.3.1 shall be adjusted  
 8 annually on the first anniversary of the Effective Date and continuing on each  
 9 anniversary thereafter during the Term to equal the original Liquidated Damages  
 10 amount multiplied by the greater of 1.0 or a fraction the numerator of which is the CCI  
 11 most recently published prior to the applicable anniversary and the denominator of  
 12 which is the Base CCI.

13 **20.3.3** Developer acknowledges and agrees that the Liquidated Damages  
 14 described in this Section 20.3 are reasonable in order to compensate ADOT for  
 15 damages it will incur by reason of the matters that result in Liquidated Damages for  
 16 Lane Closures. Such damages include loss of use, enjoyment and benefit of the  
 17 Project, and connection to ADOT transportation facilities, by the general public, injury to  
 18 the credibility and reputation of ADOT’s Transportation Facilities Construction Program  
 19 with policy makers and with the general public who depend on and expect availability of  
 20 service, and additional costs of administering this Agreement (including engineering,  
 21 legal, accounting, overhead and other administrative costs). Developer further  
 22 acknowledges that these damages are incapable of accurate measurement because of,  
 23 among other things, the unique nature of the Project and the unavailability of a  
 24 substitute for it.

25 **20.3.4** Assessment of such Liquidated Damages shall not preclude ADOT’s  
 26 exercise of its right to remove an unpermitted lane closure at Developer’s expense  
 27 under Section 19.4.

28 **20.4 Noncompliance Charges for Noncompliance Points**

29 **20.4.1** Developer shall be liable for and pay to ADOT amounts to compensate  
 30 ADOT for damages due to the occurrence of Noncompliance Events that constitute  
 31 Developer’s failure to satisfy certain requirements for the Project during the

1 Construction Period and Maintenance Period, as described in the applicable  
2 Noncompliance Event Tables. The amounts owing from Developer to ADOT as  
3 Noncompliance Charges are not intended to liquidate the costs to ADOT to rectify the  
4 corresponding Noncompliance Event.

5 **20.4.2** For each assessed Noncompliance Point, Developer shall be subject  
6 to Liquidated Damages in the amount of \$8,000.00 (the “Noncompliance Charges”). The  
7 Noncompliance Charges will not be adjusted during the D&C Period. The  
8 Noncompliance Charges, however, shall be adjusted (up or down, as applicable)  
9 commencing on the commencement date of the Maintenance Period and on each  
10 anniversary of such date thereafter throughout the Maintenance Period by a fraction,  
11 the numerator of which is the CPI most recently published prior to the commencement  
12 date or anniversary thereof, as applicable, and the denominator of which is the Base  
13 CPI.

14 **20.4.3** Developer shall pay ADOT the amount of the Noncompliance Charges  
15 accrued within 20 days after ADOT requests payment from time to time. Alternatively,  
16 ADOT shall have the right to deduct the Noncompliance Charges from payments of the  
17 D&C Price or Monthly Disbursements of the Maintenance Price, as applicable, in  
18 accordance with Section 13.

19 **20.4.4** Developer acknowledges that the Noncompliance Charges assessed  
20 in accordance with the Contract Documents are reasonable liquidated amounts in order  
21 to compensate ADOT for damages it will incur by reason of Developer’s failure to  
22 comply with the applicable provisions of the Contract Documents. The damages  
23 addressed by the Noncompliance Charges include:

24 (a) ADOT’s increased costs of administering this Agreement,  
25 including the increased costs of engineering, legal, accounting, monitoring, oversight  
26 and overhead, and could also include obligations to pay or reimburse Governmental  
27 Entities with regulatory jurisdiction over the Maintenance Services Limits for violation of  
28 applicable Governmental Approvals or for their increased costs of monitoring and  
29 enforcing Developer’s compliance with applicable Governmental Approvals;

30 (b) Potential harm and future costs to ADOT from reduction in the  
31 condition and useful life of the Elements;

32 (c) Potential harm to the credibility and reputation of ADOT with  
33 other Governmental Entities, with policy makers and with the general public who  
34 depend on and expect timely and quality delivery and availability of service;

35 (d) Potential harm and detriment to those using the Project, which  
36 may include loss of use, enjoyment and benefit of the Project and of facilities connecting  
37 to the Project, additional wear and tear on vehicles, and increased costs of congestion,  
38 travel time and accidents; and

39 (e) ADOT’s increased costs of addressing potential harm to the  
40 Environment, including increased harm to air quality caused by congestion, and harm to

1 water quality, soils conditions, historic structures and other environmental resources  
2 caused by Noncompliance Events.

3 **20.4.5** Developer further acknowledges that the damages described in  
4 Section 20.4.4 would be difficult and impracticable to measure and prove, because,  
5 among other things:

6 (a) The Project is of a unique nature and no substitute for it is  
7 available;

8 (b) The costs of monitoring and oversight prior to increases in the  
9 level thereof will be variable and extremely difficult to quantify;

10 (c) The nature and level of increased monitoring and oversight will  
11 be variable depending on the circumstances; and

12 (d) The variety of factors that influence use of and demand for the  
13 Project make it difficult to sort out causation of the matters that will trigger these  
14 Liquidated Damages and to quantify actual damages.

## 15 **20.5 Liquidated Damages Respecting DBEs and OJT**

### 16 **20.5.1 DBEs**

17 **20.5.1.1** If Developer replaces or substitutes, or allows or suffers  
18 replacement or substitution, for a Committed DBE in violation of Section 19.0 of the  
19 DBE Special Provisions, then Developer shall be liable for and pay to ADOT Liquidated  
20 Damages in an amount equal to 1.5 times the unpaid portion of the Subcontract amount  
21 under the Subcontract with the wrongfully replaced Committed DBE.

22 **20.5.1.2** If, following Substantial Completion, ADOT determines that  
23 Developer has not met the DBE Goals for Professional Services and Construction and  
24 did not exercise Good Faith Efforts to meet such DBE Goals, then Developer shall be  
25 liable for and pay to ADOT Liquidated Damages in an amount equal to the total contract  
26 value that would have had to be paid to DBEs performing Commercially Useful  
27 Functions in order to meet each of the DBE Goals, minus the total contract value of  
28 Work actually performed by DBEs and credited toward each of the DBE Goals.

29 **20.5.1.3** If, following completion of any interval of Capital Asset  
30 Replacement Work, ADOT determines that Developer has not met the DBE Goal for  
31 such interval of Capital Asset Replacement Work and did not exercise Good Faith  
32 Efforts to meet such DBE Goal, then Developer shall be liable for and pay to ADOT  
33 Liquidated Damages in an amount equal to the total contract value that would have had  
34 to be paid to DBEs performing Commercially Useful Functions in order to meet such  
35 DBE Goal, minus the total contract value of Work actually performed by DBEs and  
36 credited toward such DBE Goal.

1                   **20.5.1.4** Developer acknowledges and agrees that the Liquidated  
2 Damages respecting DBEs described in this Section 20.5.1 are reasonable in order to  
3 compensate ADOT for damages ADOT will incur by reason of the violations or failures  
4 described in this Section 20.5.1. Such damages include jeopardy to attaining ADOT's  
5 overall DBE goals, injury to the credibility and reputation of ADOT's DBE program,  
6 potential loss of federal funding equal to or exceeding the value of Work denied to  
7 DBEs, imposition of other costly measures and requirements by the FHWA, and  
8 additional costs of administering this Agreement and enforcing Developer's compliance  
9 with its DBE obligations. Further, the severity of such damages is expected to vary with  
10 the portion of the Subcontract amount denied to the Committed DBE or the portion of  
11 the DBE Goal not attained. Developer further acknowledges that these damages are  
12 incapable of accurate measurement because of, among other things, their imprecise  
13 nature.

14                   **20.5.2     OJT**

15                   **20.5.2.1** If, following Substantial Completion, ADOT determines that  
16 Developer has not met the OJT Goals and did not exercise Good Faith Efforts to meet  
17 the OJT Goals, then Developer shall be liable for and pay to ADOT Liquidated  
18 Damages in the amount that ADOT is then holding pursuant to Section 19.6.4.

19                   **20.5.2.2** Developer acknowledges and agrees that the Liquidated  
20 Damages respecting OJT described in this Section 20.5.2 are reasonable in order to  
21 compensate ADOT for damages it will incur by reason of the violations or failures  
22 described in this Section 20.5.2. Such damages include jeopardy to attaining ADOT's  
23 overall OJT goals, injury to the credibility and reputation of ADOT's OJT program,  
24 potential loss of federal funding equal to or exceeding the value of Work denied to OJT  
25 Trainees, imposition of other costly measures and requirements by the FHWA, and  
26 additional costs of administering this Agreement and enforcing Developer's compliance  
27 with its OJT obligations. Further, the severity of such damages is expected to vary with  
28 the portion of the employment work denied to OJT Trainees. Developer further  
29 acknowledges that these damages are incapable of accurate measurement because of,  
30 among other things, their imprecise nature.

31                   **20.6    Liquidated Damages for Unavailability of Key Personnel**

32 Developer shall be subject to Liquidated Damages for unavailability of Key Personnel to  
33 work on the Project, as set forth in Section 9.6.2.2.

34                   **20.7    Liquidated Damages Respecting Subcontractor Payroll Reporting**

35                   **20.7.1**     Developer shall be subject to Liquidated Damages if Developer does  
36 not comply with certain requirements respecting Subcontractor payroll reporting, as set  
37 forth in Section 9.4.2.4(c).

38                   **20.7.2**     Developer acknowledges that ADOT requires timely receipt of the  
39 Subcontractor payrolls described in Section 9.4.2.4 in order for ADOT to comply with  
40 applicable federal and State labor laws. Developer further acknowledges that the

1 Liquidated Damages described in Section 9.4.2.4(c) are reasonable in order to  
2 compensate ADOT for damages it will incur if ADOT fails to comply with these laws.  
3 Such damages include potential loss of federal funding, the imposition of other  
4 sanctions by the US Department of Labor or FHWA, and additional costs of  
5 administering this Agreement and enforcing Developers compliance with applicable  
6 requirements herein. Developer further acknowledges that these damages are  
7 incapable of accurate measurement because of, among other things, their imprecise  
8 nature.

## 9 **20.8 Payment; Satisfaction; Waiver; Non-Exclusive Remedy**

10 **20.8.1** Developer shall pay any Liquidated Damages and Noncompliance  
11 Charges owing under this Section 20 within 20 days after ADOT delivers to Developer  
12 ADOT's invoice or demand therefor.

13 **20.8.2** ADOT will have the right to deduct and offset Liquidated Damages and  
14 Noncompliance Charges from any amounts owing to Developer. ADOT also shall have  
15 the right to draw on any bond, certificate of deposit, letter of credit or other security  
16 provided by Developer pursuant to this Agreement to satisfy Noncompliance Charges  
17 and Liquidated Damages not paid when due.

18 **20.8.3** Permitting or requiring Developer to continue and finish the Work or  
19 any part thereof after a Completion Deadline, as applicable, shall not act as a waiver of  
20 ADOT's right to receive Noncompliance Charges and Liquidated Damages hereunder or  
21 any rights or remedies otherwise available to ADOT.

22 **20.8.4** Subject to Section 19.3, ADOT's right to, and imposition of,  
23 Noncompliance Charges and Liquidated Damages are in addition, and without  
24 prejudice, to any other rights and remedies available to ADOT under this Agreement, at  
25 law or in equity respecting the breach, failure to perform or Developer Default that is the  
26 basis for the Noncompliance Charges or Liquidated Damages or any other breach,  
27 failure to perform or Developer Default, except for recovery of the monetary damage  
28 that the Noncompliance Charges or Liquidated Damages are intended to compensate.

## 29 **20.9 Limitation on Developer's Liability**

### 30 **20.9.1 D&C Work**

31 **20.9.1.1** Notwithstanding any other provision of the Contract  
32 Documents, to the extent permitted by applicable Law, ADOT will not seek  
33 indemnification and defense under Section 21 or to recover damages from Developer  
34 resulting from breach of this Agreement with respect to the D&C Work (whether arising  
35 in contract, negligence or other tort, or any other theory of law) in excess of the sum of:

36 (a) Costs reasonably incurred by ADOT, or any Person  
37 acting on ADOT's behalf, to complete or correct the D&C Work, or have the D&C Work  
38 completed or corrected by another Person, in excess of the sum otherwise payable to  
39 Developer under this Agreement for the D&C Work, including the cost of the work

1 required or arising under the D&C Warranties; Amounts paid by or on behalf of  
2 Developer with respect to the D&C Work that are covered by insurance proceeds,  
3 including any amounts Developer is deemed to self-insure pursuant to Section 11.2.4;

4 (b) Losses incurred by any Indemnified Party relating to  
5 or arising out of Developer's indemnities set forth in Section 21.1 or elsewhere in the  
6 Contract Documents, related to the D&C Work or occurring during the Construction  
7 Period;

8 (c) Losses arising out of fraud, criminal conduct,  
9 intentional misconduct (which does not include any intentional Event of Default),  
10 recklessness, bad faith or gross negligence on the part of any Developer-Related Entity;

11 (d) Losses arising out of Developer Releases of  
12 Hazardous Materials; and

13 (e) An amount equal to \$100,000,000.00 (which amount  
14 shall specifically include any Liquidated Damages paid with respect to the D&C Work  
15 pursuant to this Section 20).

16  
17 **20.9.1.2** Any claims by third-party owners of facilities or  
18 improvements within the D&C Work shall not reduce or erode the amounts described in  
19 Section 20.10.1.1.

20 **20.9.2 Maintenance Services**

21 **20.9.2.1** Notwithstanding any other provision of the Contract  
22 Documents, to the extent permitted by applicable Law, ADOT will not seek  
23 indemnification and defense under Section 21 or to recover damages from Developer  
24 resulting from breach of this Agreement with respect to the Maintenance Services  
25 (whether arising in contract, negligence or other tort, or any other theory of law) in  
26 excess of the sum of:

27 (a) Costs reasonably incurred by ADOT, or any Person  
28 acting on ADOT's behalf, to perform the Maintenance Services, or have the  
29 Maintenance Services performed by another Person, for the balance of the Term in  
30 excess of the sum otherwise payable to Developer under this Agreement for the  
31 Maintenance Services for the balance of the Term;

32 (b) Amounts paid by or on behalf of Developer with  
33 respect to the Maintenance Services that are covered by insurance proceeds, including  
34 any amounts Developer is deemed to self-insure pursuant to Section 11.2.4;

35 (c) Losses incurred by any Indemnified Party relating to  
36 or arising out of Developer's indemnities set forth in Section 21.1 or elsewhere in the

1 Contract Documents, related to the Maintenance Services or occurring during the  
2 Maintenance Period;

3 (d) Losses arising out of fraud, criminal conduct,  
4 intentional misconduct (which does not include any intentional Event of Default),  
5 recklessness, bad faith or gross negligence on the part of any Developer-Related Entity;

6 (e) Losses arising out of Developer Releases of  
7 Hazardous Materials; and

8 (f) Subject to Section 20.9.2.2, an amount equal to  
9 \$15,000,000.00 (which amount shall specifically include any Liquidated Damages paid  
10 with respect to the Maintenance Services) for each five-year period during the  
11 Maintenance Period commencing with Maintenance NTP. For clarity, this amount is a  
12 cap that shall apply separately to each such five-year period and shall not carry over  
13 into subsequent five-year periods. If the last period before the end of the Term is less  
14 than five years, the cap for that period nevertheless shall not be reduced.

