PUBLIC-PRIVATE PARTNERSHIP AGREEMENT

for the

PRESIDIO PARKWAY PROJECT

Between

California Department of Transportation

and

[XXXXXXXXXXXXXXXX]

Contract # [XXXXXX]

Dated _____, 2010

Addendum #1

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PUBLIC-PRIVATE PARTNERSHIP AGREEMENT

PRESIDIO PARKWAY PROJECT

This Public-Private Partnership Agreement ("**Agreement**") is entered into and effective as of _____, 2010 by and between:

(a) the California Department of Transportation, a public agency of the State of California ("**the Department**"); and

(b) _____, a _____ ("**Developer**").

BACKGROUND:

A. The Department in cooperation with the San Francisco County Transportation Authority (the "**Authority**") wishes to develop, design, construct, finance, operate and maintain the Presidio Parkway Project (the "**Project**") through a public-private partnership. The facility will consist of a new six-lane parkway-type roadway and a southbound auxiliary lane, between the Park Presidio Interchange and the new Presidio access at Girard Road, which will replace the existing Doyle Drive facilities along Route 101 in the City of San Francisco. The Department will be responsible for the design, financing and construction of the Phase I Construction; the Developer will be responsible for the design, financing and construction of the Phase II Construction, as well as providing for the long-term operations and maintenance of both phases of the Project, all as provided in this Agreement.

B. The Department issued a Request for Qualifications for the Project on February 2, 2010 and four addenda thereto (collectively, the "**RFQ**"). The Department issued these and all subsequent procurement documents for the Project pursuant to Section 143 of the California Streets and Highway Code ("**Section 143**"). Section 143 grants the Department the authority to solicit proposals from and enter into agreements with private entities, or consortia thereof, for the planning, design, development, finance, construction, reconstruction, rehabilitation, acquisition, lease, operation or maintenance of transportation projects such as the Project.

C. On April 8, 2010, pursuant to the procurement process outlined in the RFQ, the Department selected three short-listed proposers based on their respective financial and technical qualifications as detailed in their responses to the RFQ. The Department then issued a Request for Proposals to these short-listed proposers, which included various RFP documents and addenda thereto (collectively, the "**RFP**").

D. On _____, 2010, the Department selected Developer as the preferred proposer. The Department's decision was based on its overall evaluation of the proposals, and the Department's conclusion that Developer has offered the best value in its Proposal, based on Developer's Maximum Availability Payment, together with its approach to project management, financing, design and construction, quality assurance and control, and operations and maintenance of the Project within the O&M Limits.

E. On May 20, 2010, pursuant to Section 143, the California Transportation Commission, at a regularly scheduled public hearing, (a) selected and approved the Project for procurement and entry into of a comprehensive development lease agreement, (b) certified the

Department's determination of the useful life of the Project in establishing the terms of this Agreement, and (c) approved and adopted criteria for evaluating proposals solicited by the RFP.

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

ARTICLE 1. DEFINITIONS; CONTRACT DOCUMENTS; REFERENCE DOCUMENTS; THIRD PARTY AGREEMENTS

1.1 Definitions

Definitions for certain capitalized terms used in this Agreement and the other Contract Documents are contained in Appendix 1.

1.2 Contract Documents; Order of Precedence

Each of the Contract Documents is an essential part of the agreement between the Parties and a requirement occurring in one is as binding as though occurring in all. The Contract Documents are intended to be complementary and to describe and provide for a complete comprehensive development lease agreement authorized by Section 143.

1.2.1 In the event of any irreconcilable conflict, ambiguity or inconsistency among the Contract Documents, the order of precedence, from highest to lowest, shall be as follows, except as provided otherwise in Section 1.2.2:

1. Supplements and amendments to the Agreement, and all exhibits, appendices and attachments to such supplements and amendments;

2. Volume I (this Agreement, including all Appendices, except Appendix 2 which has a lower order of precedence);

3. Supplements and amendments to Volume II (Technical Requirements), excepting to the Manuals and Guidelines which have a lower order of precedence;

4. Volume II (Technical Requirements), excepting the Manuals and Guidelines which have a lower order of precedence

5. Supplements and amendments to Volume III (the Manuals and Guidelines);

6. Volume III (the Manuals and Guidelines);

7. Supplements and amendments to Appendix 2 to this Agreement, constituting Developer's Proposal Commitments; and

8. Appendix 2 to this Agreement, constituting Developer's Proposal Commitments.

1.2.2 Notwithstanding the order of precedence among Contract Documents set forth in this Section 1.2, if Developer's Proposal Commitments include statements, terms, concepts or

designs that can reasonably be interpreted as offers to provide higher quality items than otherwise required by the other Contract Documents or to perform services or meet standards in addition to or better than those otherwise required, or otherwise contains terms or designs which are more advantageous to the Department than the requirements of the other Contract Documents, then Developer's obligations hereunder shall include compliance with all such statements, terms, concepts and designs.

1.2.3 Additional details in a lower priority Contract Document shall be given effect except to the extent they irreconcilably conflict with requirements, provisions and practices contained in the higher priority Contract Document.

1.2.4 In the event of a conflict between or among provisions in Contract Documents having the same order of precedence, the provisions that establish the higher quality, manner or method of performing the Work, exceed Best Management Practices, or use more stringent standards will prevail.

1.2.5 In the event of any irreconcilable conflict, ambiguity or inconsistency between the Project Management Plan and any of the Contract Documents, the latter shall take precedence and control.

1.3 Reference Documents

1.3.1 The Department has provided the Reference Documents to Developer for the purpose of disclosing information in the possession of the Department, regardless of whether such information is accurate, complete, pertinent, or of any value. The Reference Documents are for information only, and are not mandatory or binding on Developer, except to the extent (a) the Reference Document is a Governmental Approval or Utility Agreement or (b) information in the Reference Documents is expressly made a contractual requirement as part of the Technical Requirements. Developer is not entitled to rely on the Reference Documents as accurately describing existing conditions, presenting design, engineering, operating or maintenance solutions or directions, or defining means or methods for complying with the requirements of the Contract Documents, Governmental Approvals or Law.

1.3.2 The Department shall not be responsible or liable in any respect for any causes of action, claims or Losses whatsoever suffered by any Developer-Related Entity by reason of any use of information contained in, any conclusions Developer may draw from, or any action or forbearance in reliance on, the Reference Documents, except to the extent that information in Reference Documents is expressly made a benchmark under this Agreement for the purpose of risk sharing or risk allocation.

1.3.3 Although the Department believes the Reference Documents have been developed with the appropriate due diligence in accordance with industry standards the Department does not represent, warrant or guarantee the accuracy, completeness or fitness of the Reference Documents or the information contained in the Reference Documents or that such information is in conformity with the requirements of the Contract Documents, Governmental Approvals or Laws. Except to the extent expressly provided otherwise in this Agreement, Developer shall have no right to submit a claim for Extra Work Costs, Delay Costs, time, Financial Close Deadline or Completion Deadline extensions, compensation for losses due to delays in commencement of Availability Payments or for additional interest costs due to delayed receipt of the Milestone Payment, or other relief on account of any incompleteness or inaccuracy in the Reference Documents, including any incompleteness or inaccuracies

regarding the location, size, character and extent of Utilities, Hazardous Materials and subsurface conditions.

1.4 Third Party Agreements

1.4.1 Appendix 23 sets forth a list of material agreements with third parties existing as of the Effective Date that affect the Project, Project Right of Way or performance of the Work. Such third party agreements are in addition to Reference Documents, Governmental Approvals and Utility Agreements, although the list may include certain Governmental Approvals and Utility Agreements. Developer acknowledges that it is familiar with the provisions of such third party agreements. Developer shall comply with the provisions of such third party agreements that in any manner affect or relate to the Work or Developer's responsibilities and obligations under the Contract Documents, and shall not engage in any action that would cause the Department or the Authority to be in violation of such third party agreements, including in violation of the Department's obligations as agent for the FHWA under the Programmatic Agreement.

1.4.2 The Department and Presidio Trust are parties to the certain Standard Agreement 04A3499, which is a service agreement for provision of specified services by the Presidio Trust to the Department in connection with the Project. Such agreement is not a third party agreement, and Developer shall have no obligation for the cost of the services set forth in such agreement (except to the extent any such costs are part of the Department's Recoverable Costs for which Developer may be responsible under other provisions of this Agreement).

ARTICLE 2. CONCESSION GRANT, TERM AND PAYMENT

2.1 Grant of Concession

2.1.1 Pursuant to the provisions of Section 143 and subject to the terms and conditions of the Contract Documents, the Department hereby grants to Developer the exclusive right, and Developer accepts the obligation, (a) to develop, design, construct and finance the Phase II Construction, (b) to use, manage, operate, maintain and repair the Project, and to perform Renewal Work and Upgrades, and (c) to enter into the Lease in the form attached as Appendix 3.

2.1.2 Subject to Section 4.4, the Department grants to Developer the right to enter onto Project Right of Way and certain other adjacent lands owned by the Department, the Presidio Trust or other Governmental Entities for purposes of carrying out its obligations under this Agreement. Notwithstanding the foregoing, Developer shall be responsible for compliance with the terms and provisions of the Presidio Trust Right of Entry Agreement and the Programmatic Agreement, including paying all applicable charges and related fees and obtaining all consents or approvals for access by any Developer-Related Entity to the Project Right of Way to perform any Work required under this Agreement. The Department shall, and shall cause the Authority to, provide reasonable assistance in accordance with Section 3.2.3 to Developer in obtaining the necessary consents or approvals required to access lands owned by the Presidio Trust or other Governmental Entities as required pursuant to the Presidio Trust Right of Entry Agreement and the Programmatic Agreement for purposes of carrying out the Developer's responsibilities under this Agreement.

2.1.3 Upon the Substantial Completion Date, and as a ministerial act, the Department and Developer shall date the Lease, attach the survey description of the permanent boundaries

of the Project Right of Way prepared pursuant to Section 4.4.3, excluding all Airspace, and each Party shall execute and deliver to the other Party, and the other Party shall accept, the Lease. Thereupon, the Lease shall take effect, and the right of entry under Section 2.1.2 shall automatically cease to have effect (but the obligation under Section 2.1.2 to comply with the terms and provisions of the Presidio Trust Right of Entry Agreement shall continue in full force and effect). Neither the Lease nor a memorandum thereof shall be recorded.

2.1.4 Developer's rights granted in this Section 2.1 are limited by and subject to the terms and conditions of the Contract Documents, including the Department's sole ownership of fee simple title to the Project and the Department's, the Presidio Trust's and other Governmental Entities' ownership of the Project Right of Way, subject to Developer's Interest including Developer's leasehold estate under the Lease.

2.2 Term of Concession

2.2.1 This Agreement shall take effect on the Effective Date, and shall remain in effect until the earliest of (a) 30 years after the Baseline Substantial Completion Date, (b) 30 years after the Substantial Completion Date, or (c) the termination of this Agreement as provided herein (the "Term"); provided that the Department may extend the Term as provided in Section 9.3.2(d).

2.2.2 The Parties acknowledge that Developer's rights and obligations to finance and pay for development of the Phase II Construction, manage, operate, maintain and repair the Project, and perform Renewal Work and Upgrades commence on the Effective Date notwithstanding the later commencement of the Lease, subject to issuance of NTP 1, NTP 2 and NTP 3, and the satisfaction of other conditions precedent to performance of the Work set forth in this Agreement.

2.3 Concession Payment

2.3.1 In consideration for Developer's rights granted by this Agreement, Developer shall pay to the Department the sum of $1,000,000. Subject to Section 2.3.2, such sum shall be due and payable not later than the date of Financial Close.

2.3.2 Payment of such sum is subject to the following:

2.3.2.1 If this Agreement is terminated prior to Financial Close and the Department is entitled to draw on the Financial Close Security pursuant to this Agreement, the Department acknowledges that the Financial Close Security includes recovery of such sum; and

2.3.2.2 If this Agreement is terminated prior to Financial Close and the Department is not entitled to draw on the Financial Close Security pursuant to this Agreement, then such sum shall not be due and payable.

ARTICLE 3. DEPARTMENT REVIEW AND OVERSIGHT

3.1 Preliminary Planning and Engineering Activities

3.1.1 Unless expressly provided otherwise in this Agreement for specific elements of

the Work, Developer shall perform or cause to be performed all preliminary planning and engineering activities appropriate for design and construction of the Phase II Construction. The Department designates Developer as the Department's consultant pursuant to Section 143(f)(1)(B) of Section 143 to the extent that any such activities constitute project development services under Section 143(f)(1)(A) of Section 143.

3.1.2 Subject to Sections 4.10, 4.16 and 9.2, Developer shall bear the risk of any incorrect or incomplete review, examination and investigation by it of the Site and surrounding locations and of any incorrect or incomplete information resulting from preliminary engineering activities conducted by Developer, the Department or any other Person. The Department makes no warranties or representations as to any surveys, data, reports or other information provided by the Department or other Persons concerning surface conditions and subsurface conditions, including information related to Utilities, Hazardous Materials, and archeological, paleontological, cultural and historic resources, affecting the Site or surrounding locations. Developer acknowledges that such information is for Developer's general reference only. The preceding sentence does not affect or limit Developer's entitlement to compensation and other relief under the terms of this Agreement respecting occurrence of Relief Events.

3.2 Governmental Approvals

3.2.1 General

3.2.1.1 Prior to the Effective Date, the Department obtained certain Governmental Approvals as described in Table 1 of Appendix 21. The Government Approvals listed in Table 1 of Appendix 21 is not an exhaustive list of all the Government Approvals required to perform the Work. Unless otherwise indicated in the Contract Documents, Developer shall be solely responsible for obtaining (or, where Section 3.2.3.2 applies, performing the work required to obtain) all remaining Governmental Approvals, including any revision, modification, amendment, supplement, renewal or extension thereof and of Governmental Approvals previously obtained by the Department, including those required in connection with any Relief Event. Developer shall not be entitled to submit a claim for any Extra Work Costs, Delay Costs, time, Financial Close Deadline or Completion Deadline extensions, or other relief associated with securing and obtaining Governmental Approvals, except as provided under Section 3.2.2. Refer to Section 1.4.2 regarding costs of certain services of the Presidio Trust for which Developer bears no cost responsibility.

3.2.1.2 The Department shall be responsible for obtaining a permit to enter or comparable right of access to the portion of the Project Right of Way within the boundaries identified in Appendix 5 owned by GGBHTD. Failure or inability of the Department to obtain such permit to enter or comparable right of access on terms consistent with the Contract Documents will constitute a Relief Event under clause (h) of the definition of Relief Event, provided Developer's design meets the requirements of the Contract Documents. The terms and conditions of such permit to enter or comparable right of access are expected to include approval rights of GGBHTD regarding design of improvements and construction activities on the subject GGBHTD property. Such approval rights are part of the Governmental Approvals that Developer is solely responsible for obtaining under Section 3.2.1.1.

3.2.1.3 Developer shall take all actions necessary to comply with and to maintain in full force and effect all Governmental Approvals, including performance of all measures required by the Contract Documents or Governmental Approvals, except to the extent that responsibility for performance of such measures is expressly assigned to the

Department in the Contract Documents. Without limiting the foregoing, Developer shall comply with and fulfill all criteria and requirements in Government Approvals for achieving successful Project mitigation activity. Developer shall perform any additional mitigation, and shall pay all costs, fees, charges and penalties, including additional mitigation costs, that may be imposed as a result of the failure of any Developer-Related Entity to obtain or comply with applicable Government Approvals.

3.2.1.4 Developer shall be responsible for obtaining amendments or modifications of the Government Approvals listed in Table 1 of Appendix 21 necessary to reflect Developer's Final Design should the Final Design deviate from the issuing agency's prior expectations, subject to Developer's rights under Section 9.2 where the deviation in the Final Design is the result of a Department Change. In the event that any modifications are not permitted by the issuing agency, Developer shall be responsible for revising its Final Design as necessary to satisfy the requirements and conditions of the issuing agency, subject to Developer's rights under Section 9.2 where the revisions are to prior deviations in the Final Design resulting of a Department Change.

3.2.1.5 Developer shall promptly deliver to the Department true and complete copies of all new or amended Governmental Approvals and third party approvals and agreements.

3.2.2 Major Permit Delays, Suspensions and Revocations

3.2.2.1 Table 2 of Appendix 21 identifies those Governmental Approvals that are classified under the Contract Documents as Major Permits. If a Governmental Approval is not listed as a Major Permit in Table 2 of Appendix 21, then it shall not constitute a Major Permit for purposes of the Contract Documents, regardless of the subject matter, scope, necessity or requirements of the Governmental Approval. Table 2 of Appendix 21 also identifies the expected time necessary to secure each of the Major Permits (each a "**Major Permits Deadline**"). Developer shall be entitled to seek compensation, Completion Deadline extension and performance relief under Sections 9.2.2, 9.2.3, 9.2.5 and 9.3 due to delays in obtaining a Major Permit by the applicable Major Permits Deadline, provided that such delays are beyond the reasonable control of the Developer-Related Entities. If a Major Permit Deadline is tied to submission to the Governmental Entity of a completed application that must be submitted by the Department pursuant to Section 3.2.3.2, then, subject to Section 3.2.3.1, the Department shall submit it to the Governmental Entity within five days after the Department receives the completed application from Developer.

3.2.2.2 Notwithstanding the provisions in this Section 3.2.2, Developer shall not be entitled to any relief relating to a Relief Event under clause (t) of the definition of Relief Event for the following:

1. Extra Work Costs;

2. Delays that could have been mitigated by Developer through reasonable efforts; or

3. Delays due to differences in the Indicative Preliminary Design and Developer's Final Design, unless such differences are due to a Department Change.

3.2.3 Coordination

3.2.3.1 At Developer's request, the Department shall reasonably assist and cooperate with Developer in obtaining from Governmental Entities the Governmental Approvals required to be obtained by Developer under the Contract Documents. Such obligation to assist and cooperate shall not require the Department to (a) take a position which it believes to be inconsistent with the Contract Documents, the Project Management Plan (and component plans thereunder), applicable Law, Governmental Approval(s), the requirements of Best Management Practice, or Department policy (except policies that are incompatible with the Project's public-private contracting methodology), (b) take a position that is not usual and customary for the Department to take in addressing similar circumstances affecting its own projects (except for usual and customary arrangements that are incompatible with the Project's public-private contracting methodology), or (c) refrain from concurring with a position taken by a Governmental Entity if the Department believes that position to be correct.

3.2.3.2 Certain Governmental Entities may require that Governmental Approvals from them, including actions, approvals and authorizations under the Presidio Trust Right of Entry Agreement or Programmatic Agreement, be applied for or issued in the Department's name and/or that the Department directly coordinate with such Governmental Entities in connection with obtaining Governmental Approvals. In such event, Developer shall provide all necessary support to facilitate the application, approval, mitigation or compliance process. Such support shall include conducting necessary field investigations, preparing surveys, and preparing any required reports, applications and other documents in form approved by the Department. Such support also may include joint coordination and joint discussions and attendance at meetings with the applicable Governmental Entity.

3.2.3.3 Developer shall not enter into any agreement with any Governmental Entity, Utility Owner, railroad, property owner or other third party having regulatory jurisdiction over any aspect of the Project or Work or having any property interest affected by the Project or the Work that in any way purports to obligate the Department, or states or implies that the Department has an obligation, to the third party, to carry out any installation, design, construction, maintenance, repair, operation, control, supervision, regulation or other activity after the end of the Term, unless the Department otherwise approves in writing in its sole discretion. Developer has no power or authority to enter into any such agreement with a third party in the name or on behalf of the Department.

3.3 Submittals

3.3.1 General

This Section 3.3 sets forth uniform terms and procedures that shall govern all Submittals to the Department pursuant to the Contract Documents.

3.3.2 Department Discretionary Approvals

Certain Submittals are subject to the Department's approval in its sole or absolute discretion or good faith discretion. If the Submittal is one where the Contract Documents indicate approval is required from the Department in its sole or absolute discretion, or good faith discretion, then the Department's lack of approval, determination, decision or other action within the applicable time period under the Contract Documents shall be deemed a disapproval. If approval is subject to the sole or absolute discretion of the Department, then its decision shall

be final, binding and not subject to dispute resolution, and such decision shall not constitute a basis for any claim for Extra Work Costs, Delay Costs, time, Financial Close Deadline or Completion Deadline extensions, compensation for losses due to delays in commencement of Availability Payments or for additional interest costs due to delayed receipt of the Milestone Payment, or other relief. If the approval is subject to the good faith discretion of the Department, then its decision shall be binding unless it is finally determined through the Dispute Resolution Procedures by clear and convincing evidence that such decision was arbitrary or capricious.

3.3.3 Department Review and Comment

Whenever the Contract Documents indicate that a Submittal or other matter is subject to the Department's review and comment and the Department delivers no comments, exceptions, objections, disapprovals or rejections within the applicable time period under the Contract Documents, then Developer may proceed thereafter at its election and risk, without prejudice to the Department's rights to later object to, disapprove or reject the Submittal or other matter on the bases set forth in Section 3.3.6.1. No such failure or delay by the Department to object to, disapprove or reject a Submittal or other matter not in compliance with the Contract Documents within the applicable time period under the Contract Documents shall constitute a basis for any claim for Extra Work Costs, Delay Costs, time, Financial Close Deadline or Completion Deadline extensions, compensation for losses due to delays in commencement of Availability Payments or for additional interest costs due to delayed receipt of the Milestone Payment, or other relief.

3.3.4 Submittals Not Subject to Prior Review, Comment or Approval

Whenever the Contract Documents indicate that Developer is to deliver a Submittal to the Department but express no requirement for Department review, comment, disapproval, prior approval or other Department action, then Developer is under no obligation to obtain Department approval of the Submittal before proceeding with further Work, and the Department shall have the right, but is not obligated, to at any time review, comment on, take exception to, object to, reject or disapprove the Submittal on the bases set forth in Section 3.3.6.1. No failure or delay by the Department in delivering comments, exceptions, objections, rejections or disapprovals with respect to the Submittal shall constitute a basis for any claim for Extra Work Costs, Delay Costs, time, Financial Close Deadline or Completion Deadline extensions, compensation for losses due to delays in commencement of Availability Payments or for additional interest costs due to delayed receipt of the Milestone Payment, or other relief.

3.3.5 Other Department Approvals

3.3.5.1 Whenever the Contract Documents indicate that a Submittal or other matter is subject to the Department's approval or consent but the approval or consent is one not governed by Section 3.3.2 concerning discretionary approvals, then the standard for approval shall be reasonableness.

3.3.5.2 If the reasonableness standard applies and Department delivers no approval, consent, determination, decision or other action within the applicable time period under Section 3.3.8, then Developer may deliver to Department a written notice stating the date within which Department was to have decided or acted and that if Department does not decide or act within five Business Days after receipt of the notice, delay from and after lapse of

the applicable time period may constitute Department-Caused Delay for which Developer may be entitled to relief under Article 9.

3.3.6 Resolution of Department Comments and Objections

3.3.6.1 If the Submittal is one not governed by Section 3.3.2, the Department's exception, objection, rejection or disapproval shall be deemed reasonable, valid and binding if based on any of the following grounds:

1. The Submittal or subject provision thereof fails to comply, or is inconsistent, with any applicable covenant, condition, requirement, term or provision of the Contract Documents;

2. The Submittal or subject provision thereof is not to a standard equal to or exceeding Best Management Practice;

3. Developer has not provided all content or information required in respect of the Submittal or subject provisions thereof, provided that Developer shall have the subsequent opportunity to resubmit the Submittal with the required content or information; or

4. Adoption of the Submittal or subject provision thereof, or of any proposed course of action thereunder, would result in a conflict with or violation of any Law or Governmental Approval.

5. In the case of a Submittal that is to be delivered to a Governmental Entity as a proposed Governmental Approval, or in order to obtain, modify, amend, supplement, renew, extend, waive or carry out a Governmental Approval, the Submittal proposes commitments, requirements, actions, terms or conditions that are (a) inconsistent with the Contract Documents, the Project Management Plan (and component plans thereunder), applicable Law, the requirements of Best Management Practice, or Department policy (except for policies that are incompatible with the Project's public-private contracting methodology) or (b) not usual and customary arrangements that the Department offers or accepts for addressing similar circumstances affecting its own projects (except for usual and customary arrangements that are incompatible with the Project's public-private contracting methodology).

3.3.6.2 Developer shall respond to all of the Department's comments and objections to a Submittal and, except as provided below, make modifications to the Submittal as necessary to fully reflect and resolve all such comments and objections, in accordance with the review processes set forth in this Section 3.3. Developer acknowledges that the Department may provide comments and objections which reflect concerns regarding interpretation or preferences of the commenter or which otherwise do not directly relate to grounds set forth in Section 3.3.6.1. Developer agrees to undertake reasonable efforts to accommodate or otherwise resolve any such comments or objections through the review processes described in this Section 3.3. However, if the Submittal is not governed by Section 3.3.2, the foregoing shall in no way be deemed to obligate Developer to incorporate any comments or resolve objections that (a) are not on any of the grounds set forth in Section 3.3.6.1, (b) are otherwise not reasonable with respect to subject matter or length, and (c) would result in a delay to a Critical Path, in Extra Work Costs or in Delay Costs, except

pursuant to a Department Change. If, however, Developer does not accommodate or otherwise resolve any comment or objection, Developer shall deliver to the Department within a reasonable time period, not to exceed 30 days after receipt of the Department's comments or objections, a written explanation why modifications based on such comment or objection are not required. The explanation shall include the facts, analyses and reasons that support the conclusion.

3.3.6.3 The foregoing shall in no way be deemed to obligate Developer to incorporate any comments or resolve objections that would render the Submittal erroneous, defective or less than Best Management Practice, except pursuant to a Department Change.

3.3.6.4 If Developer fails to notify the Department within such time period, the Department may deliver to Developer a written notice stating the date by which Developer was to have addressed the Department's comments and that if Developer does not address those comments within five Business Days after receipt of this notice, then that failure shall constitute Developer's agreement to make all changes necessary to accommodate and resolve the comment or objection and full acceptance of all responsibility for such changes without right to a Relief Event, time, Financial Close Deadline or Completion Deadline extension, Extra Work Costs, Delay Costs, compensation for losses due to delays in commencement of Availability Payments or for additional interest costs due to delayed receipt of the Milestone Payment, or other Claim, including any Claim that the Department assumes design or other liability.

3.3.6.5 After the Department receives Developer's explanation as to why the modifications are not required as provided in Sections 3.3.6.2, 3.3.6.3 and 3.3.6.4, the Parties shall attempt in good faith to resolve the dispute. If they are unable to resolve the dispute and the Submittal is one not governed by Section 3.3.2, the dispute shall be resolved according to the Dispute Resolution Procedures.

3.3.7 Limitations on Developer's Right to Rely

3.3.7.1 No review, comment, objection, rejection, approval, disapproval, acceptance, concurrence, certification (including notices of Substantial Completion and Final Acceptance), monitoring, testing, inspection, spot checking, auditing or other oversight by or on behalf of the Department, and no lack thereof by the Department, shall constitute acceptance by the Department of Work that does not comply with the Contract Documents or waiver of any legal or equitable right held by the Department with respect to such Work under the Contract Documents or Law. The Department shall be entitled to exercise all rights and remedies under the Contract Documents or Law to bring the Work and the Project into compliance with requirements of the Contract Documents, regardless of whether previous review, comment, objection, rejection, approval, disapproval, acceptance, concurrence, certification, monitoring, testing, inspection, spot checking, auditing or other oversight were conducted or given by the Department. Developer at all times shall have an independent duty and obligation to fulfill the requirements of the Contract Documents. Developer agrees and acknowledges that any such activity or failure to conduct any such activity by the Department:

1. Is solely for the benefit and protection of the Department;

2. Does not relieve Developer of its responsibility for the selection and the competent performance of all Developer-Related Entities;

3. Does not create or impose upon the Department any duty or obligation toward Developer to cause it to fulfill the requirements of the Contract Documents;

4. Shall not be deemed or construed as any kind of warranty, express or implied, by the Department;

5. May not be relied upon by Developer or used as evidence in determining whether Developer has fulfilled the requirements of the Contract Documents, except that the issuance of the notices of Substantial Completion and Final Acceptance may be relied upon and used as evidence to establish the commencement of the Department's payment obligations and Developer's entitlement to receive the Milestone Payment, Availability Payments and holdbacks from Availability Payments under Section 11.2.3 (as applicable), nevertheless without waiving the Department's rights and remedies against Developer for failing to meet the requirements of the Contract Documents; and

6. May not be asserted by Developer against the Department as a legal or equitable defense to, or as a waiver of or relief from, Developer's obligation to fulfill the requirements of the Contract Documents.

3.3.7.2 Developer shall not be relieved or entitled to reduction of its obligations to perform the Work in accordance with the Contract Documents, or any of its other liabilities and obligations, including its indemnity obligations, as the result of any activity identified in Section 3.3.7.1 or failure to conduct any such activity by the Department. Such activity or failure to conduct such activity by the Department shall not relieve Developer from liability for, and responsibility to cure and correct, any Nonconforming Work or Developer Defaults.

3.3.7.3 To the maximum extent permitted by Law, Developer hereby releases and discharges the Department from any and all duty and obligation to cause Developer's Work or the Project to satisfy the standards and requirements of the Contract Documents.

3.3.8 Time Periods

3.3.8.1 Except as otherwise provided in this Section 3.3.8, whenever the Department is entitled to review and comment on, or to affirmatively approve or accept, a Submittal, the Department shall have a period of 14 days after the date the Department receives an accurate and complete Submittal in conformance with the Contract Documents to review, comment, or approve, as the case may be, the Submittal. If the Department determines that a Submittal is not complete, it will notify Developer of such determination within such 14-day period. The Department's review period for Developer's re-submission of a previously submitted Submittal shall be ten days, unless provided otherwise in the Contract Documents. 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.

3.3.8.2 If any provision of the Contract Documents expressly provides a longer or shorter period for the Department to act, such period shall control over the time

period set forth in Section 3.3.8.1. If the time period for the Department to act should end on a day when the Department is closed or when Department employees are on furlough under furlough decisions generally applicable to the Department or an entire division of the Department, the time period shall automatically be extended to the next day when the Department is open or when Department employees are no longer on furlough, as applicable; provided that no more than one furlough day per week shall be counted for this purpose.

3.3.8.3 Developer shall schedule, prioritize and coordinate all Submittals to allow an efficient and orderly Submittal review process. All time periods for the Department to act shall be extended by the period of any delay caused by the negligence, willful misconduct, or breach of applicable Law or contract by Developer or any Developer-Related Entity. In no event shall Developer be entitled to submit a claim for Extra Work Costs, Delay Costs, time, Financial Close Deadline or Completion Deadline extensions, compensation for losses due to delays in commencement of Availability Payments or for additional interest costs due to delayed receipt of the Milestone Payment, or other relief for such extension of the review period.

3.3.8.4 During any time that the Department is entitled under Section 6.8 to increase the level of its auditing, monitoring, inspection, sampling, measuring, testing and oversight of Developer's compliance with its obligations under this Agreement, the applicable period for the Department to act on any Submittals received during such time shall automatically be extended by ten days.

3.4 Interpretive Engineering Decisions

3.4.1 Developer may apply in writing to the Department for approvals of an interpretive engineering decision concerning the meaning, scope, interpretation and application of the Technical Requirements (an "Interpretive Engineering Decision"). The Department may issue a written approval of Developer's proposed Interpretive Engineering Decision (if any), may issue its own Interpretive Engineering Decision or may disapprove any Interpretive Engineering Decision Developer proposes.

3.4.2 Within 14 days after Developer applies for an Interpretive Engineering Decision, or such other time period as the Department and Developer may agree to at the time of such application, the Department shall provide its written determination including explanation of any disapproval of such application or any differing interpretation; provided that no presumption of approval or disapproval shall arise by reason of the Department's delay in issuing its written determination. If Developer disputes the Department's disposition of the application, such dispute shall be subject to resolution in accordance with the Dispute Resolution Procedures.

3.4.3 Accepted Interpretive Engineering Decisions shall constitute provisions of the Technical Requirements and shall not constitute a Department Change or entitle Developer to any Extra Work Costs, Delay Costs, time or Completion Deadline extension, compensation for losses due to delays in commencement of Availability Payments or for additional interest costs due to delayed receipt of the Milestone Payment, or other relief. Subsequent Department orders and directives that are contrary to the Interpretive Engineering Decision shall constitute a Department Change.

ARTICLE 4. DESIGN AND CONSTRUCTION

4.1 Obligations of Developer

4.1.1 General Duties

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

4.1.1.1 Furnish all design and other services, provide all materials, equipment and labor and undertake all efforts necessary or appropriate (excluding only those materials, services and efforts which the Contract Documents expressly specify will be undertaken by the Department or other Persons) to construct the Phase II Construction and to maintain it during construction and to achieve Substantial Completion no later than the Long Stop Date;

4.1.1.2 Ensure that the Project Manager or the superintendent identified in Developer's Statement of Qualifications for the Lead Contractor, or one of its Department-approved designees, is present at the Site at all times during the performance of Construction Work;

4.1.1.3 Comply with, and require that all Contractors comply with, all requirements of all Laws applicable to the D&C Work;

4.1.1.4 Cooperate with the Department and Governmental Entities with jurisdiction in all matters relating to the Work, including their review, inspection and oversight of the D&C Work; and

4.1.1.5 Exercise commercially reasonable efforts to mitigate delay and damages due to delay regardless of the cause of the delay, including by re-sequencing, reallocating, or redeploying Developer's and its Contractors' forces to other work, as appropriate.

4.1.2 Performance, Design and Construction Standards

4.1.2.1 Developer shall perform the D&C Work in accordance with (a) Best Management Practice, (b) the requirements, terms, conditions and standards set forth in the Contract Documents, (c) the Project Management Plan, (d) all Laws, and (e) the requirements, terms, conditions and standards set forth in all Governmental Approvals. If Developer encounters a contradiction between subsections (a) through (e), the provisions that establish the highest quality, manner or method of performing the Work, exceed Best Management Practices, or use the most stringent standards will prevail.

4.1.2.2 The Department has approved the standards and specifications for Project design set forth in the Technical Requirements. Developer shall not deviate from such standards and specifications except (a) through a Department-approved Change Proposal, (b) as required under the order of precedence for Contract Documents set forth in Section 1.2 or (c) as provided in the last sentence of Section 4.1.2.1. The Department's approval of such standards and specifications, and of deviations therefrom, shall constitute approval for purposes of California Government Code Section 830.6.

4.1.2.3 Developer shall use reasonable care to identify any provisions in the Technical Requirements that are erroneous, create a potentially unsafe condition, or are or become inconsistent with Best Management Practice. Whenever Developer knows or, in the exercise of reasonable care should have known that a provision of the Technical Requirements is erroneous, creates a potentially unsafe condition or is or becomes inconsistent with Best Management Practice, Developer shall have the duty to notify the Department in writing of such fact and of the changes to the provision that Developer believes are the minimum necessary to render it correct, safe and consistent with Best Management Practice. If Developer commences or continues any D&C Work affected by the change after the need for the change was identified, or should have been identified through the exercise of reasonable care, Developer shall bear the risk of loss and any additional costs associated with redoing the Work already performed in accordance with the Contract Documents.

4.1.2.4 References in the Technical Requirements to the Manuals and Guidelines or other publications governing the D&C Work prior to Substantial Completion shall mean the most recent editions in effect as of the date the Department issued the RFP, unless expressly provided otherwise.

4.1.2.5 The Parties anticipate that from time to time after the Department issues the RFP the Department will adopt, through revisions to the existing Manuals and Guidelines or through new manuals and publications, changed, added or replacement standards, criteria, requirements, conditions, procedures, specifications and other provisions relating to the D&C Work of general application to comparable Department projects. Pursuant to Section 10.1 and subject to Section 8.2.1, the Department shall have the right to add such changed, added or replacement standards, criteria, requirements, conditions, procedures, specifications and other provisions to the Technical Requirements in accordance with the Contract Documents.

4.2 Project Management Plan; Design Implementation

4.2.1 Developer is responsible for all quality assurance and quality control activities necessary to manage the Work, including the Developer's Utility Adjustment Work. Developer shall undertake all aspects of quality assurance and quality control for the Project and Work in accordance with the approved Project Management Plan and Best Management Practice.

4.2.2 Developer shall develop the Project Management Plan and its component parts, plans and other documentation in accordance with the Proposal, the requirements set forth in Section 1 of Division 1 and Best Management Practice. In accordance with Section 6.2.6 of the RFP, Developer was authorized to commence work on the Project Management Plan prior to the Effective Date, and is authorized to continue such work, as necessary, after the Effective Date.

4.2.3 Developer shall submit the initial Project Management Plan and any subsequent updates thereto to the Department for approval in accordance with Sections 3.3.5 and 3.3.8.1, and Section 1 of Division 1. Each such update, revision or modification to the Project Management Plan shall constitute a separate Submittal.

4.2.4 Developer shall not commence or permit the commencement of any Design Work before the Project Management Plan has been submitted to and approved by the Department.

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

4.2.6 Developer shall carry out internal audits of the Project Management Plan at the times prescribed in the Project Management Plan.

4.2.7 Developer shall cause each of its Contractors at every level to comply with the applicable requirements of the Project Management Plan.

4.2.8 The Quality Manager shall, irrespective of his/her other responsibilities, have defined authority for ensuring the establishment and maintenance of the Project Management Plan and reporting to the Department on the performance of the Project Management Plan.

4.2.9 Developer, through the appropriately qualified and licensed design professionals identified in Developer's Project Management Plan, shall prepare designs, plans and specifications in accordance with the Contract Documents.

4.3 Nonconforming and Defective Work

4.3.1 If Nonconforming Work is discovered, the Department shall have the right, in its sole discretion, to direct Developer, at Developer's sole cost and without Claim of any kind against the Department, to remove, replace and otherwise correct the Nonconforming Work. If, at Developer's request, the Department elects to accept Nonconforming Work, the Department may recover from Developer 100% of the cost savings of Developer or the Lead Contractor associated with its failure to perform the Work in accordance with requirements of the Contract Documents (in addition to any other adjustment of the Milestone Payment or Availability Payments). In determining cost savings, the Parties shall take into account (a) all avoided costs, including avoided design, material, equipment, labor, construction, testing, commissioning, acceptance and overhead costs and avoided costs due to time savings, (b) all the savings in financing costs associated with such avoided costs, and (c) the net present value of increases, if any, in operations, maintenance and Renewal Work costs that Developer will incur as a result of the Nonconforming Work. Developer shall bear the burden of proving such increased costs. Net present value shall be determined by using Developer's then-current weighted average cost of capital as the discount rate. The Department shall have the right to deduct such cost savings from the Milestone Payment (subject to the Milestone Payment Adjustment Cap set forth in Appendix 4) and Availability Payments.

4.3.2 Subject to Section 18.2.13, nothing contained in the Contract Documents shall in any way limit the right of the Department to assert claims for damages resulting from patent or latent defects in the Work for the period of limitations prescribed by applicable Law, and the foregoing shall be in addition to any other rights or remedies the Department may have hereunder or under Law.

4.4 Project Right of Way Access and Project Right of Way Acquisition

4.4.1 The Project shall be situated entirely within the Project Right of Way as described in Appendix 5, all of which is owned by the Department, the Presidio Trust, or the Golden Gate Bridge, Highway and Transportation District.

4.4.2 If Developer identifies additional Project Right of Way or other lands or property rights beyond that identified in Appendix 5-A or 5-C as permanently needed to construct or maintain the Phase II Construction, Developer shall be responsible for all costs it or the Department incurs in the acquisition of the additional Project Right of Way or other lands or property rights, and shall bear the sole risk and cost of any time and cost impacts to the Work related to such acquisition. Developer shall submit to the Department in writing any requests Developer may have for any such additional Project Right of Way. If such proposed permanent additional Project Right of Way is on Presidio Trust or GGBHTD lands, then the Department shall have the right to coordinate communications with the Presidio Trust or GGBHTD in accordance with Section 3.2.3. Developer shall not negotiate with any property owners with respect to activities under the Federal Uniform Relocation Assistance and Real Property Acquisition Policies Act, P.L. 91-646, as amended. As a matter of information only and not as a binding representation, Developer should not anticipate such additional Project Right of Way being made available to Developer any earlier than 18 months after receipt by the Department of Developer's drawing of the limits necessary for each desired parcel. The Department undertakes no obligation to complete acquisition within such 18-month period.

4.4.3 Prior to Substantial Completion, the Department will survey the final right of way lines for the Project, including clear zones and maintenance areas, to identify the permanent boundaries of the Project Right of Way. Such surveyed boundaries shall constitute the Project Right of Way thereafter for all purposes under the Contract Documents, and the Parties shall amend Appendix 5-A so that it specifically identifies only such Project Right of Way.

4.4.4 The Parties recognize that from time to time it may be necessary to obtain temporary rights of access to lands or property beyond that identified in Appendix 5-A or 5-C owned by the Presidio Trust or others for Developer's performance of unexpected, major Renewal Work required due to unusual events. Developer shall submit to the Department in writing any requests Developer may have for any such temporary rights of access. Thereafter, the Parties shall cooperate to obtain such temporary rights of access, at Department's expense. The Department undertakes no obligation to complete acquisition of such temporary rights of access within any given time period, and makes no representation or warranty regarding availability or the terms and conditions of such access rights. Developer shall bear the costs of complying with such terms and conditions, except to the extent the Department is obligated under this Agreement to compensate Developer where the event requiring such temporary rights of access is a Relief Event.

4.4.5 From and after issuance of NTP 3, Developer shall have the right to access and use the areas identified in the TCE Occupation Plan for Staging Areas, Haul Routes, temporary works and other temporary requirements related to the Construction Work, subject to the applicable terms and conditions of the Presidio Trust Right of Entry Agreement (including duration of use) and of the Contract Documents. Developer, at its sole cost, shall be solely responsible for obtaining title to, leases of or temporary permits for any additional construction staging, lay down, storage and stockpiling areas, haul routes and other construction-related uses that Developer desires. Developer shall conduct any such acquisition in accordance with the Contract Documents and applicable Law.

4.4.5.1 From NTP 2 until 30 days after NTP 3, Developer shall have the right to amend the TCE Occupation Plan to add (but not delete) areas within the TCE that may be required for the execution of the Work.

4.4.5.2 Developer shall not utilize any areas of the Temporary Construction Easement not shown on the TCE Occupation Plan as it may be amended pursuant to Section 4.4.5.1.

4.4.6 Developer shall not enter any portion of the Project Right of Way, including any additional Project Right of Way or other property, for the purpose of construction staging, lay down, storage or stockpiling activities, or starting any demolition, site preparation or other Construction Work, until the Department issues NTP 3. Notwithstanding the foregoing, Developer shall have the right to enter the Project Right of Way, including any additional Project Right of Way or other property, after issuance of NTP 1 and prior to issuance of NTP 3, for the sole purposes of baseline investigation and inspection of existing work and conditions (including inspection of the Phase I Construction), surveying, and taking borings; provided that Developer (a) shall deliver to the Department not less than five days prior written notice of intent to enter, (b) before entry shall deliver to the Department such insurance certificates, indemnifications and releases from liability as the Department may reasonably require and (c) shall not interfere with the work of any contractors of the Department, including the contractors for on-going Phase I Construction activities.

4.4.7 The Department will provide Developer access rights as follows:

4.4.7.1 90 days prior to the anticipated date for issuing NTP 2, access to the Project Right of Way for the sole purpose of staff training and to execute the preparatory activities necessary to ensure effective and immediate start of the O&M Work upon NTP 2; and

4.4.7.2 15 days prior to the anticipated date for issuing NTP 3, access to the Staging Areas as designated in the TCE Occupation Plan or substantially equivalent areas for the sole purpose of construction staging.

4.4.8 Developer acknowledges that after NTP 2 and until Phase 1 Final Acceptance, the Department may restrict limited areas of the Project Right of Way for the purpose of conducting or causing to conduct activities necessary for Phase I Final Acceptance. Notwithstanding other provisions of the Contract Documents, during such period, if the Developer's access to the Project Right of Way is restricted by the Department after NTP 2, the Department and Developer shall work collaboratively and in good faith to ensure that Phase I Final Acceptance is achieved promptly, to complete the Baseline Report, Survey of Existing Conditions and Updated Survey of Existing Conditions, and to enable the Department to conduct any testing, commissioning, training, and operation activity associated with Phase I Construction. During such period and only as long as Developer's access to the Project Right of Way is restricted by the Department, the Department agrees to wave its right to assess the O&M Noncompliance Adjustment to the extent that the restricted access precludes Developer from meeting the O&M Work requirements detailed in Table 4.1 of Section 4 of Division II.

4.5 Utility Adjustments

4.5.1 Developer's General Responsibilities

4.5.1.1 Developer shall be responsible for coordinating and causing all Utility Adjustments necessary for the timely construction, operation and maintenance of the Project in accordance with the Contract Documents. Developer shall ensure that all Utility Adjustments, whether performed by Developer or a Utility Owner, comply with the Contract Documents and applicable Utility Agreements. Except with respect to Developer's rights to

claim a Relief Event for Utility Owner Delays pursuant to Section 4.5.7, Developer shall not be entitled to submit a claim for Extra Work Costs, Delay Costs, time or Completion Deadline extensions, compensation for losses due to delays in commencement of Availability Payments or for additional interest costs due to delayed receipt of the Milestone Payment, or other relief related to the Utility Adjustment Work, inaccuracy of the Utility Information, or Utilities located within or outside the Project Right of Way or otherwise impacted by, or having an impact on, the Project or the Work.

4.5.1.2 If a Utility Owner performs all or any part of the Utility Adjustment, Developer shall coordinate, monitor, and otherwise undertake the necessary efforts to enable such Utility Owner to perform such work timely, in coordination with the Work, and in compliance with the Contract Documents and applicable Utility Agreement.

4.5.1.3 The Department will endeavor to cooperate with Developer with respect to Developer's contractual obligations for coordinating with Utility Owners. Notwithstanding the foregoing, Developer shall be solely responsible for performing its obligations under the Contract Documents related to Utility Adjustment Work and such cooperation or failure to cooperate by the Department shall not relieve Developer from fulfilling such obligations.

4.5.2 Utility Agreements

4.5.2.1 Developer shall perform Utility Adjustments in accordance with the License to Enter Agreement. Developer, as a "Licensee's Contractor" or "Contractor" thereunder, shall carry out all the obligations of the Department as "Licensee" or "State" thereunder, and shall be bound by the terms, conditions and limitations applicable to the "Licensee" or "State" thereunder, with respect to the Utility Adjustment Work, provided that the Department retains its authority and functions as a lead agency under NEPA and CEQA with respect to review and analysis of potential environmental impacts of proposed Utility Adjustment Work to the extent reevaluation is required under NEPA or CEQA. Developer shall undertake the same indemnifications and grant the same releases as set forth in Sections 11 and 12(f) of the License to Enter Agreement, as required by Section 5 of the License to Enter Agreement. The provisions of Section 16 of the License to Enter Agreement, entitled "Licensee's Contractor's Insurance", shall not apply to Developer, and instead the insurance provisions of this Agreement shall control. The Department will not agree or consent to amendment of the License to Enter Agreement without Developer's prior written approval. The Department will not agree or consent to termination of the License to Enter Agreement prior to completion of all Utility Adjustment Work. If the License to Enter Agreement is amended without Developer's prior written approval or is suspended or terminated by the Presidio Trust in accordance with the first paragraph of Section 9 thereof, then such amendment, suspension or termination shall be deemed a Department Change.

4.5.2.2 Developer shall be responsible for negotiating, preparing and executing Utility Agreements in addition to the License to Enter Agreement necessary to accomplish the Utility Adjustments in accordance with the Contract Documents. The Department agrees to cooperate as reasonably requested by Developer in pursuing such Utility Agreements. All such Utility Agreements shall be reasonably acceptable to the Department and consistent with the requirements of the Contract Documents related to the applicable Utility Adjustment. Developer shall submit to the Department a true and complete copy of each such Utility Agreement and each amendment or supplement thereto within five days after it is executed and delivered.

4.5.3 Utility Adjustment Costs

4.5.3.1 Except for Betterment costs which are the responsibility of the Utility Owner and for other Utility Adjustment Work costs that may be the responsibility of the Utility Owner under applicable Law, and subject to Developer's rights to claim a Relief Event for Utility Owner Delays pursuant to Section 4.5.7, Developer is responsible for all costs of the Utility Adjustment Work. Developer shall fulfill this responsibility either by performing the Utility Adjustment Work itself at its own cost, or by reimbursing the Utility Owner for the Utility Adjustment Work. Developer is solely responsible for collecting directly from the Utility Owner any reimbursement due for Betterment costs or other costs for which the Utility Owner is considered responsible under applicable Law.

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

4.5.3.3 For each Utility Adjustment, Developer shall maintain or cause a Utility Owner to maintain cost records in accordance with the recordkeeping and audit requirements of the Contract Documents and applicable Law, including 23 CFR Part 645, Subpart A. Developer shall obtain from the Utility Owner a complete set of records of the Utility Owner's costs incurred for such Utility Adjustment Work. All records maintained pursuant to this Section 4.5.3.3 shall be in a format compatible with any related estimates and in sufficient detail for analysis. For both Utility Owner costs and Developer costs, the totals for each cost category shall be shown in such manner as to permit comparison with the categories stated on the estimate.

4.5.4 Utility Enhancements

Developer shall respond to any requests by Utility Owners that Developer design and/or construct Betterments or Utility Owner Projects (collectively, "**Utility Enhancements**"), although Developer is not required to agree to such requests. Any Betterment performed as part of Utility Adjustment, whether by Developer or by the Utility Owner, shall be subject to the requirements of this Section 4.5 as if it were a Utility Adjustment. Developer shall perform any work on a Utility Owner Project only by separate contract outside of the Work. Any proposed Utility Enhancement shall be subject to the Department's prior approval. Under no circumstances shall Developer proceed with any Utility Enhancement that is incompatible with the Project or is not in compliance with the Contract Documents. Developer shall not be entitled to any Extra Work Costs, Delay Costs, time or Completion Deadline extension, compensation for losses due to delays in commencement of Availability Payments or for additional interest costs due to delayed receipt of the Milestone Payment, or other relief as the result of any Utility Enhancement, whether performed by Developer or by the Utility Owner. Developer shall be responsible for and liable to the Department for any deficiencies relating to any Utility Enhancements.

4.5.5 Utility Permit Applications

For reasons unrelated to a Utility Adjustment, it is anticipated that from time to time during the Construction Work, Utility Owners might apply for utility permits to install new Utilities

that would cross or longitudinally occupy those areas of the Project that are subject to the Department's permitting jurisdiction, or to modify, upgrade, relocate or expand existing Utilities within such areas. For such utility permit applications pending as of or submitted after the Effective Date, Developer shall assist the Department in its consideration of each utility permit application in accordance with the Contract Documents. Further, Developer shall make available upon request the most recent Project design information and/or As-Built Record Plans, as applicable, to the applicants, shall assist each applicant with information regarding the location of other proposed and existing Utilities, and shall use commercially reasonable efforts to coordinate work schedules with such applicants as appropriate to avoid interference with the Project Schedule by their activities.

4.5.6 Assignment of Rights Against Utility Owners

In the event of good-faith and bona fide colorable potential claims on behalf of Developer for wrongful actions or inactions of a Utility Owner within the Project Right of Way, the Department agrees that, upon receipt of a written request from Developer, the Department in its reasonable discretion will assign to Developer the Department's rights of recovery, as such may exist, under any existing agreement between the Department and a Utility Owner, including any utility permits, utility relocation agreements, or other agreements.

4.5.7 Utility Owner Delay

4.5.7.1 Developer shall be entitled to seek compensation and performance relief under Sections 9.2.2, 9.2.3 and 9.2.5 for a Utility Owner Delay, provided that all of the following conditions have been met:

1. A Qualifying Utility Agreement exists between Developer and the Qualifying Utility Owner; and

2. Developer has established by evidence reasonably satisfactory to the Department that: (a) the subject Utility Adjustment is necessary and Developer has provided a reasonable plan for same to the Qualifying Utility Owner, (b) the time for completion of the Utility Adjustment in the Project Schedule is reasonable, (c) Developer has complied with its obligations to coordinate with the Qualifying Utility Owner under the Contract Documents, (d) Developer has furnished the Qualifying Utility Owner and the Department with sufficient advance notice regarding the potential impact of the Utility Owner Delay, and (e) Developer has pursued all commercially reasonable options to avoid the Utility Owner Delay, including the enforcement of any rights that Developer may have against the Qualifying Utility Owner under the Qualifying Utility Agreement.

4.5.7.2 Notwithstanding the provisions in this Section 4.5.7, Developer shall not be entitled to any relief relating to a Utility Owner Delay for the following:

1. Extra Work Costs; and

2. Utility Owner Delays that could have been mitigated by Developer through reasonable efforts.

4.5.8 Unknown Utilities

Developer shall be entitled to seek compensation, Completion Deadline extension and performance relief under Sections 9.2.2, 9.2.3, 9.2.5 and 9.3 for the discovery of Unknown Utilities during Phase II Construction; provided that Developer shall not be entitled to any Claim for Delay Costs respecting discovery of Unknown Utilities.

4.5.9 Utility Services

4.5.9.1 The Department is responsible, without cost to Developer, to provide or cause PG&E to provide the PG&E Utility Line, in live condition, up to the Project's permanent redundant power substation for the Tunnel Systems. Developer is responsible, without cost to the Department, for connection of the PG&E Utility Line to the substation. Except for incremental additional costs directly attributable to a Relief Event, Developer is responsible for all costs of PG&E Utility services required to carry out the D&C Work and operate and maintain the Project, including connection fees, testing, inspection, and certification, and Utility service/usage fees and charges.

4.5.9.2 Developer is responsible to provide all other Utility service facilities (both on-Site and off-Site) required to carry out the D&C Work and operate and maintain the Project. The service facilities include those needed for power (except the PG&E Utility Line), gas, communications, water, sewage and drainage. Except for incremental additional costs directly attributable to a Relief Event, Developer is responsible for all costs of such other Utility service facilities and Utility services, including costs of design and construction (both on-Site and off-Site), Governmental Approvals, connection fees, testing, inspection, and certification, and Utility service/usage fees and charges.

4.6 Conditions to Commencement of Design Work

Within five days after satisfaction of the conditions set forth in this Section 4.6, the Department shall issue NTP 1 to Developer authorizing commencement of the Design Work. Any Design Work performed by Developer prior to issuance of NTP 1 shall be at Developer's sole risk and expense. The conditions to the Department's issuance of NTP 1 are:

4.6.1 Insurance Policies required under Section 16.1 and Appendix 9 for the Design Work have been obtained and are in full force and effect, and Developer has delivered to the Department written binders of insurance, in form and content set forth in Section 16.1.2.4, verifying coverage from the relevant Insurers of such Insurance Policies;

4.6.2 Developer has prepared and submitted to the Department the Project Schedule, in accordance with the requirements set forth in Section 1 of Division 1;

4.6.3 Developer has caused to be developed and delivered to the Department and the Department has approved the final initial Project Management Plan; and

4.6.4 All representations and warranties of Developer set forth in this Agreement and the Key Contracts to which Developer is a party shall be and remain true and correct in all material respects.

4.7 Conditions to Commencement of Construction Work

Developer shall not commence or permit commencement of the Construction Work, or any portion thereof, until the Department's issuance of NTP 3 for the Construction Work. The

Department shall issue NTP 3 within five days after all of the conditions in this Section 4.7 have been satisfied:

4.7.1 Developer has achieved Financial Close and made the payment to the Department required under Section 2.3;

4.7.2 The Performance Security and Payment Bond required under Sections 16.2.1.1 and 16.2.2.1, respectively, have been obtained and are in full force and effect, and Developer has delivered to the Department, as applicable, either the original Performance Security and Payment Bond or, if the original has been delivered to the Collateral Agent, a certified and conformed copies of the originals including, in the case of a letter of credit, the related documentation required under Section 16.2.3.5 or, in the case of bonds, the multiple obligee rider;

4.7.3 All Insurance Policies required under Section 16.1 and Appendix 9 for the Construction Work and O&M Work have been obtained and are in full force and effect, and Developer has delivered to the Department (a) written binders of insurance, in form and content set forth in Section 16.1.2.4, verifying coverage from the relevant Insurers of such Insurance Policies, and (b) proof that all eligible Contractors that are scheduled to commence performance of Construction Work within the next 90 days after issuance of NTP 3 have completed their enrollment in the OCIP according to the enrollment procedures set forth in the OCIP Manual;

4.7.4 All Governmental Approvals and other third-party approvals necessary to begin the applicable portions of the Construction Work and O&M Work have been obtained, Developer has furnished to the Department fully executed copies of such Governmental Approvals, and there exists no uncured material violation of the terms and conditions of any such Governmental Approval or other third-party approval;

4.7.5 Developer has satisfied all applicable pre-construction requirements contained in the NEPA/CEQA Approval and other Governmental Approvals for the applicable portion of the Construction Work;

4.7.6 The Department has approved final versions of Developer's Project Schedule (see Section 1 of Division I), Construction Quality Plan (see 3Section 1 of Division I), vibration monitoring plan (see Section 1 of Division I), and O&M Plan (see Section 4, 1.4 of Division II), and all component parts of such plans;

4.7.7 Developer demonstrates to the Department's reasonable satisfaction that all of Developer's field personnel have completed cultural resources training; evidence of such training shall be in the form of employee sign-in sheets, stickers for hard hats, and other appropriate tracking measures as reasonably appropriate;

4.7.8 Developer has adopted written policies establishing ethical standards of conduct for all Developer-Related Entities, including Developer's supervisory and management personnel in dealing with (a) the Department and (b) employment relations, in accordance with Section 7.7;

4.7.9 Developer has satisfied all other requirements of the Contract Documents that are required to be satisfied prior to commencement of the applicable portion of the Construction Work and O&M Work, including delivery to the Department of all Submittals relating to the applicable portion of the Construction Work and O&M Work required by the Project

Management Plan or Contract Documents, in the form and content required by the Project Management Plan or Contract Documents;

4.7.10 All representations and warranties of Developer set forth in this Agreement and the Key Contracts to which Developer is a party shall be and remain true and correct in all material respects;

4.7.11 Developer is not then in receipt of any notice of Developer Default from the Department unless any such default has been cured;

4.7.12 Developer is not then in receipt of any notice of default from any Lender unless any such noticed default has been cured, and no Lender has otherwise indicated that it is unwilling or unable to presently fund Developer's costs of the D&C Work and O&M Work; and

4.7.13 The Department has achieved Phase I Substantial Completion.

4.8 Project Schedule

Developer shall perform the D&C Work in accordance with the Project Schedule. Each Project Schedule submission and update shall comply with Section1 of Division I and other provisions set forth in the Technical Requirements.