15 **20.9.2.2** The \$15,000,000.00 amount set forth in Section 20.9.2.1(f)  
16 shall be adjusted annually on the first anniversary of the Effective Date and continuing  
17 on each anniversary thereafter during the Term to equal \$15,000,000.00 multiplied by  
18 the greater of 1.0 or a fraction the numerator of which is the CCI most recently  
19 published prior to the applicable anniversary and the denominator of which is the Base  
20 CCI.

## 21 **20.10 Limitation on Consequential Damages**

22 **20.10.1** Notwithstanding any other provision of the Contract Documents and  
23 except as set forth in this Section 20.10.1 and in Section 20.10.2, to the extent  
24 permitted by applicable Law, neither Party shall be liable to the other for punitive  
25 damages or indirect or incidental consequential damages, whether arising out of breach  
26 of this Agreement, tort (including negligence) or any other theory of liability, and each  
27 Party hereby releases the other party from any such liability.

28 **20.10.2** The foregoing limitations on Developer's liability for consequential  
29 damages shall not apply to or limit any right of recovery ADOT may have respecting the  
30 following:

31 (a) Losses (including defense costs) to the extent (i) covered by the  
32 proceeds of insurance required to be carried pursuant to Section 11, and (ii) covered by  
33 the proceeds of insurance actually carried by or insuring any Developer-Related Entity  
34 under policies solely with respect to the Project and the Work, regardless of whether  
35 required to be carried pursuant to Section 11, or (iii) Developer is deemed to have self-  
36 insured the Loss pursuant to Section 11.2.4;

37 (b) Losses arising out of fraud, criminal conduct, intentional  
38 misconduct (which does not include any intentional Event of Default), recklessness, bad  
39 faith or gross negligence on the part of any Developer-Related Entity;

1 (c) Developer's indemnities set forth in Section 21.1 or elsewhere in  
2 the Contract Documents;

3 (d) Developer's obligation to pay Noncompliance Charges and  
4 Liquidated Damages in accordance with Section 20 or any other provision of the  
5 Contract Documents;

6 (e) Losses arising out of Developer Releases of Hazardous  
7 Materials; and

8 (f) Amounts Developer may owe or be obligated to reimburse to  
9 ADOT under the express provisions of the Contract Documents, including, subject to  
10 any agreed scope of work and budget, ADOT's Recoverable Costs.  
11

**ARTICLE 21.**  
**INDEMNIFICATION**

**21.1 Indemnity by Developer**

**21.1.1** Subject to Section 21.1.2, Developer shall release, protect, defend, indemnify and hold harmless the Indemnified Parties from and against any and all Claims, causes of action, suits, judgments, investigations, legal or administrative proceedings, demands and Losses, in each case if asserted or incurred by or awarded to any third party, arising out of, relating to or resulting from:

(a) The breach or alleged breach of any of the Contract Documents by any Developer-Related Entity;

(b) The failure or alleged failure by any Developer-Related Entity to comply with the Governmental Approvals, any applicable environmental laws or other Laws (including laws regarding Hazardous Materials Management);

(c) Any alleged patent or copyright infringement or other allegedly improper appropriation or use of trade secrets, patents, proprietary information, know-how, copyright rights or inventions in performance of the Work, or arising out of any use in connection with the Project of methods, processes, designs, information, or other items furnished or communicated to ADOT or another Indemnified Party pursuant to this Agreement; provided, however, that this indemnity shall not apply to any infringement to the extent resulting from ADOT's failure to comply with specific written instructions regarding use provided to ADOT by Developer;

(d) The actual or alleged culpable act, error, omission, negligence, breach or misconduct of any Developer-Related Entity in or associated with performance of the Work;

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

(f) for The failure or alleged failure by any Developer-Related Entity to pay sums due for the work or services of Subcontractors, laborers, or Suppliers, provided that ADOT has paid all undisputed amounts owing to Developer with respect to such Work;

(g) Any actual or threatened Developer Release of Hazardous Materials;

(h) The Claim or assertion by any other ADOT contractor or developer: (i) that any Developer-Related Entity failed to cooperate reasonably with such other ADOT contractor or developer, so as to cause inconvenience, disruption, delay or loss, except where the Developer-Related Entity was not in any manner

1 engaged in performance of the Work or (ii) that any Developer-Related Entity interfered  
2 with or hindered the progress or completion of work being performed by such other  
3 ADOT contractor or Developer, so as to cause inconvenience, disruption, delay or loss,  
4 to the extent such claim arises out of the actual or alleged culpable act, error, omission,  
5 negligence, breach or misconduct of any Developer-Related Entity;

6 (i) Developer's performance of, or failure to perform, the  
7 obligations under any Utility Agreement, or any dispute between Developer and a Utility  
8 Company arising out of Utility Adjustments;

9 (j) Any Developer-Related Entity's breach of or failure to perform  
10 an obligation that ADOT owes to a third person, including Governmental Entities, under  
11 Law or under any agreement between ADOT and a third person, where ADOT has  
12 delegated performance of the obligation to Developer under the Contract Documents or  
13 (ii) the acts or omissions of any Developer-Related Entity which render ADOT unable to  
14 perform or abide by an obligation that ADOT owes to a third person, including  
15 Governmental Entities, under any agreement between ADOT and a third person, where  
16 the agreement was expressly disclosed or known to Developer;

17 (k) The fraud, bad faith, arbitrary or capricious acts, or violation of  
18 Law by any Developer-Related Entity in or associated with the performance of the  
19 Work;

20 (l) Inverse condemnation, trespass, nuisance or similar taking of or  
21 harm to real property by reason of: (i) the failure of any Developer-Related Entity to  
22 comply with Good Industry Practices, requirements of the Contract Documents, the  
23 Project Management Plan or Governmental Approvals respecting control and mitigation  
24 of construction activities and construction impacts, (ii) the intentional misconduct or  
25 negligence of any Developer-Related Entity, or (iii) the actual physical entry onto or  
26 encroachment upon another's property by any Developer-Related Entity; and

27 (m) Errors, inconsistencies or other defects in the design,  
28 construction or maintenance of the Project or of Utility Adjustments included in the  
29 Work.

30 **21.1.2** Subject to the releases and disclaimers herein, including all the  
31 provisions set forth in Section 3.1.8 of this Agreement, Developer's indemnity obligation  
32 shall not extend to any third party Loss to the extent caused by:

33 (a) The negligence, reckless or intentional misconduct, bad faith or  
34 fraud of such Indemnified Party,

35 (b) ADOT's material breach of any of its material obligations under  
36 the Contract Documents;

37 (c) An Indemnified Party's material violation of any Laws or  
38 Governmental Approvals; or

1 (d) An unsafe requirement inherent in prescriptive design or  
2 prescriptive construction specifications of the Technical Provisions, but only where prior  
3 to occurrence of the third party Loss: (i) Developer complied with such specifications  
4 and did not actually know, or would not have known, while exercising reasonable  
5 diligence, that the requirement created a potentially unsafe condition or (ii) Developer  
6 knew of and reported to ADOT the potentially unsafe requirement.

7 **21.1.3** In claims by an employee of Developer, a Subcontractor, anyone  
8 directly or indirectly employed by them or anyone for whose acts they may be liable, the  
9 indemnification obligation under this Section 21.1 shall not be limited by a limitation on  
10 the amount or type of damages, compensation or benefits payable by or for Developer  
11 or a Subcontractor under workers' compensation, disability benefit or other employee  
12 benefits laws.

13 **21.1.4** For purposes of this Section 21.1, "third party" means any person or  
14 entity other than an Indemnified Party and Developer, except that a "third party"  
15 includes any Indemnified Party's employee, agent or contractor who asserts a claim  
16 against an Indemnified Party which is within the scope of the indemnities and which is  
17 not covered by the Indemnified Party's worker's compensation program.

18 **21.1.5** Developer hereby acknowledges and agrees that it is Developer's  
19 obligation to perform the Work in accordance with the Contract Documents and that the  
20 Indemnified Parties are fully entitled to rely on Developer's performance of such  
21 obligation. Developer further agrees that any certificate, review or approval by ADOT or  
22 others hereunder shall not relieve Developer of any of its obligations under the Contract  
23 Documents or in any way diminish its liability for performance of such obligations or its  
24 obligations under this Section 21.

25 **21.1.6** The indemnity set forth in Section 21.1(g) is intended to operate as an  
26 agreement pursuant to Section 107(e) of the Comprehensive Environmental Response,  
27 Compensation and Liability Act, 42 U.S.C. Section 9607(e), and Health and Safety  
28 Code section 25364, to insure, protect, hold harmless and indemnify the Indemnified  
29 Parties.

30 **21.1.7** The obligations under this Article 21 shall not be construed to negate,  
31 abridge, or reduce other rights or obligations that would otherwise exist in favor of an  
32 Indemnified Party hereunder.

## 33 **21.2 Defense and Indemnification Procedures**

34 **21.2.1** If ADOT receives notice of a claim or otherwise has actual knowledge  
35 of a claim that it believes is within the scope of the indemnities under Section 21.1, and  
36 if ADOT gives notice thereof pursuant to Section 11.2, then ADOT will have the right to  
37 conduct its own defense unless either an Insurer accepts defense of the claim within the  
38 time required by law or Developer accepts the tender of the claim in accordance with  
39 Section 21.2.3.

1           **21.2.2** Subject to Section 21.2.6, if the insurer under any applicable insurance  
2 policy accepts the tender of defense, ADOT and Developer shall cooperate in the  
3 defense as required by the insurance policy. If no insurer under potentially applicable  
4 insurance policies provides defense, then Section 21.2.3 shall apply.

5           **21.2.3** If the defense is tendered to Developer, then within 15 days after  
6 receipt of the tender Developer shall notify the Indemnified Party whether Developer  
7 has tendered the matter to an insurer. If Developer does not tender the matter to an  
8 insurer, then within such 15 days, or if the insurer has rejected the tender, then within  
9 five days after such rejection, Developer shall deliver a notice to the Indemnified Party  
10 stating one of the following:

11                   (a) Developer accepts the tender of defense and confirms that the  
12 claim is subject to full indemnification hereunder without any “reservation of rights” to  
13 deny or disclaim full indemnification thereafter;

14                   (b) Developer accepts the tender of defense but with a “reservation  
15 of rights” in whole or in part; or

16                   (c) Developer rejects the tender of defense based on a  
17 determination that it is not required to indemnify against the claim under the terms of  
18 this Agreement.

19           **21.2.4** If Developer accepts the tender of defense under Section 21.2.3(a),  
20 Developer shall have the right to select legal counsel for the Indemnified Party, subject  
21 to reasonable approval by the Indemnified Party, and Developer shall otherwise control  
22 the defense of such claim, including settlement, and bear the fees and costs of  
23 defending and settling such claim. During such defense:

24                   (a) Developer shall fully and regularly inform the Indemnified Party  
25 of the progress of the defense and of any settlement discussions; and

26                   (b) The Indemnified Party shall fully cooperate in said defense,  
27 provide to Developer all materials and access to personnel it requests as necessary for  
28 defense, preparation and trial and which or who are under the control of or reasonably  
29 available to the Indemnified Party, and maintain the confidentiality of all communications  
30 between it and Developer concerning such defense.

31           **21.2.5** If Developer responds to the tender of defense as specified in Section  
32 21.2.3(b) or 21.2.3(c), the Indemnified Party shall be entitled to select its own legal  
33 counsel and otherwise control the defense of such claim, including settlement.

34           **21.2.6** Notwithstanding Section 21.2.3(a) or 21.2.3(b), the Indemnified Party  
35 may assume its own defense by delivering to Developer notice of such election and the  
36 reasons therefor, if the Indemnified Party, at the time it gives notice of the claim or at  
37 any time thereafter, reasonably determines that:

1 (a) A conflict exists between it and Developer which prevents or  
2 potentially prevents Developer from presenting a full and effective defense;

3 (b) Developer is otherwise not providing an effective defense in  
4 connection with the claim; or

5 (c) Developer lacks the financial capacity to satisfy potential liability  
6 or to provide an effective defense.

7 **21.2.7** If the Indemnified Party is entitled and elects to conduct its own  
8 defense pursuant hereto of a claim for which it is entitled to indemnification, Developer  
9 shall reimburse on a current basis all reasonable costs and expenses the Indemnified  
10 Party incurs in investigating and defending, except to the extent the Indemnified Party  
11 conducts its own defense as a result of Developer's denial of such defense pursuant  
12 Section 21.2.3(c). In the event the Indemnified Party is entitled to and elects to conduct  
13 its own defense, then:

14 (a) In the case of a defense conducted under Section 21.2.3(a), it  
15 shall have the right to settle or compromise the claim with Developer's prior consent,  
16 which shall not be unreasonably withheld or delayed;

17 (b) In the case of a defense conducted under Section 21.2.3(b), it  
18 shall have the right to settle or compromise the claim with Developer's prior consent,  
19 which shall not be unreasonably withheld or delayed, or with approval of the court or  
20 arbitrator following reasonable notice to Developer and opportunity to be heard and  
21 without prejudice to the Indemnified Party's rights to be indemnified by Developer; and

22 (c) In the case of a defense conducted under Section 21.2.3(c), it  
23 shall have the right to settle or compromise the claim without Developer's prior consent  
24 and without prejudice to its rights to be indemnified by Developer. If a dispute resolver  
25 determines that Developer wrongfully denied the defense of the Indemnified Party, the  
26 Indemnified Party shall be entitled to reimbursement of the costs of defense, including  
27 reimbursement of reasonable attorneys' fees and other litigation and defense costs, and  
28 indemnification of costs to settle or compromise the claim, in addition to interest at the  
29 rate calculated in accordance with Section 25.13 payable on such defense and  
30 settlement amounts from the date such costs and expenses are incurred by the  
31 Indemnified Party.

32 **21.2.8** The Parties acknowledge that while Section 21.1 contemplates that  
33 Developer will have responsibility for certain claims and liabilities arising out of its  
34 obligations to indemnify, circumstances may arise in which there may be shared liability  
35 of the Parties with respect to such claims and liabilities. In such case, where either  
36 Party believes a claim or liability may entail shared responsibility and that principles of  
37 comparative negligence and indemnity are applicable, it shall confer with the other Party  
38 on management of the claim or liability in question. If the Parties cannot agree on an  
39 approach to representation in the matter in question, each shall arrange to represent  
40 itself and to bear its own costs in connection therewith pending the outcome of such

1 matter. Within 30 days subsequent to the final, non-appealable resolution of the matter  
2 in question, whether by arbitration or by judicial proceedings, the Parties shall adjust the  
3 costs of defense, including reimbursement of reasonable attorneys' fees and other  
4 litigation and defense costs, in accordance with the indemnification arrangements of  
5 Section 21.2, and consistent with the outcome of such proceedings concerning the  
6 respective liabilities of the Parties on the third party claim.