4.9 Substantial Completion and Final Acceptance

4.9.1 Substantial Completion

Developer shall exercise its best efforts to achieve Substantial Completion on or before the Scheduled Substantial Completion Date. Failure to achieve Substantial Completion by the Long Stop Date is a Developer Default under Section 18.1.

4.9.2 Conditions to Substantial Completion

4.9.2.1 The Department will issue a notice of Substantial Completion upon satisfaction of all the following conditions for the entire Project:

1. Developer has completed the design and construction of the Phase II Construction in accordance with the Contract Documents, including all Project equipment required to be installed and commissioned by Developer, except for (a) remaining Construction Work the completion of which will not require any Closures at any time, and (b) Punch List items the existence and completion of which will not require any Closures at any time;

2. All lanes of traffic, ramps, shoulders and points of entry and exit as set forth in the Design Documents are in their final configuration and Developer has certified that such lanes, ramps, shoulders and entry and exit points can be opened to normal and safe traffic;

3. The relevant systems and equipment installed by Developer comply with applicable Laws, have passed the State Fire Marshal and any other inspections and tests required under the Contract Documents, and Developer has delivered to the Department all reports, data and documentation relating

to such tests;

4. All Utility Adjustment Work and other work that Developer is obligated to perform for or on behalf of third parties as required by the Contract Documents complies with the requirements of the applicable agreements with such third parties, and Developer has paid for all work by third parties that Developer is obligated to pay for, other than disputed amounts;

5. Developer has received, and paid all associated fees due and owing for, all applicable Governmental Approvals and other third-party approvals required for use and operation of the Project, and there exists no uncured violation of the terms and conditions of any such Governmental Approval or other third-party approvals;

6. All plans, manuals and reports for the O&M After Construction have been submitted and accepted by the Department as required under the Contract Documents;

7. Developer has made all deposits to the Intellectual Property Escrow required at or prior to Substantial Completion pursuant to Section 21.5;

8. There exist no uncured Developer Defaults (except any Developer Default which will be cured by achieving Substantial Completion);

9. All Insurance Policies required under Section 16.1 and Appendix 9 for the O&M After Construction have been obtained and are in full force and effect, and Developer has delivered to the Department written binders of insurance verifying coverage from the relevant Insurers of such Insurance Policies;

10. Developer demonstrates to the Department's reasonable satisfaction that Developer has completed training of operations and maintenance personnel, required pursuant to Section 3, 17.10 of Division II, for the O&M After Construction, which demonstration shall consist of (a) delivery to the Department of a written certificate, in form acceptable to the Department, executed by Developer that it and its Contractors are fully staffed with such trained personnel and are ready, willing and able to perform the O&M After Construction in accordance with the terms and conditions of the Contract Documents and Project Management Plan, and (b) delivery to the Department of training records and course completion certificates issued to each of the subject personnel; and

11. Developer has prepared and submitted the Punch List in accordance with the procedures and schedules set forth in the Project Management Plan.

4.9.2.2 Approximately 60 days prior to the date on which Developer expects to achieve Substantial Completion, Developer shall provide written notice to the Department so as to allow the Department to promptly commence its review of those conditions to Substantial Completion amenable to being reviewed at the time of the notice. Following the date Developer determines it has achieved Substantial Completion, Developer shall provide the Department with written notification of such date. During the ten-day period following receipt of such notice, Developer and the Department shall meet and confer to

facilitate the Department's determination of whether Developer has met the criteria for Substantial Completion.

4.9.2.3 Within 20 days following such meeting, the Department shall conduct an inspection of the Project and its components, a review of the Final Design Documents, Construction Documents, other Submittals and such other investigation as may be necessary to evaluate whether Substantial Completion is achieved.

4.9.2.4 Within the 20-day period described in Section 4.9.2.3, the Department shall either (a) issue the written notice of Substantial Completion, effective as of the date that the conditions to Substantial Completion were actually satisfied; or (b) notify Developer in writing of the reasons why Substantial Completion has not been achieved. If the Department and Developer cannot agree as to the date of Substantial Completion, such Dispute shall be resolved according to the Dispute Resolution Procedures; provided, however, that the Parties may proceed directly to the Disputes Review Board and need not comply with subsections 1 through 4 as described in Section 24.2.1.

4.9.2.5 In connection with the Department's issuance of the notice of Substantial Completion, the Department shall have the right in its reasonable discretion to add items to the Punch List to address incomplete work or work in need of repair. Any Dispute regarding whether an item added by the Department is appropriately included on the Punch List shall be resolved according to the Dispute Resolution Procedures. The notice of Substantial Completion will indicate the actual date on which Developer achieved Substantial Completion.

4.9.3 Final Acceptance

4.9.3.1 Developer shall achieve Final Acceptance by the Final Acceptance Deadline. The Department will issue a written notice of Final Acceptance at such time as all of the following have occurred for the entire Project:

1. All Construction Work has been completed in accordance with the Design Documents and the Contract Documents;

2. All Punch List items have been completed to the reasonable satisfaction of the Department;

3. All local streets and landscaping features have been completed in accordance with the Design Documents and the Contract Documents;

4. Developer has cleared and restored to their original condition the Temporary Construction Easement and any other Presidio Trust lands and properties made available to Developer for temporary access and activities during the D&C Work, in accordance with Section 4.17.

5. Developer demonstrates to the Department's reasonable satisfaction that Developer has acquired and properly stored, or arranged for immediate availability, a reasonable inventory of all spare parts, spare components, spare equipment, special tools, materials, expendables and consumables necessary for operation and maintenance of the Project as identified in the O&M Plan for the Operating Period;

6. All Submittals for the D&C Work that Developer is required by the Contract Documents to submit after Substantial Completion have been submitted to the Department;

7. The Department has received a complete set of the As-Built Record Plans in the form required by the Contract Documents;

8. If any Governmental Entity with jurisdiction requires any form of certification of design, engineering or construction with respect to the Project or any portion thereof, including any certifications from the Engineer of Record and Architect of Record for the Project, Developer has caused such certificates to be delivered and has concurrently issued identical certificates to the Department;

9. Developer has properly completed and the Department has received the OCIP notice of work completion form; and

10. There exist no uncured Developer Defaults (except any Developer Default which will be cured by achieving Final Acceptance).

4.9.3.2 Approximately 30 days prior to the date on which Developer expects to achieve Final Acceptance, Developer shall provide written notice to the Department so as to allow the Department to promptly commence its review of those conditions to Final Acceptance amenable to being reviewed at the time of the notice. Following the date Developer determines it has achieved Final Acceptance, Developer shall provide the Department with written notification of such date. During the ten-day period following receipt of such notification, Developer and the Department shall meet and confer to facilitate the Department's determination of whether to issue a written notice of Final Acceptance.

4.9.3.3 Within 20 days following such meeting, the Department shall conduct an inspection of the Punch List items, a review of the As-Built Record Plans, other Submittals and such other investigation as may be necessary to evaluate whether Final Acceptance is achieved.

4.9.3.4 Within the 20-day period described in Section 4.9.3.3, the Department shall either (a) issue a notice of Final Acceptance effective as of the date that the conditions to Final Acceptance were actually satisfied; or (b) notify Developer in writing of the reasons why Final Acceptance has not been achieved. If the Department and Developer cannot agree as to the date of Final Acceptance, such Dispute shall be resolved according to the Dispute Resolution Procedures. The notice of Final Acceptance will indicate the actual date on which Developer achieved Final Acceptance.

4.9.4 Milestone Payment and Adjustments

4.9.4.1 Subject to Sections 4.9.4.3 and 4.9.4.5, Developer shall be entitled to receive from the Department the payment ("**Milestone Payment**") in the amount ("**Milestone Payment Amount**") set for in Appendix 4. The Milestone Payment is a payment chosen to be made by the Department as an economic measure in lieu of larger Availability Payments, in order to maximize the overall value to the Department of this Agreement, and is not intended and shall not be construed as a progress payment or retention under California Law.

4.9.4.2 Developer shall submit an invoice in a format acceptable to the Department's chief financial officer for the Milestone Payment. The Department shall make payment to Developer of the Milestone Payment Amount within 45 days after the Department receives (a) the invoice in the proper format issued on or after the Substantial Completion Date and (b) Developer's written report on determination of adjustments to the Milestone Payment pursuant to Section 4.9.4.3 and Appendix 4.

4.9.4.3 The Milestone Payment shall be subject to adjustment by the Milestone Payment Adjustment in accordance with Appendix 4. Developer acknowledges that such adjustments to the Milestone Payment are reasonable liquidated damages in order to compensate the Department for damages it will incur by reason of Developer's failure to comply with the performance standards for O&M Work applicable to the period prior to Substantial Completion. Such damages include:

1. The Department's increased costs of administering this Agreement, including the increased costs of legal, accounting, monitoring, oversight and overhead, and could also include obligations to pay or reimburse Governmental Entities with regulatory jurisdiction over the Project for violation of applicable Governmental Approvals or for their increased costs of monitoring and enforcing Developer's compliance with applicable Governmental Approvals;

2. Potential harm and future costs to the Department from reduction in the condition and Design Life of the Project;

3. Potential harm to the credibility and reputation of the Department's transportation improvement program with other Governmental Entities, with policy makers and with the general public who depend on and expect availability of service;

4. Potential harm and detriment to the general pubic, which may include loss of the use, enjoyment and benefit of the Project and of facilities connecting to the Project;

5. Loss of economic benefits by other Governmental Entities owning and operating transportation facilities that connect to or are affected by the Project; and

6. The Department's increased costs of addressing potential harm to the Environment, including increased harm to air quality caused by congestion, and harm to water quality, soils conditions, historic structures and other environmental resources caused by adjustment factors set forth in Appendix 4.

4.9.4.4 Developer further acknowledges that these damages would be difficult and impracticable to measure and prove because, among other things, (a) the Project is of a unique nature and no substitute for it is available; (b) the costs of monitoring and oversight prior to increases in the level thereof will be variable and extremely difficult to quantify; (c) the nature and level of increased monitoring and oversight will be variable depending on the circumstances; and (d) the variety of factors that influence use of and demand for the Project make it difficult to sort out causation of the matters that will trigger these liquidated damages and to quantify actual damages.

4.9.4.5 The Milestone Payment is also subject to deduction and offset as expressly provided in Sections 4.3.1, 4.12.2.1, 4.13.2.1, 7.6.1, 16.1.2.2 and 18.2.5.2, subject to the Milestone Payment Adjustment Cap set forth in Appendix 4.

4.10 Hazardous Materials and Undesirable Materials Management

4.10.1 Developer's General Responsibilities

4.10.1.1 Developer shall manage, treat, handle, store, remediate, remove, transport (where applicable) and dispose of all Hazardous Materials or Undesirable Materials encountered in performing the Work, including contaminated soil and groundwater, in accordance with applicable Law, Governmental Approvals, and all applicable provisions of the Contract Documents. If during the course of the Work, a Release of Hazardous Materials occurs or Developer otherwise encounters Hazardous Materials or Undesirable Materials, Developer shall follow the procedures and perform the activities as set forth in the Contract Documents.

4.10.1.2 Except as set forth in Sections 4.10.2 and 4.10.3, Developer shall not be entitled to submit a claim for any Extra Work Costs, Delay Costs, time, Financial Close Deadline or Completion Deadline extensions or other relief associated with discovering, encountering, managing, treating, handling, storing, remediating, removing, transporting or disposing of Hazardous Materials or Undesirable Materials, including contaminated soil and groundwater.

4.10.2 Pre-existing Hazardous Materials

4.10.2.1 Except as provided in Sections 4.10.2.2 and 4.10.2.6, Developer shall be solely responsible for all costs, including Extra Work Costs and Delay Costs, relating to Pre-existing Hazardous Materials.

4.10.2.2 Subject to Section 4.10.2.3, Developer and the Department shall allocate the risk of Extra Work Costs as follows:

1. The Extra Work Costs for off-site disposal of the first 9,450 cubic yards of excavated soils contaminated with Pre-existing Hazardous Materials that must be disposed of at a Class 1 disposal facility, and the first 53,550 cubic yards of excavated soils contaminated with Pre-existing Hazardous Materials that can be disposed of at a Class 2 disposal facility ("**Pre-existing Hazardous Materials Deductible**"), shall be borne solely by Developer.

2. The Extra Work Costs for off-site disposal of the next 1,890 cubic yards of excavated soils contaminated with Pre-existing Hazardous Materials that must be disposed of at a Class 1 disposal facility, and the next 10,710 cubic yards of excavated soils contaminated with Pre-existing Hazardous Materials that can be disposed of at a Class 2 disposal facility ("**Tiered Pre-existing Hazardous Materials Deductible**"), shall be borne 50% by Developer and 50% by the Department.

3. The Department shall compensate Developer for 100% of the Extra Work Costs for off-site disposal of Pre-existing Hazardous Materials in excess of the relevant Tiered Pre-existing Hazardous Materials Deductible.

4.10.2.3 For purposes of Section 4.10.2.2:

1. Contaminated excavated soils shall not be counted if Developer is permitted to return such soils to trenches or other areas of excavation pursuant to the Presidio Trust's or other applicable property owner's soil re-use policies or pursuant to provisions of the Presidio Trust Right of Entry Agreement or the License to Enter Agreement (including Section 12(h) thereof), provided that the reasonable costs of handling such contaminated soils in excess of the costs Developer would incur to handle such soils if they were not contaminated shall constitute Extra Work Costs recoverable by Developer, subject to clauses 2 and 3 below and Section 4.10.2.7;

2. Contaminated excavated soils shall not be counted if such soils are excavated from property located outside the boundaries for the Project Right of Way indicated in Appendix 5-A, unless such property is added due to a Department Change; and

3. Developer shall solely bear the Extra Work Costs for all Hazardous Materials excavated from property located outside the boundaries for the Project Right of Way indicated in Appendix 5-A, unless such property is added due to a Department Change.

4.10.2.4 Extra Work Costs for which the Department is liable under Section 4.10.2.2 shall be determined by applying the same unit price (per cubic yard) for off-site disposal of soils contaminated with Hazardous Materials that applies to Developer under the Contract with the Lead Contractor with respect to off-site disposal for which Developer is not compensated by the Department. If no such unit price is stated in such Contract, then the unit price shall not exceed the unit price the Department could obtain through competitive low bid from a qualified contractor for such work.

4.10.2.5 Developer shall not be entitled to seek, nor shall Developer be entitled to charge against any of the deductibles established under Section 4.10.2.2, the following:

1. Extra Work Costs covered by insurance obtained for the Project;

2. Extra Work Costs that could have been avoided by the exercise of reasonable efforts to mitigate and reduce costs;

3. Extra Work Costs associated with the investigation of and planning for Pre-existing Hazardous Materials prior to the completion of the Final Design;

4. Delay Costs of any kind.

4.10.2.6 If remediation of Pre-existing Hazardous Materials cannot be accomplished through off-site disposal of excavated soils, then except for the Claim Deductible and except as provided in Section 4.10.2.7, the Department shall compensate Developer for 100% of the Extra Work Costs and Delay Costs reasonably incurred for managing, treating, handling, storing, remediating, removing, transporting or disposing of such Pre-existing Hazardous Materials. Each discrete, separate remedial action required by applicable Law shall be counted as one instance of discovery and remediation of Pre-existing Hazardous

Materials for the purpose of apply the Claim Deductible. (For example, if several items of UXO are contemporaneously discovered and handled and disposed of together at one time in accordance with applicable Law, then one Claim Deductible will apply.)

4.10.2.7 Developer shall not be entitled to seek the following:

1. Extra Work Costs or Delay Costs covered by insurance obtained for the Project;

2. Extra Work Costs or Delay Costs that could have been avoided by the exercise of reasonable efforts to mitigate and reduce costs;

3. Extra Work Costs or Delay Costs associated with the investigation of and planning for Pre-existing Hazardous Materials prior to the completion of the Final Design.

4.10.2.8 Nothing in this Section 4.10.2 shall prejudice Developer's right to seek compensation, Completion Deadline extension and performance relief under Sections 9.2.2, 9.2.3 and 9.2.5.

4.10.2.9 To the extent permitted by Law, the Department agrees to hold harmless and indemnify Developer for Losses arising out of or related to Third-Party Claims with respect to Pre-existing Hazardous Materials discovered or encountered by Developer during the performance of the Work, provided that: (a) the Pre-existing Hazardous Materials were not known or reasonably discoverable by Developer or any Developer-Related Entity and (b) such Losses were not the result of the negligence, willful misconduct, or breach of applicable Law or contract by Developer or any Developer-Related Entity.

4.10.3 Releases of Hazardous Materials

For Releases of Hazardous Materials as set forth in clause (n) of the definition of Relief Event, Developer shall be entitled to submit a claim for compensation, Completion Deadline extensions, performance relief and other relief permitted under Article 9; provided that (a) the provisions of Section 4.10.2 shall exclusively control if such Hazardous Materials are Pre-existing Hazardous Materials and (b) no compensation shall be available under Section 9.3 for Extra Work Costs and Delay Costs arising out of Releases of Hazardous Materials from vehicles operating within the Project Right of Way, unless operated by the Department.

4.10.4 Generator and Arranger of Hazardous Materials

4.10.4.1 As between Developer and the Department, the Department shall be considered the sole generator and arranger of (a) Pre-existing Hazardous Materials, (b) Hazardous Materials Released by the Department (including a Department contractor or subcontractor for the Phase I Construction) and (c) Hazardous Materials that migrate into, onto or under the Project Right of Way indicated in Appendix 5-A from points or origin located outside the boundaries of such Project Right of Way unless the source of such Hazardous Materials is a Developer-Related Entity in the course of performing Work, provided that such Pre-existing Hazardous Materials or such other Hazardous Materials are handled and disposed of by Developer in accordance with the Contract Documents.

4.10.4.2 Whenever there occurs a third party Release of Hazardous

Materials onto the Project or Project Right of Way (which for this purpose does not include migration described in Section 4.10.4.1(c)), Developer shall use diligent efforts to handle disposal of the Hazardous Materials in a manner that does not place either Developer or the Department in the position of assuming generator or arranger liability. Measures to accomplish this objective include the following:

1. Obtaining from the vehicle operator a "transportation manifest" or “bill of lading” and a Material Data Safety Sheet (MSDS) and contacting the owner of the cargo, so that such owner assumes responsibility as generator and arranger for disposal of the Hazardous Materials;

2. If a transportation manifest or bill of lading and MSDS are incomplete and the owner of the cargo is not immediately available, causing the removal of the Hazardous Materials to protect human heath and the environment and storing the Hazardous Materials in the vehicle responding to the incident pending contact with and further guidance from the owner of the cargo; and

3. If no third party assumes generator and arranger responsibility for the Release, immediately reporting the Release to the Office of Emergency Services and/or the local heath department and having such agency handle the Release, so that the State is aware that the Release is from a fugitive disposer.

4.10.4.3 If despite such diligent efforts Developer is unable to avoid generator and arranger liability for the Parties with respect to a third party Release of Hazardous Materials onto the Project or Project Right of Way, then the Department will undertake arranger (and, if necessary, generator) liability for such third party spills.

4.10.4.4 The Department has exclusive decision-making authority regarding selection of the destination facility to which the Pre-existing Hazardous Materials or such other Hazardous Materials will be transported whenever it acts as generator or arranger. The foregoing shall not preclude or limit any rights or remedies that the Department may have against Developer-Related Entities (other than Developer), third parties and/or prior owners, lessees, licensees and occupants of the Project Right of Way.

4.10.4.5 As between Developer and the Department, Developer shall be considered the sole generator and arranger for Hazardous Materials other than Hazardous Materials governed by Sections 4.10.4.1, 4.10.4.2 and 4.10.4.3. The foregoing shall not preclude or limit any rights or remedies that Developer may have against any Governmental Entity or any other third parties, including existing or prior owners, lessees, licensees and occupants of any parcel of land that is or becomes part of the Project Right of Way, excluding, however, the Department, the Authority and their respective agents.

4.10.5 Assignment and Subrogation of Rights Against Third Parties

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

4.11 Environmental Compliance

Throughout the course of the D&C Work, Developer shall comply with all Environmental Laws and perform or cause to be performed all environmental mitigation measures required under the Contract Documents and the Environmental Approvals, including the NEPA/CEQA Approval, the approvals and consents obtained under the Programmatic Agreement and similar Governmental Approvals for the D&C Work, and shall comply with all other conditions and requirements thereof. Developer, at its sole cost and expense, shall also abide by and comply with the commitments contained in subsequent re-evaluations and modifications of Environmental Approvals that are submitted 30 days prior to the Proposal Submittal Date which may identify additional commitments. If the Department directs Developer to comply with commitments contained in re-evaluations and modifications of Environmental Approvals submitted after such 30-day period that affect the D&C Work, such directive shall be deemed a Department Change. Notwithstanding the foregoing, Developer shall be responsible, and bear the sole risk for any costs and delays, for obtaining and complying with any environmental re-evaluations and new or modified approvals, authorizations and consents required (a) under the Programmatic Agreement due to differences between the Indicative Preliminary Design and Developer's Final Design, unless such differences are due to a Department Change pursuant to Article 10 and (b) under the License to Enter Agreement for Utility Adjustment Work not covered by the FEIS/R due to differences between the Indicative Preliminary Design and Developer's Final Design, unless such differences are due to a Department Change pursuant to Article 10. Developer shall reimburse the Department for the Department's Recoverable Costs of technical studies and documentation, including biological and cultural resource studies, prepared in connection with any such environmental re-evaluations required due to the differences between the Indicative Preliminary Design and Developer's Final Design, unless such differences are due to a Department Change pursuant to Article 10.

4.12 Landscaping

4.12.1 The landscaping design and materials for the portion of the Project located on Presidio Trust lands (with the possible exception of the Project median) are subject to the approval of the Presidio Trust under the Presidio Trust Right of Entry Agreement, but as of the Proposal Submission Date the Presidio Trust had not established or approved design criteria for the landscaping. In anticipation of the Department, in consultation with the Presidio Trust, establishing final criteria and requirements, the Department has included in the Reference Documents a landscaping concept plan for the entire Project, and included in the Technical Requirements baseline design criteria for Project landscaping. The landscaping criteria and requirements established by the Department in consultation with the Presidio Trust shall prevail over the landscaping concept plan and baseline landscaping design criteria in the Technical Requirements to the extent there exist any irreconcilable differences. Even though such differences may be documented as a Department Change, the provisions of this Section 4.12 shall prevail over provisions in this Agreement regarding Developer's entitlement to compensation or other relief arising from a Department Change.

4.12.2 Developer shall be solely responsible for all costs, including Extra Work Costs and Delay Costs, relating to the design, purchase, installation, establishment, maintenance and replacement of Project landscaping, except that Developer and the Department shall allocate the risk of Extra Work Costs of Allowance Landscaping as follows:

4.12.2.1 If the Extra Work Costs of Allowance Landscaping are less than $12,000,000, then the Department shall be entitled to 50% of the savings, which the

Department may elect to receive as a deduction from the Milestone Payment (subject to the Milestone Payment Adjustment Cap set forth in Appendix 4) or as an adjustment to the Maximum Availability Payments;

4.12.2.2 If the Extra Work Costs of Allowance Landscaping equal or exceed $12,000,000 but are less than or equal to $18,000,000, then Developer shall bear 100% of such costs;

4.12.2.3 If the Extra Work Costs of Allowance Landscaping exceed $18,000,000 but are less than or equal to $24,000,000, then the Department and Developer shall each bear 50% of such excess costs; and

4.12.2.4 If the Extra Work Costs of Allowance Landscaping exceed $24,000,000, then the Department shall bear 100% of such excess costs.

4.12.3 Claims by Developer under this Section 14.12 shall be submitted and subject to the claims procedures and requirements set forth in Section 9.1.1.

4.13 Haul Routes

4.13.1 The restoration of Haul Routes for the Project is subject to the approval of the Presidio Trust under the Presidio Trust Right of Entry Agreement, but as of the Proposal Submission Date the extent of the damage to the Haul Routes could not be fully established. In anticipation of the final inspection requirements, the Department has included a requirement in the Technical Requirements for all Haul Routes to be returned to the preexisting condition prior to commencement of Phase I Construction, as indicated in the Survey of Existing Conditions Prior to Phase I Work. The requirements established by the Department in consultation with the Presidio Trust shall prevail over the Technical Requirements to the extent there exist any irreconcilable differences. Even though such differences may be documented as a Department Change, the provisions of this Section 4.13 shall prevail over provisions in this Agreement regarding Developer's entitlement to compensation or other relief arising from a Department Change.

4.13.2 Developer shall be solely responsible for all costs, including Extra Work Costs and Delay Costs, relating to the restoration of all Haul Routes in accordance with the applicable requirements, except that Developer and the Department shall allocate the risk of Extra Work Costs as follows:

4.13.2.1 If the Extra Work Costs of the Haul Routes restoration are less than $1,000,000, then the Department shall be entitled to 50% of the savings, which the Department may elect to receive as a deduction from the Milestone Payment (subject to the Milestone Payment Adjustment Cap set forth in Appendix 4) or as an adjustment to the Maximum Availability Payments;

4.13.2.2 If the Extra Work Costs of the Haul Routes restoration equal or exceed $1,000,000 but are less than or equal to $1,300,000, then Developer shall bear 100% of such costs; and

4.13.2.3 If the Extra Work Costs of the Haul Routes restoration exceeds $1,300,000, then the Department shall bear 100% of such excess costs.

4.13.3 Claims by Developer under this Section 4.13.3 shall be submitted and subject to the claims procedures and requirements set forth in Section 9.1.1.

4.14 Oversight, Meetings and Reporting

4.14.1 Oversight by the Department

The Department shall have the right but not the obligation to perform oversight and auditing relating to the D&C Work in accordance with the Contract Documents.

4.14.2 Meetings

4.14.2.1 In addition to the meeting requirements set forth in Section 1 of Division 1, Developer shall conduct regular progress meetings at least once a month during the Construction Period. The Department and the Presidio Trust shall be invited to participate in such progress meetings. At the Department's request, Developer will require its design consultants and construction contractors to attend these progress meetings.

4.14.2.2 In addition, the Department and Developer, through their respective Authorized Representatives, shall meet from time to time at the other Party's request to discuss and resolve matters relating to the D&C Work.

4.14.2.3 Developer shall schedule all meetings with the Department (and, when applicable, the Presidio Trust) at a date, time and place reasonably convenient to both Parties (and, when applicable, the Presidio Trust) and, except in cases of urgency, shall provide the Department (and when applicable, the Presidio Trust) with written notice and a meeting agenda at least five Business Days in advance of each meeting.

4.14.3 Reporting

Developer shall submit all reports relating to the D&C Work in the form, with the content and within the time required under the Contract Documents.

4.15 Construction Warranties

4.15.1 Developer shall obtain from all Contractors appropriate representations, warranties, guarantees and obligations with respect to design, materials, workmanship, equipment, tools and supplies furnished by such Contractors, which shall extend not only to Developer but also to Utility Owners and any third parties for whom Work is being performed. All representations, warranties, guarantees and obligations of Contractors (a) shall be written so as to survive all Department and Utility Owner inspections, tests and approvals and (b) shall provide that upon any termination of the Agreement prior to the expiration of such representations, warranties, guarantees and obligations they shall automatically be for the benefit of and enforceable by the Department. To the extent that any Contractor warranty or guaranty is voided after termination of the Agreement by reason of Developer's negligence or failure to comply with the requirements of the Contract Documents in incorporating material or equipment into the Work, Developer shall be responsible for correcting any defects in the Work performed by such Contractor which would otherwise have been covered by such warranty.

4.15.2 The Contractor warranties are in addition to all rights and remedies available under the Contract Documents or applicable Law, and shall not limit Developer's liability or

responsibility imposed by the Contract Documents or applicable Law with respect to the Work, including liability for design defects, construction defects, strict liability, breach, negligence, willful misconduct or fraud.

4.16 Defects in Phase I Construction

4.16.1 The Department has provided to Developer or will promptly provide to Developer after they are prepared as-built drawings of Phase I Construction works and Phase I Construction records including Department's quality control and testing results, which shall be made part of the Baseline Report.

4.16.2 As part of its normal procedures for certifying substantial completion of the construction work performed under Phase I Construction, the Department will perform inspections of the Phase I Construction to evaluate the physical condition of the Phase I Construction works listed in Section 2.1 of Appendix 22 and develop a punch list ("**Phase I Punch List**"). The Phase I Punch List shall identify, by the Phase I Operation Start Date, incomplete construction work items and apparent deficiencies in the Phase I Construction works listed in Section 2.1 of Appendix 22 the existence, correction and completion of which after the Phase I Operation Start Date and before Phase I Final Acceptance will have no adverse effect on the normal, uninterrupted and safe use and operation of the Project. The Department shall keep Developer currently informed of its inspection schedule, and the Parties shall collaborate to enable Developer to join the Department on its inspections of Phase I Construction works listed in Section 2.1 of Appendix 22 without delaying the Department's inspection schedule. Developer shall have the right to accompany the Department on such inspections and to prepare its own notes regarding potential items to be included on the Phase I Punch List. As promptly as possible after each such inspection, the Department shall deliver the Phase I Punch List or update thereto to Developer. Developer shall review the Phase I Punch List and updates thereto and shall have five days from receipt thereof to deliver to the Department Developer's comments, additions and deletions regarding the Phase I Punch List based on the last inspection, including items that Developer believes are deficiencies that must be rectified before Phase I Final Acceptance. The Department and Developer shall then meet and confer to seek to resolve the discrepancies (if any) between the Department and Developer and to seek to agree upon a Baseline Report. If the Department and Developer are unable to agree on the Baseline Report within ten days after the Department receives Developer's comments on the final Phase I Punch List update, the Department shall decide on what items and work to include in the Phase I Punch List and shall issue the Baseline Report incorporating all such items and work. For disputed items not included in the Baseline Report, either Party may refer the Dispute for resolution according to the Dispute Resolution Procedures. Any items resolved in favor of Developer shall be added to the Baseline Report.

4.16.3 As part of its normal procedures for final acceptance of the construction work performed under Phase I Construction, the Department will perform inspections of the Phase I Construction to verify that Phase I Punch List items have been completed. Upon issuance by the Department of Phase I Final Acceptance, Developer shall inspect conditions established in the Baseline Report and verify that the Phase I Punch List items have been completed. Developer also shall inspect the Phase I Construction works listed in Section 2.1 of Appendix 22, which are within or near demolition activities that took place after the Department's issuance of the Baseline Report as provided in Section 4.16.2. Developer shall propose revisions to the Baseline Report within ten days of Phase I Final Acceptance only on the basis that (a) Phase I Punch List items made part of the Baseline Report per Section 4.16.1 have not been completed or were altered as a direct consequence of the Department's actions necessary to reach Phase

1 Final Acceptance, or (b) the condition of the Phase 1 Construction works listed in Section 2.1 of Appendix 22, which are within or near Phase I Construction demolition activities that took place after the Department's issuance of the Baseline Report as provided in Section 4.16.2, was altered as a direct consequence of these demolition activities. The Department shall have ten days to review. The Department and Developer shall then meet and confer to seek to resolve the discrepancies (if any) between the Department and Developer and to seek to agree upon a revised Baseline Report. If the Department and Developer are unable to agree on a revised Baseline Report within ten days after Developer receives the Department's comments, the Department shall decide on what items and work to include in the revised Baseline Report and shall issue a revise Baseline Report if necessary incorporating all such items and work. For disputed items not included in the revised Baseline Report, either Party may refer the Dispute for resolution according to the Dispute Resolution Procedures. Any items resolved in favor of Developer shall be added to the revised Baseline Report.

4.16.4 Except as provided in Section 4.16.6, prior to the Substantial Completion Date, the Department shall elect either to (a) undertake the rehabilitation or repair of any defect in the Phase I Construction or any other item identified in the Baseline Report, at its sole cost, or (b) issue a Department Change directing Developer to undertake such rehabilitation or repair and pay Developer the Extra Work Costs and Delay Costs thereof. The Baseline Report shall be revised to reflect completion of any such rehabilitation or repair. If any items in dispute are not finally resolved prior to the Substantial Completion Date, then after final resolution Developer shall undertake rehabilitation or repair of any items that are added to the Baseline Report as a result of such final resolution, and the Department shall pay the cost thereof as provided above.

4.16.5 Except as provided in Sections 4.16.2, 4.16.3 and 4.16.6, Developer shall be deemed to have accepted the Phase I Construction in its then current condition on the Substantial Completion Date, without right to any Extra Work Costs, Delay Costs, time or Completion Deadline extension, compensation for losses due to delays in commencement of Availability Payments or for additional interest costs due to delayed receipt of the Milestone Payment, or other claim or relief.

4.16.6 If Developer encounters any Structural Latent Defect after the Phase I Final Acceptance, Developer (a) shall be responsible for undertaking the rehabilitation of such Structural Latent Defect as well as any resulting increased costs of operating and maintaining the Project, and (b) subject to the following terms and conditions, shall be entitled to receive compensation from the Department and performance relief as provided in Section 9.2:

4.16.6.1 The Structural Latent Defect must be identified and described with specificity in a written report received by the Department within ten years after the date the Department issues the Baseline Report pursuant to Section 4.16.2; and

4.16.6.2 The costs to be compensated must not be attributable to substandard maintenance and repair by any Developer-Related Entity.

4.17 Survey of Existing Site Conditions

4.17.1 The Department has provided to Developer or will promptly provide to Developer after they are prepared surveys establishing the site conditions prior to commencement of Phase I Construction of lands, facilities, and properties within or near the TCE, including those facilities listed in Section 3.2 of Appendix 22 ("**Survey of Existing Conditions Prior to Phase I Work**").

4.17.2 As part of its procedures for certifying Phase I Substantial Completion, the Department will perform inspections of lands, facilities, and properties within or near the TCE, including those facilities listed in Section 3.2 of Appendix 22, but excluding the assets listed in Section 2.1 of Appendix 22, establishing the site conditions as of to the date of such inspection ("**Survey of Existing Conditions**"). The requirements for management of cultural resources are detailed in Section 1 of Division I. As part of these requirements, the Department will provide to Developer Condition Assessment Reports (CAR) for buildings within 200 feet of Phase I Construction activities as Reference Documents. Those CARs will be made part of the Survey of Existing Conditions. Developer shall have ten days after receipt of the Survey of Existing Conditions to deliver to the Department comments to the Survey of Existing Conditions. The Department and Developer shall then meet and confer to seek to resolve the discrepancies (if any) between the Department and Developer and to seek to agree upon the Survey of Existing Conditions. If the Department and Developer are unable to agree on the Survey of Existing Conditions within ten days after the Department receives the Developer's comments, the Department shall decide on the content of and then issue the Survey of Existing Conditions. For disputed matters, either Party may refer the Dispute for resolution according to the Dispute Resolution Procedures. The Survey of Existing Conditions shall be modified in accordance with the final outcome of such Dispute.

4.17.3 As part of its procedures for Final Acceptance, the Department will perform inspections of the lands, facilities and properties identified in the Survey of Existing Conditions, establishing the site conditions as of the date of such inspection (the "**Updated Survey of Existing Conditions**"). Developer shall have ten days after receipt of the Updated Survey of Existing Conditions to deliver to the Department comments to the Updated Survey of Existing Conditions. The Department and Developer shall then meet and confer to seek to resolve the discrepancies (if any) between the Department and Developer and to seek to agree upon the Updated Survey of Existing Conditions. If the Department and Developer are unable to agree on the Updated Survey of Existing Conditions within ten days after the Department receives the Developer's comments, the Department shall decide on the content of and then issue the Updated Survey of Existing Conditions. For disputed matters, either Party may refer the Dispute for resolution according to the Dispute Resolution Procedures. The Updated Survey of Existing Conditions shall be modified in accordance with the final outcome of such Dispute.

4.17.4 Developer shall restore all areas within the TCE Occupation Plan, as it may be amended pursuant to Section 4.4.4, to the conditions described in the Survey of Existing Conditions Prior to Phase I Work, at its sole cost, except as provided in Section 4.13 with respect to Haul Routes.

4.17.5 Except as provided in Sections 4.17.4 and 4.17.7, for those areas and facilities that have been disturbed or damaged by Phase I Construction as indicated by a comparison of the Survey of Existing Conditions to the Survey of Existing Conditions Prior to Phase I Work, the Department shall elect either to (a) undertake prior to Phase I Final Acceptance restoration to the conditions described in the Survey of Existing Conditions Prior to Phase I Work, at its sole cost, or (b) issue a Department Change directing Developer to undertake such restoration and pay Developer the Extra Work Costs and Delay Costs thereof. If any matters in the Survey of Existing Conditions are in dispute and not finally resolved prior to the Substantial Completion Date, then after final resolution Developer shall undertake restoration of any matters that are added to the Survey of Existing Conditions as a result of such final resolution, and the Department shall pay the cost thereof as provided above. Developer shall conduct the restoration work under such a Department Change in compliance with Section 17 of the Presidio Trust Right of Entry Agreement.

4.17.6 For those areas and facilities not covered under Section 4.17.4 that have been disturbed or damaged by Phase II Construction as indicated by a comparison of the condition of the Updated Survey of Existing Conditions to the Survey of Existing Conditions, Developer shall restore to the conditions described in the Survey of Existing Conditions Prior to Phase I Work at its sole cost. Developer shall conduct such restoration work in compliance with the Presidio Trust Right of Entry Agreement. If the final outcome of a Dispute over matters included in the Updated Survey of Existing Conditions is in favor of Developer, then the Updated Survey of Existing Conditions shall be modified accordingly; provided that if in the interim Developer performs the disputed restoration work, then Developer shall be entitled to a Department Change for such restoration work.

4.17.7 The Parties recognize that the Department will not re-landscape Staging Areas that Developer will be using for the Phase II Construction. Accordingly, Developer shall perform all such re-landscaping, regardless of the condition of such Staging Areas indicated in the Survey of Existing Conditions. For any such Staging Area re-landscaping that is part of the Allowance Landscaping, the cost of such re-landscaping is part of and governed by the cost allocation set forth in Section 4.12. Developer shall bear the entire cost of any other re-landscaping of Staging Areas.

4.18 Assignment of Certain Causes of Action

Developer agrees to assign to the Department all rights, title, and interest in and to all causes of action Developer may have under Section 4 of the Clayton Act (15 U.S.C. Sec. 15) or under the Cartwright Act (Chapter 2 (commencing with Section 16700) of Part 2 of Division 7 of the Business and Professions Code), arising from purchases of goods, services, or materials pursuant to this Agreement. This assignment shall be made and become effective automatically upon tender of the Milestone Payment (with adjustments and deductions as permitted under this Agreement), without further acknowledgment by the Parties.

ARTICLE 5. OPERATIONS AND MAINTENANCE

5.1 Timing of O&M Work

5.1.1 Developer shall perform O&M During Construction within the Construction Period O&M Limits, as described in Section 5.2.3, and shall perform O&M After Construction within the Operating Period O&M Limits.

5.1.2 The Department intends to issue NTP 2 on the Phase I Operation Start Date. The Department will deliver to Developer written notice of the expected Phase I Operation Start Date at least 30 days prior to such date. Thereafter, the Department and Developer shall regularly coordinate to effectuate a smooth and uninterrupted transition of O&M activities and functions to Developer.

5.1.3 Developer shall commence O&M During Construction upon the latest to occur of (a) issuance of NTP 2, (b) the date that is 30 days after the Department delivers the written notice set forth in Section 5.1.2, provided the Department has issued NTP 2 before such date, and (c) September 5, 2011.

5.1.4 Prior to the Phase I Operations Start Date Developer shall demonstrate to the Department's reasonable satisfaction that Developer has completed training of operations and

maintenance personnel, which demonstration shall consist of (a) delivery to the Department of a written certificate, in form acceptable to the Department, executed by Developer that it and its Contractors are fully staffed with such trained personnel and are ready, willing and able to perform the O&M During Construction in accordance with the terms and conditions of the Contract Documents and Project Management Plan, (b) delivery to the Department of training records and course completion certificates issued to each of the subject personnel and (c) the Department's verification that the training program and number of trained personnel meet the standards in Section 3, 17.10 of Division II.

5.1.5 Prior to issuance of NTP 2 Developer shall obtain all Insurance Policies required under Section 16.1 and Appendix 9 for the O&M During Construction and deliver to the Department written binders of insurance, in form and content set forth in Section 16.1.2.4, verifying coverage from the relevant Insurers of such Insurance Policies.

5.2 Operation and Maintenance Standards and Requirements

5.2.1 General Obligations

5.2.1.1 Developer shall carry out the O&M Work within the applicable O&M Limits in accordance with (a) Best Management Practice, as it evolves from time to time, (b) the requirements, terms, conditions and standards set forth in the Contract Documents as the same may change from time to time in accordance with their terms, (c) the Project Management Plan, (d) all Laws, and (e) the requirements, terms, conditions and standards set forth in all Governmental Approvals. If Developer encounters a contradiction between subsections (a) through (e), Developer shall advise the Department of the contradiction and the Department shall instruct Developer as which subsection shall control in that instance. Developer is responsible for keeping itself informed of current Best Management Practice.

5.2.1.2 In addition to performing all other requirements of the Contract Documents, Developer shall: cooperate with the Department and Governmental Entities with jurisdiction in all matters relating to the O&M Work, including their review, inspection and oversight of the operation and maintenance of the Project.

5.2.1.3 Section 4 of Division II sets forth certain minimum performance requirements related to the O&M Work. Developer's failure to comply with such requirements shall entitle the Department to the rights and remedies set forth in the Contract Documents, including the assessment of Noncompliance Points, liquidated damages, deductions from payments otherwise owed to Developer, and termination for Developer Default.

5.2.2 Changes in Operation and Maintenance Standards

5.2.2.1 The Department shall have the right to adopt at any time, and Developer acknowledges it must comply with, all changes and additions to, and replacements of, the Technical Requirements relating to the O&M Work. Without limiting the foregoing, the Parties anticipate that from time to time after the Effective Date, the Department will adopt Non-Discriminatory O&M Changes that will apply to the O&M Work. Developer shall be responsible for keeping itself informed of any Non-Discriminatory O&M Changes to the Manuals and Guidelines. For any other changed, added or replacement standards, criteria, requirements, conditions, procedures, specifications and other provisions to the Technical Requirements, the Department shall provide written notice to Developer, whereupon they shall constitute amendments, and become part, of the Technical Requirements. Non-Discriminatory

O&M Changes that encompass matters that are addressed in the Technical Requirements as of the Effective Date shall replace and supersede inconsistent provisions of such Technical Requirements.

5.2.2.2 If a Non-Discriminatory O&M Change requires major repair, reconstruction, rehabilitation, restoration, renewal or replacement of any Element, Developer shall perform the major repair, reconstruction, rehabilitation, restoration, renewal or replacement not later than the first to occur of (a) any deadline prescribed by the Department for the Non-Discriminatory O&M Change, (b) the date when Developer performs the Renewal Work on such Element; (c) the date when Developer is obligated to perform Renewal Work on such Element; and (d) provided the Department gives no less than 30 days prior written notice to Developer, the date the Department first applies the Non-Discriminatory O&M Changes to projects that the Department manages or operates. If, however, the Department adopts the Non-Discriminatory O&M Change prior to the Substantial Completion Date, the Department shall issue a written notice informing Developer when to implement such Non-Discriminatory O&M Change. Following commencement of any Work pursuant to this Section 5.2.2.2, Developer shall diligently prosecute the Work until completion, and in any event by any deadline for completion reasonably required by the Department for such Non-Discriminatory O&M Change. Should Developer dispute the timing for commencement or completion of Work as described in this Section 5.2.2.2, Developer may submit the Dispute for resolution according to the Dispute Resolution Procedures; pending such resolution Developer shall prosecute the Work in accordance with the Department's directive or Department Change.

5.2.2.3 If a Non-Discriminatory O&M Change requires construction or installation of new improvements at, for or on the Project, Developer shall complete construction and installation of the new improvements according to the implementation period reasonably required by the Department for such Non-Discriminatory O&M Change. Should Developer dispute the timing for commencement or completion of Work as described in this Section 5.2.2.3, Developer may submit the issue for resolution according to the Dispute Resolution Procedures; pending such resolution Developer shall diligently prosecute the Work in accordance with the Department's directive or Department Change.

5.2.2.4 Developer shall be obligated to implement a Discriminatory O&M Change only after the Department issues a written directive or Department Change therefor pursuant to Article 10. Such directive shall indicate the schedule, if applicable, for the completion of such work required by the Discriminatory O&M Change.

5.2.2.5 For purposes of subsection (d) of Section 5.2.2.2, a change, addition or replacement shall be deemed to have been first applied by the Department when the Department commences implementing actions on any other project that the Department manages or operates.

5.2.2.6 Subject to Section 5.2.2.7, for Extra Work relating to capital expenditures required by Non-Discriminatory O&M Changes (whether such Extra Work is caused by one or more Non-Discriminatory O&M Changes) (a) occurring prior to the Substantial Completion Date, Developer shall be entitled to recover only those Extra Work Costs incurred in excess of an aggregate deductible of $2,000,000, and (b) occurring after the Substantial Completion Date, Developer shall be entitled to recover only those Extra Work Costs incurred in excess of an aggregate deductible of $2,000,000 (collectively, the "**Non-Discriminatory O&M Change Deductible**"). The Non-Discriminatory O&M Change Deductible reflects the Parties' agreement that: (i) Developer will bear the financial risks for

Extra Work Costs incurred due to Non-Discriminatory O&M Changes up to the Non-Discriminatory O&M Change Deductible and (ii) the Department will compensate Developer for Extra Work Costs incurred due to Non-Discriminatory O&M Changes in excess of the Non-Discriminatory O&M Change Deductible, provided that each Claim complies with Section 9.1.1. The Non-Discriminatory O&M Change Deductible shall be adjusted in accordance with Section 9.1.3.

5.2.2.7 In no event shall Developer be entitled to compensation for increases in costs of O&M Work, whether Extra Work Costs or Delay Costs, due to a Non-Discriminatory O&M Change, except for capital costs of required major new improvements or required major repair, reconstruction, rehabilitation, restoration, renewal or replacement of any affected Element. Developer shall be entitled to Extra Work Costs pursuant to subsection (ii) of Section 5.2.2.6 only if the Department directs Developer to implement the Non-Discriminatory O&M Changes prior to the date when Developer performs or is scheduled to perform the Renewal Work (if any) on the affected Element or otherwise outside the ordinary course of performing the O&M Work. In such case the amount of the Extra Work Costs (for purposes of calculating both the amount to be applied against the Non-Discriminatory O&M Change Deductible and the amount to be paid by the Department) shall equal the lesser of (a) the actual, reasonable Extra Work Costs incurred or (b) the net present value (applying Developer's then-current weighted average cost of capital as the discount rate) of the cost of funds for such actual, reasonable Extra Work Costs from the date of funding until the next Renewal Work Date for the affected Element. Developer shall not be entitled to any Extra Work Costs for implementing Non-Discriminatory O&M Changes if Developer replaces the affected Element during the ordinary course of performing the O&M Work.

5.2.3 O&M During Construction

5.2.3.1 For O&M During Construction, Developer shall be required to comply with the operations and maintenance performance standards identified in Section 4 of Division II.

5.2.3.2 Developer shall submit to the Department for its review and comment the O&M Plan (including the initial O&M Plan, the final O&M Plan, and updates thereto) for O&M During Construction, in accordance with Section 4 of Division II. Such O&M Plan shall identify the planned activities, resources and level of effort for the O&M Work During Construction. As part of this review and comment process the Parties shall review such planned activities, resources and level of effort, and Developer shall modify the O&M Plan as reasonably requested by the Department to take into account changes in Project conditions that require adjustment to the planned O&M Work.

5.2.3.3 For the O&M During Construction, Developer shall provide traffic management in accordance with the Contract Documents, the approved Traffic Control Plan, and detour and traffic diversion plans consistent with the Traffic Control Plan.

5.2.3.4 During the Construction Period Developer shall perform any O&M Work that is required, and in a manner, to ensure that the Project is maintained in a condition that poses no threat to the health or safety of any Person or physical damage to the Project.

5.2.4 Management of Hazardous Materials and Undesirable Materials

In performing the O&M Work, Developer shall perform all necessary Hazardous

Materials Management and Undesirable Materials Management, including all efforts to manage, treat, handle, store, remediate, remove, transport (where applicable) and dispose of all Hazardous Materials and Undesirable Materials, including contaminated soil and groundwater, in accordance with applicable Law, Governmental Approvals and all applicable provisions of the Contract Documents. The provisions of Section 4.10 shall apply to the O&M Work, including those provisions related to Pre-existing Hazardous Materials and Releases of Hazardous Materials.

5.2.5 Environmental Compliance

Throughout the course of the O&M Work, Developer shall comply with all Environmental Laws and perform or cause to be performed all environmental mitigation measures required under the Contract Documents or under the Environmental Approvals, including the consents and approvals obtained thereunder, and shall comply with all other conditions and requirements thereof. Developer, at its sole cost and expense, shall also abide by and comply with the commitments contained in the environmental impact documentation related to the NEPA/CEQA Approval and any additional commitments contained in subsequent re-evaluations and Environmental Approvals required for the Renewal Work.

5.2.6 Utility Accommodation

5.2.6.1 It is anticipated that from time to time during the O&M Work, Utility Owners will apply for additional utility permits to install new Utilities that would cross or longitudinally occupy areas of the Project that are subject to the Department's permitting jurisdiction, or to modify, repair, upgrade, relocate or expand existing Utilities within such areas. In such circumstances, the provisions of Section 4.5.6 shall apply.

5.2.6.2 Throughout the performance of the O&M Work, Developer shall monitor Utilities and Utility Owners within the Project Right of Way for compliance with applicable utility permits, the Department regulations, policies and other requirements, and other applicable Law and Governmental Approvals, and shall use diligent efforts to obtain the cooperation of each Utility Owner having Utilities within the Project Right of Way in accordance with the Contract Documents.

5.2.7 Emergency Repair Work

5.2.7.1 Developer shall be responsible for procuring and overseeing temporary and/or permanent emergency repair work for the Project. Developer shall solicit competitive bids for such work if FHWA or FEMA regulations policies or procedures require competitive bidding in order to obtain reimbursement for eligible costs. The Department shall provide oversight relating to emergency repair work in accordance with the Contract Documents.

5.2.7.2 Developer shall ensure that such repair work is performed in accordance with the Contract Documents and State and federal Law applicable to such repair work, including the requirements of the FHWA Emergency Relief Manual. Further, Developer shall maintain estimates, cost records and supporting documentation in accordance with such Laws, and in a form and content to enable the Department to seek reimbursement for eligible costs from FHWA or FEMA, if applicable.

5.3 Annual Budget

Developer shall deliver to the Department any budget for O&M Work, and any updates thereto, required by or delivered to any Lender. Developer shall deliver the same to the Department concurrently with Developer's delivery thereof to any Lender.

5.4 Oversight, Meetings and Reporting

5.4.1 Oversight by the Department

The Department shall have the right but not the obligation to perform oversight and auditing relating to the O&M Work in accordance with the Contract Documents.

5.4.2 Meetings

5.4.2.1 Developer shall schedule all progress and periodic meetings with its Lead Operations and Maintenance Contractor, if any, at a date, time and place reasonably convenient for the Department to attend and, except in the case of urgency, shall provide the Department with written notice and an agenda for such meetings at least five Business Days in advance of each meeting. The Department is authorized to attend all such meetings and is permitted to raise any questions, concerns or opinions without restriction.

5.4.2.2 In addition to the regularly scheduled meetings set forth in Section 1 of Division I, the Department and Developer, through their respective Authorized Representatives, shall meet from time to time at the other Party's request to discuss and resolve matters relating to the O&M Work or Project.

5.4.3 Reporting

Developer shall submit all reports relating to the O&M Work, including the O&M Annual Reports, in the form, with the content and within the time required under the Contract Documents.

5.5 Renewal Work

5.5.1 Developer shall diligently perform Renewal Work as and when necessary to maintain compliance with the performance measures, standards and requirements set forth in the Technical Requirements. Developer also shall perform Renewal Work according to the other applicable terms of the Technical Requirements, including, when applicable, the Handback Requirements.

5.5.2 Developer shall use the Renewal Work Plan, including Renewal Work Schedule, as updated from time to time, for scheduling and performing Renewal Work.

5.5.3 Developer shall annually prepare and deliver to the Department a Renewal Work Report which, among other things, shall describe the Renewal Work performed in the preceding Fiscal Year. Certain requirements for the Renewal Work Report (e.g., submittal schedule and component parts) are described in Section 4, 1 of Division II. The Renewal Work Report also shall set forth the total draws and deposits made from and to the Renewal Work Reserve in the immediately preceding Fiscal Year and the date, amount and use of each draw (including any use for Compliance Work or Handback Requirements work).

5.5.4 If at any time the Department determines that Developer has failed to complete any part of the Renewal Work within the time required under the Contract Documents, the Renewal Work Plan, or the Renewal Work Schedule, the Department shall give written notice thereof to Developer. If Developer has failed to complete the Renewal Work within 90 days after the Department delivers such notice, then the Department shall have the right, but not the obligation, to perform and complete such Renewal Work at the expense and for the account of Developer, and to make draws from the Renewal Work Reserve to pay the costs of such action, subject to the Lenders' rights to cure such failure and the Lenders' rights in and to the Renewal Work Reserve established in the Financing Documents. If the amounts in the Renewal Work Reserve are insufficient or the Department is unable to make draws from the Renewal Work Reserve, the Department shall have the right to use and apply payments otherwise payable to Developer by the Department under this Agreement to pay the costs of such action. The foregoing remedy is in addition to any other remedies available to the Department under the Contract Documents on account of such failure, including the assessment of Noncompliance Points, and its right to intervene immediately and without notice to address Developer failures regarding Safety Standards, Safety Compliance, uses or Closures.

5.5.5 Developer may, by notice to the Department, object to any demand by the Department under Section 5.5.3 on the grounds that Developer has completed the Renewal Work specified in the Department's demand or that such Renewal Work is not then required, which notice shall give details of the grounds for objection. Promptly after the delivery of any such notice, the Parties will endeavor to reach agreement as to any matters referred to in the notice. If no agreement is reached as to any such matter within 30 days after Developer delivers such notice, either Party may refer the matter for resolution according to the Dispute Resolution Procedures.

5.6 Renewal Work Plan

5.6.1 Developer shall prepare and submit to the Department for review and comment Developer's five-year Renewal Work Plan, and annual updates thereof, in accordance with Section 4, 1 of Division II. As a component of its Renewal Work Plan, Developer also shall prepare and submit to the Department for review and comment a Renewal Work Schedule, and annual updates thereof, in accordance with Section 4, 2 of Division II.

5.6.2 Developer shall submit the initial Renewal Work Plan, including Renewal Work Schedule, not later than 45 days prior to the estimated date for issuance of NTP 3. Thereafter, Developer shall submit each annual update of the Renewal Work Plan, including an annual update of the Renewal Work Schedule, not later than 45 days prior to the beginning of each Fiscal Year.

5.6.3 Developer's updated Renewal Work Plan, including updated Renewal Work Schedule, shall include revisions thereto based on the following: Project experience and then-existing Project conditions: changes in the estimated costs of Renewal Work; changes in the Renewal Work Reserve; changes in technology; changes in Developer's planned means and methods of performing Renewal Work; and other relevant factors. The updated Renewal Work Plan, including updated Renewal Work Schedule, shall highlight or redline the revisions, if any, to the prior Renewal Work Plan, including prior Renewal Work Schedule, and include an explanation for such revisions. If no revisions are proposed, Developer shall include an explanation of the reasons no revisions are necessary. The updated Renewal Work Plan, including updated Renewal Work Schedule, also shall set forth, by Element, Developer's planned draws from the Renewal Work Reserve during the forthcoming five Fiscal Years.

5.6.4 At the Department's request, Developer and its Lead Operations and Maintenance Contractor, if any, shall promptly meet and confer with the Department to review and discuss the initial or updated Renewal Work Plan, including initial or updated Renewal Work Schedule.

5.7 Renewal Work Reserve

5.7.1 Establishment

5.7.1.1 After the first to occur of the Final Acceptance Date or the Final Acceptance Deadline (or any earlier date required by Lenders), Developer shall establish and fund a reserve account (the "**Renewal Work Reserve**") that may be used for the purposes set forth in Section 5.7.3. The Renewal Work Reserve shall at a minimum be in the amount identified in Appendix 2-F and shall be established under arrangements that, subject to the prior rights of the Lenders in and to the Renewal Work Reserve established in the Financing Documents in compliance with Section 15.4.10, will ensure its availability to the Department if the Department exercises its option to perform the Renewal Work in accordance with Section 5.5.3.