7           **21.2.9** In determining responsibilities and obligations for defending suits  
8 pursuant to this Section 21.2, specific consideration shall be given to the following  
9 factors: (a) the party performing the activity in question; (b) the location of the activity  
10 and incident; (c) contractual arrangements then governing the performance of the  
11 activity; and (d) allegations of respective fault contained in the claim.  
12

**ARTICLE 22.**  
**PARTNERING AND DISPUTE RESOLUTION PROCEDURES**

**22.1 Partnering**

**22.1.1 General Provisions**

**22.1.1.1** For the mutual benefit of the Parties, ADOT and Developer shall establish a partnering relationship to effectively complete the Project. The purpose of the partnering relationship is to establish and maintain effective communication between the Parties to cooperatively identify and resolve critical Project-related issues. Neither the partnering relationship itself, nor discussions between the Parties addressed at the initial partnering workshop, refresher partnering meetings or the construction closeout partnering meeting (collectively “Partnering Meetings”), shall modify the terms and conditions of this Agreement.

**22.1.1.2** In implementing and managing the partnering relationship required under this Section 22.1, ADOT and Developer shall:

- (a) Use early and regular communication with parties involved;
- (b) Establish and maintain a relationship of shared trust, equity and commitment;
- (c) Identify, quantify, and support attainment of mutual goals;
- (d) Develop strategies for using risk-management tools and concepts;
- (e) Implement timely communication and decision making;
- (f) Resolve potential problems at the lowest level of responsible management to avoid negative impacts and Disputes;
- (g) Develop a plan for periodic joint evaluation based on mutually agreed goals;
- (h) Hold Partnering Meetings, as set forth in Section 22.1.2, to preserve the partnering relationship and its benefits for the duration of the Term; and
- (i) Establish periodic joint evaluations of the partnering process and attainment of mutual goals.

**22.1.2 Partnering Meeting Schedule; Participants**

1                   **22.1.2.1** The Parties shall jointly select, before the initial partnering  
2 workshop, a third-party facilitator to facilitate Partnering Meetings.

3                   **22.1.2.2** The Parties shall schedule and conduct Partnering Meetings  
4 as follows:

5                               (a) The initial partnering workshop prior to NTP 2;

6                               (b) Refresher partnering meetings annually thereafter, or  
7 as mutually agreed by the Parties; and

8                               (c) The construction closeout meeting no later than  
9 60 days after the Substantial Completion Date.

10                   **22.1.2.3** The Parties shall conduct Partnering Meetings at ADOT's  
11 offices or at such other locations as the Parties mutually agree.

12                   **22.1.2.4** Key Personnel and executives from both Parties must attend  
13 Partnering Meetings.

14                   **22.1.3 Partnering Team; Partnering Charter**

15                   **22.1.3.1** ADOT and Developer shall establish a partnering team for  
16 the Project, which team shall consist of Project-level contributors and decision-makers  
17 from ADOT, Developer, and, if applicable, stakeholder organizations. Each Party must  
18 identify its respective members of the partnering team prior to the initial partnering  
19 workshop; all members of the partnering team must attend the initial partnering  
20 workshop.

21                   **22.1.3.2** The partnering team shall create during the initial partnering  
22 workshop a partnering charter that includes:

23                               (a) Mutual goals (e.g., core goals that may also include  
24 Project-specific goals and individual goals that are jointly supported by both Parties);

25                               (b) A partnering team commitment statement signed by  
26 every member of the partnering team; and

27                               (c) A plan for both Parties to jointly maintain the  
28 partnering relationship for the duration of the Term.

29                   **22.1.3.3** The members of the partnering team shall:

30                               (a) Identify the appropriate persons in each Party's  
31 organization who shall fill the roles of reviewers for the Issues Resolution Ladder  
32 described in Section 22.2.1;

1 (b) Identify the scope of documentation required for  
2 review of a Dispute at each level of the Issue Resolution Ladder described in  
3 Section 22.2.1;

4 (c) Participate in a partnering evaluation survey, monthly  
5 during the D&C Period and twice a year for the first three years during the Maintenance  
6 Period, to measure the progress of mutual goals and key short-term issues as they  
7 arise in connection with the Project;

8 (d) Jointly review the results of the partnering evaluation  
9 survey, on a quarterly basis during the D&C Period and once a year for the first three  
10 years of the Maintenance Period; and

11 (e) Document lessons learned regarding the Project's  
12 D&C Work after Substantial Completion, and regarding the Project's Maintenance  
13 Services no later than 42 months after the Substantial Completion Date.

14 **22.1.3.4** While the provisions of this Section 22.1 are not part of the  
15 Dispute Resolution Procedures contemplated under this Agreement, the Parties shall  
16 exhaust the use of the partnering relationship when addressing potential Disputes and  
17 prior to proceeding to the Disputes Resolution Procedures set forth in Section 22.2.

#### 18 **22.1.4 Confidentiality**

19 Subject to the requirements of the Public Records Law, any statements made or  
20 materials prepared during or relating to partnering meetings, including any statements  
21 made or documents prepared by the facilitator, shall be kept in confidence and used  
22 only for the purpose of facilitating resolution of potential Disputes via the partnering  
23 process, and shall not be utilized or revealed to others, except to officials and agents of  
24 the Parties who are authorized to act on the subject matter. However, the Parties  
25 understand that such documents may be subsequently discoverable and admissible  
26 in mediation, arbitration of court proceedings.

#### 27 **22.1.5 Cost Responsibility**

28 **22.1.5.1** The costs of the facilitator, the site and food for Partnering  
29 Meetings shall be shared equally by ADOT and Developer. All other costs associated  
30 with the partnering process shall be borne separately by the Party that incurs the costs.

31 **22.1.5.2** ADOT will initially pay the full costs of the facilitator, the site  
32 and food for Partnering Meetings, and thereafter deduct 50% of the qualifying costs  
33 from amounts owing to Developer under this Agreement.

### 34 **22.2 Disputes Resolution Procedures**

35 The Parties agree that:

1 (a) Any Dispute arising out of, relating to, or in connection with this  
2 Agreement not resolved by partnering, per Section 22.1, shall be resolved pursuant to  
3 the multi-step Dispute Resolution Procedures described in this Section 22.2;

4 (b) The Party bringing a Dispute shall bear the burden of proving the same;

5 (c) Resolutions of Disputes pursuant to this Section 22.2 shall be final,  
6 binding, conclusive and enforceable as set forth in this Section 22.2; and

7 (d) The Issue Resolution Ladder and mediation processes are administrative  
8 procedures and remedies, and failure of Developer to comply with either such process  
9 in all material respects as to any Dispute or Claim shall constitute a failure to diligently  
10 pursue and exhaust such administrative procedures and remedies, and shall operate as  
11 a bar against the Dispute or Claim.

## 12 **22.2.1 Issue Resolution Ladder**

13 As a condition to the right to bring a Dispute to mediation, arbitration or litigation,  
14 the Party bringing the Dispute shall first attempt to informally resolve the Dispute directly  
15 with other Party using the Issue Resolution Ladder. The Issue Resolution Ladder is the  
16 process for elevating Disputes from the Project's field level to various levels of review,  
17 up to the Parties' executive management if necessary, with defined time limits for each  
18 level of review. The goal of the Issue Resolution Ladder is to resolve each Dispute as  
19 close to the field level as possible while recognizing the requirement to elevate the  
20 Dispute to the next level of review before the Dispute impacts cost or schedule.

### 21 **22.2.1.1 Issue Resolution Ladder Process**

22 (a) The Issue Resolution Ladder shall consist of three  
23 levels of review and corresponding time limits to review, as follows:  
24

Level of Review	Developer Reviewer	ADOT Reviewer	Time Limit
3	Executive Officer	Senior Deputy State Engineer	Issue Dependent
2	Project Manager	Design Manager, Construction Manager or Project Manager (as applicable)	14 days
1	Project Level	Lead Inspector/ Construction Compliance Engineer	7 days

25 (b) The partnering team as set forth in Section 22.1.3  
26 shall identify the individuals from ADOT's and Developer's respective organizations  
27 filling the roles of reviewers in the Issue Resolution Ladder, and the documentation

1 required for each level of review in the Issue Resolution Ladder. The individuals filling  
2 such roles and the documentation required for each level of review may vary for the  
3 D&C Work and Maintenance Services, as appropriate.

4 (c) If reviewers at any level of the Issue Resolution  
5 Ladder cannot resolve a Dispute within the time limits set forth in this Section 22.2.2.1,  
6 the reviewers shall elevate the Dispute to the next level of review in the Issues  
7 Resolution Ladder.

8 **22.2.2 Issue Resolution Ladder Outcome**

9 (a) If ADOT and Developer succeed in resolving a Dispute using  
10 the Issue Resolution Ladder, the Parties shall memorialize the resolution in writing,  
11 including execution of any Supplemental Agreement as appropriate, and promptly  
12 perform their respective obligations in accordance therewith.

13 (b) If the Parties do not resolve the Dispute using the Issues  
14 Resolution Ladder within the applicable time periods set forth in Section 22.2.1, then  
15 either Party shall have 15 days from the conclusion of the Issues Resolution Ladder to  
16 bring the Dispute to mandatory mediation, as described in Section 22.2.3.

17 **22.2.3 Mediation**

18 Only upon completion of the requirements of Section 22.2.1, either Party shall  
19 have the right to initiate mandatory mediation proceedings for the unresolved Dispute,  
20 as a condition to bringing the Dispute to arbitration or litigation.

21 **22.2.3.1 Mediation Process**

22 (a) The Party bringing the Dispute shall do so by serving  
23 the other Party with a written notice to initiate mediation proceedings.

24 (b) Within ten Business Days after providing such notice,  
25 the Parties shall mutually select a qualified individual to serve as mediator. The  
26 mediator shall have at least ten years of experience serving as a mediator, shall have at  
27 least five years of experience mediating design, construction or maintenance work  
28 disputes, as applicable based on the nature of the Dispute, and preferably shall be an  
29 attorney at law.

30 (c) If the Parties are unable to agree upon an individual  
31 to serve as mediator, then either Party may petition the Superior Court located in  
32 Maricopa County to appoint a mediator who meets the foregoing qualifications.

33 (d) The Parties shall use diligent efforts to convene and  
34 conclude mediation proceedings within 30 days after the mediator is appointed, or at  
35 such other date and time as may be set by the mediator. Each Party shall have the  
36 right to present to the mediator such materials and documentation it may deem relevant  
37 to the Dispute; provided, however, that it concurrently provide a copy of such materials

1 and documentation to the other Party. Each Party shall provide to the mediator and the  
2 other Party further materials, documentation and information as the mediator may  
3 reasonably request.

4 (e) Each Party shall bring to the mediation a  
5 representative with authority to mediate and settle the Dispute, and such representative  
6 shall actively participate in the mediation process. Each Party may bring to the  
7 mediation such other persons as it chooses; provided, however, that neither Party shall  
8 be represented at the mediation by legal counsel unless both Parties consent thereto in  
9 advance of the mediation.

10 (f) Each Party shall make good faith efforts to resolve the  
11 Dispute through mediation.

12 (g) Developer and ADOT will share equally the expenses  
13 of the mediation. Each Party shall bear its own costs of preparing for and participating  
14 in the mediation.

15 (h) The deadlines in this Section 22.2 for processing a  
16 Dispute shall be postponed, day for day, during mediation.

17 **22.2.3.2 Mediation Outcome**

18 If the Parties do not resolve the Dispute using mediation, the Party  
19 bringing the Dispute may proceed to either arbitration in accordance with Section 22.2.5  
20 or litigation in accordance with Section 22.2.6, as applicable.

21 **22.2.4 Evidentiary Impact of Issue Resolution Ladder or Mediation**

22 **22.2.4.1** The Issue Resolution Ladder process and mediation process  
23 shall be considered settlement negotiations for the purpose of all State and federal rules  
24 that protect disclosures made during settlement negotiations from later discovery or use  
25 in evidence; provided, however, that any settlement executed by the Parties shall not be  
26 considered confidential and may be disclosed.

27 **22.2.4.2** Evidence of anything said, or of any admission made, in the  
28 course of the Issue Resolution Ladder process or mediation is without prejudice and is  
29 not admissible in evidence for any purpose, including impeachment, and disclosure of  
30 such evidence shall not be compelled before an arbitrator or in any civil action.

31 **22.2.4.3** No document or copy thereof prepared for the purpose of, in  
32 the course of, or pursuant to the Issue Resolution Ladder process or mediation shall be  
33 admissible in evidence, and disclosure of such document or copy shall not be  
34 compelled, in any arbitration or civil action.

35 **22.2.4.4** No stenographic or other record of the Issue Resolution  
36 Ladder process or mediation session(s) shall be made except to memorialize a  
37 settlement record.

1                   **22.2.4.5** All conduct, statements, promises, offers, views and  
2 opinions, oral or written, made during the Issue Resolution Ladder process or mediation  
3 by any party or agent are confidential and, where appropriate, are to be considered  
4 work product and privileged. Such conduct, statements, promises, offers, views and  
5 opinions shall not be subject to discovery and shall not be admissible for any purpose,  
6 including impeachment, before an arbitrator or in any civil action involving the Parties.

7                   **22.2.4.6** The limitations of this Section 22.2.5 do not affect the  
8 discovery or admissibility of facts, opinions, statements, documents or other evidence  
9 existing or developed independent of the Issue Resolution Ladder process or mediation,  
10 and the discoverability or admissibility of such evidence is not changed or affected  
11 because of its use in the Issue Resolution Ladder process or mediation.

12                   **22.2.4.7** The Parties may waive any of the confidentiality provisions  
13 of this Section 22.2.5 through a written waiver or consent to disclosure.

14                   **22.2.5     Binding Arbitration**

15                   Only upon completion of the requirements of Section 22.2.1 and Section 22.2.2,  
16 either Party shall have the right to initiate binding arbitration proceedings only for an  
17 unresolved Claim or Dispute, or related or similar unresolved Claims or Disputes that  
18 arise fairly contemporaneously out of the same set of acts, events or circumstances,  
19 that has or have (a) a cumulative amount in controversy not exceeding \$2,500,000, and  
20 (b) a cumulative Completion Deadline adjustment in controversy not exceeding 45 days.  
21 To clarify, all unresolved Claims or Disputes that arise fairly contemporaneously out of  
22 the same set of acts, events or circumstances shall be aggregated to determine  
23 whether the foregoing arbitration caps are met; and the arbitrator shall have no power  
24 whatsoever to make an aggregate arbitration award for all such unresolved Claims or  
25 Disputes in excess of such caps. Any such arbitration proceeding shall be *de novo*.

26                   **22.2.5.1   Arbitration Process**

27                   (a)     The Party electing to bring its unresolved Dispute to  
28 arbitration shall serve upon the other Party a written request for mandatory and binding  
29 arbitration.

30                   (b)     The Parties shall then seek to mutually agree upon  
31 the arbitration process, and any other matter pertinent to arbitration not otherwise  
32 addressed in this Section 22.2.3.

33                   (c)     If the Parties cannot agree upon an arbitration  
34 process within 30 days, then the Party seeking arbitration shall be entitled to compel  
35 arbitration by serving a demand for arbitration, in accordance with American Arbitration  
36 Association (“AAA”) rules, on the other party and the AAA. If arbitration is administered  
37 through the AAA, then the Expedited Procedures of the Construction Industry Arbitration  
38 Rules of the AAA shall be used for design and construction Disputes and the  
39 Commercial Dispute Resolution Procedures of the AAA shall be used for all other  
40 Disputes. The arbitration shall be conducted by a single arbitrator mutually agreeable to

1 the Parties and selected from the complex construction litigation panel developed by  
2 AAA in the case of design and construction Disputes, or from a list developed by the  
3 AAA in all other cases. If the Parties fail to appoint a mutually agreeable arbitrator  
4 within 30 days, the President of the AAA shall appoint the arbitrator from the complex  
5 construction litigation panel in the case of design and construction Disputes, or from  
6 such list developed by the AAA in all other Disputes. The scope and extent of discovery  
7 shall be as determined by the arbitrator in accordance with AAA rules set forth above.

8 (d) Notwithstanding Section 22.2.3.1(c), for insurance  
9 Disputes, the arbitrator(s) shall be experienced in the industry of insurance underwriting.

10 (e) The arbitrator shall render his or her decision by  
11 applying the pertinent provision(s) of the Contract Documents and applicable Law to the  
12 relevant facts and circumstances of the case. The arbitrator shall set forth the decision  
13 and reasoning for the decision in writing.

14 (f) If any Party acts to unreasonably delay or prevent  
15 arbitration, the other Party shall be entitled to enforce the arbitration provisions of this  
16 Agreement by petition to the Superior Court located in Maricopa County, Arizona.

17 (g) The arbitrator shall not have the power to award  
18 punitive damages, rescind this Agreement, reform the Contract Documents, or void any  
19 limitations on liability contained in this Agreement.

20 (h) The venue of any arbitration hearing shall be in  
21 Phoenix, Arizona.

22 (i) Developer and ADOT will share equally the expenses  
23 of the arbitrator. Each Party shall bear its own costs of preparing for and participating in  
24 the arbitration.

25 **22.2.5.2 Arbitration Outcome**

26 The decision of the arbitrator shall be binding, and judgment upon the award  
27 rendered by the arbitrator may be entered in the Superior Court located in Maricopa  
28 County, Arizona.

29 **22.2.6 State Court Litigation; Jurisdiction and Venue**

30 **22.2.6.1** Only upon completion of the requirements of Section 22.2.1  
31 and Section 22.2.2, and only if the unresolved Dispute is not eligible for arbitration,  
32 either Party shall have the right to initiate litigation proceedings for the unresolved  
33 Dispute. Any such litigation proceeding shall be *de novo*.

34 **22.2.6.2** All litigation between the parties concerning any Disputes  
35 shall be filed, heard and decided in the Superior Court located in Maricopa County,  
36 Arizona, which shall have exclusive jurisdiction and venue.

1                   **22.2.7 Continuation of Work and Payments During Dispute**

2                   Failure by ADOT to pay any amount in Dispute shall not  
3 alleviate, diminish or modify in any respect Developer’s obligation to perform under the  
4 Contract Documents, including Developer’s obligation to achieve the Completion  
5 Deadlines and perform all Work in accordance with the Contract Documents. At all  
6 times during the Dispute Resolution Procedures, Developer and all Subcontractors shall  
7 continue with the performance of the Work and their obligations, including any disputed  
8 Work or obligations, diligently and without delay or slow down, in accordance with the  
9 Contract Documents, except to the extent enjoined by order of a court or otherwise  
10 specified or directed by ADOT. Developer acknowledges that it shall be solely  
11 responsible for the results of any delaying actions or inactions that Developer or any  
12 Developer-Related Entity takes during the pendency of resolution of a Dispute relating  
13 to the Work even if Developer’s position in connection with the Dispute ultimately  
14 prevails. In addition, during the pendency of resolution of a Dispute relating to the  
15 Work, the Parties shall continue to comply with all provisions of the Contract  
16 Documents, the Project Management Plan, the Governmental Approvals and applicable  
17 Law.

18                   **22.2.7.1** During the course of any and all Dispute Resolution  
19 Procedures, ADOT will continue to pay to Developer when due all undisputed amounts  
20 owing under this Agreement.

21                   **22.2.7.2** Any Claim or Dispute regarding such payment shall be  
22 resolved pursuant to Section 19. Developer shall proceed as directed by ADOT  
23 pending resolution of the Claim or Dispute. Upon resolution of any such Claim or  
24 Dispute, each Party shall promptly pay to the other any amount owing.

25                   **22.2.8 Attorney Fees**

26                   Except as expressly provided otherwise in this Agreement, each Party shall bear  
27 its own attorneys’ fees and expenses incurred in connection with any Dispute  
28 Resolution Procedures, regardless of the outcome. Each Party hereby waives Arizona  
29 Revised Statutes section 12-341.01 and all benefits thereof. Each Party acknowledges  
30 that it understands the provisions and effect of such statute, has consulted with legal  
31 counsel regarding such waiver, and willingly grants such waiver.

1 **ARTICLE 23.**  
2 **RECORDS AND AUDITS; OWNERSHIP OF DOCUMENTS AND INTELLECTUAL**  
3 **PROPERTY**

4 **23.1 Detailed Pricing Documents**

5 **23.1.1 Contents of DPDs**

6 The "Detailed Pricing Documents," or "DPDs," shall consist of all cost, unit  
7 pricing, price quote and other documentary information used in preparation of the Price.  
8 The DPDs shall, inter alia, clearly detail how each cost or price included in the Proposal  
9 has been determined and shall show cost or price elements in sufficient detail as is  
10 adequate to enable ADOT to understand how Developer calculated the Price. The  
11 DPDs provided in connection with quotations and Supplemental Agreements shall, *inter*  
12 *alia*, clearly detail how the total cost or price and individual components of that cost or  
13 price were determined. The DPDs shall itemize the estimated costs or price of  
14 performing the Work separated into usual and customary items and cost or price  
15 categories to present a detailed estimate of costs and price, such as direct labor, repair  
16 labor, equipment ownership and operation, expendable materials, permanent materials,  
17 supplies, Subcontract costs, plant and equipment, insurance, bonds, letters of credit,  
18 indirect costs, contingencies, mark-up, overhead and profit. The DPDs shall itemize the  
19 estimated annual costs of insurance premiums for each coverage required to be  
20 provided by Developer under Section 11. The DPDs shall include all assumptions  
21 made in determining the scope of the Work and calculating the Price, detailed quantity  
22 takeoffs, price reductions and discounts, rates of production and progress calculations,  
23 and quotes from Subcontractors used by Developer to arrive at the Price, and any  
24 adjustments to the Price under this Agreement.

25 **23.1.2 Manner and Duration for Retaining Detailed Pricing Documents**

26 **23.1.2.1** Prior to execution of this Agreement, Developer delivered to  
27 ADOT one copy of all the DPDs, together with a detailed index and catalogue of the  
28 DPDs. Upon execution of this Agreement, the DPDs and index and catalogue shall be  
29 held in locked fireproof cabinet(s) supplied by Developer and located in ADOT's project  
30 office with the key held only by Developer. Further, concurrently with execution of each  
31 Subcontract or with approval of each Supplemental Agreement or amendment to any  
32 Contract Document, the Parties shall add to the cabinet one copy of all documentary  
33 information respecting the pricing by the Subcontractor or used in preparation of the  
34 Supplemental Agreement or amendment, and shall update the index and catalogue.

35 **23.1.2.2** The DPDs and index and catalogue pertaining to the D&C  
36 Work and Maintenance Services During Construction shall be held in such cabinet or  
37 otherwise maintained until all of the following have occurred:

38 (a) 180 days have elapsed from the earlier of Project  
39 Final Acceptance or termination of this Agreement;

- 1 (b) All Warranty Terms have expired pursuant to this  
2 Agreement;
- 3 (c) All Claims or Disputes regarding the D&C Work have  
4 been settled; and
- 5 (d) The Final D&C Payment has been made and  
6 accepted.

7 **23.1.2.3** The DPDs and index and catalogue pertaining to the  
8 Maintenance Services After Substantial Completion shall be held in such cabinet or  
9 otherwise maintained until all of the following have occurred:

- 10 (a) 60 days have elapsed from the expiration or earlier  
11 termination of this Agreement;
- 12 (b) All Claims or Disputes regarding the Maintenance  
13 Services After Substantial Completion have been settled; and
- 14 (c) All amounts owing from ADOT to Developer and from  
15 Developer to ADOT under this Agreement has been made and accepted.

16 **23.1.3 Availability for Review**

17 The DPDs shall be available during business hours for joint review by Developer  
18 and ADOT, or by Developer, ADOT and any dispute resolver, in accordance with  
19 Article 22, in connection with approval of the Project Schedule, negotiation of  
20 Supplemental Agreements, and resolution of Claims or Disputes under the Contract  
21 Documents, and also as described in Section 23.1.7. ADOT will be entitled to review all  
22 or any part of the DPDs in order to satisfy itself regarding the applicability of the  
23 individual documents to the matter at issue.

24 **23.1.4 Proprietary Information**

25 The DPDs are, and shall always remain, the property of Developer and shall be  
26 considered to be in Developer's possession, subject to ADOT's right to review the DPDs  
27 as provided in this Section 23.1. Developer will have and control the keys to the filing  
28 cabinet containing the DPDs. ADOT acknowledges that Developer may consider that  
29 the DPDs constitute trade secrets or proprietary information. ADOT will have the right  
30 to copy the DPDs for the purposes set forth in this Section 23.1, provided that the  
31 Parties execute a mutually agreeable confidentiality agreement with respect to DPDs  
32 that constitute trade secrets or proprietary information, which confidentiality agreement  
33 shall explicitly acknowledge that it is subject to applicable Law (including the Arizona  
34 Public Records Act).

35 **23.1.5 Representation**

1 Developer represents and warrants that the DPDs constitute all documentary  
2 information used in the preparation of its Price. Developer agrees that no other price  
3 proposal preparation information will be considered in resolving Disputes or Claims.  
4 Developer further agrees that the DPDs are not part of the Contract Documents and  
5 that nothing in the DPDs shall change or modify any Contract Document.

#### 6 **23.1.6 Form of DPDs**

7 Except as otherwise provided in the RFP, Developer shall submit the DPDs in  
8 such format as is used by Developer in connection with its Proposal. Developer  
9 represents and warrants that the DPDs provided with the Proposal were personally  
10 examined by an authorized officer of Developer prior to delivery, and that the DPDs  
11 meet the requirements of Section 23.1.4. Developer further represents and warrants  
12 that all DPDs provided were or will be personally examined prior to delivery by an  
13 authorized officer of Developer, and that they shall meet the requirements of Section  
14 23.1.4.

#### 15 **23.1.7 Review by ADOT to Confirm Completeness**

16 ADOT may at any time conduct a review of the DPDs to determine whether they  
17 are complete. If ADOT determines that any data is missing from a DPD, Developer  
18 shall provide such data within three Business Days after delivery of ADOT's request for  
19 such data. At that time of its submission to ADOT, such data will be date stamped,  
20 labeled to identify it as supplementary DPD information and added to the DPDs.  
21 Developer shall have no right to add documents to the DPDs except upon ADOT's  
22 request. The DPDs associated with any Supplemental Agreement or Price adjustment  
23 under this Agreement shall be reviewed, organized and indexed in the same manner as  
24 the original DPDs.

### 25 **23.2 Financial Reporting Requirements**

26 **23.2.1** Developer shall deliver to ADOT financial and narrative reports,  
27 statements, certifications, budgets and information as and when required under the  
28 Contract Documents.

29 **23.2.2** Developer shall furnish, or cause to be furnished, to ADOT such  
30 financial information and statements as ADOT may reasonably request from time to  
31 time for any purpose related to the Project, the Work or the Contract Documents. In  
32 addition, Developer shall deliver to ADOT the following financial statements for each  
33 Guarantor, at the times specified below:

34 (a) Within 60 days after the end of each fiscal quarter, duplicate  
35 copies of the balance sheet and a consolidated statement of earnings of the Guarantor  
36 and its consolidated subsidiaries for such quarter and for the period from the beginning  
37 of the then current fiscal year to the end of such quarter, setting forth in comparative  
38 form the figures for the corresponding periods during the previous fiscal year, all in  
39 reasonable detail and certified by the chief financial officer of the Guarantor as complete  
40 and correct, subject to changes resulting from year-end adjustments;

1 (b) Within 120 days after the end of each fiscal year, duplicate  
2 copies of the financial statements (which shall include a balance sheet and a  
3 consolidated statement of financial condition of the Guarantor and its consolidated  
4 subsidiaries at the end of such year, and statements of earnings, changes in financial  
5 position of the Guarantor and its consolidated subsidiaries for such year, and all related  
6 notes to the financial statements, setting forth in each case in comparative form the  
7 figures for the previous fiscal year), all in reasonable detail and accompanied by an  
8 opinion thereon of an independent public accountant of recognized national standing  
9 selected by the Guarantor, which opinion shall state that such financial statements have  
10 been prepared in accordance with GAAP consistently applied, and that the examination  
11 of such accountants in connection with such financial statements has been made in  
12 accordance with generally accepted auditing standards, and accordingly, included such  
13 tests of the accounting records and such other auditing procedures as were considered  
14 necessary in the circumstances. If financial statements are prepared in accordance  
15 with principles other than GAAP, Developer shall concurrently deliver a letter from the  
16 certified public accountant of the applicable entity discussing the areas of the financial  
17 statements that would be affected by a conversion to GAAP; and

18 (c) Upon request of ADOT for particular fiscal quarters, copies of all  
19 other financial statements and information reported by the Guarantor to its shareholders  
20 generally and of all reports filed by the Guarantor with the Securities Exchange  
21 Commission under Sections 13, 14 or 15(d) of the Exchange Act, to be provided to  
22 ADOT as soon as practicable after furnishing such information to the Guarantor's  
23 shareholders or filing such reports with the Securities and Exchange Commission, as  
24 applicable.

25 **23.2.3** Developer shall cooperate and provide, and shall cause the  
26 Subcontractors to cooperate and provide, such information as determined necessary or  
27 desirable by ADOT in connection with any Project financing. Without limiting the  
28 generality of the foregoing, Developer shall provide such information deemed necessary  
29 or desirable by ADOT for inclusion in ADOT's securities disclosure documents and in  
30 order to comply with Securities and Exchange Commission Rule 15c2-12 regarding  
31 certain periodic information and notice of material events. Developer shall provide  
32 customary representations and warranties to ADOT and the capital markets as to the  
33 correctness, completeness and accuracy of any information furnished.

34 **23.2.4** Developer shall cooperate and provide, and shall cause the  
35 Subcontractors to cooperate and provide, such information as is necessary or  
36 requested by ADOT to assist or facilitate the submission by ADOT of any  
37 documentation, reports or analysis required by the State, FHWA or any other  
38 Governmental Entity with jurisdiction over the Project.

39 **23.2.5** All reports and information delivered by Developer under  
40 Sections 23.2.3 and 23.2.4 shall also be delivered electronically, to the extent electronic  
41 files exist, and be suitable for posting on the web.