5.7.1.2 Developer shall provide to the Department the details regarding the account, including the name, address and contact information for the depository institution and the account number. Developer shall inform the depository institution of all of the Department's rights and interests with respect to the Renewal Work Reserve, which shall be subordinate to the rights of the Lenders in and to the account as provided in the Financing Documents in compliance with Section 15.4.10, including the Department's right to draw on the Renewal Work Reserve as provided in Section 5.5.3. Developer shall deliver such notices to the depository institution and execute such documents as may be required to establish and perfect the Department's interest in the Renewal Work Reserve under the Uniform Commercial Code as adopted in the State, which interest shall be subordinate to the rights of the Lenders under the Financing Documents as provided herein.

5.7.1.3 In lieu of establishing the Renewal Work Reserve, Developer may deliver to the Department Renewal Work Letters of Credit, on the terms and conditions set forth in Section 5.7.6.

5.7.2 Funding

Developer shall make deposits to the Renewal Work Reserve commencing at the time, at the frequencies or intervals and in the amounts as determined by the Lenders under the Funding Agreements, as such requirements may be waived or amended by the Lenders. Notwithstanding the foregoing, Developer shall obtain the Department's reasonable consent, in writing, if the amount deposited to the Renewal Work Reserve is less than the amount set forth therefor in Developer's Proposal. The Parties recognize and acknowledge that Developer has the ability to annually change the amounts deposited into the Renew Work Reserve consistent with each updated Renewal Work Plan, including updated Renewal Work Schedule.

5.7.3 Use

5.7.3.1 In addition to any other uses of the Renewal Work Reserve permitted by the Lenders under the Funding Agreements (provided that amounts in the Renewal Work Reserve are not available as security for repayment of Project Debt or making

Distributions), Developer will have the right to draw from the Renewal Work Reserve for the following purposes:

1. Costs of Renewal Work;

2. Costs of Compliance Work; and

3. Costs of work pursuant to the Handback Requirements.

The use of amounts in the Renewal Work Reserve for any purpose other than as permitted in this Section 5.7.3.1 shall be a Developer Default.

5.7.3.2 If Developer intends to spend from the Renewal Work Reserve less than 90% of the amount set forth in the applicable Renewal Work Plan for the scheduled Renewal Work, Developer shall obtain the reasonable consent of the Department in writing. Any amounts deposited to the Renewal Work Reserve for the scheduled Renewal Work, as updated in accordance with this Section 5.7, in excess of the amount spent by Developer in performing such Renewal Work may be distributed to Developer only with the reasonable consent of the Department in writing.

5.7.4 Disposition Upon Establishment of Handback Requirements Reserve Account or Earlier Termination

5.7.4.1 The Renewal Work Reserve shall be used to establish and fund the Handback Requirements Reserve Account as and within the time required under Section 5.10.1. Upon establishment and funding of the Handback Requirements Reserve Account, Developer's obligations to fund the Renewal Work Reserve pursuant to this Section 5.7 shall terminate.

5.7.4.2 If this Agreement is terminated for any reason prior to the establishment of the Handback Requirements Reserve Account, including termination due to Developer Default, the Department's interest in the Renewal Work Reserve shall terminate.

5.7.5 Coordination with Lender Requirements

5.7.5.1 It is the Parties' intent that any major maintenance or Renewal Work reserve required by the Lenders serve as the Renewal Work Reserve required under this Section 5.7.

5.7.5.2 Except as otherwise provided in this Agreement, no provisions of Financing Documents shall have any effect on the applicability and enforcement of any other provisions of the Contract Documents pertaining to Renewal Work, the Renewal Work Plan or the Renewal Work Reserve.

5.7.6 Renewal Work Letters of Credit

5.7.6.1 In lieu of establishing the Renewal Work Reserve, Developer may deliver one or more letters of credit (each, a "**Renewal Work Letter of Credit**"), on the terms and conditions set forth in this Section 5.7.6 and Section 16.3. If the Renewal Work Reserve has been previously established, Developer at any time thereafter may substitute one or more Renewal Work Letters of Credit for all or any portion of the amounts required to be on deposit

in the Renewal Work Reserve, on the terms and conditions set forth in this Section 5.7.6 and Section 16.3. Upon receipt of the required substitute Renewal Work Letter of Credit, amounts in the Renewal Work Reserve shall be released to Developer equal to the face amount of the substitute Renewal Work Letter of Credit. The amount of the Renewal Work Letter of Credit shall be subject to adjustment in accordance with Section 5.7.2.

5.7.6.2 The Department shall be named as the beneficiary under the Renewal Work Letter of Credit and shall have the right to draw on the Renewal Work Letter of Credit (a) if Developer fails to pay or perform as and when due any obligation with respect to Renewal Work under the Contract Documents for which the Renewal Work Letter of Credit is held, or (b) in any circumstance described in Section 16.3.3(b) or (c), in which event the Department shall deposit the proceeds from such drawing into the Renewal Work Reserve.

5.7.6.3 In the event the Department draws on a Renewal Work Letter of Credit, the Department shall have the right to use and apply the proceeds of such drawing as provided in Section 5.5.3.

5.7.6.4 The Department's interest in the Renewal Work Letter of Credit shall terminate at the same time as its interest in the Renewal Work Reserve terminates under Section 5.7.4.

5.8 Policing, Security and Incident Response

5.8.1 Police Services

5.8.1.1 Developer acknowledges that any Governmental Entity empowered to enforce all applicable Laws is free to enter the Project at any and all times to carry out its law enforcement duties. No provision of this Agreement is intended to surrender, waive or limit any police powers of any Governmental Entity, and all such police powers are hereby expressly reserved.

5.8.1.2 The Department and Developer shall not have any liability or obligation to each other resulting from, arising out of or relating to the failure of a public law enforcement agency to provide services, or its negligence or misconduct in providing services.

5.8.2 Security and Incident Response

5.8.2.1 Except as expressly set forth herein, Developer is responsible for the safety and security of the Project and the workers and public thereon during the performance of the Work.

5.8.2.2 Developer shall comply with all rules, directives and guidance of the U.S. Department of Homeland Security and comparable State agency and shall coordinate and cooperate with the Department and all other Governmental Entities providing security, first responder and other public emergency response services in accordance with the Contract Documents.

5.8.2.3 Developer shall perform and comply with the provisions of the Technical Requirements concerning Emergencies, Incident Response, safety and security, including implementing all procedures, plans, protocols and requirements set forth in the Emergency Response Plan in the event of Emergencies or in the Technical Requirements.

5.9 Handback Requirements

5.9.1 Handback Condition

5.9.1.1 Upon the Termination Date, Developer shall transfer the Project, including any Upgrades, to the Department, at no charge to the Department, in the condition and meeting all of the requirements set forth in Section 5 of Division II ("**Handback Requirements**").

5.9.1.2 In the event of the earlier termination of this Agreement, Developer shall only be required to comply with the requirements of this Section 5.9 to the extent that any Renewal Work was scheduled to have been performed prior to the Early Termination Date.

5.9.2 Handback Inspections

The Department will have the right to conduct inspections of the Project at the times and according to the terms and procedures specified in the Handback Requirements, including the approved Handback Renewal Work Plan.

5.9.3 Handback Renewal Work

Developer shall prepare the Handback Renewal Work Plan as required under Section 5, 1 of Division II, which, among other items, shall include a schedule for and description of the Handback Renewal Work based on any required adjustments or changes to the Renewal Work Schedule that result from any inspections or analyses required under the Handback Requirements. The Handback Renewal Work Plan shall be subject to Department review and comment as set forth in Section 5 of Division II. Developer shall diligently perform and complete all Handback Renewal Work:

5.9.3.1 Prior to the Termination Date, if transfer of the Project is to occur at the natural expiration of the Term; or

5.9.3.2 As close as possible to the Early Termination Date, but only for Renewal Work scheduled to be performed as of the Early Termination Date. If Developer fails to complete such work prior to the Early Termination Date, the Department shall deduct the cost of completing such work from the amount of compensation, if any, payable to Developer as a result of the early termination of this Agreement.

5.10 Handback Requirements Reserve Account

5.10.1 Establishment

5.10.1.1 Beginning four full Fiscal Years before the expected end of the Term, Developer shall establish a reserve account (the "**Handback Requirements Reserve Account**") exclusively available for the uses set forth in Section 5.10.3. Developer shall provide to the Department the details regarding the account, including the name, address and contact information for the depository institution and the account number. The Department shall have a first priority perfected security interest in the Handback Requirements Reserve Account, and the right to receive directly from the depository institution monthly account statements.

5.10.1.2 In lieu of Developer establishing the Handback Requirements Reserve Account, Developer may deliver to the Department Handback Requirements Letters of Credit on the terms and conditions set forth in Section 5.10.4 and Section 16.3.

5.10.2 Funding

5.10.2.1 The Financial Model projects the amount of funds to be held in the Handback Requirements Reserve Account to fund the Handback Renewal Work. The Parties shall re-estimate the costs of the Handback Renewal Work, and the Handback Renewal Amount, in accordance with Section 5 of Division II. Pursuant to Section 5.7.4.1, Developer shall transfer amounts in the Renewal Work Reserve into the Handback Requirements Reserve Account on the date set forth in Section 5.10.1.1. Beginning on the 36th month prior to the expected end of the Term, if amounts then on deposit in the Handback Requirements Reserve Account are insufficient to pay the costs of the Handback Renewal Work as estimated by the Parties in accordance with Section 5 of Division II, Developer shall deposit each month into the Handback Requirements Reserve Account an amount to fund the shortfall (the "**Monthly Handback Reserve Deposit**"). The Monthly Handback Reserve Deposit will be calculated in accordance with Section 5.10.2.2. If Developer does not have sufficient funds to pay the full amount of the Monthly Handback Reserve Deposit, then Developer will deposit an additional amount from the subsequent Quarterly Payment(s) to fund the shortfall for the prior month(s).

5.10.2.2 The Monthly Handback Reserve Deposit shall equal the Handback Renewal Amount as estimated following each inspection of the Project, less any amounts then on deposit in the Handback Requirements Reserve Account, divided by the number of months remaining until the date that is six months before the end of the Term.

5.10.2.3 The Monthly Handback Reserve Deposit will be subject to adjustment following each annual inspection of the Project taking into account the Handback Renewal Amount determined annually as provided in Section 5 of Division II and the amount of funds then on deposit in the Handback Requirements Reserve Account. If the Handback Renewal Amount has not been determined at the beginning of each Fiscal Year as provided in Section 5 of Division II, the Monthly Handback Reserve Deposit shall equal the Monthly Handback Reserve Deposit for the prior year.

5.10.2.4 Funds held in the Handback Requirements Reserve Account may be invested and reinvested only in Eligible Investments. Eligible Investments in the Handback Requirements Reserve Account must mature during the Term, or the principal of and accrued interest on such Eligible Investments must be available for withdrawal at any time during the Term without penalty. All interest earned or profits realized from Eligible Investments in the Handback Requirements Reserve Account shall be retained therein.

5.10.2.5 If Developer fails to make the deposit of any Monthly Handback Reserve Deposit when due, including funding any prior month's shortfall as required in Section 5.10.2.1, the Department shall be entitled to deduct the amount of the Monthly Handback Reserve Deposit from the Quarterly Payment due to Developer at the time of payment of the Quarterly Payment to Developer, and shall deposit such amount to the Handback Requirements Reserve Account on behalf of Developer.

5.10.3 Use

5.10.3.1 Developer shall be entitled to draw funds from the Handback Requirements Reserve Account in such amounts and at such times as needed only to make progress and final payments for Handback Renewal Work performed as required by the Handback Renewal Work Plan prepared in accordance with Section 5 of Division II. Amounts in the Handback Requirements Reserve Account can only be used for the purposes described in this Section 5.10.3.1 and are not available as security for repayment of Project Debt or making Distributions. The use of amounts in the Handback Requirements Reserve Account for any purpose other than as permitted in this Section 5.10.3.1 shall be a Developer Default. Prior to drawing funds from the Handback Requirements Reserve Account, Developer shall give written notice to the Department of the amount to be drawn and reasonable evidence, including copies of Contractor invoices, of the Handback Renewal Work performed relating to the draw and the cost thereof. The Department shall have ten days from the date of the receipt of such notice to disapprove the draw from the Handback Requirements Reserve Account. The Department may disapprove the draw only if the requested amount and/or purposes for which the funds will be used does not comply with the Handback Renewal Work Plan. If the Department fails to disapprove the draw within the ten-day period following receipt of notice, Developer shall be entitled to draw funds from the Handback Requirements Reserve Account in the manner described in the notice to the Department.

5.10.3.2 If, after recalculation of the Handback Renewal Amount following any of the annual inspections provided for in the Handback Requirements, the amount on deposit in the Handback Requirements Reserve Account exceeds the Handback Renewal Amount, Developer shall be entitled to draw any surplus amount and no further Monthly Handback Reserve Deposits shall be made until the next inspection and determination of the Handback Renewal Amount.

5.10.3.3 On the Termination Date, any amounts held in the Handback Requirements Reserve Account shall be paid to Developer, less any costs (including professional fees, staff costs, overheads and administrative expenses), if any, the Department reasonably expects to incur to perform the Work necessary to meet the Handback Requirements as of the Termination Date.

5.10.4 Handback Requirements Letters of Credit

5.10.4.1 In lieu of establishing the Handback Requirements Reserve Account, Developer may deliver to the Department one or more letters of credit (each, a "**Handback Requirements Letter of Credit**"), on the terms and conditions set forth in this Section 5.10.4 and Section 16.3. If the Handback Requirements Reserve Account has been previously established, Developer at any time thereafter may substitute one or more Handback Requirements Letters of Credit for all or any portion of the amounts required to be on deposit in the Handback Requirements Reserve Account, on the terms and conditions set forth in this Section 5.10.4. Upon receipt of the required substitute Handback Requirements Letter of Credit, the Department shall authorize the release to Developer of amounts in the Handback Requirements Reserve Account equal to the face amount of the substitute Handback Requirements Letter of Credit. If the face amount of all Handback Requirements Letters of Credit is less than the total amount required to be funded to the Handback Requirements Reserve Account prior to expiration of the Handback Requirements Letter of Credit, Developer shall be obligated to pay, when due, the shortfall into the Handback Requirements Reserve Account. Alternatively, Developer may deliver a Handback Requirements Letter of Credit with

a face amount equal to at least the total amount required to be funded to the Handback Requirements Reserve Account during the period up to the expiration of the Handback Requirements Letter of Credit, or may deliver additional Handback Requirements Letters of Credit or cause the existing Handback Requirements Letter of Credit to be amended to cover the shortfall before deposits of the shortfall to the Handback Requirements Reserve Account are due. The Department shall be named as the sole beneficiary under the Handback Requirements Letter of Credit.

5.10.4.2 The Department shall have the right to draw on the Handback Requirements Letter of Credit upon the Termination Date in an amount equal to any costs (including professional fees, staff costs, overheads and administrative expenses) the Department reasonably expects to incur as a consequence of Developer's failure to comply with the Handback Requirements. Further, the Department shall have the right to draw on the Handback Requirements Letter of Credit in any circumstance described in Section 16.3.3(b) or (c), in which event the Department shall deposit the proceeds from such drawing into the Handback Requirements Reserve Account.

ARTICLE 6. NONCOMPLIANCE POINTS

6.1 Noncompliance Points System

6.1.1 Section 4 of Division II sets forth tables for the identification of Noncompliance and the Cure Period (if any) available to Developer for each such Noncompliance. Noncompliance Points are a system to measure Developer performance levels during the design, construction and operations and maintenance phases of the Project and trigger the remedies set forth in this Article 6.

6.1.2 The tables set forth in Section 4 of Division II contain a representational, but not exhaustive, list of Noncompliance possible under the Contract Documents. Accordingly, subject to Section 6.1.3, the Department may from time to time add an entry to either such table describing a Noncompliance under the existing Contract Documents that was not previously included in the table, establishing the Noncompliance Points applicable to such Noncompliance by assigning to it one of the Noncompliance event classifications (A through E) as set forth in such tables, setting a Cure Period therefor (or no Cure Period) and Interval of Recurrence (unless there is no Cure Period), and establishing whether the Noncompliance is a Long Cure Priority Noncompliance. The Department shall notify Developer in writing whenever the Department separately proposes to make such additions to Section 4 of Division II. Developer shall have 15 days after receipt of any recommended additions or adjustments to deliver written comments. Thereafter, the Department shall render its decision regarding whether and on what terms to incorporate the proposed additions to Section 4 of Division II by written notice to Developer. The Department's right to make additions or adjustments to Section 4 of Division II is not intended to expand Developer's existing contractual obligations as set forth in the Contract Documents, but rather to add existing contractual obligations as set forth in the Contract Documents to the list of Noncompliance for which Noncompliance Points may be assessed.

6.1.3 The Department's right to add existing contractual obligations to Section 4 of Division II is limited to obligations respecting O&M Work and is limited such that the total number of Noncompliance Points set forth in Section 4 of Division II as they exist on the Effective Date shall not increase by more than 10%. The Department may elect to remove

contractual obligations and reduce Noncompliance Points allocated to listed contractual obligations through reclassification between the Noncompliance event classifications (A through E) in order to comply with the 10% growth limit. Further, the Department shall have no right to assess Noncompliance Points on account of a Noncompliance that occurs prior to the date it is added to Section 4 of Division II.

6.2 Assessment, Notification and Cure Process

6.2.1 Notification Initiated by Developer

6.2.1.1 As an integral part of Developer's self-monitoring obligations, Developer shall establish and maintain an electronic data base of each Noncompliance event specified in Section 4 of Division II, as it may be revised from time to time; and Developer shall enter each Noncompliance event into the data base in real time upon discovery. The format and design of the data base shall be subject to the Department's reasonable approval. At a minimum, the data base shall (a) include a description of each Noncompliance in reasonable detail, (b) identify the Project location (if applicable), (c) identify the date and time of occurrence, (d) identify the applicable response time, if any, (e) indicate the applicable Cure Period, if any, as set forth in Section 4 of Division II, (f) indicate status, and (g) indicate date and time of cure. Developer shall assure that the Department has electronic access to the data base at all times and ability to make entries as provided in Sections 6.2.2 and 6.2.4. Developer shall retain each Noncompliance entry into the database until at least four years after the date of cure.

6.2.1.2 Each O&M Monthly Report to the Department shall include a report of all Noncompliances occurring during the preceding month. At its sole discretion, the Department may require more frequent reports of Noncompliance. The O&M Monthly Report (or more frequent report) shall include all the same information required in the electronic data base and shall identify each Noncompliance for which the cure has not yet occurred. Within a reasonable time after receiving the O&M Monthly Report (or more frequent report), the Department shall deliver to Developer a written notice setting forth the Department's determination whether the Noncompliance was cured during the applicable Cure Period (if any) and, if not, whether to assess Noncompliance Points (a "notice of determination").

6.2.2 Notification Initiated by the Department

If the Department believes there has occurred any Noncompliance specified in Section 4 of Division II, as it may be revised from time to time, the Department may deliver to Developer a notice of determination setting forth the Noncompliance, the applicable Cure Period and the Noncompliance Points to be assessed with respect thereto. The Department may deliver the notice of determination via the electronic data base, and delivery shall be deemed given upon entry of the information into the electronic data base.

6.2.3 Cure Periods

6.2.3.1 Subject to Section 6.5, Developer shall have the Cure Period (if any) for each Noncompliance set forth in Section 4 of Division II.

6.2.3.2 Developer's Cure Period (if any) with respect to such Noncompliance shall be deemed to start upon the date Developer first obtained knowledge of the Noncompliance. For this purpose, if the notice of the Noncompliance is initiated by the

Department, Developer shall be deemed to first obtain knowledge of the Noncompliance not later than the date of delivery of the notice to Developer.

6.2.3.3 Each of the Cure Periods set forth in Section 4 of Division II, as revised from time to time, shall be the only Cure Period for Developer applicable to the Noncompliance and supersedes any cure period otherwise applicable under Section 18.1.2.

6.2.4 Notification of Cure

When Developer determines that it has completed cure of any Noncompliance for which it is being assessed Noncompliance Points, Developer shall enter into the electronic data base, as well as in the next O&M Monthly Report (or more frequent report) notice identifying the Noncompliance, stating that Developer has completed cure and briefly describing the cure. The O&M Monthly Report (or more frequent report) also shall describe any modifications to the Project Management Plan and Quality Plan under consideration or made to protect against future similar Noncompliance. Thereafter, the Department shall have the right, but not the obligation, to inspect to verify completion of the cure and shall, if it verifies completion of the cure, deliver to Developer a certification of cure either by entry into the data base or in a separate writing. The Department may reject any Developer notice of cure if the Department determines that Developer has not cured the Noncompliance. Upon making this determination, the Department shall deliver a written notice of rejection to Developer either by entry into the data base or in a separate writing. Any Dispute regarding rejection of cure shall be resolved according to the Dispute Resolution Procedures.

6.3 Assessment of Noncompliance Points

6.3.1 Assessment Provisions

If at any time (a) any the electronic data base, O&M Monthly Report (or more frequent report) indicates or the Department is notified or otherwise becomes aware of a Noncompliance or (b) the Department serves notice of determination under Section 6.2.2, then, without prejudice to any other right or remedy available to the Department, the Department may assess Noncompliance Points in accordance with Section 4 of Division II, as revised from time to time, subject to the following terms and conditions:

6.3.1.1 The date of assessment shall be deemed to be the date of the initial notification under Section 6.2.

6.3.1.2 The number of points listed in Section 4 of Division II for any particular Noncompliance is the maximum number of Noncompliance Points that may be assessed for each event or circumstance that is a Noncompliance. The Department may, but is not obligated to, assess less than the maximum.

6.3.1.3 Subject to Section 6.5, the occurrence of a Noncompliance will result in assessment of Noncompliance Points according to the following table regarding cure.

Notification Category:	Percent Assessed Prior to Expiration of Applicable Cure Period (if any):	Remaining Percent Assessed (a) if No Cure Period or (b) After Expiration of Applicable Cure Period without Full and Complete Cure (totaling 100%):
Notification initiated by Developer under Section 6.2.1	0%	100%
Notification initiated by the Department under Section 6.2.2	100%	0%

6.3.1.4 For the purpose of applying the foregoing table, if the Department, on the one hand, and Developer, on the other hand, deliver concurrent electronic or written notices under Section 6.2 of the same Noncompliance, Developer's notice shall prevail. Notices shall be deemed to be concurrent if each sends its electronic or written notice before actually receiving the electronic or written notice from the other. Knowledge of the other's electronic or written notice obtained prior to actual receipt of the notice shall have no effect on determining whether concurrent notice has occurred.

6.3.1.5 The total number of Noncompliance Offsets awarded to Developer shall be as provided under Section 6.3.4.

6.3.2 Assessments for Continuing Noncompliance

6.3.2.1 If a Noncompliance is capable of being cured but is not cured within the applicable Cure Period, then continuation of such Noncompliance beyond such Cure Period shall be treated as a new and separate Noncompliance upon which the Department may, in its sole discretion, assess additional Noncompliance Points. The number of Noncompliance Points that the Department may assess in such a case shall be determined by the Department based on (a) the total number of Noncompliance Points that the Department may assess for the particular type of Noncompliance (see Sections 6.3.1.2 and 6.3.1.3); and (b) the Interval of Recurrence for the particular type of Noncompliance. Therefore, until such Noncompliance is cured, the Department may reassess the total number of Noncompliance Points after each Interval of Recurrence.

6.3.2.2 For the purpose of assessing additional Noncompliance Points under this Section 6.3.2, the Department is under no obligation to provide notice to Developer upon the expiration of any Interval of Recurrence beyond the initial Cure Period. Regardless of the continuing assessment of Noncompliance Points under this Section 6.3.2, the Department shall be entitled to exercise its step-in rights under Section 18.2.4 and, if applicable, its work suspension rights under Section 18.2.7, after expiration of the initial Cure Period available to Developer. If the Noncompliance is one for which no Cure Period and no Interval of Recurrence is provided, then continuation thereof shall not be treated as a new or separate Noncompliance.

6.3.3 Records Regarding Assessment

Developer is responsible for keeping and providing the Department with current records of the number of assessed Noncompliance Points for Noncompliance, the date of each assessment, and the date when the Noncompliance was cured. Developer is responsible for

keeping and providing the Department with current records of the number of Noncompliance Offsets accrued for each reporting period and the outstanding balance of Noncompliance Offsets for the same reporting period.

6.3.4 Noncompliance Offsets

6.3.4.1 Noncompliance Offsets Accruals

From the date of NTP 1 until the Substantial Completion Date, subject to Developer demonstrating good faith efforts toward the achievement of the DBE/UDBE/SBE/DVBE/LBE participation goals as set forth in Section 7.8.2, the Department will review the DBE/SBE Participation Rates For D&C Work reported by Developer and award Developer Noncompliance Offsets as set forth in Section 6.3.4.2. During the Operating Period, subject to Developer demonstrating good faith efforts to encourage DBE/UDBE/SBE/DVBE/LBE participation in the O&M Work as set forth in Section 7.8.2, the Department will review the DBE/SBE Participation Rate For O&M Work reported by Developer and award Developer Noncompliance Offsets as set forth in Section 6.3.4.3.

6.3.4.2 Noncompliance Offsets Calculation Between NTP 1 and Substantial Completion

Concurrently with its reports regarding success in attaining the established participation goals during the D&C Work, Developer shall report the number of Noncompliance Offsets accrued during the period. From the date of issuance of NTP 1 until the date of Substantial Completion, the Department shall award Noncompliance Offsets to Developer for meeting the DBE/SBE Participation Rates For D&C Work in accordance with Section 6.3.4.1 and as set forth in the following table:

DBE/SBE Participation Rate For D&C Work	DBE Noncompliance Offsets (per Quarter)	SBE Noncompliance Offsets (per Quarter)
50% or higher	2 x 1.5 points	2 x 1.5 points
45% or higher	1.8 x 1.5 points	1.8 x 1.5 points
40% or higher	1.6 x 1.5 points	1.6 x 1.5 points
35% or higher	1.4 x 1.5 points	1.4 x 1.5 points
30% or higher	1.2 x 1.5 points	1.2 x 1.5 points
25% or higher	1.5 points	1.5 points
20% or higher	0.80 x 1.5 points	0 points
15% or higher	0.60 x 1.5 points	0 points
13.5% or higher	0.40 x 1.5 points	0 points
Below 13.5%	0 points	0 points

6.3.4.3 Noncompliance Offsets Calculation Between Substantial Completion and Termination Date

From the Substantial Completion Date, the DBE/SBE Participation Rate For O&M Work shall be measured by Fiscal Year and reported monthly as part of the corresponding O&M Report. This report to the Department shall identify the number of Noncompliance Offsets accrued to date during such Fiscal Year and the number of such Noncompliance Offsets applied in accordance with Section 6.3.4.4 against O&M Noncompliance Events or Construction Noncompliance Events that have occurred during such Fiscal Year. From the date of Substantial Completion until the Termination Date, the Department shall award Noncompliance Offsets to Developer for meeting the DBE/SBE Participation Rate For O&M Work in accordance with Section 6.3.4.1 and as set forth in the following table:

DBE/SBE Participation Rate For O&M Work	Annual DBE Noncompliance Offsets	Annual SBE Noncompliance Offsets
$300,000 or higher	2 x 5 points	2 x 5 points
$250,000 or higher	1.8 x 5 points	1.8 x 5 points
$200,000 or higher	1.6 x 5 points	1.6 x 5 points
$150,000 or higher	1.4 x 5 points	1.4 x 5 points
$100,000 or higher	1.2 x 5 points	1.2 x 5 points
$50,000 or higher	5 points	5 points

Line items in this table are not cumulative. One line item shall apply corresponding to the highest dollar figure achieved. The dollar figures in this table shall be adjusted on the first day

of each Fiscal Year, beginning July 1, 2011, by a factor equal to the greater of 1 or a number the numerator of which is the CPI as at the first day of the Fiscal Year and the denominator of which is the CPI as at July 1, 2010.

6.3.4.4 Use of Noncompliance Offsets

1. From the date of issuance of NTP 1, Noncompliance Offsets that Developer accrues as set forth in Section 6.3.4.1 may be subtracted from Noncompliance Points assessed by the Department for O&M Noncompliance Events or Construction Noncompliance Events other than those defined as Noncompliance event classification "E" in Table 4.1 and Table 4.2 of Section 4 of Division II.

2. The total value of Noncompliance Offsets to be subtracted from Noncompliance Points assessed by the Department in any given Quarter of the Construction Period shall not exceed ten percent of the total value of Noncompliance Points assessed by the Department in that Quarter.

3. The total value of Noncompliance Offsets to be subtracted from Noncompliance Points assessed by the Department in any given Fiscal Year of the Operating Period shall not exceed ten percent of the total value of Noncompliance Points assessed by the Department in that Fiscal Year.