## 42 **23.3 Subcontract Pricing Documents**

1 Developer shall require each Key Subcontractor to submit to Developer a copy of  
2 all documentary information used in determining its Subcontract price (including the  
3 price for Subcontract work included in any Supplemental Agreement), immediately prior  
4 to executing the Subcontract and each Subcontract change order, to be held in the  
5 same manner as the DPDs and which shall be accessible by ADOT, Developer and  
6 Dispute resolvers, on terms substantially similar to those contained herein. Each Key  
7 Subcontract shall include a representation and warranty from the Subcontractor, for the  
8 benefit of Developer and ADOT, stating that its submission in the DPDs, constitutes all  
9 the documentary information used in establishing its Subcontract price, and agreeing to  
10 provide a sworn certification in favor of Developer and ADOT together with each  
11 supplemental set of DPDs, stating that the information contained therein is complete,  
12 accurate and current. Each Subcontract that is not subject to the foregoing requirement  
13 shall include a provision requiring the Subcontractor to preserve all documentary  
14 information used in establishing its Subcontract price and to provide such  
15 documentation to Developer or ADOT in connection with any Claim made by such  
16 Subcontractor.

#### 17 **23.4 Maintenance and Inspection of Records**

18 **23.4.1** Except for DPDs (which shall be maintained as set forth in  
19 Section 23.1), Developer shall keep and maintain in a secure, fire proof location in  
20 Maricopa County, Arizona, or in another location ADOT approves in its sole discretion,  
21 accurate and complete Books and Records, including copies of all original documents  
22 delivered to ADOT. Developer shall keep and maintain such Books and Records in  
23 accordance with applicable provisions of the Contract Documents, and of the Project  
24 Management Plan, and in accordance with Good Industry Practice. Developer shall  
25 notify ADOT where the Books and Records are kept.

26 **23.4.2** Developer shall make all its Books and Records available for  
27 inspection by ADOT and ADOT's Representatives at Developer's principal offices in  
28 Arizona, or at ADOT's project office for DPDs, at all times during normal business  
29 hours, without charge. Developer shall provide copies thereof to ADOT, or make  
30 available for review to ADOT, as and when expressly required by the Contract  
31 Documents, or, for those not expressly required, upon request and at no expense to  
32 ADOT. ADOT may conduct any such inspection upon 48 hours' prior notice, or  
33 unannounced and without prior notice where there is good faith suspicion of fraud. The  
34 right of inspection includes the right to make extracts and take notes. The provisions of  
35 this Section 23.4.2 are subject to the following:

36 (a) They shall remain in full force and effect regardless of whether a  
37 Claim or Dispute exists or whether either Party or both of the Parties have invoked the  
38 Dispute Resolution Procedures; and

39 (b) Developer reserves the right to assert exemptions from  
40 disclosure for information that would be exempt under applicable State Law from  
41 discovery or introduction into evidence in legal actions, including information protected

1 by the attorney-client or other legal privilege based upon an opinion of counsel  
2 reasonably satisfactory to ADOT.

3 **23.4.3** Developer shall retain Books and Records for a minimum of five years  
4 after the Final Acceptance date or after the date generated, whichever is later; provided,  
5 however, that if the Contract Documents specify any different time period for retention of  
6 particular records, such time period shall control. Any provision of the Contract  
7 Documents establishing a stated period for retention of Books and Records means the  
8 period of time, as stated, after the date the Book or Record is generated, unless  
9 specifically provided otherwise.

10 **23.4.4** Notwithstanding the foregoing, Developer shall retain and make  
11 available all Books and Records which relate to Claims and Disputes being processed  
12 or the subject of the Dispute Resolution Procedures for a period of not less than one  
13 year after the date the Dispute is finally resolved (or for any longer period required  
14 under any other applicable provision of the Contract Documents). Throughout the  
15 course of any Work that is in Dispute and the subject of the Dispute Resolution  
16 Procedures, Developer shall keep separate and complete Books and Records that  
17 provide a clear distinction between the incurred direct costs of disputed Work and that  
18 of undisputed Work, and shall permit ADOT access to these Books and Records on an  
19 Open Book Basis.

20 **23.4.5** Refer to Attachment 1 to Exhibit 4 for federal requirements applicable  
21 to maintenance and inspection of Books and Records, with which Developer shall  
22 comply.

## 23 **23.5 Audits**

24 **23.5.1** ADOT will have such rights to review and audit Developer, its  
25 Subcontractors and their respective Books and Records as and when ADOT deems  
26 necessary for purposes of verifying compliance with the Contract Documents and  
27 applicable Law. Without limiting the foregoing, ADOT will have the right to audit  
28 Developer's Project Management Plan and compliance therewith, including the right to  
29 inspect Work or activities and to verify the accuracy and adequacy of the Project  
30 Management Plan and its component parts, plans and other documentation. ADOT  
31 may conduct any such audit of Books and Records upon 48 hours' prior notice, or  
32 unannounced and without prior notice where there is good faith suspicion of fraud.

33 **23.5.2** All Claims or Disputes filed against ADOT will be subject to audit at  
34 any time following the filing of the Claim or Dispute. The audit may be performed by  
35 employees of ADOT or by an auditor under contract with ADOT. No notice is required  
36 before commencing any audit (i) within 60 days after Final Acceptance or (ii) within 60  
37 days after termination of this Agreement. Thereafter, ADOT will provide 20 days' notice  
38 to Developer, any Subcontractors or their respective agents before commencing an  
39 audit. Developer, Subcontractors or their agents shall provide and cause Developer-  
40 Related Entities to provide adequate facilities, acceptable to ADOT, for the audit during  
41 normal business hours. Developer shall cooperate and cause Developer-Related

1 Entities to cooperate with the auditors. At a minimum, the auditors shall have available  
2 to them the following documents:

- 3 (a) Daily time sheets and supervisor's daily reports;
- 4 (b) Union agreements;
- 5 (c) Insurance, welfare, and benefits records;
- 6 (d) Payroll registers;
- 7 (e) Earnings records;
- 8 (f) Payroll tax forms;
- 9 (g) Material invoices and requisitions;
- 10 (h) Material cost distribution work sheet;
- 11 (i) Equipment records (list of company equipment, rates, etc.);
- 12 (j) Subcontractors' (including Suppliers) invoices;
- 13 (k) Subcontractors' and agents' payment certificates;
- 14 (l) Canceled checks (payroll, Subcontractors and Suppliers);
- 15 (m) Job cost report;
- 16 (n) Job payroll ledger;
- 17 (o) General ledger;
- 18 (p) Cash disbursements journal;
- 19 (q) Project Schedules;
- 20 (r) All documents that relate to each and every Claim or Dispute,  
21 together with all documents that support the amount of damages as to each Claim or  
22 Dispute; and
- 23 (s) Work sheets used to prepare the Claim or Dispute establishing  
24 the cost components for items of the Claim or Dispute, including labor, benefits and  
25 insurance, materials, equipment, subcontractors, all documents that establish the time  
26 periods, individuals involved, the hours for the individuals, and the rates for the  
27 individuals.

28 **23.5.3** Failure of any Developer-Related Entity to maintain and retain  
29 sufficient records to allow the auditors to verify all or a portion of the Claim or Dispute, to

1 permit the auditor access to the Books and Records of any Developer-Related Entity, or  
2 to otherwise fully comply with the provisions of this Section 23.5 shall constitute a  
3 waiver of the Claim or Dispute and shall bar any recovery or relief thereunder.

4 **23.5.4** Any rights of the FHWA to review and audit Developer, its  
5 Subcontractors and their respective Books and Records are set forth in Exhibit 4.

6 **23.5.5** Developer represents and warrants the completeness and accuracy of  
7 all information it or its agents provides in connection with ADOT audits, and shall cause  
8 all Subcontractors other than ADOT and Governmental Entities acting as  
9 Subcontractors to warrant the completeness and accuracy of all information such  
10 Subcontractors or their agents provides in connection with ADOT audits.

11 **23.5.6** ADOT's rights of audit include the right to observe the business  
12 operations of Developer and its Subcontractors to confirm the accuracy of Books and  
13 Records.

14 **23.5.7** Developer's internal and third party quality and compliance auditing  
15 responsibilities shall be set forth in the Project Management Plan, consistent with the  
16 audit requirements referred to in Sections GP 110.04.1, GP 110.07.2, GP 110.08 and  
17 GP 110.09 of the Technical Provisions.

18 **23.5.8** Nothing in the Contract Documents shall in any way limit the  
19 constitutional and statutory powers, duties and rights of elected State officials, including  
20 the independent rights of the State Auditor General, in carrying out his or her legal  
21 authority. Developer understands and acknowledges that:

22 (a) The State Auditor General may conduct an audit or investigation  
23 of any Person receiving funds from the State directly under this Agreement or indirectly  
24 through a Subcontract;

25 (b) Acceptance of funds directly under this Agreement or indirectly  
26 through a Subcontract acts as acceptance of the authority of the State Auditor General,  
27 under the direction of the Joint Legislative Audit Committee, to conduct an audit or  
28 investigation in connection with those funds; and

29 (c) A Person that is the subject of an audit or investigation must  
30 provide the State Auditor General with access to any information the State Auditor  
31 General considers relevant to the investigation or audit.

32 **23.6 Arizona Public Records Law**

33 **23.6.1** Developer acknowledges and agrees that all records, documents,  
34 drawings, plans, specifications and other materials in ADOT's possession, including  
35 materials submitted by Developer, are subject to the provisions of the Arizona Public  
36 Records Law. To the extent that this Agreement involves the exchange or creation of  
37 "public information," as such term is defined by the Arizona Public Records Act, that  
38 ADOT collects, assembles, or maintains or has a right of access to, and is not otherwise

1 excepted from disclosure under the Arizona Public Records Act, Developer is required,  
2 at no additional charge to the State, to make any such information available in .pdf  
3 format, which is accessible by the public.

4 **23.6.2** If Developer believes information or materials submitted to ADOT  
5 constitute trade secrets, proprietary information or other information that is excepted  
6 from disclosure under the Arizona Public Records Act, Developer shall be solely  
7 responsible for specifically and conspicuously designating that information by placing  
8 “CONFIDENTIAL” in the center header of each such page affected, as it determines to  
9 be appropriate. Any specific proprietary information, trade secrets or confidential  
10 commercial and financial information shall be clearly identified as such, and shall be  
11 accompanied by a concise statement of reasons supporting the claim.

12 **23.6.3** If ADOT receives a request for public disclosure of materials marked  
13 “CONFIDENTIAL,” ADOT will use reasonable efforts to notify Developer of the request  
14 and give Developer an opportunity to assert, in writing and at its sole expense, a  
15 claimed exception under the Arizona Public Records Act or other applicable Law within  
16 the time period specified in the notice issued by ADOT and allowed under the Arizona  
17 Public Records Act. Under no circumstances, however, will ADOT be responsible or  
18 liable to Developer or any other Person for the disclosure of any such labeled materials,  
19 whether the disclosure is required by Law, or court order, or occurs through  
20 inadvertence, mistake or negligence on the part of ADOT or its officers, employees,  
21 contractors or consultants.

22 **23.6.4** In the event of any proceeding or litigation concerning the disclosure of  
23 any material submitted by Developer to ADOT, ADOT’s sole involvement will be as a  
24 stakeholder retaining the material until otherwise ordered by a court or such other  
25 authority having jurisdiction with respect thereto, and Developer shall be fully  
26 responsible for otherwise prosecuting or defending any action concerning the materials  
27 at its sole cost and risk; provided, however, that ADOT reserves the right, in its  
28 discretion, to intervene or participate in the litigation in such manner as it deems  
29 necessary or desirable. Except in the case of ADOT’s voluntary intervention or  
30 participation in litigation, Developer shall pay and reimburse ADOT within 30 days after  
31 receipt of demand and reasonable supporting documentation for all costs and fees,  
32 including attorneys’ fees and costs, ADOT incurs in connection with any litigation,  
33 proceeding or request for disclosure.

34 **23.6.5** Nothing contained in this Section 23.6 shall modify or amend  
35 requirements and obligations imposed on ADOT by the Arizona Public Records Act or  
36 other applicable Law, and the provisions of the Arizona Public Records Act or other  
37 Laws shall control in the event of a conflict between the procedures described above  
38 and the applicable Law. Developer is advised to contact legal counsel concerning such  
39 Law and its application to Developer.

40 **23.7 Intellectual Property**

41 **23.7.1 Proprietary Intellectual Property**

1                   **23.7.1.1** Developer acknowledges and agrees that all Proprietary  
2 Intellectual Property, in any medium, is specially ordered or commissioned by ADOT,  
3 including works made for hire in accordance with Section 101 of the Copyright Act of the  
4 United States. Developer hereby assigns to ADOT all rights, title and interest in and to  
5 the Proprietary Intellectual Property including any and all software, work product and  
6 designs.

7                   **23.7.1.2** As a condition of Final Acceptance, Developer shall deliver  
8 to ADOT all work product, documents, results and related materials created in the  
9 development of Proprietary Intellectual Property during the D&C Period as well as an  
10 indexed collection of such materials. Without limiting the generality of the foregoing,  
11 delivery of such materials shall include Design Documents and Construction  
12 Documents.

13                   **23.7.1.3** Developer shall deliver to ADOT all work product,  
14 documents, results and related materials created in the development of Proprietary  
15 Intellectual Property during the Maintenance Period promptly after creation, as well as  
16 an indexed collection of such materials.

17                   **23.7.1.4** ADOT hereby grants to Developer a limited license to use,  
18 exploit, manufacture, distribute, copy, adapt and display the Proprietary Intellectual  
19 Property solely in connection with and limited to (a) incorporation into the Project  
20 Intellectual Property, (b) the Work for this Project, and (c) all other services performed  
21 by or on behalf of ADOT to complete the Work, or comply with Developer's obligations  
22 under this Agreement. No Intellectual Property rights of ADOT are being licensed to  
23 Developer except as otherwise expressly provided in this Section.

## 24                   **23.7.2     Developer Intellectual Property**

25                   **23.7.2.1** Subject to Section 23.7.5, Developer hereby grants to ADOT  
26 an irrevocable, perpetual, fully paid-up right and license to use, exploit, manufacture,  
27 distribute, copy, adapt and display the Developer Intellectual Property, including any  
28 enhancements thereof.

29                   **23.7.2.2** Developer shall identify and disclose all Developer  
30 Intellectual Property contained or included in the Project Intellectual Property, including  
31 (when reasonably available) full and specific information detailing Intellectual Property  
32 claimed, date of authorship, creation or invention, date of application(s), application  
33 number(s) and registering entit(ies), date of registration(s), registration number(s) and  
34 registering entit(ies), if any, and owner including person or entity name and address.

35                   **23.7.2.3** Developer shall deliver to ADOT all Developer Intellectual  
36 Property contained or included in the Project Intellectual Property promptly upon  
37 request.

## 38                   **23.7.3     Third Party Intellectual Property**

1                   **23.7.3.1** Whenever using any design, device, material, software or  
2 process protectable or protected as Third Party Intellectual Property, Developer shall  
3 obtain the right and license for such use. Without limiting the foregoing, and subject to  
4 Section 23.7.5, Developer shall secure nonexclusive, transferable, irrevocable,  
5 unconditional, royalty-free licenses in the name of ADOT to use, reproduce, modify,  
6 adapt and disclose Third Party Intellectual Property and shall pay any and all royalties  
7 and license fees required to be paid for any Intellectual Property incorporated into the  
8 Project Intellectual Property. All Third Party Intellectual Property licenses are subject to  
9 ADOT’s review and approval. The foregoing requirement shall not apply, however, to  
10 mass-marketed software products (sometimes referred to as “shrink wrap software”)  
11 owned by such a Person where such a license cannot be extended to ADOT using  
12 commercially reasonable efforts.

13                   **23.7.3.2** Developer shall identify and disclose all Third Party  
14 Intellectual Property contained or included in the Project Intellectual Property including  
15 (when reasonably available) full and specific information detailing Intellectual Property  
16 claimed, date of authorship, creation or invention, date of application(s), application  
17 number(s) and registering entit(ies), date of registration(s), registration number(s) and  
18 registering entit(ies), if any, and owner including person or entity name and address.

19                   **23.7.4     Inclusion in Price**

20                   Developer acknowledges and agrees that the Price includes all royalties and  
21 costs arising from Project Intellectual Property or in any way involved in the Work.

22                   **23.7.5     Licensing Limitations**

23                   Licenses granted under Sections 23.7.2 and 23.7.3 shall be limited as follows:

24                   **23.7.5.1** The right to transfer the license is limited to any  
25 Governmental Entity that succeeds to the power and authority of ADOT generally or  
26 with respect to the Project, and any Governmental Entity having power and authority  
27 over any city or county road where the Proprietary Intellectual Property of Developer is  
28 installed, deployed or operated.

29                   **23.7.5.2** The right to sublicense is limited to State, regional and local  
30 Governmental Entities that own or operate a State Highway or other road (tolled or not  
31 tolled) where the Proprietary Intellectual Property of Developer is installed, deployed or  
32 operated, and to the concessionaires, developers, contractors, subcontractors,  
33 employees, attorneys, consultants and agents that are retained by or on behalf of ADOT  
34 or any such State, regional or local Governmental Entity in connection with the Project,  
35 another State Highway, or other road (tolled or untolled) where the Proprietary  
36 Intellectual Property of Developer is installed, deployed or operated.

37                   **23.7.5.3** ADOT will:

38                                   (a) Not disclose any Developer Intellectual Property or  
39 Third Party Intellectual Property to any Person other than authorized transferees and

1 sublicensees who agree to be bound by any confidentiality obligations of ADOT relating  
2 thereto;

3 (b) Enter into a commercially reasonable confidentiality  
4 agreement if requested by Developer with respect to the licensed Developer Intellectual  
5 Property or Third Party Intellectual Property; and

6 (c) Include, or where applicable require such State or  
7 regional Governmental Entity to include, in the contract with the sublicensee its  
8 covenant to employ sound business practices no less diligent than those used for its  
9 own confidential information, and no less diligent than required by commercially  
10 reasonable standards of confidentiality, to protect all Developer Intellectual Property or  
11 Third Party Intellectual Property and other materials provided under the sublicense  
12 against disclosure to third parties not in receipt of a sublicense, and to use the  
13 sublicense only for the permitted purposes.

14 **23.7.6 Limitation on ADOT Liability**

15 Notwithstanding any contrary provision of this Agreement, in no event shall  
16 ADOT or any of its directors, officers, employees, consultants or agents be liable to  
17 Developer, any Affiliate or any Subcontractor for any damages, including loss of profit,  
18 arising out of breach of the duty of confidentiality set forth in Section 23.7.5 if such  
19 breach is not the result of gross negligence or intentional misconduct. Developer  
20 hereby irrevocably waives all claims to any such damages.  
21

1 **ARTICLE 24.**

2 **EARLY TERMINATION OF AGREEMENT; TRANSITION AT END OF TERM**

3 **24.1 Termination for Convenience**

4 **24.1.1** ADOT may, at any time, terminate this Agreement and the  
5 performance of the Work by Developer, in whole or in part, if ADOT determines, in its  
6 discretion, that a termination is in ADOT’s best interest (“Termination for Convenience”).  
7 ADOT will terminate by delivering to Developer a Notice of Termination for Convenience  
8 or Notice of Partial Termination for Convenience specifying the extent of termination  
9 and its effective date. Termination (or partial termination) of this Agreement under this  
10 Section 24 shall not relieve Developer or any Surety or Guarantor of its obligation for  
11 any claims arising prior to termination.

12 **24.1.2** If ADOT terminates this Agreement on grounds or in circumstances  
13 beyond ADOT’s termination rights specifically set forth in this Agreement, such  
14 termination shall be deemed a Termination for Convenience for the purpose of  
15 determining the amount of Termination Compensation due (but not for any other  
16 purpose).

17 **24.2 Termination for Convenience Compensation Amount**

18 **24.2.1** If ADOT exercises its right of Termination for Convenience, it shall owe  
19 Termination Compensation to Developer in an amount equal to the sum of the following:

20 (a) Payments due but not yet paid in accordance with Article 13 for  
21 all D&C Work and Maintenance Services performed up to the date of termination,  
22 including work in progress since the last Draw Request or Maintenance Draw Request,  
23 as applicable, but without regard to the Maximum Allowable Cumulative Draw; plus

24 (b) Developer’s actual reasonable out-of-pocket cost, without profit,  
25 and including equipment costs only to the extent permitted by Section 1.2.3 of  
26 Exhibit 14 for demobilization, and work done to secure the applicable portion of the  
27 Project for termination, including reasonable overhead; plus

28 (c) Solely with respect to the Maintenance Services, an amount  
29 equal to 6% of the sum of the unescalated Annual Routine Maintenance Payments for  
30 the next five years after the year in which such termination occurs; if termination occurs  
31 prior to the start of the Maintenance Period, then such amount shall equal 6% of the  
32 sum of the unescalated Annual Routine Maintenance Payments for the first five years of  
33 the Maintenance Period; plus

34 (d) The cost of settling and paying claims arising out of the  
35 termination of Work under Subcontracts and Utility Agreements, exclusive of the  
36 amounts paid or payable on account of supplies or materials delivered or services  
37 furnished by the Subcontractor prior to the effective date of the Notice of Termination for  
38 Convenience or Notice of Partial Termination for Convenience of Work under this

1 Agreement, which amounts shall be included in the cost on account of which payment is  
2 made under clause (c) above; plus

3 (e) The reasonable out-of-pocket cost incurred (including  
4 reasonable overhead) to preserve and protect property; plus

5 (f) The reasonable out-of-pocket cost incurred to prepare and carry  
6 out the transition plan under Section 24.9.1; plus

7 (g) Any other reasonable out-of-pocket cost (including overhead)  
8 incurred incidental to termination of Work under this Agreement, including the  
9 reasonable cost to Developer of handling material returned to the Supplier, delivered to  
10 ADOT or otherwise disposed of as directed by ADOT, and including a reasonable  
11 allowance for Developer's administrative costs in determining the amount payable due  
12 to termination of this Agreement, but excluding any costs and expenses incurred in  
13 connection with any Disputes; minus

14 (h) The cost of property, materials, supplies, equipment and other  
15 things to be retained by Developer, the agreed price for, or proceeds from, the sale of  
16 such items not otherwise delivered to ADOT, and other appropriate deductions allowed  
17 under this Agreement, including those deductions that would be permitted in connection  
18 with the Final D&C Payment and each Monthly Disbursement of the Maintenance Price;  
19 minus

20 (i) All unliquidated advance or other payments made to or on  
21 behalf of Developer applicable to the terminated portion of the Work or Agreement;  
22 minus

23 (j) The cost of repairing any Nonconforming Work (or, in ADOT's  
24 discretion, the amount of the reimbursement to which ADOT is entitled under  
25 Section 6.7); minus

26 (k) The amount of any other claim which ADOT may have against  
27 any Developer-Related Entity in connection with this Agreement; minus

28 (l) Any other amounts due or payable by Developer to ADOT  
29 pursuant to this Agreement; minus

30 (m) Amounts that ADOT reasonably deems advisable to retain to  
31 cover any existing or threatened claims and stop notices relating to the Project,  
32 including claims by Utility Companies, or to cover Warranty work, provided that ADOT  
33 will promptly pay to Developer any such retained amounts remaining after the need for  
34 the retention ends.

35 **24.2.2** Developer acknowledges and agrees that it shall not be entitled to any  
36 compensation in excess of the value of the Work performed (determined as provided in  
37 Section 24.2.1) plus its settlement costs, and that, except to the extent provided in  
38 Section 24.2.1(a) and (c), items such as lost or anticipated profits, unabsorbed

1 overhead and opportunity costs shall not be recoverable by it upon termination of this  
2 Agreement. The total amount to be paid to Developer for a termination with respect to  
3 the Maintenance Services, exclusive of the payment described in Section 24.2.1(d) and  
4 the costs described in Sections 24.2.1(d), (e), (f) and (g), may not exceed the sum of  
5 the total Annual Routine Maintenance Payment for the year in which the termination  
6 occurs less: (a) the amount of said payment previously made; and (b) the portions of the  
7 Maintenance Price related to Maintenance Services not terminated, if any.  
8 Furthermore, in the event that any refund is payable with respect to insurance or bond  
9 premiums, letter of credit fees, deposits or other items which were previously passed  
10 through to ADOT by Developer, such refund shall be paid directly to ADOT or otherwise  
11 credited to ADOT. Except for normal spoilage, and except to the extent that ADOT will  
12 have otherwise expressly assumed the risk of loss, there will be excluded from the  
13 amounts payable to Developer under Section 24.2.1, the fair value, as determined by  
14 ADOT, of equipment, machinery, materials, supplies and property which is destroyed,  
15 lost, stolen, or damaged so as to become undeliverable to ADOT, or sold pursuant to  
16 Section 24.9.11. Information contained in the DPDs may be a factor in determining the  
17 value of the Work terminated.

18 **24.2.3** Upon determination of the amount of the termination payment, the  
19 Parties shall amend this Agreement to reflect the agreed termination payment, ADOT  
20 will pay Developer the amount due, and, in the case of a Partial Termination for  
21 Convenience, the Price shall be reduced to reflect the reduced scope of Work.

22 **24.2.4** If a termination hereunder is partial, Developer may file a proposal with  
23 ADOT for an equitable adjustment of the Price for the continued portion of this  
24 Agreement. Any proposal by Developer for an equitable adjustment under this  
25 Section 24.2.3 shall be requested within 90 days from the effective date of the partial  
26 termination unless extended in writing by ADOT. The amount of any such adjustment  
27 as may be agreed upon shall be set forth in a Supplemental Agreement.

## 28 **24.3 Payment**

29 ADOT may from time to time, under such terms and conditions as it may prescribe and  
30 in its discretion, make partial payments for costs incurred by Developer in connection  
31 with the terminated portion of this Agreement, whenever in the opinion of ADOT the  
32 aggregate of such payments shall be within the amount to which Developer will be  
33 entitled hereunder. If the total of such payments is in excess of the amount finally  
34 determined to be due under this Article 24, such excess shall be payable by Developer  
35 to ADOT upon demand.

## 36 **24.4 Subcontracts**

37 **24.4.1** Provisions shall be included in each Subcontract (at all tiers) regarding  
38 terminations for convenience, allowing such termination rights and obligations to be  
39 passed through to the Subcontractors and establishing terms and conditions relating  
40 thereto, including procedures for determining the amount payable to the Subcontractor  
41 upon a termination, consistent with this Article 24.

1           **24.4.2** Each Subcontract shall provide that, in the event of a termination for  
2 convenience by ADOT, the Subcontractor will not be entitled to any anticipatory or  
3 unearned profit on Work terminated or partly terminated, except as provided in  
4 Section 24.2.1(c), or to any payment which constitutes consequential damages on  
5 account of the termination or partial termination.

## 6   **24.5 Termination Based on Delayed Issuance of NTPs**

7           **24.5.1** If NTP 1 has not been issued within 120 days after the Effective Date  
8 and this delay is not caused in whole or in part by an act, omission, negligence,  
9 intentional misconduct, or breach of applicable Law, contract or Governmental Approval  
10 of any Developer-Related Entity, Developer, as its sole remedy, shall have the right to  
11 terminate this Agreement, which right shall be exercised by delivery of notice of  
12 termination to ADOT. In such event, ADOT's sole liability to Developer is to pay  
13 Developer (a) the same payment for work product as provided to unsuccessful  
14 Proposers pursuant to Section 6.3 of the ITP, provided, however, that all other  
15 conditions for such payment are met, plus (b) reasonable out-of-pocket costs (including  
16 overhead) incurred in performing any of the activities described or required in  
17 Sections 5.11, 5.12 and 6.1 of the ITP.

18           **24.5.2** If NTP 2 has not been issued within 120 days after satisfaction of all  
19 conditions precedent to issuance of NTP 2, Developer, as its sole remedy, may  
20 conditionally elect to terminate this Agreement by providing ADOT with notice of such  
21 conditional election. If Developer delivers a notice of its conditional election to  
22 terminate, ADOT will have the choice of either accepting such notice of termination or  
23 continuing this Agreement in effect by delivering to Developer notice of ADOT's choice  
24 not later than 30 days after receipt of Developer's notice. If ADOT does not deliver  
25 notice of its choice within such 30-day period, then it will be deemed to have accepted  
26 Developer's election to terminate the Agreement. In such event, the termination shall  
27 be deemed a termination for convenience and handled in accordance with this  
28 Section 24. If ADOT delivers timely notice choosing to continue this Agreement in  
29 effect, then the Price adjustment provisions described in Section 14.4.11 shall be  
30 extended and continue in effect for the duration of the delay in issuance of NTP 2, or  
31 until earlier termination of this Agreement.

## 32   **24.6 Termination by Court Ruling**

33           **24.6.1** This Agreement and the other Contract Documents are subject to  
34 Termination by Court Ruling.

35           **24.6.2** Termination by Court Ruling becomes effective, and automatically  
36 terminates this Agreement, upon issuance of the final, non-appealable court order by a  
37 court of competent jurisdiction; provided, however, that where Section 25.15 applies,  
38 Termination by Court Ruling becomes effective only after the Parties determine they are  
39 unable to negotiate revisions to the Contract Documents to effect their original intent.

1           **24.6.3**     If both Parties agree in writing, they may elect to partially terminate this  
2 Agreement due to such court order and to continue the remainder of this Agreement in  
3 effect, to the extent it is possible to do so without violating the court order.

4           **24.6.4**     If Termination by Court Ruling occurs, then ADOT will owe termination  
5 compensation to Developer equal to that owing upon a Termination for Convenience or  
6 Partial Termination for Convenience, as applicable, except the amount set forth in  
7 Section 24.2.1(c).

## 8   **24.7 Termination Based on Statutory Grounds**

9           **24.7.1**     ADOT may terminate this Agreement, without penalty or further  
10 obligation, within three years after the Effective Date, if any person significantly involved  
11 in initiating, negotiating, securing, drafting or creating this Agreement for ADOT is or  
12 becomes, at any time during such three-year period, an employee or agent of  
13 Developer. See Arizona Revised Statutes, Title 38, Chapter 3, Article 8, and, in  
14 particular, Section 38-511.