4. The total balance of Noncompliance Offset available for subtraction from Noncompliance Points assessed by the Department shall not exceed 70 from NTP 2 to 12 months after the Substantial Completion Date. Noncompliance Offsets awarded from NTP 2 to 12 months after the Substantial Completion Date shall not be available to be subtracted from Noncompliance Points assessed by the Department in any subsequent Fiscal Year of the Operating Period. Subsequent to 12 months after the Substantial Completion Date, the total balance of Noncompliance Offsets available for subtraction from Noncompliance Points assessed by the Department shall not exceed 20. Noncompliance Offsets awarded subsequent to 12 months after the Substantial Completion Date shall only be subtracted from Noncompliance Points assessed by the Department in the Fiscal Year of the Operating period in which the Noncompliance Offsets were awarded.

6.4 Monetary Deductions Assessed for Certain Noncompliance

6.4.1 General

In addition to Noncompliance Points, certain instances of Noncompliance shall result in monetary deductions as set forth in Appendices 4 and 7.

6.4.2 Basis for Deductions

6.4.2.1 Developer acknowledges that the monetary deductions assessed in accordance with the Contract Documents are reasonable liquidated damages in order to compensate the Department for:

1. The Department's increased costs of administering this Agreement, including

the increased costs of engineering, legal, accounting, monitoring, oversight and overhead, and could also include obligations to pay or reimburse Governmental Entities with regulatory jurisdiction over the Project for violation of applicable Governmental Approvals or for their increased costs of monitoring and enforcing Developer's compliance with applicable Governmental Approvals;

2. Potential harm and future costs to the Department from reduction in the condition and Design Life of the Project;

3. Potential harm to the credibility and reputation of the Department's transportation improvement program with other Governmental Entities, with policy makers and with the general public;

4. Potential harm and detriment to Users, which may include additional wear and tear on vehicles and increased costs of congestion, travel time and accidents; and

5. The Department's increased costs of addressing potential harm to the Environment, including increased harm to air quality caused by congestion, and harm to water quality, soils conditions, historic structures and other environmental resources caused by Noncompliance.

6.4.2.2 Developer further acknowledges that these damages would be difficult and impracticable to measure and prove, because, among other things, (a) the Project is of a unique nature and no substitute for it is available; (b) the costs of monitoring and oversight prior to increases in the level thereof will be variable and extremely difficult to quantify; (c) the nature and level of increased monitoring and oversight will be variable depending on the circumstances; and (d) the variety of factors that influence use of and demand for the Project make it difficult to sort out causation of the matters that will trigger these liquidated damages and to quantify actual damages.

6.5 Special Provisions for Certain Noncompliances

6.5.1 The provisions of this Section 6.5 apply to a Noncompliance that has a Cure Period listed in Table 4.1 or Table 4.2 of Section 4 of Division II and is directly attributable to:

6.5.1.1 A Relief Event;

6.5.1.2 A traffic accident or incident on the Project Right of Way not caused by the negligence, willful misconduct, breach of contract, or violation of Law or Governmental Approval by any Developer-Related Entity; or

6.5.1.3 Unexpected loss, disruption, break, explosion, leak or other damage of a Utility serving or in the vicinity of the Project but not within the maintenance responsibility of Developer.

6.5.2 If any such Noncompliance occurs, then:

6.5.2.1 If applicable, it shall not be counted as an instance of Long Cure Priority Noncompliance for purposes of Section 6.7.1 or toward a Persistent Developer

Noncompliance for purposes of Section 18.2.6.3, provided the Long Cure Priority Noncompliance is cured within the applicable Cure Period, as it may be extended pursuant to Section 6.5.2.2;

6.5.2.2 The applicable Cure Period (but not any Interval of Recurrence) for any such Noncompliance caused by a Relief Event shall be extended if such Noncompliance is not reasonably capable of being cured within the applicable Cure Period solely due to the occurrence of such Relief Event. The extension shall be for a reasonable period of time under the circumstances, taking into account the scope of the efforts necessary to cure, the effect of the Relief Event on Developer's ability to cure, availability of temporary remedial measures, and need for rapid action due to impact of the Noncompliance on safety or traffic movement;

6.5.2.3 Regardless of which Party initiates notification of such Noncompliance, no Noncompliance Points shall be assessed if Developer cures such Noncompliance within the applicable Cure Period, as it may be extended pursuant to Section 6.5.2.2; and

6.5.2.4 Such Noncompliance shall not result in monetary deductions under Section 6.4 if the Noncompliance is cured within the applicable Cure Period, as it may be extended pursuant to Section 6.5.2.2.

6.6 Special Provisions for Department Step-in

6.6.1 If the Department exercises a step-in right under Section 18.2.4 with respect to any portion of the Project (the "affected Project portion"), then:

6.6.1.1 During the period that the Department is in control of the Work for the affected Project portion (the "step-in period"), neither the condition of the affected Project portion nor the performance of or failure to perform Work respecting the affected Project portion shall result in a Noncompliance, assessment of Noncompliance Points or monetary deductions under Section 6.4;

6.6.1.2 All Cure Periods that are available for Noncompliances respecting the affected Project portion and that arose prior to and are pending as of the date the step-in period commences shall be deemed forfeited by Developer;

6.6.1.3 During the step-in period for the affected Project portion, no new Intervals of Recurrence shall be applied to Noncompliances that arose prior to the date such step-in period commences;

6.6.1.4 The step-in period for the affected Project portion shall be disregarded for purposes of determining the Department's increased oversight rights under Section 6.7.1 and determining a Persistent Developer Noncompliance under Section 18.2.6.3. For avoidance of doubt, this means that (a) such step-in period shall not be included in counting the consecutive time periods set forth in Sections 6.7.1 and 18.2.6.3 and (b) such consecutive time periods shall be treated as consecutive notwithstanding the intervening step-in period; and

6.6.1.5 No Quarterly Unavailability Adjustment shall apply to Unavailability Events respecting the affected Project portion first occurring during the step-in period.

6.6.2 Refer to Sections 18.2.4.2 and 18.2.5.2 for the Department's right to damages and to offset the Milestone Payment and Availability Payments in the event the Department incurs costs arising out of exercise of its step-in right under Section 18.2.4.

6.7 Provisions Regarding Dispute Resolution

6.7.1 Developer may object to the assessment of Noncompliance Points or the starting point for the Cure Period respecting any Noncompliance listed in Section 4 of Division II by delivering to the Department written notice of such objection not later than 20 days after the Department delivers its written notice of such Noncompliance.

6.7.2 Developer may object to any Department decision under Section 6.1.2 regarding whether and on what terms to add instances of Noncompliance to Section 4 of Division II, including the number of Noncompliance Points to be assigned to such Noncompliance, by delivering to the Department written notice of such objection not later than 20 days after the Department delivers its written decision.

6.7.3 Developer may object to the Department's rejection of any Developer notice of cure given pursuant to Section 6.2.4 by delivering to the Department written notice of such objection not later than 20 days after the Department delivers its notice of rejection.

6.7.4 If for any reason Developer fails to deliver its written notice of objection within the applicable time period, Developer shall be conclusively deemed to have accepted the matters set forth in the applicable Department notice, and to have irrevocably waived its rights and be forever barred from challenging them.

6.7.5 If Developer gives timely notice of objection and the Parties are unable to reach agreement on any matter in Dispute within ten days of such objection, either Party may refer the matter for resolution according to the Dispute Resolution Procedures.

6.7.6 In the case of any Dispute as to the number of Noncompliance Points to assign for Noncompliance added to Section 4 of Division II, the sole issue for decision shall be how many Noncompliance Points should be assigned in comparison with the number of Noncompliance Points set forth in Section 4 of Division II for Noncompliance of equivalent severity.

6.7.7 Pending the resolution of any Dispute arising under this Section 6.7, the provisions of this Article 6 shall take effect as if the matter were not in Dispute; provided that if the final decision regarding the Dispute is that (a) the Noncompliance Points should not have been assessed, (b) the number of Noncompliance Points must be adjusted, or (c) the starting point or duration of the Cure Period must be adjusted, then the number of Noncompliance Points assigned or assessed and the related liabilities of Developer shall be adjusted to reflect such decision.

6.7.8 Pending the resolution of any Dispute arising under this Section 6.7, the number of Noncompliance Points in Dispute shall not be counted for the purpose of determining whether the Department may declare a Persistent Developer Noncompliance.

6.8 Increased Oversight, Testing and Inspection

6.8.1 If at any time (a) Developer is assessed more than 170 Noncompliance Points in any consecutive 365-day period; (b) Developer is assessed more than 425 Noncompliance Points in any consecutive 1095-day period; or (c) Developer accumulates more than 30 instances of Long Cure Priority Noncompliance, cured or uncured, in any consecutive 1095-day period, then, in addition to other remedies available under the Contract Documents, the Department shall be entitled, at Developer's expense, to increase the level of monitoring, inspection, sampling, measuring, testing, auditing and oversight of the Project and Developer's compliance with its obligations under the Contract Documents, to such level as the Department sees fit, until such time as Developer has demonstrated to the reasonable satisfaction of the Department that Developer:

6.8.1.1 Has reduced the number of Noncompliance Points below the threshold triggering such heightened scrutiny;

6.8.1.2 Is diligently pursuing cure of all other instances of Noncompliance that have resulted in assessment of Noncompliance Points, has a written plan on how to cure the instances of Noncompliance, and has a deadline by which it will remedy each instance of Noncompliance;

6.8.1.3 Has cured any then-existing Developer Defaults; and

6.8.1.4 Will perform and is capable of performing its obligations under the Contract Documents.

6.8.2 The foregoing does not preclude the Department, at its sole discretion and expense, from increasing its level of monitoring, inspection, sampling, measuring, testing, auditing and oversight at other times.

ARTICLE 7. CONTRACTING AND LABOR PRACTICES

7.1 Disclosure of Contracts and Contractors; Contracting Authority

7.1.1 Developer shall provide the Department with a list of all Contracts and the Contractors thereunder with each monthly report required under this Agreement or the Technical Requirements. Developer shall allow the Department ready access to all Contracts and records regarding Contracts and shall deliver to the Department, (a) within ten days after execution, copies of all Key Contracts, guarantees thereof and amendments and supplements to Key Contracts and guarantees thereof, and (b) within ten days after receipt of a request from the Department, copies of all other Contracts and amendments and supplements thereto as may be requested.

7.1.2 As soon as Developer identifies a potential first-tier Contractor, but in no event later than 15 days prior to the scheduled initiation of Work by such proposed Contractor, Developer shall notify the Department in writing of the name, address, phone number and authorized representative of such Contractor.

7.1.3 Developer is authorized to use any method of lawful contracting with Contractors, including the design-build method.

7.2 Responsibility for Work, Contractors and Employees

7.2.1 Developer shall retain or cause to be retained only Contractors that are qualified, experienced and capable in the performance of the portion of the Work assigned. Developer shall assure that each Contractor has at the time of execution of the Contract, and maintains at all times during performance of the assigned Work, all licenses required by applicable Laws. Developer shall not permit or suffer any Contractor to perform Work if that Contractor is ineligible to bid on, be awarded or perform work on public works projects pursuant to Section 1777.1 or 1777.7 of the California Labor Code. Pursuant to the provisions in Section 1777.1 of the California Labor Code, the Labor Commissioner publishes and distributes a list of contractors ineligible to perform work as a contractor on a public works project. This list of debarred contractors is available from the Department of Industrial Relations web site at http://www.dir.ca.gov/dir/Labor_law/DLSE/Debar.html.

7.2.2 The retention of Contractors by Developer will not relieve Developer of its responsibilities hereunder or for the quality of the Work or materials or services provided by it. Developer will at all times be held fully responsible to the Department for the negligence, willful misconduct, or breach of applicable Law or contract by Contractors.

7.2.3 Each Contract shall include terms and conditions sufficient to ensure both the acknowledgement and compliance by the Contractor with the Contract Documents and its requirements, and shall include those terms that are specifically required by the Contract Documents to be included therein.

7.2.4 Developer shall require each Contractor to familiarize itself with the requirements of any and all applicable Laws, including those Laws applicable to the use of federal-aid funds, and the conditions of any required Governmental Approvals.

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

7.2.6 Developer shall supervise and be fully responsible for the negligence, willful misconduct, or breach of applicable Law or contract by any member or employee of Developer or any Developer-Related Entity, as though all such individuals were directly employed by Developer.

7.3 Key Contracts; Contractor Qualifications

7.3.1 Key Contract Approvals; Use of and Change in Key Contractors

7.3.1.1 The Key Contract with each of the Lead Contractor, Lead Engineering Firm and Lead Operations and Maintenance Contractor (if applicable) shall be subject to the Department's prior written approval.

7.3.1.2 Developer shall retain, employ and utilize the firms and organizations specifically listed in Appendix 2-H to fill the corresponding Key Contractor positions listed therein. Developer shall not terminate any Key Contract with a Key Contractor, or permit or suffer any substitution or replacement (by way of assignment of the Key Contract, transfer to another of any material portion of the scope of work, or otherwise) of such Key Contractor, except in the case of material default by the Key Contractor or with the

Department's prior written approval in its good faith discretion. For Key Contractors not identified in Appendix 2-H, Developer's selection thereof shall be subject to the Department's prior written approval in its good faith discretion.

7.3.2 Key Contract Provisions

Each Key Contract shall:

7.3.2.1 Require the Key Contractor to carry out its scope of work in accordance with the Contract Documents, the Governmental Approvals, applicable Law, and plans, systems and manuals developed and used by Developer pursuant to the Contract Documents;

7.3.2.2 Include a covenant to maintain all licenses required by applicable Law;

7.3.2.3 Set forth a standard of professional responsibility or a standard for commercial practice equal to the requirements of the Contract Documents and in accordance with Best Management Practice for work of similar scope and scale;

7.3.2.4 Set forth warranties, guaranties and liability provisions of the Key Contractor in accordance with Best Management Practice for work of similar scope and scale;

7.3.2.5 Expressly state that all remaining warranties and guarantees, express or implied, shall inure to the benefit of the Department and its successors and assigns upon expiration of the term or earlier termination of the Agreement;

7.3.2.6 Require the Key Contractor to procure the applicable Payment Bond and Performance Security (as applicable) required under Section 16.2, if any, prior to commencement of any work by or on behalf of the Key Contractor;

7.3.2.7 In the case of each Key Contractor that has provided a Payment Bond and/or Performance Security with the Department named as a dual obligee, expressly provide that the Key Contractor shall have no right to suspend or demobilize unless and until it delivers to the Department written notice of Developer's breach or default;

7.3.2.8 Require the personal services of and not be assignable by the Key Contractor without Developer's and the Department's prior written consent, provided that this provision shall not prohibit the subcontracting of portions of the Work;

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

7.3.2.10 Expressly require the Key Contractor to participate in meetings between Developer and the Department concerning matters pertaining to such Key Contractor, its work or the coordination of its work with other Contractors, provided that all direction to such Key Contractor shall be provided by Developer, and provided further that nothing in this Section 7.3.2.10 shall limit the authority of the Department to give such direction or take such action as in its opinion is necessary to remove an immediate and present threat to the safety of life or property;

7.3.2.11 Include an agreement by the Key Contractor to participate in any dispute resolution proceeding pursuant to Article 24, if such participation is requested by either the Department or Developer;

7.3.2.12 Without cost to Developer or the Department and subject to the Lender's rights under the Direct Agreement, expressly permit assignment to the Department of all Developer's rights under the Key Contract, contingent only upon delivery of written request from the Department pursuant to Section 19.6.3.1, allowing the Department to assume the benefit of Developer's rights with liability only for those remaining obligations of Developer accruing after the date of assumption, such assignment to include the benefit of all Key Contractor warranties, indemnities, guarantees and professional responsibility;

7.3.2.13 Expressly state that any acceptance of assignment of the Key Contract to the Department shall not operate to make the assignee responsible or liable for any breach of the Key Contract by Developer or for any amounts due and owing under the Key Contract for work or services rendered prior to assignment;

7.3.2.14 Subject to the Lender's rights under the Direct Agreement, expressly include a covenant acknowledging that, upon receipt of written notice from the Department, the Department is entitled to exercise step-in rights under this Agreement, without any necessity for a consent or approval from Developer or the making of a determination whether the Department validly exercised its step-in rights, and include a waiver and release by Developer of any claim or cause of action against the Key Contractor arising out of or relating to its recognition of the Department's rights in reliance on any such written notice from the Department;

7.3.2.15 Expressly include requirements that the Key Contractor (a) will maintain usual and customary books and records for the type and scope of operations of business in which it is engaged (e.g., constructor, equipment supplier, designer, service provider), (b) permit audit thereof by both Developer and the Department and (c) provide progress reports to Developer appropriate for the type of work it is performing sufficient to enable Developer to provide the reports it is required to furnish the Department under this Agreement;

7.3.2.16 Include the right of Developer to terminate the Key Contract in whole or in part upon any termination of this Agreement, without liability of Developer or the Department for the Key Contractor's lost profits or business opportunity in the case of a Termination for Convenience and without liability of the Department for the Key Contractor's lost profits or business opportunity in the case of termination of this Agreement under Section 19.2, 19.3, 19.4 or 19.5.3;

7.3.2.17 Not contain any terms that do not comply or are inconsistent with the terms of the Contract Documents, including terms that do not comply or are inconsistent with this Article 7 or with the applicable requirements of Section 21.1 regarding maintenance of books and records, that fail to incorporate the applicable California labor code requirements set forth in Appendix 19 or federal requirements set forth in Appendix 20, or that are inconsistent with the requirements of the relevant scope of Work; and

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

7.3.3 Key Contract Amendments and Termination

7.3.3.1 Developer shall not amend any Key Contract with respect to any of the foregoing matters without the Department's prior written consent in its good faith discretion.

7.3.3.2 Developer shall not terminate or permit termination of a Key Contract except (a) in the case of material uncured default by the Key Contractor, (b) termination of this Agreement and the Department's election not to assume the Key Contract, (c) if there occurs any suspension, debarment, disqualification or removal (distinguished from ineligibility due to lack of financial qualifications) of the Contractor, or there goes into effect an agreement for voluntary exclusion of the Contractor, from bidding, proposing or contracting with any federal, State or local department or agency, or (d) with the Department's prior written approval in its good faith discretion.

7.4 Key Personnel

7.4.1 Developer shall retain, employ and utilize the individuals specifically listed in Appendix 2-H or in the Project Management Plan to fill the corresponding Key Personnel positions listed therein. Developer shall not, prior to Substantial Completion, change or substitute any such individuals except due to retirement, death, disability, incapacity, or voluntary or involuntary termination of employment.

7.4.2 In such circumstances, Developer shall promptly propose a replacement for the Key Personnel position and notify the Department in writing of the proposed replacement. The Department shall have the right to review the qualifications and character of each individual to be appointed to a Key Personnel position (including personnel employed by Contractors to fill any such position) and to approve or disapprove use of such individual in such position prior to the commencement of any Work by such individual.

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

7.4.4 Developer shall provide the Department with phone and cell phone numbers and email addresses for all Key Personnel. The Department requires the ability to contact Key Personnel 24 hours per Day, seven Days per week.

7.5 Contracts with Affiliates

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

7.5.1.1 Developer shall execute a written Contract with the Affiliate;

7.5.1.2 The Contract shall comply with all applicable provisions of this Article 7, be consistent with Best Management Practice, and be in form and substance substantially similar to Contracts then being used by Developer for similar work with unaffiliated Contractors;

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

7.5.1.4 The pricing, scheduling and other terms and conditions of the Contract shall be no less favorable to Developer than those that Developer could reasonably obtain in an arms' length, competitive transaction with an unaffiliated Contractor. Developer shall bear the burden of proving that the same are no less favorable to Developer; and

7.5.1.5 No Affiliate shall be engaged to perform any Work which (a) any Contract Document indicates are to be performed by an independent or unaffiliated Contractor or (b) would be inconsistent with Best Management Practice.

7.5.2 Before entering into a written Contract with an Affiliate or any supplement or amendment thereto, Developer shall submit a true and complete copy of the proposed Contract to the Department. If such a Contract has a value of $500,000 or more, then the Contract, and any supplement or amendment thereto, shall be subject to the Department's review and comment. Contracts with the same Affiliate, regardless of when executed, shall be aggregated and treated as a single Contract for the purpose of determining whether the $500,000 threshold is met. The Department shall have 20 Days after receipt to deliver its comments to Developer. If the Contract with the Affiliate is a Key Contract, it shall be subject to the Department's approval as provided in Section 7.3.1.

7.5.3 Developer shall make no payments to Affiliates for work or services in advance of provision of such work or services, except for reasonable mobilization payments or other payments consistent with arm's length, competitive transactions of similar scope. Advance payments in violation of this provision shall be excluded from the calculation of Termination Compensation.

7.6 Labor Standards, Prevailing Wages, Nondiscrimination and Job Training

7.6.1 In the performance of its obligations under the Contract Documents, Developer at all times shall comply with, and require by contract that all Contractors and vendors comply with, all applicable federal and State labor, occupational safety and health Laws. Without limiting the foregoing, Developer shall comply with all requirements of the California Labor Code and implementing regulations, including requirements with respect to prevailing wages, minimum wages, the 8-hour day and 40-hour week, overtime, Saturday, Sunday, and holiday work, nondiscrimination, and employment and training of apprentices as more specifically described in Appendix 19 attached to this Agreement. Developer shall forfeit to the Department the penalties prescribed in the California Labor Code for noncompliance, including the penalties set forth in Section 1813 for violations of Sections 1810 through 1815. The Department shall have the right to deduct such penalties from the Milestone Payment (subject to the Milestone Payment Adjustment Cap set forth in Appendix 4) and Availability Payments. Such penalties are in addition to any damages or other amounts owing under the Contract Documents, and in addition to any other amounts, charges and penalties for which Developer may be liable to Governmental Entities under other applicable Law, due to such noncompliance.

7.6.2 Prevailing wage rates for the Work through Final Acceptance are established as set forth in Attachment 3 to Appendix 20. In the event rates of wages and benefits change after Final Acceptance and while this Agreement is in effect, Developer shall bear the cost of such changes and shall have no Claim against the Department on account of such changes. Without limiting the foregoing, no Claim will be allowed which is based upon Developer's lack of

knowledge or a misunderstanding of any wage rate requirements or Developer's failure to include in the Original Financial Model or Financial Model Updates adequate increases in such wages over the duration of this Agreement.

7.6.3 All individuals performing the Work shall at all times have the licenses or certifications required by Law, and shall possess the skill and experience necessary to fulfill the standards and requirements of the Contract Documents applicable to the Work assigned to them, including any applicable minimum levels of skill and experience set forth in Division I. In addition to any other rights and remedies under the Contract Documents, the Department shall have the right to require Developer to remove any person who lacks such skill, experience, licensing and certification, and such individual shall not be re-employed on the Work.

7.6.4 Developer shall comply with all applicable Laws, Governmental Approvals and the Contract Documents, including Division I, regarding workforce development. No later than 30 days prior to NTP 2, the Department will meet with Developer to finalize and agree upon the goals, substantive approach, and implementation schedule for Developer's Workforce Development and Training Program. This program is described in more detail in Division I.

7.6.5 During the performance of this Agreement, Developer shall not discriminate against any person or group of persons, including employees and applicants for employment, on account of race, religious creed, color, national origin, ancestry, physical disability, mental disability, medical condition, marital status, age, sex or sexual orientation, except as otherwise provided in Section 12940 of the California Government Code.

7.6.6 Developer confirms for itself and all Contractors Developer and each Contractor has an equal employment opportunity policy ensuring equal employment opportunity without regard to race, religious creed, color, national origin, ancestry, physical disability, mental disability, medical condition, marital status, age, sex or sexual orientation; and that Developer and each Contractor maintains no employee facilities segregated on the basis of race, religious creed, color, national origin, ancestry, physical disability, mental disability, medical condition, marital status, age, sex or sexual orientation.

7.6.7 Developer shall include Sections 7.6.4 and 7.6.5 in every Contract to which Developer is a party, and shall require that they be included in all Contracts at lower tiers, so that such provisions will be binding upon each Contractor.

7.7 Ethical Standards

7.7.1 Within 90 days after the Effective Date, Developer shall adopt written policies establishing ethical standards of conduct for all Developer-Related Entities, including Developer's supervisory and management personnel in dealing with (a) the Department and (b) employment relations in connection with the Project. Such policy shall be subject to review and comment by the Department prior to adoption. Such policy shall include standards of ethical conduct concerning the following:

7.7.1.1 Restrictions on gifts and contributions to, and lobbying of, the Department and any of its commissioners, directors, officers and employees;

7.7.1.2 Protection of Developer's Project employees from unethical practices in selection, use, hiring, compensation or other terms and conditions of employment, or in firing, promotion and termination of employees;

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

7.7.1.4 Restrictions on directors, members, officers or supervisory or management personnel of any Developer-Related Entity engaging in any transaction or activity, including receiving or offering a financial incentive, benefit, loan or other financial interest, that is, or to a reasonable person appears to be, in conflict with or incompatible with the proper discharge of duties or independence of judgment or action in the performance of duties, or adverse to the interests of the Project or employees;

7.7.1.5 Restrictions on use of office or job position for a purpose that is, or would to a reasonable person appear to be, primarily for the private benefit of a director, member, officer or supervisory or management person, rather than primarily for the benefit of Developer or the Project, or primarily to achieve a private gain or an exemption from duty or responsibility for a director, member, officer or supervisory or management person; and

7.7.1.6 Adherence to the Department's organizational conflict of interest rules and policies applicable to the Project, as amended form time to time following written notice by the Department to Developer.

7.7.2 Developer shall cause its directors, members, officers and supervisory and management personnel, and require those of all other Developer-Related Entities, to adhere to and enforce the adopted policy on ethical standards of conduct for the Project. Developer shall establish reasonable systems and procedures to promote and monitor compliance with the policy.

7.7.3 No funds received from the Department pursuant to this Agreement may be expended for lobbying any Governmental Entity, including the State or Federal legislature, the judicial branch, any State agency, or any county, city or other Governmental Entity.

7.8 UDBE/DBE/SBE Program

7.8.1 General

7.8.1.1 The minimum required parameters of Developer's DBE/SBE Program" are set forth in Division I. The purpose of the DBE/SBE Program is to ensure that these identified categories of business enterprises shall have an equal opportunity to participate in the performance of the Work. In the preparation and performance of its DBE/SBE Program, Developer shall comply with all applicable Laws and Governmental Approvals, including 49 CFR Part 26, and the Contract Documents.

7.8.1.2 Except for performance/service agreements with any Governmental Entities, Developer shall include provisions to effectuate the DBE/SBE Program in every Contract to which it is a party (including purchase orders and task orders for Work), and shall require that they be included in all Contracts at lower tiers(including purchase orders and task orders for Work), so that such provisions will be binding upon each Contractor.

7.8.1.3 DBE/SBE Participation Rates For D&C Work and goals identified in Section 7.8.2 shall be measured by calculating actual costs of the Work performed by eligible Contractors as a percentage of the cost of the D&C Work as presented in the Financial Model, and success in attainment of such goals shall be evaluated no less frequently than annually, and then upon Substantial Completion. If a Contractor qualifies in more than one category for which the participation goals are stated below, the cost of Work performed by such Contractor may count toward multiple categories.

7.8.2 DBE/UDBE/SBE/DVBE/LBE Participation Goals

7.8.2.1 The goals for participation in the D&C Work are as follows:

1. For DBE participation –- 13.5%.
2. For UDBE participation –- 5%.
3. For SBE participation –- 25%.
4. For DVBE participation –- 3%.
5. For LBE participation –- 5%.

7.8.2.2 Developer shall exercise good faith efforts to achieve the DBE/UDBE/SBE/DVBE/LBE participation goals for the D&C Work through implementation of Developer's approved DBE/SBE Program.

7.8.2.3 DBE/SBE Participation Rates For the O&M Work shall be measured by calculating the actual costs of the Work performed by eligible Contractors and by Developer for the same time period. There are no minimum DBE/SBE participation goals for the O&M Work. However, Developer agrees to use good faith efforts to encourage DBE/UDBE/SBE/DVBE/LBE participation in the O&M Work.

7.8.3 Termination of DBE/UDBE/SBE/DVBE/LBE Contracts

Developer shall not cancel or terminate any Contract with a DBE/UDBE/SBE/DVBE/LBE firm except in accordance with all requirements and provisions of 49 CFR 26.53 and, if such Contract is a Key Contract, in accordance with Section 7.3.3.2.

7.9 Retainage

Developer shall comply and cause its Contractors to comply with 49 CFR 26.29 concerning prompt payment of retainage to subcontractors.

ARTICLE 8 MANDATORY TECHNOLOGY ENHANCEMENTS AND SAFETY COMPLIANCE

8.1 Conditions Requiring Mandatory Technology Enhancements

Subject to Section 8.2, Developer at its expense shall be obligated to make Technology Enhancements on the systems it provides as and when necessary (a) to correct defects, (b) under the Renewal Work Schedule, (c) to meet the provisions of the Technical Requirements;

and (d) to comply with changes and additions to, and replacements of, the Technical Requirements relating to the Work (collectively, "**Mandatory Technology Enhancements**").