15           **24.7.2**     ADOT may terminate this Agreement, without obligation or penalty, if  
16 Developer or any member of the Developer's team violates Arizona Revised Statutes,  
17 Section 41-2517.C, regarding unlawful offering of employment to a procurement officer  
18 or procurement employee.

## 19   **24.8 Responsibilities after Notice of Termination**

20           **24.8.1**     Within three days after either Party delivers to the other Party a notice  
21 of termination of this Agreement, Developer and ADOT shall meet and confer for the  
22 purpose of developing an interim transition plan for the orderly transition of the  
23 terminated Work, demobilization and transfer of the Project and its maintenance to  
24 ADOT. The Parties shall use diligent efforts to complete preparation of the interim  
25 transition plan within 15 days after the date Developer receives such notice of  
26 termination. The Parties shall use diligent efforts to complete a final transition plan  
27 within 30 days after such date. The transition plan shall be in form and substance  
28 acceptable to ADOT in its good faith discretion and shall include and be consistent with  
29 the provisions and procedures set forth in Section 24.8.2.

30           **24.8.2**     After either Party delivers to the other Party a notice of termination of  
31 this Agreement, and except as otherwise directed by ADOT, Developer shall timely  
32 comply with the following obligations independent of, and without regard to, the timing  
33 for preparing or implementing the transition plan or for determining, adjusting, settling  
34 and paying any amounts due Developer under this Agreement:

35                   **24.8.2.1**   Stop the Work as specified in the notice;

36                   **24.8.2.2**   Notify all affected Subcontractors and Suppliers that this  
37 Agreement is being terminated and that their Subcontracts (including orders for  
38 materials, services or facilities) are not to be further performed unless otherwise  
39 authorized in writing by ADOT;

1                   **24.8.2.3** Enter into no further Subcontracts (including orders for  
2 materials, services or facilities), except as necessary to complete the continued portion  
3 of the Work;

4                   **24.8.2.4** Unless instructed otherwise by ADOT, terminate all  
5 Subcontracts and Utility Agreements to the extent they relate to the Work terminated;

6                   **24.8.2.5** To the extent directed by ADOT, execute and deliver to  
7 ADOT written assignments, in form and substance acceptable to ADOT, acting  
8 reasonably, of all of Developer's right, title, and interest in and to: (a) Subcontracts and  
9 Utility Agreements that relate to the terminated Work, provided ADOT assumes in  
10 writing all of Developer's obligations thereunder that arise after the effective date of the  
11 termination; and (b) all assignable warranties, claims and causes of action held by  
12 Developer against Subcontractors and other third parties in connection with the  
13 terminated Work, to the extent such Work is adversely affected by any Subcontractor or  
14 other third party breach of warranty, contract or other legal obligation; provided,  
15 however, that Developer may retain claims against Subcontractors for which ADOT has  
16 been fully compensated;

17                   **24.8.2.6** Subject to the prior approval of ADOT, settle all outstanding  
18 liabilities and claims arising from termination of Subcontracts and Utility Agreements  
19 that are required to be terminated hereunder;

20                   **24.8.2.7** Within 30 days after notice of termination is delivered,  
21 provide ADOT with a true and complete list of all materials, goods, machinery,  
22 equipment, parts, supplies and other property in inventory or storage (whether held by  
23 Developer or any person or entity on behalf of or for the account of Developer) for use  
24 in or respecting the terminated Work, or on order or previously completed but not yet  
25 delivered from Suppliers for use in or respecting such Work. In addition, if requested by  
26 ADOT, Developer shall promptly transfer title and deliver to ADOT or ADOT's  
27 Authorized Representative, through bills of sale or other documents of title, as directed  
28 by ADOT, all such materials, goods, machinery, equipment, parts, supplies and other  
29 property, provided ADOT assumes in writing all of Developer's obligations under any  
30 contracts relating to the foregoing that arise after the effective date of termination;

31                   **24.8.2.8** On or about the effective date of termination, execute and  
32 deliver to ADOT the following, together with an executed bill of sale or other written  
33 instrument, in form and substance acceptable to ADOT, acting reasonably, assigning  
34 and transferring to ADOT all of Developer's right, title and interest in and to the  
35 following:

36                                   (a) All completed or partially completed drawings  
37 (including plans, elevations, sections, details and diagrams), specifications, designs,  
38 design documents, Record Drawings, surveys, and other documents and information  
39 pertaining to the design or construction of the terminated Work;

1 (b) All samples, borings, boring logs, geotechnical data  
2 and similar data and information relating to the terminated Work;

3 (c) All books, records, reports, test reports, studies and  
4 other documents of a similar nature relating to the terminated Work; and

5 (d) All other work product used or owned by Developer or  
6 any Affiliate relating to the terminated Work;

7 **24.8.2.9** In the case of a partial termination, complete performance in  
8 accordance with the Contract Documents of all Work not terminated, except to the  
9 extent performance of the remaining Work is rendered impossible due to the scope of  
10 the partial termination;

11 **24.8.2.10** For the period of time specified by ADOT in the notice of  
12 termination or until ADOT takes over the Work, take all action that may be necessary, or  
13 that ADOT may direct, for the safety, protection and preservation of:

14 (a) The public, including public and private vehicular  
15 movement;

16 (b) The Work; and

17 (c) Equipment, machinery, materials and property related  
18 to the Project that is in the possession of Developer and in which ADOT has or may  
19 acquire an interest.

20 **24.8.2.11** As authorized by ADOT in writing, use its best efforts to sell,  
21 at reasonable prices, any property of the types referred to in Section 24.8.2.10;  
22 provided, however, that Developer: (a) is not required to extend credit to any purchaser;  
23 and (b) may acquire the property under the conditions prescribed and at prices  
24 approved by ADOT. The proceeds of any transfer or disposition will be applied to  
25 reduce any payments to be made by ADOT under the Contract Documents or paid in  
26 any other manner directed by ADOT;

27 **24.8.2.12** Immediately safely demobilize and secure construction,  
28 staging, lay down and storage areas for the Project and Utility Adjustments included in  
29 the Work in a manner satisfactory to ADOT, and remove all debris and waste materials,  
30 except as otherwise approved by ADOT in writing;

31 **24.8.2.13** Assist ADOT in such manner as ADOT may require prior to  
32 and for a reasonable period following the effective date of termination to ensure the  
33 orderly transition of the terminated Work and its management to ADOT, and shall, if  
34 appropriate and if requested by ADOT, take all steps as may be necessary to enforce  
35 the provisions of Subcontracts pertaining to the surrender of the terminated Work;

36 **24.8.2.14** Deliver to ADOT all Books and Records and the then-current  
37 Electronic Document Management System, except for information in Books and

1 Records exempt under applicable State Law from discovery or introduction into  
2 evidence in legal actions, including information protected by the attorney-client or other  
3 legal privilege based upon an opinion of counsel reasonably satisfactory to ADOT;

4 **24.8.2.15** Carry out such other directions as ADOT may give for the  
5 termination of the Work; and

6 **24.8.2.16** Take such other actions as are necessary or appropriate to  
7 mitigate further cost.

8 **24.9 No Consequential Damages**

9 Except as provided in Section 24.2.1(c), under no circumstances shall Developer be  
10 entitled to anticipatory or unearned profits or consequential or other damages as a  
11 result of any termination under this Article 24. The payment to Developer determined in  
12 accordance with this Article 24 constitutes Developer's exclusive remedy for a  
13 termination hereunder.

14 **24.10 No Waiver; Release**

15 **24.10.1** Notwithstanding anything contained in this Agreement to the contrary,  
16 a termination under this Article 24 shall not waive any right or claim to damages which  
17 ADOT may have and ADOT may pursue any cause of action which it may have at Law,  
18 in equity or under the Contract Documents.

19 **24.10.2** Subject to Section 24.11, ADOT's payment to Developer of the  
20 amounts required under this Article 24 shall constitute full and final satisfaction of, and  
21 upon payment ADOT will be forever released and discharged from, any and all Claims,  
22 causes of action, suits, demands and Losses, known or unknown, suspected or  
23 unsuspected, that Developer may have against ADOT arising out of or relating to the  
24 terminated Work. Upon such payment, Developer shall execute and deliver to ADOT all  
25 such releases and discharges as ADOT may reasonably require to confirm the  
26 foregoing, but no such release and discharge shall be necessary to give effect to the  
27 foregoing satisfaction and release.

28 **24.11 Dispute Resolution**

29 The failure of the Parties to agree on amounts due under this Article 24 shall be a  
30 Dispute to be resolved in accordance with Article 22.

31 **24.12 Allowability of Costs**

32 All costs claimed by Developer under this Article 24 must be allowable, allocable and  
33 reasonable in accordance with the cost principles and procedures of 48 CFR Part 31.

34 **24.13 Transition upon Maturity of Maintenance Term**

1           **24.13.1** ADOT and Developer shall meet and confer between 18 and six  
2 months before the maturity of the Maintenance Term for the purpose of developing a  
3 Handback transition plan for the orderly demobilization of Developer and its  
4 Subcontractors and transfer of Project maintenance from Developer to ADOT at the  
5 maturity of the Maintenance Term. The Parties shall use diligent efforts to complete  
6 preparation of the Handback transition plan not later than six months prior to the  
7 maturity of the Maintenance Term.

8           **24.13.2** Based on initial consultation, Developer shall prepare a draft of the  
9 Handback transition plan. ADOT will review and provide comments on the draft  
10 Handback transition plan within 30 days after receipt. Within ten days after ADOT  
11 delivers its comments, the Parties will meet to resolve all comments. Developer shall  
12 resolve all comments to ADOT's satisfaction and submit the final Handback transition  
13 plan for approval no later than 30 days after the comment resolution meeting.

14           **24.13.3** The Handback transition plan shall be in form and substance  
15 acceptable to ADOT in its good faith discretion, and shall include and be consistent with  
16 the provisions and procedures set forth in (a) Sections 24.8.2.7, 24.8.2.8, 24.8.2.12,  
17 24.8.2.13, 24.8.2.14 and 24.8.2.16, and (b) Section 501.2.5 of the Technical Provisions.

18           **24.13.4** The Parties shall carry out the provisions and procedures in the  
19 Handback transition plan in a timely manner in order to effectuate a smooth and  
20 uninterrupted transition of Project maintenance to ADOT at the maturity of the  
21 Maintenance Term.  
22

**ARTICLE 25.**  
**MISCELLANEOUS PROVISIONS**

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**25.1 Amendments**

The Contract Documents may be amended only by a written instrument duly executed by the Parties or their respective successors or assigns, except to the extent expressly provided otherwise in this Agreement.

**25.2 Waiver**

**25.2.1** No waiver of any term, covenant or condition of the Contract Documents shall be valid unless in writing and signed by the obligee Party.

**25.2.2** The exercise by a Party of any right or remedy provided under the Contract Documents shall not waive or preclude any other or further exercise thereof or the exercise of any other right or remedy. No waiver by any Party of any right or remedy under the Contract Documents shall be deemed to be a waiver of any other or subsequent right or remedy under the Contract Documents. The consent by one Party to any act by the other Party requiring such consent shall not be deemed to render unnecessary the obtaining of consent to any subsequent act for which consent is required, regardless of whether similar to the act for which consent is given.

**25.2.3** Except as provided otherwise in the Contract Documents, no act, delay or omission done, suffered or permitted by one Party or its agents shall be deemed to waive, exhaust or impair any right, remedy or power of such Party hereunder, or to relieve the other Party from the full performance of its obligations under the Contract Documents.

**25.2.4** Either Party's waiver of any breach or failure to enforce any of the terms, covenants, conditions or other provisions of the Contract Documents at any time shall not in any way limit or waive that Party's right thereafter to enforce or compel strict compliance with every term, covenant, condition or other provision, any course of dealing or custom of the trade notwithstanding. Furthermore, if the Parties make and implement any interpretation of the Contract Documents without documenting such interpretation by an instrument signed by both Parties, such interpretation and implementation thereof will not be binding in the event of any future Claims or Disputes.

**25.3 Independent Contractor**

**25.3.1** Developer is an independent contractor, and nothing contained in the Contract Documents shall be construed as constituting any relationship with ADOT other than that of Project developer and independent contractor.

**25.3.2** Nothing in the Contract Documents is intended or shall be construed to create any partnership, joint venture or similar relationship between ADOT and Developer; and in no event shall either Party take a position in any tax return or other writing of any kind that a partnership, joint venture or similar relationship exists. While

1 the term “public-private partnership” may be used on occasion to refer to contractual  
2 relationships of the type hereby created, the Parties do not thereby express any  
3 intention to form or hold themselves out as a de jure or de facto partnership, joint  
4 venture or similar relationship, to share net profits or net losses, or to give ADOT control  
5 or joint control over Developer’s financial decisions or discretionary actions concerning  
6 the Project and the Work.

7 **25.3.3** In no event shall the relationship between ADOT and Developer be  
8 construed as creating any relationship whatsoever between ADOT and Developer’s  
9 employees. Neither Developer nor any of its employees is or shall be deemed to be an  
10 employee of ADOT. Except as otherwise specified in the Contract Documents,  
11 Developer has sole authority and responsibility to employ, discharge and otherwise  
12 control its employees and has complete and sole responsibility as a principal for its  
13 agents, for all Subcontractors and for all other Persons that Developer or any  
14 Subcontractor hires to perform or assist in performing the Work.

15 **25.4 Successors and Assigns; Change of Control**

16 **25.4.1** The Contract Documents shall be binding upon and inure to the benefit  
17 of ADOT and Developer and their permitted successors, assigns and legal  
18 representatives.

19 **25.4.2** ADOT may transfer and assign all or any portion of its rights, title and  
20 interests in and to the Contract Documents, including rights with respect to the D&C  
21 Payment Bond, the D&C Performance Bond, the Maintenance Performance Bond, the  
22 Maintenance Payment Bond, Guarantees, letters of credit and other security for  
23 payment or performance:

24 (a) Without Developer’s consent, to any other public agency or  
25 public entity as permitted by Law, provided that the successor or assignee has assumed  
26 all of ADOT’s obligations, duties and liabilities under the Contract Document then in  
27 effect;

28 (b) Without Developer’s consent, to any other Person that succeeds  
29 to the governmental powers and authority of ADOT; provided, however, that such  
30 successor(s) has assumed all of ADOT’s obligations, duties and liabilities under the  
31 Contract Documents then in effect; and

32 (c) To any other Person with the prior approval of Developer.

33 **25.4.3** The Warranties and all rights of ADOT under Section 12, as well as all  
34 other rights and claims of ADOT, insofar as they relate to Non-Maintained Elements that  
35 will be owned by Persons other than ADOT (such as Utility Companies and the City of  
36 Phoenix), shall be assignable to such Persons.

37 **25.4.4** In the event of ADOT’s assignment of all of its rights, title and interests  
38 in the Contract Documents as permitted hereunder, Developer shall have no further

1 recourse to ADOT under the Contract Documents or otherwise except as specifically  
2 provided by other contractual agreement or by statute.