8.2 Cost and Financing of Mandatory Technology Enhancements

8.2.1 Developer acknowledges and represents that the cost of Mandatory Technology Enhancements and future financing thereof are incorporated into the Financial Model. No Mandatory Technology Enhancement required to be performed prior to Substantial Completion shall entitle Developer to any claim against the Department.

8.2.2 Mandatory Technology Enhancements required to be performed after Substantial Completion, except those necessary to correct defects, may qualify as a Non-Discriminatory O&M Change or Discriminatory O&M Change, as applicable, under Section 5.2.2.

8.3 Safety Compliance

The Department is entitled from time to time to issue Safety Compliance Orders to Developer with respect to the Project to correct a specific safety condition or risk involving the Project that the Department has reasonably determined exists through investigation or analysis.

8.3.1 Safety Compliance Orders

8.3.1.1 The Department shall use good-faith efforts to inform Developer at the earliest practicable time of any circumstance or information relating to the Project which in the Department's reasonable judgment is likely to result in a Safety Compliance Order. Except in the case of an emergency, the Department shall consult with Developer prior to issuing a Safety Compliance Order concerning the risk to public or worker safety, alternative compliance measures, cost impacts, and the availability of Developer resources to fund the required Work.

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

8.3.2 Duty to Comply

8.3.2.1 Subject to Section 8.3.1, Developer shall implement all Safety Compliance as expeditiously as reasonably possible following issuance of the Safety Compliance Order. Developer shall diligently prosecute the work necessary to achieve such Safety Compliance until completion.

8.3.2.2 A Safety Compliance Order is a Relief Event which may entitle Developer to compensation, Completion Deadline extension, performance relief and other relief as provided in Article 9. Notwithstanding the provisions in this Section 8.3.2.2, Developer shall not be entitled to any compensation, time or Completion Deadline extension, performance relief or other claim against the Department to the extent that the Safety Compliance Order is the result of the negligence, willful misconduct, or breach of applicable Law or contract by Developer or any Developer-Related Entity.

ARTICLE 9. DEVELOPER CLAIMS AND RELIEF EVENTS

9.1 Developer Claims

9.1.1 Claim Submission

It is the intention of the Parties that any Claim or potential Claim of Developer arising under and by virtue of the Contract Documents be brought to the attention of the Department at the earliest possible time in order that the matter may be resolved expeditiously, if possible, or other appropriate action promptly taken. If Developer believes it is entitled to Extra Work Costs, Delay Costs, Completion Deadline extensions, relief under Section 9.2, or relief under any other provision of the Contract Documents, then Developer shall comply with the Claim submission procedure described in Section 9.1.1.1.

9.1.1.1 Claim Submission Procedure

1. TIME OF ESSENCE. TIME IS OF THE ESSENCE IN DEVELOPER'S NOTIFICATION AND DELIVERY OF CLAIMS TO THE DEPARTMENT. ACCORDINGLY, IF DEVELOPER FAILS TO COMPLY WITHIN THE APPLICABLE DEADLINE WITH ANY OF THE NOTICE REQUIREMENTS DESCRIBED IN THIS SECTION 9.1.1.1, DEVELOPER SHALL BE DEEMED TO HAVE IRREVOCABLY AND FOREVER WAIVED AND RELEASED ANY AND ALL CLAIM OR RIGHT TO EXTRA WORK COSTS, DELAY COSTS, COMPLETION DEADLINE EXTENSION, RELIEF UNDER SECTION 9.2, OR RELIEF UNDER ANY OTHER PROVISION OF THE CONTRACT DOCUMENTS. The Department will not consider any Claim unless Developer complies with all of the requirements described in this Section 9.1.1.1.

2. Initial Notice of Potential Claim.

   (a) For any Claim or potential Claim, Developer shall submit a signed written initial notice of potential Claim to the Department within ten days after the date on which Developer first becomes aware of the event and/or circumstances that give rise to the Claim or potential Claim.

   (b) The initial notice of potential Claim shall describe the nature of and circumstances involved in the potential Claim. The initial notice of potential Claim shall specify whether the O&M Work will likely be impacted, and, if applicable, whether a Permitted Construction Closure or Permitted Closure will be claimed.

   (c) The nature and scope of the potential Claim stated in the initial notice shall remain consistent (except for reductions) for the remainder of the Claim process and, if applicable, during any subsequent Dispute Resolution Procedures.

   (d) The initial notice of potential Claim shall be submitted on Form CEM 6201A furnished by the Department, and shall be certified with reference to the California False Claims Act, Government Code Sections 12650 and 12655.

(e) Developer shall assign an exclusive identification number for each Claim and potential Claim, determined by chronological sequencing, based on the date of the initial notice of potential Claim. The exclusive identification number shall be used on each of the following corresponding documents: (i) initial notice of potential Claim; (ii) supplemental notice of potential Claim; and (iii) full and final documentation of Claim.

3. Supplemental Notice of Potential Claim. Within 45 days of submitting the initial notice of potential Claim, Developer shall submit to the Department a signed supplemental notice of potential Claim that provides all of the following information:

(a) A detailed factual narration of events fully describing the nature and circumstances that caused the potential Claim, including material dates, locations, and items of Work affected by the potential Claim. Impacts to the O&M Work, if any, shall be stated by Fiscal Year. If applicable, the narration shall analyze the cause of any claimed Permitted Construction Closure or Permitted Closure.

(b) Identification of all pertinent documents and the substance of any oral communications, if any, relating to the potential Claim and the name of the person or persons making such material oral communications.

(c) Identification of the particular provisions of the Contract Documents that are claimed to entitle Developer to the relief sought, and a statement that sets forth the reasons why such provisions entitle Developer to said relief. If Developer seeks relief for the Department's alleged breach of the Contract Documents, then Developer shall identify the provisions of the Contract Documents which allegedly have been breached and the actions constituting such breach.

(d) A detailed, itemized estimate of all Extra Work Costs, Delay Costs, and amounts under Sections 9.2.2 and 9.2.3 to the extent such amounts are available under the terms of the Contract Documents for the potential Claim in question. All such amounts shall be broken down in terms of the direct costs for labor (including burden), Materials, supplies, Equipment, indirect costs, including expenses and profit, and any other cost category or categories reasonably specified by the Department. The estimate shall include, to the extent applicable, the Extra Work Costs for future O&M Work, stated by Fiscal Year and by net present value using Developer's then-current weighted average cost of capital as the discount rate.

(e) If applicable, the actual or projected impacts of any claimed Permitted Construction Closure or Permitted Closure.

(f) Where a request for a Completion Deadline adjustment is made, a Critical Path time impact analysis of the Project Schedule that identifies Controlling Work Items and Critical Path and illustrates the effect of schedule changes or disruptions on the Completion Deadlines.

The information provided under this clause (3) shall provide Developer's

complete reasoning for additional compensation, Completion Deadline adjustments and other requested relief. The supplemental notice of potential Claim shall be submitted on Form CEM 6201B furnished by the Department and shall be certified with reference to the California False Claims Act, Government Code Sections 12650, 12655

4. Department Evaluation and Response. The Department will evaluate the information presented in the supplemental notice of potential Claim and provide a written response to Developer within 60 days of its receipt. If the estimated cost, estimated effect on Completion Deadlines, estimated effect on Closures, or effect on performance of the Work changes, Developer shall update information in the supplemental notice of potential Claim as soon as the change is recognized and submit this information to the Department.

5. Effect of Supplemental Notice. Neither the fact that Developer submits to the Department a supplemental notice of potential Claim, nor the fact that the Department keeps account of the costs of labor, Materials, or Equipment, or time, shall in any way be construed as establishing the validity of the Claim or method of computing any compensation or extension of Completion Deadlines.

6. Full and Final Documentation of Claim. Within 30 days of the completion of work related to a Claim, Developer shall submit to the Department the full and final documentation of the Claim which shall include all of the following information:

   (a) The detailed factual statement of the Claim that was submitted with the initial notice of potential Claim (including, if applicable, the analysis of the cause of any claimed Permitted Construction Closure or Permitted Closure).

   (b) Identification of all pertinent documents and the substance of any oral communications, if any, relating to such Claim and the name of the person or persons making such material oral communications.

   (c) Identification of the particular provisions of the Contract Documents that are claimed to entitle Developer to the relief sought, and a statement that sets forth the reasons why such provisions entitle Developer to said relief. If Developer seeks relief for the Department's alleged breach of the Contract Documents, then Developer shall identify the provisions of the Contract Documents which allegedly have been breached and the actions constituting such breach.

   (d) Where Developer claims Extra Work Costs, Delay Costs, or amounts under Sections 9.2.2 and 9.2.3, and except to the extent that the same are the subject of a previous written agreement by the Parties to be paid as a negotiated fixed price, provide an itemized accounting of the actual direct costs broken down in terms of labor (including burden), Materials, supplies, Equipment, indirect costs, including expenses and profit, and any other cost category reasonably requested by the Department. The documentation also shall include, to the extent applicable, the Extra Work

Costs for future O&M Work, stated by Fiscal Year and by net present value using Developer's then-current weighted average cost of capital as the discount rate. The labor, Materials, and Equipment cost categories shall account for the following items:

(i) Labor. A listing of individuals, classifications, regular hours and overtime hours worked, dates worked, and other pertinent information related to the requested payment of labor costs.

(ii) Materials. Invoices, purchase orders, location of materials either stored or incorporated into the Project, dates materials were transported to the Site or incorporated into the Project, and other pertinent information related to the requested payment of material costs.

(iii) Equipment. Listing of detailed description (make, model, and serial number), hours of use, dates of use and equipment rates. Equipment rates shall be at the applicable State rental rate as listed in the Department's publication entitled "Labor Surcharge and Equipment Rental Rates," in effect when the affected work related to the Claim was performed.

(e) When a Completion Deadline adjustment is requested the following information shall be provided:

(i) The specific dates for which the Completion Deadline adjustment is being claimed.

(ii) A detailed Critical Path time impact analysis of the Project Schedule. The time impact analysis shall identify Controlling Work Items and Critical Path and illustrate the effect of changes or disruptions on the Completion Deadlines.

(f) If applicable, the actual impacts of any claimed Permitted Construction Closure or Permitted Closure.

(g) The full and final documentation of Claim shall be submitted on Form CEM 6201C furnished by the Department and shall be certified with reference to the California False Claims Act, Government Code Sections 12650 and 12655. Pertinent information, references, arguments, and data to support the Claim shall be included in the full and final documentation of Claim. Information submitted subsequent to the full and final documentation submittal will not be considered. No full and final documentation of Claim will be considered that does not have the same nature and circumstances, and basis of Claim, as those specified on the initial and supplemental notices of potential Claim.

7. Opportunity to Examine Site. The Department shall have the right to examine the Site at any time after the Department's receipt of an initial notice of potential Claim. Developer shall proceed with the performance of the Work unless otherwise directed by the Department.

8. Mandatory Records; Auditing. Developer shall maintain records that provide a clear distinction between the actual costs of any Work that arise from the events or circumstances that give rise to the Claim or potential Claim. The Department shall have the right to audit the Claim or potential Claim as set forth in Section 21.2.

9. Deferral of Compensation. At the Department's request, Developer shall submit to the Department a reasonably detailed analysis of amounts that would be due on a Claim under one or more methods of payment for Extra Work Costs and/or Delay Costs described in Section 9.3, including, if applicable, the information required under Section 9.4.2.

9.1.1.2 Action on Claims

1. The Department's failure to respond to a full and final documentation of Claim within 60 days shall constitute the Department's rejection of the Claim. If the Department finds the Claim or any part thereof to be valid, the Department will (a) deliver to Developer written notice of determination authorizing such partial or whole Claim; (b) pay such Claim to the extent deemed valid (as to Extra Work Costs and Delay Costs, by one of the methods set forth in Section 9.3); and (c) grant a commensurate Completion Deadline adjustment, if applicable, as provided in the Contract Documents.

2. If Developer disagrees with the Department's determination with respect to a Claim, Developer's sole option is to dispute the Department's final decision through the Dispute Resolutions Procedures. FAILURE OF DEVELOPER TO CONFORM TO THE DISPUTE RESOLUTION PROCEDURES SHALL CONSTITUTE A FAILURE TO PURSUE DILIGENTLY AND EXHAUST THE ADMINISTRATIVE PROCEDURES IN THE CONTRACT DOCUMENTS AND SHALL OPERATE AS A BAR TO LITIGATION OF THE CLAIM.

9.1.2 Claim Deductible

9.1.2.1 Except as provided in Section 9.1.2.2, each Claim seeking the recovery of Extra Work Costs and Delay Costs, as applicable, shall be subject to the Claim Deductible. The Claim Deductible reflects the Parties' agreement that: (a) Developer shall bear the financial risks for Extra Work Costs and Delay Costs, as applicable, for each Claim, up to the Claim Deductible; and (b) the Department will compensate Developer for Extra Work Costs and Delay Costs, as applicable, in excess of the Claim Deductible, provided that each Claim complies with Section 9.1.1.

9.1.2.2 The Claim Deductible shall not apply to a Claim seeking recovery for the following:

1. Non-Discriminatory O&M Change, which is subject to the Non-Discriminatory O&M Change Deductible;

2. Department Change (other than a Non-Discriminatory O&M Change);

3. A Relief Event set forth in clause (f), (g), (h), (i), (j) but only as to violations of Law by the Department). (k) (but only as to performance or failure to perform

work by the Department), (n) (but only as to releases of Hazardous Materials by the Department), (p) or (s) of the definition of Relief Event;

4. Pre-existing Hazardous Materials, which is subject to the Pre-existing Hazardous Materials Deductible and the Tiered Pre-existing Hazardous Materials Deductible;

5. Extra Work Costs and Delay Costs directly attributable to a Seismic Event, which are subject to the Seismic Event Deductible;

6. Compensation under Sections 9.2.2 and 9.2.3; or

7. Increased costs of landscaping, which are subject to the allocations set forth in Section 4.12.

9.1.3 Seismic Event Deductible

9.1.3.1 Subject to the provisions in this Section 16.1.6 and Section 9.1.5, the Department shall, as of the Effective Date and continuing throughout the Term, pay for the Extra Work Costs and Delay Costs to repair or replace tangible property damage to the Project caused by Seismic Events. However, the Department shall not be responsible for tangible property damage to any tools, machinery, equipment, protective fencing, job trailers, scaffolding or other items used in the performance of the Work but not intended for permanent installation into the Project that is caused by Seismic Event.

9.1.3.2 Developer shall bear the first $10,000,000 of Extra Work Costs and Delay Costs in the aggregate incurred during the Term to repair or replace tangible property damage to the Project caused by Seismic Events ("**Seismic Event Deductible**").

9.1.3.3 If tangible property damage to the Project is caused by Seismic Event, Developer shall, within five days of such occurrence, submit to the Department written notice thereof. Developer shall thereafter follow the procedures for notification set forth in Section 9.1.1.1,, or such shorter or extended periods of time for notification and Claim submission as the parties agree is reasonable under the circumstances, Developer shall submit complete written and photographic documentation supporting its Claim, and provide detailed quantification of the damages caused thereby. Such written documentation shall include detailed identification of the tangible property damage, the scope of necessary repair work, the proposed approach to performing the necessary repair work, and the projected costs of repair together with a supporting cost-loaded repair schedule. According to the time periods set forth in Section 9.1.1.2, or such shorter or extended period of time as the parties agree is reasonable under the circumstances, the Department shall evaluate the documentation supplied by Developer and provide the Department's provisional determination of the cost to repair the tangible property damage to the Project, which determination shall be subject to the Dispute Resolution Procedures. Developer shall comply with any Department request for explanation, elaboration or additional information reasonably necessary to facilitate the Department's analysis.

9.1.3.4 Unless specified otherwise by the Department, Developer shall comply with the requirements for performance of emergency repair work and maintenance of documents as set forth in Section 5.2.7 and other provisions of the Contract Documents.

9.1.4 CPI Adjustments to Deductibles

The amounts remaining in the Non-Discriminatory O&M Change Deductible, Seismic Event Deductible, and Claim Deductible shall be adjusted annually at the beginning of each Fiscal Year after the Effective Date by a percentage equal to the percentage adjustment in the CPI between the CPI for April of the second immediately preceding Fiscal Year and the CPI for April of the immediately preceding Fiscal Year.

9.1.5 Insurance Deductible

Each Claim seeking the recovery of Extra Work Costs and Delay Costs, as applicable, shall be net of all insurance available to Developer, or deemed to be self-insured by Developer under Section 16.1.4.4, with respect to the Relief Event giving rise to the Extra Work Costs or Delay Costs. The amount of such insurance or deemed self-insurance shall be netted out before determining the amount of Extra Work Costs and Delay Costs to be charged against the Non-Discriminatory O&M Change Deductible, Pre-existing Hazardous Materials Deductible, Tiered Pre-existing Hazardous Materials Deductible, or Claim Deductible, as the case may be. If Developer elects to carry insurance for Seismic Events, the availability of insurance proceeds to Developer to satisfy the Seismic Event Deductible shall not be netted out before determining the amount of Extra Work Costs and Delay Costs to be charged against the Seismic Event Deductible.

9.2 Relief Events

9.2.1 General

Developer hereby acknowledges and agrees that the Milestone Payment and Availability Payments provide for full compensation for performance of all the Work, and the deadlines for performance of the Work specified in this Agreement provide reasonable and adequate time for performance, subject only to those rights to additional compensation, deadline extension and performance relief for Relief Events set forth in this Section 9.2 and other provisions of this Agreement specifying compensation, performance relief and deadline extension for Relief Events. The compensation amounts, deadline extensions and performance relief specified in this Section 9.2 and other provisions of this Agreement concerning Relief Events shall represent the sole right against the Department, the State, and their respective successors, assigns, agencies, divisions, officeholders, officers, directors, commissioners, agents, representatives, consultants and employees to compensation, damages, deadline extension and performance relief for the adverse financial and schedule effects of any event affecting the Work, the Project or Developer. Developer unconditionally and irrevocably waives the right to any Claim against the Department, the State, and their respective successors, assigns, agencies, divisions, officeholders, officers, directors, commissioners, agents, representatives, consultants and employees for any monetary compensation in addition to the Milestone Payment and Availability Payments, or for deadline extension or performance relief, except in accordance with this Section 9.2 and other provisions of this Agreement specifying compensation, performance relief and deadline extension for Relief Events. The foregoing waiver encompasses all theories of liability, whether in contract, tort (including negligence), equity, *quantum meruit* or otherwise, and encompasses all theories to extinguish contractual obligations, including impracticability, mutual mistake and frustration of purpose. Nothing in the Technical Requirements shall have the intent or effect or shall be construed to create any right of Developer to any Claim for additional monetary compensation, time or deadline extension, performance relief or other relief, any provision in the Technical Requirements to the contrary notwithstanding. The foregoing provisions shall not preclude Developer's remedies under Section 4.12 (concerning changes in

landscaping requirements) or Developer's other remedies provided under the Contract Documents in the event of Department Default or upon termination of this Agreement prior to the stated expiration of the Term.

9.2.2 Delayed Availability Payments Due to Relief Events Before Final Acceptance

9.2.2.1 The Parties acknowledge that Developer may incur certain losses due to delays in commencement of Availability Payments by the Baseline Substantial Completion Date. For the delay in receiving Availability Payments beyond the Baseline Substantial Completion Date, the Department agrees to compensate Developer for its losses, but only to the extent such losses are caused by Relief Event Delays. Such compensation shall be calculated in accordance with the formula set forth in Section 9.2.2.2.

9.2.2.2 Subject to the other limitations set forth in this Section 9.2.2, the total compensation owed to Developer for the delay in receiving Availability Payments shall equal the lesser of the MAP or the following:

1. Debt service (except the repayment of principal scheduled to be funded by the Milestone Payment which has been delayed by a Relief Event Delay) scheduled to be incurred on the Initial Project Debt during the period commencing on the Baseline Substantial Completion Date and ending on the Substantial Completion Date, multiplied by the lesser of (a) 1 or (b) a ratio the numerator of which is the number of days of Relief Event Delays and the denominator of which is the number of days from and including the Baseline Substantial Completion Date to the Substantial Completion Date;

   plus

2. The number of days, if any, that the Relief Event Delay causes the Substantial Completion Date to be delayed beyond the Baseline Substantial Completion Date, multiplied by 100% of the average daily costs of O&M During Construction as shown in the Financial Model for the 12-month period prior to the Baseline Substantial Completion Date;

   minus

3. The number of days, if any, that the Relief Event Delay delays the Substantial Completion Date beyond the Baseline Substantial Completion Date, multiplied by 100% of the average daily costs of O&M After Construction as shown in the Financial Model for the 12-month period starting on the Baseline Substantial Completion Date;

   minus

4. The proceeds from any delayed start up or business interruption insurance policy procured to cover any loss of Availability Payment during the period commencing on the Baseline Substantial Completion Date and ending on the Substantial Completion Date, multiplied by the lesser of (a) 1 or (b) a ratio the numerator of which is the number of days of Relief Event Delays and the denominator of which is the number of days from and including the Baseline Substantial Completion Date to the Substantial Completion Date, excluding

any insurance proceeds paid to Developer to cover the loss of the Availability Payment, if any, during the 90 day period provided in Section 9.2.2.3;

minus

5. The amount of any deduction or offset allowed under this Agreement.

9.2.2.3 If a Deductible Relief Event causes a Relief Event Delay, no compensation under this Section 9.2.2 shall be due or payable for the first 90 days of Relief Event Delays attributable to such Deductible Relief Event, and such deductible shall not be included in calculating the number of days of Relief Event Delays under Section 9.2.2.2. Such 90 day deductible shall be cumulative and apply in the aggregate for all Deductible Relief Events. If a Relief Event Delay is caused concurrently by a Deductible Relief Event and a non-Deductible Relief Event, such delay shall be deemed caused solely by the Deductible Relief Event.

9.2.2.4 Except to the extent that Section 19.3.3 applies and provides otherwise, in no event shall Developer be entitled to compensation under this Section 9.2.2 in excess of 270 days for Relief Event Delays in the aggregate. If Relief Event Delays exceed 270 days in the aggregate, the Parties' rights and remedies shall be as set forth in Section 19.3.

9.2.2.5 Compensation owed under this Section 9.2.2 shall be paid quarterly, commencing on the last day of the Quarter when Substantial Completion would have been achieved had the Relief Event Delays not occurred and continuing on the last day of each Quarter thereafter until all compensation owed under this Section 9.2.2 is paid. The amount paid each Quarter shall not exceed the amount of compensation owed for 90 days of Relief Event Delays, and any remaining amounts shall be paid in the subsequent month(s).

9.2.2.6 Notwithstanding any provision to the contrary, Developer shall not be entitled to any payments under this Section 9.2.2 if Developer achieves Substantial Completion on or before the Baseline Substantial Completion Date.

9.2.2.7 Claims under this Section 9.2.2 shall be submitted and subject to the claims procedures and requirements set forth in Section 9.1.1, and Developer shall be required to prove the existence, cause, effect, and timing of a Relief Event Delay in accordance with Section 9.1.1.

9.2.3 Delayed Milestone Payment Due to Relief Events

9.2.3.1 If a Relief Event Delay extends Substantial Completion beyond the Baseline Substantial Completion Date, then subject to Sections 9.2.3.2, 9.2.3.3, 9.2.3.4 and 9.2.3.5 Developer shall be entitled to submit Claims for the additional interest incurred resulting from a delay in making any Project Debt principal payment beyond the date scheduled in the Financial Model (before the impact of the Relief Event Delay), provided that (a) such Project Debt principal payment was scheduled to be funded by the Milestone Payment, (b) receipt of the Milestone Payment was delayed by a Relief Event Delay, and (c) the delay in making such Project Debt principal payment was directly caused by the delayed receipt of the Milestone Payment. The compensation owed under this Section 9.2.3 shall be calculated based on the number of days of Relief Event Delays (up to 270 days) multiplied by the daily interest charged for the relevant principal amount under the applicable Funding

Agreement.

9.2.3.2 If a Deductible Relief Event causes a Relief Event Delay, no compensation shall be due or payable for the first 90 days of Relief Event Delays attributable to such Deductible Relief Event, and such deductible shall not be included in calculating the number of days of Relief Event Delays under Section 9.2.3.1. Such 90 day deductible shall be cumulative and apply in the aggregate for all Deductible Relief Events. If a Relief Event Delay is caused concurrently by a Deductible Relief Event and a non-Deductible Relief Event, such delay shall be deemed caused solely by the Deductible Relief Event.

9.2.3.3 Interest shall only be calculated on principal payments equal to the Milestone Payment Amount.

9.2.3.4 The compensation owed shall be reduced by the proceeds from any delayed start up or business interruption insurance policy procured to cover any extra cost of funds during the period of delay in payment of the Milestone Payment, excluding any insurance proceeds paid to Developer to cover the cost of funds during the 90 day period provided in Sections 9.2.3.2.

9.2.3.5 Claims for the additional interest shall be due and payable the later of (a) 30 days after each date Developer delivers to the Department a request for payment together with documentation demonstrating the next interest payment date under the terms of the applicable Funding Agreement and the amount of the additional interest owing under this Section 9.2.3 or (b) two Business Days before such interest payment date, provided that payments shall not be due earlier or more frequently than 30 days after the end of each Quarter.

9.2.3.6 Claims under this Section 9.2.3 shall be submitted and subject to the claims procedures and requirements set forth in Section 9.1.1, and Developer shall be required to prove the existence, cause, effect and timing of a Relief Event Delay in accordance with Section 9.1.1.

9.2.4 Certain Relief Events Causing Closures During Operating Period

If a Relief Event described in clause (a), (b), (j) (but only a violation by a third party), (k) (but only by a Governmental Entity), (l), (m), (n) (but only a third party release), (o), (q), (r), (t) or (u) of the definition of Relief Event results in a Closure, then solely for purposes of the definition of Unavailability Event such a Closure shall not be deemed a Permitted Closure; provided that:

9.2.4.1 For up to the first 30 days that such Closure persists, plus any additional period that such Closure persists due to Developer's failure to use commercially reasonable efforts to mitigate the effects of such Relief Event and the resulting Closure, Developer shall be assessed 100% of the adjustment due to such Unavailability Event as calculated under Appendix 7;

9.2.4.2 For up to the next 30 days that such Closure persists, Developer shall be assessed only 50% of the adjustment due to such Unavailability Event as calculated under Appendix 7; and

9.2.4.3 For any further period that such Closure persists, Developer shall be assessed only 15% of the adjustment due to such Unavailability Event as calculated under

Appendix 7.

For the avoidance of doubt, such Relief Events may constitute Permitted Closures under the definition of Permitted Closure for all other purposes under this Agreement, including for determining a Developer Default under Section 18.1.1.17, and determining Noncompliance Points.

9.2.5 Deadline Extensions; Defense to Noncompliance Points, Deductions and Developer Default

9.2.5.1 Developer shall have the right to extend the Financial Close Deadline by the period of delay in Developer's ability to achieve Financial Close that Developer cannot reasonably avoid through mitigation as required under Section 9.2.6 and that is solely and directly attributable to a Relief Event set forth in clause (a), (g), (j) or (o) of the definition of Relief Event (Force Majeure Event, Department-Caused Delay, certain violations of Law, certain court orders). The Financial Close Deadline will not be extended on account of any other Relief Event (notwithstanding any other provision of this Agreement to the contrary). Developer's right to extend the Financial Close Deadline is conditioned upon Developer extending the expiration of the Financial Close Security so that at all times the Financial Close Security is valid for a period that is at least ten days beyond the Financial Close Deadline (as extended). Developer shall be entitled to reimbursement from the Department for Developer's reasonable costs to extend the expiration of the Financial Close Security.

9.2.5.2 Developer shall be entitled to extension of applicable Completion Deadlines by the period of any Relief Event Delay that Developer cannot reasonably avoid through mitigation as required under Section 9.2.6, subject to satisfaction of any conditions or requirements set forth in the Contract Documents (e.g. Section 3.2.2.1 regarding Major Permit Delays; Section 4.5.8.1 regarding Utility Owner Delays).

9.2.5.3 Refer to Section 6.5 regarding the effect of a Relief Event on the accrual of Noncompliances and Noncompliance Points and assessment of monetary deductions for Noncompliance. Developer shall be entitled to rely upon the occurrence of a Relief Event as a defense against a Developer Default where the occurrence of the Relief Event causes such Developer Default.

9.2.5.4 Developer shall not be excused from compliance with the Contract Documents, applicable Laws or Governmental Approvals due to the occurrence of a Relief Event, except for its temporary inability to comply as a direct result of a Relief Event.

9.2.6 Mitigation

9.2.6.1 Developer shall take all steps necessary on a commercially reasonable basis to mitigate the consequences of any Relief Event, including all steps that would generally be taken in accordance with Best Management Practice. Without limiting the foregoing, Developer shall not be entitled to submit a claim for Extra Work Costs, Delay Costs, time or Completion Deadline extensions, compensation for losses due to delays in commencement of Availability Payments or for additional interest costs due to delayed receipt of the Milestone Payment, or other relief for impacts that could have been avoided through re-sequencing and re-scheduling of the Work and/or other work-around measures whose cost is justified by equal or greater savings in Extra Work Costs, Delay Costs and additional interest costs.