3 **25.4.5** Developer shall not voluntarily or involuntarily sell, assign, convey,  
4 transfer, pledge, mortgage or otherwise encumber Developer's interest in and to the  
5 Contract Documents or any portion thereof without ADOT's prior approval, except to  
6 any entity that is under the same ultimate management control as Developer.  
7 Developer shall not grant any right of entry, license or other special occupancy of the  
8 Project to any other Person that is not in the ordinary course of Developer performing  
9 the Work, without ADOT's prior approval. Any sale, assignment, conveyance, transfer,  
10 pledge, mortgage, encumbrance, grant of right of entry, license or other special  
11 occupancy in violation of this provision shall be null and void *ab initio* and ADOT, at its  
12 option, may declare any such attempted action to be a material Developer Default and  
13 Event of Default.

14 **25.4.6** Developer shall not voluntarily or involuntarily cause, permit or suffer  
15 any Change of Control during the Term without ADOT's prior approval. If there occurs  
16 any voluntary or involuntary Change of Control without ADOT's prior approval, ADOT, at  
17 its option, may declare it to be a material Developer Default and Event of Default.

18 **25.4.7** Where ADOT's prior approval is required for a proposed sale,  
19 assignment, conveyance, transfer, pledge, mortgage, encumbrance, sublease or grant  
20 of right of entry, license or other special occupancy, or for any proposed Change of  
21 Control during the Term, ADOT may withhold or condition its approval in its sole  
22 discretion. Any such decision of ADOT to withhold consent shall be final, binding and  
23 not subject to the Dispute Resolution Procedures.

24 **25.4.8** Assignments and transfers of Developer's interest in or to the Contract  
25 Documents permitted under this Section 25.4 or otherwise approved by ADOT will be  
26 effective only upon ADOT's receipt of notice of the assignment or transfer and a written  
27 recordable instrument executed by the transferee, in form and substance acceptable to  
28 ADOT, in which the transferee, without condition or reservation, assumes all of  
29 Developer's obligations, duties and liabilities under this Agreement and the other  
30 Contract Documents then in effect and agrees to perform and observe all provisions  
31 thereof applicable to Developer. Each transferee shall take Developer's interest in or to  
32 the Contract Documents subject to, and shall be bound by, the Project Management  
33 Plan, the Key Subcontracts, the Utility Agreements, all agreements between the  
34 transferor and railroads, the Governmental Approvals, and all agreements between the  
35 transferor and Governmental Entities with jurisdiction over the Project or the Work,  
36 except to the extent otherwise approved by ADOT in its good faith discretion.

37 **25.5 Change of Organization or Name**

38 **25.5.1** Developer shall not change the legal form of its organization in a  
39 manner that adversely affects ADOT's rights, protections and remedies under the  
40 Contract Documents without the prior approval of ADOT, which consent may be granted  
41 or withheld in ADOT's sole discretion.

1           **25.5.2** In the event either Party changes its name, such Party agrees to  
2 promptly furnish the other Party with notice of change of name and appropriate  
3 supporting documentation.

#### 4   **25.6 Designation of Representatives; Cooperation with Representatives**

5           **25.6.1** ADOT and Developer shall each designate an individual or individuals  
6 with the authority to make decisions and bind the Parties on matters relating to the  
7 Contract Documents (for each Party, its respective “Authorized Representative”).  
8 Exhibit 17 hereto provides the Parties’ initial Authorized Representative designations.  
9 Either Party may change its initial Authorized Representative designation by a  
10 subsequent writing delivered to the other Party in accordance with Section 25.11.

11           **25.6.2** Developer’s Authorized Representative(s) shall have onsite field and  
12 office authority to represent and act on behalf of Developer. Such Authorized  
13 Representative(s) shall be present at the jobsite at all times while Work is actually in  
14 progress.

15           **25.6.3** The Parties may also designate technical representatives who shall be  
16 authorized to investigate and report on matters relating to the design and construction of  
17 the Project and negotiate on behalf of each of the Parties, but who do not have authority  
18 to bind ADOT or Developer.

19           **25.6.4** Developer shall cooperate with ADOT and all representatives of ADOT  
20 designated as described above.

#### 21   **25.7 Survival**

22 Developer’s representations and warranties, the provisions regarding invoicing and  
23 payment under Article 13, the express rights and obligations of the Parties following  
24 termination of this Agreement under Articles 19 and 24, the indemnifications and  
25 releases contained in Article 21, the dispute resolution provisions contained in  
26 Article 22, and all other provisions that by their inherent character should survive  
27 termination of this Agreement or completion of the Work, shall survive the termination of  
28 this Agreement or completion of the Work. The provisions of Article 22 shall continue to  
29 apply after expiration or earlier termination of this Agreement to all Claims and Disputes  
30 between the Parties arising out of the Contract Documents.

#### 31   **25.8 Limitation on Third Party Beneficiaries**

32 It is not intended by any of the provisions of the Contract Documents to create any third  
33 party beneficiary hereunder or to authorize anyone not a Party hereto to maintain a suit  
34 for personal injury or property damage pursuant to the terms or provisions hereof,  
35 except to the extent that specific provisions (such as the Warranty and indemnity  
36 provisions) identify third parties and state that they are entitled to benefits hereunder.  
37 Except as otherwise provided in this Section 25.8, the duties, obligations and  
38 responsibilities of the Parties to the Contract Documents with respect to third parties  
39 shall remain as imposed by Law. The Contract Documents shall not be construed to

1 create a contractual relationship of any kind between ADOT and a Subcontractor or any  
2 Person other than Developer.

3 **25.9 No Personal Liability of ADOT Employees; Limitation on State’s Liability**

4 **25.9.1** ADOT’s Authorized Representatives are acting solely as agents and  
5 representatives of ADOT when carrying out the provisions of or exercising the power or  
6 authority granted to them under the Contract Documents. They shall not be liable to  
7 any Developer-Related Entity either personally or as employees of ADOT for actions in  
8 their ordinary course of employment.

9 **25.9.2** Each of the Parties agrees to provide to the other Party’s Authorized  
10 Representative notice of any claim received by the Party from any third party relating in  
11 any way to the matters addressed in the Contract Documents.

12 **25.9.3** In no event shall ADOT be liable for injury, damage, or death sustained  
13 by reason of a defect or want of repair on or within the Site during the Term, nor shall  
14 ADOT be liable for any injury, damage or death caused by the actions, omissions,  
15 negligence, intentional misconduct, or breach of applicable Law or contract by any  
16 Developer-Related Entity.

17 **25.10 Governing Law**

18 The Contract Documents shall be governed by and construed in accordance with the  
19 Laws of the State for contracts made and to be performed in the State.

20 **25.11 Notices and Communications**

21 **25.11.1** Notices under the Contract Documents shall be in writing and: (a)  
22 delivered personally; (b) sent by certified mail, return receipt requested; (c) sent by a  
23 recognized overnight mail or courier service, with delivery receipt requested; or (d) sent  
24 by facsimile or email communication followed by a hard copy and with receipt confirmed  
25 by telephone, to the addresses set forth in Sections 25.11.2 and 25.11.3, as applicable  
26 (or to such other address as may from time to time be specified in writing by such  
27 Person).

28 **25.11.2** All notices, correspondence and other communications to Developer  
29 shall be delivered to the following address or as otherwise directed by Developer’s  
30 Authorized Representative:

31  
32  
33  
34  
35  
36 Telephone: \_\_\_ - \_\_\_ - \_\_\_  
37 Mobile: \_\_\_ - \_\_\_ - \_\_\_  
38 Facsimile: \_\_\_ - \_\_\_ - \_\_\_  
39 E-mail: \_\_\_\_\_@\_\_\_\_\_

1 With a copy to:

2 [Redacted]  
 3 [Redacted]  
 4 [Redacted]  
 5 [Redacted]  
 6 Telephone: \_\_\_ - \_\_\_ - \_\_\_  
 7 Mobile: \_\_\_ - \_\_\_ - \_\_\_  
 8 Facsimile: \_\_\_ - \_\_\_ - \_\_\_  
 9 E-mail: \_\_\_\_\_ @ \_\_\_\_\_

10 In addition, copies of all notices to proceed and suspension, termination and default  
11 notices shall be delivered to the following Persons:

12 [Redacted]  
 13 [Redacted]  
 14 [Redacted]  
 15 [Redacted]  
 16 [Redacted]  
 17 Telephone: \_\_\_ - \_\_\_ - \_\_\_  
 18 Mobile: \_\_\_ - \_\_\_ - \_\_\_  
 19 Facsimile: \_\_\_ - \_\_\_ - \_\_\_  
 20 E-mail: \_\_\_\_\_ @ \_\_\_\_\_  
 21

22 **25.11.3** All notices, correspondence and other communications to ADOT will  
23 be marked as regarding the Loop 202 South Mountain Freeway Project and shall be  
24 delivered to the following address or as otherwise directed by ADOT's Authorized  
25 Representative:

26  
 27 Arizona Department of Transportation  
 28 206 S. 17th Avenue  
 29 Phoenix, AZ 85007  
 30 Attn: Robert Samour, P.E.  
 31 Telephone: **[NTD – INSERT TELEPHONE NUMBER PRIOR**  
 32 **TO EXECUTION]**  
 33 E-mail: **[NTD – INSERT EMAIL ADDRESS PRIOR TO**  
 34 **EXECUTION]**  
 35

36 In addition, copies of all notices regarding Disputes, suspension, termination and default  
37 notices shall be delivered to the following:

38  
 39 Office of the Arizona Attorney General  
 40 Transportation Section  
 41 1275 W. Washington Street  
 42 Phoenix, AZ 85007  
 43

1           **25.11.4** Notices shall be deemed received when actually received in the office  
2 of the addressee (or by the addressee if personally delivered) or when delivery is  
3 refused, as shown on the receipt of the U.S. Postal Service, private carrier or other  
4 Person making the delivery. Notices delivered by email communication shall be  
5 deemed received when actual receipt at the email address of the addressee is  
6 confirmed. Notwithstanding the foregoing, notices sent by facsimile after 4:00 p.m.  
7 Mountain Standard Time and all other notices received after 5:00 p.m. shall be deemed  
8 received on the first Business Day following delivery (that is, in order for a fax to be  
9 deemed received on the same day, at least the first page of the fax must have been  
10 received before 4:00 p.m.). Any technical or other communications pertaining to the  
11 Work shall be conducted by Developer's Authorized Representative and technical  
12 representatives designated by ADOT.

## 13 **25.12 Taxes**

14 Developer shall pay, prior to delinquency, all applicable taxes. Developer shall have no  
15 right to an adjustment to the Price or any other Claim due to its misinterpretation of  
16 Laws respecting taxes or incorrect assumptions regarding applicability of taxes.

## 17 **25.13 Interest on Amounts Due and Owing**

18           **25.13.1** Pursuant to Arizona Revised Statutes Section 44-1201D, no  
19 prejudgment interest shall be due either Party for any unliquidated amount.

20           **25.13.2** Subject to Section 25.13.1, amounts owed to Developer under this  
21 Agreement and not paid when due shall bear interest at a floating rate equal to the  
22 following:

23                   (a) If not in good faith Dispute, then at the Prime Rate in effect from  
24 time to time plus 100 basis points, commencing on the date due and continuing until  
25 paid; and

26                   (b) If subject to a good faith Dispute over whether it is due, then at  
27 the Prime Rate in effect from time to time, commencing from the date ADOT responds  
28 to a Claim therefor or the date ADOT denies the Claim, whichever is earlier, and  
29 continuing until the date the amount is finally determined to be due pursuant to  
30 settlement or the Dispute Resolution Procedures, and thereafter at the Prime Rate in  
31 effect from time to time plus 100 basis points until paid.

32           **25.13.3** Subject to Section 25.13.1, amount owed to ADOT under this  
33 Agreement, including any overpayment to Developer as a result of an inaccuracy in a  
34 Draw Request or Maintenance Draw Request, and not paid when due shall bear interest  
35 at a floating rate equal to the following:

36                   (a) If not in good faith Dispute, then at the Prime Rate in effect from  
37 time to time plus 100 basis points, commencing on the date of ADOT's payment of the  
38 Draw Request or Maintenance Draw Request, or the date ADOT claims any other

1 amount is due, and continuing until the date the overpayment or other amount due is  
2 deducted or paid; and

3 (b) If the subject of a good faith Dispute over whether it is due, then  
4 at the Prime Rate in effect from time to time, commencing on the date of ADOT's  
5 payment of the Draw Request or Maintenance Draw Request, or the date ADOT claims  
6 any other amount is due, and continuing until the date the amount is finally determined  
7 to be due pursuant to settlement or the Dispute Resolution Procedures, and thereafter  
8 at the Prime Rate in effect from time to time plus 100 basis points until paid.

9 **25.13.4** ADOT will not owe interest on any sum ADOT withholds from  
10 payments to Developer pursuant to this Agreement, except for the period, if any, from  
11 the date the withheld amount becomes due and owing to Developer until paid.

12 **25.13.5** A Party's right to receive interest is without prejudice to any other rights  
13 and remedies the Party may have under this Agreement.

#### 14 **25.14 Integration of Contract Documents**

15 ADOT and Developer agree and expressly intend that, subject to Section 25.15, this  
16 Agreement and other Contract Documents constitute a single, non-severable, integrated  
17 agreement whose terms are interdependent and non-divisible.

#### 18 **25.15 Severability**

19 **25.15.1** If any clause, provision, section or part of the Contract Documents is  
20 ruled invalid by a court having proper jurisdiction, then the Parties shall:

21 (a) Promptly meet and negotiate a substitute for such clause,  
22 provision, section or part, which shall, to the greatest extent legally permissible, effect  
23 the original intent of the Parties, including an equitable adjustment to the Price to  
24 account for any change in the Work resulting from such invalidated portion; and

25 (b) If necessary or desirable, apply to the court or other decision  
26 maker (as applicable) which declared such invalidity for an interpretation of the  
27 invalidated portion to guide the negotiations.

28 **25.15.2** The invalidity or unenforceability of any such clause, provision, section  
29 or part shall not affect the validity or enforceability of the balance of the Contract  
30 Documents, which shall be construed and enforced as if the Contract Documents did  
31 not contain such invalid or unenforceable clause, provision, section or part.

#### 32 **25.16 Headings**

33 The captions of the articles, sections and subsections herein are inserted solely for  
34 convenience and under no circumstances are they or any of them to be treated or  
35 construed as part of this Agreement.

1    **25.17 Entire Agreement**

2    The Contract Documents contain the entire understanding of the Parties with respect to  
3    the subject matter hereof and supersede all prior agreements, understandings,  
4    statements, representations and negotiations between the Parties with respect to its  
5    subject matter.

6    **25.18 Counterparts**

7    This instrument may be executed in two or more counterparts, each of which shall be  
8    deemed an original, but all of which together shall constitute one and the same  
9    instrument.  
10

1 IN WITNESS WHEREOF, this Agreement has been executed as of the date first set  
2 forth above.

3  
4

DEVELOPER:

[ ]

ARIZONA DEPARTMENT OF  
TRANSPORTATION

By: [ ]

By: [ ]

By  
Name:  
Title:

By  
Name: John Halikowski  
Title: ADOT Director

By: [ ]

By  
Name:  
Title:

By: [ ]

By  
Name:  
Title:

5  
6  
7  
8