9.2.6.2 Whenever a Relief Event occurs and Developer submits an initial notice of potential Claim for Extra Work Costs, Delay Costs and/or additional interest costs, Developer shall concurrently submit to the Department an analysis of potential re-sequencing, re-scheduling and other work-around measures and a comparison of the estimated costs thereof to the estimated savings in Extra Work Costs, Delay Costs and/or additional interest costs that would result. Developer shall cooperate with the Department thereafter to identify the re-sequencing, re-scheduling and other work around measures that will maximize mitigation of costs to the Department taking into account the cost of potential re-sequencing, re-scheduling and other work-around measures. The Department shall compensate Developer for the reasonable costs of re-sequencing, re-scheduling and other work-around measures authorized in writing by the Department pursuant to this provision, in the same manner it compensates for Extra Work Costs and Delay Costs under Sections 9.3 and 9.4.

9.2.7 Special Provisions Respecting Change in Law

9.2.7.1 A Nondiscriminatory O&M Change that the Department requires in order to comply with or implement a Change in Law shall be treated under this Agreement as a Change in Law.

9.2.7.2 In no event shall Developer be entitled to compensation for increases in costs of O&M Work, whether Extra Work Costs or Delay Costs, due to a Change in Law, except for capital costs of required major new improvements or required major repair, reconstruction, rehabilitation, restoration, renewal or replacement of any Element.

9.2.7.3 Notwithstanding any contrary provision of this Agreement, if the Change in Law is the levy of State or local ad valorem property taxes on the Developer's Interest, the Developer shall be entitled to compensation for the full amount of such property taxes.

9.3 Payment for Extra Work Costs and Delay Costs

9.3.1 Except as provided otherwise in this Agreement, the Department shall compensate Developer for Extra Work Costs and Delay Costs directly attributable to occurrence of a Relief Event.

9.3.2 The Department shall compensate Developer for amounts due for Extra Work Costs and Delay Costs (a) to the extent permitted by law, as a lump sum payment, (b) as periodic payments over the Term, (c) as an adjustment to the MAP over the Term, (d) as progress payments invoiced as Work is completed, (e) through an extension of the Term if the event giving rise to the Claim occurs after the Construction Period, or (f) through any combination of the above, as determined by the Department in its sole discretion. Subject to Section 9.4.3, the Department shall pay for any Extra Work Costs and Delay Costs resulting from Department Changes as progress payments invoiced as Work is completed.

9.3.3 The Department shall provide Developer with a written notice of the method chosen for paying Developer for the amounts of Extra Work Costs and Delay Costs owed under this Article 9. The Parties shall conduct all discussions and negotiations to determine any compensation amount (including additional compensation amounts under Section 9.4, if any), and Developer shall provide the Department with all data, documents and information pertaining thereto, on an Open Book Basis.

9.3.4 If the Department chooses to compensate Extra Work Costs and Delay Costs owed under this Article 9:

9.3.4.1 As a lump sum payment other than a negotiated fixed price, then payment shall be due and owing 30 days following the Department's receipt of (a) all required Claim documentation in full compliance with Section 9.1.1.1, and (b) all pertinent data, documents and information on an Open Book Basis;

9.3.4.2 As a lump sum payment that is a negotiated fixed price, then payment(s) shall be due and owing 30 days after the Department receives from Developer (a) all required Claim documentation in full compliance with Section 9.1.1.1, (b) all pertinent data, documents and information on an Open Book Basis and (c) documentation required pursuant to the negotiated fixed price terms in order to receive scheduled payments under the negotiated fixed price terms; and

9.3.4.3 As progress payments invoiced as Work is completed, then payment shall be due and owing 30 days after each date the Department receives from Developer (a) all required Claim documentation through and including a certified written supplemental notice of potential Claim in full compliance with Section 9.1.1.1 and (b) an invoice, not more often than monthly, of such Extra Work Costs and Delay Costs incurred for such Work during the previous month, which invoice shall be itemized as set forth in Section 9.1.1.1(6)(d) and by the components of Extra Work Costs and Delay Costs allowable under Appendix 6.

9.3.5 In exchange for the payment by the Department of any such compensation amounts (and additional compensation amounts under Section 9.4, if any), Developer shall execute a full, unconditional, irrevocable waiver, release and acknowledgement of satisfaction by Developer, in form reasonably acceptable to the Department, of any claim for Extra Work Costs, Delay Costs, compensation for losses due to delays in commencement of Availability Payments or for additional interest costs due to delayed receipt of the Milestone Payment, and other rights to compensation or other monetary relief associated with such event that is not the subject of a Dispute.

9.4 Restoration of Financial Balance for Deferral of Compensation

9.4.1 If the Department elects to compensate Developer through Deferral of Compensation, Developer shall be entitled to additional compensation to restore the losses in Equity IRR and debt service ratios in the Financial Model as a result of the Deferral of Compensation.

9.4.2 Developer shall provide the Department with the total amount of compensation that Developer considers owed to restore the Equity IRR and debt service ratios in the Financial Model as a result of the Deferral of Compensation, including supporting calculations and documentation. In no event shall Developer be entitled to any compensation for losses unrelated and not directly caused by the Deferral of Compensation.

9.4.3 If through mutual consent of the Parties, the Department is to compensate Developer through Deferral of Compensation for any Extra Work Costs and Delay Costs resulting from a Department Change, the Equity IRR assumed to be earned on the additional invested equity in connection with the Department Change shall be equal to the Original Equity IRR.

9.5 Disputes Related to Claims and Relief Events

Any Dispute as to whether Developer is entitled to Extra Work Costs, Delay Costs, other compensation, Financial Close Deadline or Completion Deadline extensions or other relief as provided in this Article 9 shall be resolved according to the Dispute Resolution Procedures. If the Department disagrees with an amount of compensation or deadline extension sought by Developer, the Department shall pay the undisputed portion of compensation and allow the undisputed portion of Financial Close Deadline or Completion Deadline extension, and the disputed portion shall be resolved according to the Dispute Resolution Procedures.

ARTICLE 10. CHANGES IN THE WORK

10.1 Department Changes

10.1.1 The Department reserves the right to make alterations or changes in the Work (including reductions in the scope of the D&C Work) or in terms and conditions of the Technical Requirements (including changes in the standards applicable to the Work). Such alterations and changes shall be documented through issuance of a Department Change or other written directive signed by the Department's Authorized Representative or by his/her designee appointed in writing.

10.1.2 If Developer believes it is entitled to additional compensation, a Financial Close Deadline or Completion Deadline extension or other relief for Extra Work which is directed by the Department, Developer shall submit a Claim in accordance with Section 9.1. Compensation and Financial Close Deadline or Completion Deadline extension for Extra Work shall be subject to all terms and conditions of the Contact Documents, provided that such Claims shall not be subject to the deductibles set forth in this Agreement.

10.1.3 If the Department Change results in a reduction to the scope of the Work, the Department shall be entitled to 100% of the net reduction in direct labor, material and equipment costs associated with the Department Change, and 100% of the savings in financing costs associated with any Design and Construction Cost savings, which shall be paid by Developer to the Department: (a) as periodic payments over the Term; (b) as an adjustment to the MAP over the Term; (c) through a reduction in the Term; or (d) through any combination of the above, as mutually agreed upon by the Parties. The Department also may take such reduction in direct labor, material and equipment costs as a credit against the Department's liability for Extra Work Costs and Delay Costs during the Term.

10.2 Developer Change Proposals

10.2.1 Developer may, by submittal of a written Change Proposal using a form approved by the Department, request the Department to (a) approve modifications to the Technical Requirements, (b) approve modifications to Developer's Proposal Commitments, or (c) approve adjustments to the Project Right of Way, Temporary Construction Easement, Construction Period O&M Limits or Operating Period O&M Limits identified in Appendix 5. The Change Proposal shall set forth Developer's detailed estimate of net cost impact (positive or negative) and schedule impact of the requested change.

10.2.2 The Department, in its sole discretion may accept or reject any Change Proposal submitted by Developer pursuant to Section 10.2.1. No acceptance shall be deemed to take

effect unless documented in writing signed by the Department's Authorized Representative or by his/her designee appointed in writing. No such acceptance shall constitute a Department Change regardless of its title, designation or wording. If such Change Proposal is accepted by the Department, Developer shall implement the change in accordance with all applicable requirements contained in the Contract Documents (as amended to reflect the Department-approved Change Proposal, if applicable), the Project Management Plan, Best Management Practice, and all applicable Laws.

10.2.3 Developer shall be solely responsible for payment of any increased Design and Construction Costs, finance or other costs, additional risks, and any Project Schedule delays or other impacts resulting from a Change Proposal accepted by the Department.

10.2.4 To the extent a change under Section 10.2.1(a) or (b) results in a cost savings to Developer, the Department shall be entitled to 50% of the savings related to the direct labor, materials and equipment costs associated with the change. The Department shall obtain its share of the savings in the manner described in Section 10.1.3.

10.2.5 To the extent a change under Section 10.2.1(c) results in a reduction in the number of parcels identified in Appendix 5 necessary for the construction or operation and maintenance of the Project, does not require a modification to the Project configuration, and does not affect any elements or functionality as set forth in the Technical Requirements, Developer shall share in 50% of the savings to the Department in real estate costs. However, Developer shall not be entitled to a share in any savings in real estate costs if a change under Section 10.2.1(c) requires a modification to the Project configuration or affects any elements or functionality as set forth in the Technical Requirements. The Department shall pay any amounts due to Developer under this Section 10.2.5 upon submission of a signed payment request setting forth the parcel or parcels to which it is entitled to share in savings. Such payment request may be submitted no earlier than the Substantial Completion Date.

10.2.6 For any Change Proposal accepted by the Department, the Department shall be entitled to 100% of the savings in financing costs associated with any Design and Construction Cost savings. The Department shall obtain the savings in the manner described in Section 10.1.3.

10.2.7 No Change Proposal shall be required to implement any change to the Work that is not specifically regulated or addressed by the Contract Documents, applicable Law or Governmental Approvals.

ARTICLE 11. PAYMENTS TO DEVELOPER

11.1 Timing and Basis for Availability Payments

11.1.1 The right to Availability Payments shall commence upon Substantial Completion of the Project. The Department will begin making Availability Payments to Developer as provided in this Article 11.

11.1.2 The Availability Payments are based on the Project being open and available for public travel as measured through Developer's conformance with the Contract Documents, including the minimum operating and maintenance requirements set forth in Section 4 of Division II.

11.2 Availability Payment Calculation, Invoicing and Holdback

11.2.1 Calculation of Availability Payment

11.2.1.1 Availability Payments shall be calculated and earned by Developer according to the methodology set forth in Appendix 7. The Availability Payments payable during any given Fiscal Year shall never exceed the MAP for that year, adjusted at Financial Close and for inflation, as described in Appendix 7.

11.2.1.2 Each Availability Payment constitutes a single, all-inclusive payment with no fixed component and no separation of payments for operations, capital, maintenance, Renewal Work, Handback Renewal Work or Upgrades. Availability Payments are not intended and shall not be construed as progress payments or retention under California Law. In addition to any other deductions or withholdings allowed under this Agreement, the Availability Payments shall be subject to adjustment for Unavailability Events and O&M Noncompliance Events in accordance with Appendix 7, subject to the limitation on adjustments during a Department step-in as set forth in Section 6.6. Developer acknowledges that such adjustments to the Availability Payments are reasonable liquidated damages in order to compensate the Department for damages it will incur by reason of Developer's failure to comply with the availability and performance standards applicable to the Operating Period. Such damages include:

1. The Department's increased costs of administering this Agreement, including the increased costs of engineering, legal, accounting, monitoring, OCIP insurance, oversight and overhead, and could also include obligations to pay or reimburse Governmental Entities with regulatory jurisdiction over the Project for violation of applicable Governmental Approvals or for their increased costs of monitoring and enforcing Developer's compliance with applicable Governmental Approvals;

2. Potential harm and future costs to the Department from reduction in the condition and Design Life of the Project;

3. Potential harm to the credibility and reputation of the Department's transportation improvement program with other Governmental Entities, with policy makers and with the general public who depend on and expect availability of service;

4. Potential harm and detriment to Users, which may include loss of the use, enjoyment and benefit of the Project and of facilities connecting to the Project, additional wear and tear on vehicles and increased costs of congestion, travel time and accidents;

5. Loss of economic benefits by other Governmental Entities owning and operating transportation facilities that connect to or are affected by the Project; and

6. The Department's increased costs of addressing potential harm to the Environment, including increased harm to air quality caused by congestion, and harm to water quality, soils conditions, historic structures and other environmental resources caused by adjustment factors set forth in Appendix

7.

11.2.1.3 Developer further acknowledges that these damages would be difficult and impracticable to measure and prove, because, among other things, (a) the Project is of a unique nature and no substitute for it is available, (b) the costs of monitoring and oversight prior to increases in the level thereof will be variable and extremely difficult to quantify, (c) the nature and level of increased monitoring and oversight will be variable depending on the circumstances, and (d) the variety of factors that influence use of and demand for the Project make it difficult to sort out causation of the matters that will trigger these liquidated damages and to quantify actual damages.

11.2.2 Invoicing

11.2.2.1 The Availability Payments shall be payable in Quarterly Payments. The Availability Payment for any partial Quarter shall be prorated. The Department shall pay Developer a Quarterly Payment within 30 days after the Department receives a proper invoice for the applicable Quarter that meets the requirements of this Section 11.2.2. The 30-day period within which to make payment of a Quarterly Payment shall not begin until Developer submits and the Department receives a proper invoice therefor in accordance with this Section 11.2.

11.2.2.2 Developer shall submit the invoice no later than 30 days after the end of the prior Quarter. The invoice must set forth the amount and calculation of the Quarterly Payment due, including the calculation of the Quarterly Payment Adjustment for all applicable Unavailability Events and O&M Noncompliance Events in accordance with Appendix 7, if any. In addition, the invoice must be accompanied by an attached report containing information that the Department can use to verify the Quarterly Payment and all components of the Quarterly Payment Adjustment for Unavailability Events, O&M Noncompliance Events and Milestone Payment Adjustment Excess for the prior Quarter. Such attached report shall include (a) the calculation of the actual Availability Payment earned during the prior Quarter using the methodology set forth in Appendix 7 for determining the Quarterly Payment Adjustment, (b) a description of any Unavailability Events, including the date and time of occurrence and duration, (c) a description of any O&M Noncompliance Events, (d) the calculation of the Milestone Payment Adjustment Excess to the extent not previously recovered through a Quarterly Payment Adjustment, (e) any adjustments to reflect previous over-payments and/or under-payments, and (f) any other amount due and payable from Developer to the Department or from the Department to Developer under this Agreement, including deductions the Department is entitled to make under Section 5.10.2.5 (Monthly Handback Reserve Deposit) and Section 6.4 (Noncompliance Points). Developer shall set forth and submit in a separate invoice any interest payable in respect of any amounts owed. The Department shall return any invoices that are incomplete and/or incorrect in any material respect to Developer for correction and resubmission.

11.2.2.3 The Department will verify the amount of each Quarterly Payment by (a) examining the invoice for the applicable Quarter, (b) verifying the results reported therein by Developer, including through the Department's independent oversight and auditing process, and (c) reconciling the actual Quarterly Payment earned and any other amount due and payable from Developer to the Department or from the Department to Developer under this Agreement.

11.2.2.4 The Department shall not be required to pay any quarterly invoice

if Developer has failed to file the reports required to be filed for that Quarter as required by Section 4 of Division II, unless and until the required report is filed. If it is determined that any quarterly report required to be filed pursuant to Section 4 of Division II is inaccurate, which, had it been accurate, would have revealed that an Unavailability Event or O&M Noncompliance Event had occurred, then the Department shall not be required to pay any quarterly invoice submitted by Developer unless and until Developer submits to the Department a revised report which is accurate to the reasonable satisfaction of the Department. Once the required or revised reports are filed, the Department shall process the quarterly invoice for payment. The failure to file a quarterly report or the filing of an inaccurate report may result in the assessment of Noncompliance Points.

11.2.3 Holdback for Security

11.2.3.1 Notwithstanding any contrary provision of this Section 11.2 or Appendix 7, Availability Payments shall be subject to a holdback for security pending Final Acceptance.

11.2.3.2 The amount of the holdback shall equal 20% of each Quarterly installment of the MAP, before any adjustments thereto.

11.2.3.3 The Department shall release the holdback to Developer within 30 days after the Final Acceptance Date.

11.2.3.4 The holdback shall not bear interest prior to the date payment is due.

11.3 Disputed Amounts

11.3.1 Either Developer or the Department shall have the right to dispute, in good faith, any amount specified in an invoice submitted pursuant to this Article 11. The Party disputing any such amount shall pay the amount of the invoice in question that is not in dispute and is entitled to withhold the balance pending resolution of the Dispute.

11.3.2 Developer and the Department shall use their reasonable efforts to resolve any such Dispute within 30 days after the Dispute arises. If they fail to resolve the Dispute within that period, then the Dispute shall be resolved according to the Dispute Resolution Procedures.

11.3.3 Any amount determined to be due pursuant to the Dispute Resolution Procedures will be paid within 20 days following resolution of the Dispute, together with interest thereon in accordance with Section 11.4.

11.4 Interest on Payments

11.4.1 Interest on amounts owed to Developer under this Agreement shall be in accordance with the applicable Late Payment Rate.

11.4.2 If as a result of any inaccuracy in an invoice any overpayment is made by the Department to Developer then, in addition to the adjustments to a Quarterly Payment as provided in Section 11.2.2.2, the Department shall be entitled to deduct or receive as a payment from Developer interest thereon at the applicable Late Payment Rate from the date of payment of the invoice by the Department to the date the overpayment is deducted or paid. The

Department will notify the Developer of any Department determination that it is entitled to deduct or receive payment for interest owed on any such overpayment. The right of the Department to deduct the interest from the Quarterly Payment and/or to receive a payment from Developer is without prejudice to any other rights the Department may have under this Agreement.

11.4.3 Amounts determined to be due pursuant to the Dispute Resolution Procedures shall accrue interest at the applicable Late Payment Rate.

11.5 Appropriations and Budgeting of Payments

11.5.1 The Parties hereto acknowledge that the source of funds for payment of the Milestone Payment, Availability Payments and other amounts due to Developer under this Agreement is subject to the availability of funds appropriated by the State legislature and approved by the State governor. The Department shall include the Milestone Payment, Maximum Availability Payment, and other amounts then anticipated to be due under this Agreement during the following Fiscal Year (and any subsequent periods for which appropriations may be budgeted, requested, and appropriated) as amounts to be appropriated from the State Highway Account in its proposed STIP Fund Estimate ("Fund Estimate") for adoption by the California Transportation Commission and in its legislative budget request prepared in accordance with the Budget Acts and Executive Orders of the years covered by this Agreement, including any mid-year budget augmentation process as needed to meet its obligations under the Agreement. Upon timely demand by Developer, the Department agrees to provide to Developer a copy of its proposed Fund Estimate no later than five Business Days before such submission. Furthermore, for any source of funds not traditionally included in the Fund Estimate, the Department shall make the funding requests to obtain these funds from the respective funding sources on a timely basis and, where applicable, to include appropriation requests for those payments in the Department's budget requests in the years needed to make the payments on or before the date when such payments are due under this Agreement.

11.5.2 The Department agrees to prioritize in the State Highway Account (to the maximum extent permitted by Streets and Highways Code section 163, subject to the Department's other contractual obligations regarding the prioritization of funds then existing at the time of the submission of the Fund Estimate), ahead of annual capacity for projects for which the Department does not have contractual obligations, the Milestone Payment, Availability Payments and other amounts then anticipated to be due under this Agreement, in the development of Fund Estimates submitted to the California Transportation Commission for adoption. The Department shall, so long as this Agreement is in effect, provide an annual report to Developer (and, so long as any portion of a TIFIA loan is outstanding, to the USDOT) regarding: (a) whether the then-current year's payments due under this Agreement have been duly appropriated; and (b) the inclusion of subsequent year's payments due under this Agreement in the Department's Fund Estimate submitted to the California Transportation Commission for adoption. All Department project contractual obligations existing at the time of submission of the Fund Estimate, including any and all payments due Developer under this Agreement, will have the same priority in the Fund Estimate. The Department may not prioritize any project contractual obligations higher than the prioritization of any and all payments due Developer under this Agreement. So long as the TIFIA Loan is outstanding, USDOT shall be a third-party beneficiary of this Section 11.5.2.

11.5.3 Nothing in this Section 11.5 shall prejudice Developer's right to declare a Department Default under Section 18.3.1.1.

11.6 Tolling

11.6.1 Developer shall be authorized to impose tolls and user fees for use of the Project subject to prior compliance with and satisfaction of all of the following conditions:

11.6.1.1 Developer shall give to the Department written notice of its intent to exercise the right to impose toll and user fees, as well as the Developer's proposed schedule of toll rates or user fee rates and plan to construct and operate the toll collection facilities;

11.6.1.2 Developer shall obtain the approval of the Golden Gate Bridge Highway and Transportation District, the Metropolitan Transportation Commission, and the Authority to (a) the exercise of such authority to impose tolls and user fees and (b) the toll rates or user fee rates, which approval shall be governed by and consistent with the requirements of that certain Memorandum of Understanding ("MOU") dated November 26, 2008;

11.6.1.3 Developer's exercise of the right to impose tolls and user fees as provided in this Section 11.6.1 shall not affect, alter or supersede the MOU;

11.6.1.4 Developer must obtain all necessary Environmental Approvals and governmental permits required in order to exercise the right to impose tolls and user fees, including compliance with all legal requirements including CEQA and NEPA requirements;

11.6.1.5 Developer shall obtain the prior written approval of the Department in its good faith discretion to (a) the toll rates or user fee rates, which approval shall be consistent with the approvals given as provided in Section 11.6.1.2; and (b) amendments or supplements to the Technical Requirements establishing the standards and specifications for the design, construction, operation and maintenance of the tolling system;

11.6.1.6 The Department and the Authority have agreed on (a) the use and disposition of excess toll and user fee revenue payable to Department under Section 11.6.3, consistent with Streets and Highways Code Section 143(j)(1), and (b) amendments to this Agreement to take into account the impact of toll revenues on compensation for Relief Events and the measurement of Termination Compensation; ;and

11.6.1.7 Section 143(q) of the Streets and Highways Code is (a) repealed, (b) amended to not preclude tolling of the Project or (c) determined by the Department or a court of competent jurisdiction to not apply to the Project.

11.6.2 In the event Developer decides to exercise the right to impose tolls and user fees as provided in this Section 11.6, the Department shall be relieved of its obligation to make Availability Payments as provided in Article 11 in an amount equal to the gross amount of tolling and user fees received by the Developer. All adjustments to Availability Payments for Unavailability Events and O&M Noncompliance Events shall continue to be calculated in accordance with Appendix 7, and the excess thereof (if any) over the amount of any Availability Payment remaining due (if any) shall be due and payable to the Department, as liquidated damages, on the same date that each invoice and attachment is required to be delivered to the Department under Section 11.2.2.2.

11.6.3 In the event Developer decides to exercise the right to impose tolls and user fees

as provided in this Section 11.6, Developer shall pay to the Department 80% of all toll revenues received each month which exceed in amount the Availability Payments that would be owing to Developer (assuming no adjustments for Unavailability Events and O&M Noncompliance Events) had Developer not exercised its authority to toll set forth in this Section 11.6. Such payments to the Department shall constitute the excess toll or user fee revenue governed by Streets and Highways Code Section 143(j)(1), shall not be available to Developer or its Lenders, and shall be subject to disposition as determined by the Department and the Authority.

11.6.4 In the event Developer decides to exercise the right to impose tolls and user fees as provided in this Section 11.6, the tolling system shall be an open road, barrier-free, electronic tolling system that does not interrupt the flow of traffic on the Project or its approaches.

ARTICLE 12. LENDERS' RIGHTS

12.1 Conditions and Limitations Respecting Lenders' Rights

12.1.1 No Funding Agreement or related Security Document shall be valid or effective, and no Lender shall be entitled to the rights, benefits and protections of this Article 12 or the Direct Agreement, unless the Funding Agreement and related Security Document strictly comply with Section 15.4.

12.1.2 No Funding Agreement or Security Document relating to any Refinancing shall be valid or effective, and no Lender shall be entitled to the rights, benefits and protections of this Article 12 or the Direct Agreement, unless the Refinancing is in compliance with Section 15.5.

12.1.3 No Funding Agreement or Security Document shall be binding upon the Department in the enforcement of its rights and remedies as provided herein and by Law, and no Lender shall be entitled to the rights, benefits and protections of this Article 12 or the Direct Agreement, unless and until the Department has received a copy (certified as true and correct by the Collateral Agent) of the original thereof bearing, if applicable, the date and instrument number or book and page of recordation or filing thereof, including a copy of a specimen bond, note or other obligation (certified as true and correct by the Collateral Agent) secured by such Security Document, together with written notice of the address of the Collateral Agent to which notices may be sent. In the event of an assignment of any such Funding Agreement or Security Document, such assignment shall not be binding upon the Department unless and until the Department has received a certified copy thereof, which copy shall, if required to be recorded, bear the date and instrument number or book and page of recordation thereof, together with written notice of the assignee thereof to which notices may be sent. In the event of any change in the identity of the Collateral Agent, such change shall not be binding upon the Department unless and until the Department has received a written notice thereof signed by the replaced and substitute Collateral Agent and setting forth the address of the substitute Collateral Agent to which notices may be sent.

12.1.4 No Lender shall be entitled to the rights, benefits and protections of this Article 12 unless the Funding Agreements in favor of the Lender are secured by senior or first tier subordinate Security Documents, including any first tier subordinate security interest that is extended in connection with Project Debt provided under the U.S. Department of Transportation's Transportation Infrastructure Finance and Innovative Act (TIFIA) program, and the Department shall only enter into Direct Agreements with such Lenders. For avoidance of doubt, no Lender holding Project Debt secured by an Equity Members Security Document shall

have any rights, benefits or protections under this Article 12 and the Department shall not be required to enter into a Direct Agreement with such a Lender.

12.1.5 All rights acquired by Lenders under any Funding Agreement or Security Document shall be subject to the provisions of this Agreement and the Lease and to the rights of the Department hereunder and thereunder.

12.1.6 A Lender shall not, by virtue of its Funding Agreement or Security Document, acquire any greater rights to or interest in the Project, the Lease or payments from the Department under this Agreement than Developer has at any applicable time under this Agreement, other than the provisions in this Article 12 for the specific protection of Lenders and in the Direct Agreement.

12.1.7 To further evidence the rights, benefits and protections afforded to Lenders, the Department will enter into a Direct Agreement at a Lender's request.

12.2 Effect of Amendments

Subject to Article 10, while any Security Document is in effect, no agreement between the Department and Developer for the modification or amendment of this Agreement that in any way could reasonably be expected to have a material adverse effect on the rights or interests of the Lender(s) shall be binding on the Lender(s) under such Security Document without the Collateral Agent's consent.

12.3 Notices to Collateral Agent

As long as any Project Debt secured by any Security Document shall remain outstanding, the Department shall promptly provide the Collateral Agent with a copy of any notice it sends to Developer concerning an actual or potential Developer Default, including Warning Notices.

12.4 Opportunity to Cure and Step-In

As long as any Project Debt secured by any Security Document shall remain outstanding and the conditions and limitations of Section 12.1 are satisfied, the following provisions shall apply with respect to any such Security Document and the related Lender or Lenders and Funding Agreements.

12.4.1 Upon the occurrence of a Developer Default and expiration of the relevant cure period, if any, without a full or complete cure, the Department shall not terminate this Agreement until it first delivers to the Collateral Agent notice of its intent to terminate and provides the Collateral Agent a reasonable opportunity to cure such Developer Default, as provided in the Direct Agreement. The Lenders shall have the right (but not the obligation) to remedy such Developer Default or cause the same to be remedied by a Substituted Entity; and the Department shall deem such performance by or at the instigation of the Lender or Substituted Entity as if the same had been done by Developer, as provided in the Direct Agreement.

12.4.2 Any curing of any Developer Default by the Collateral Agent shall not be construed as an assumption by the Collateral Agent of any obligations, covenants or agreements of Developer under the Contract Documents, except that the Collateral Agent shall be responsible for the work, services and actions taken or performed by or on behalf of the

Collateral Agent.

12.4.3 Except as set forth in this Agreement or in the Direct Agreement, the Department shall not be precluded from or delayed in exercising any remedies, including termination of this Agreement due to the accumulation of Noncompliance Points during the step-in period by the Collateral Agent and the Department's rights to cure Developer Default at Developer's expense; provided, however, the Department shall forebear from exercising its right of termination due to Noncompliance Points accumulated prior to such step in so long as the Collateral Agent is curing the Noncompliance that resulted in such Noncompliance Points as quickly as practicable using commercially reasonable efforts. Once all instances of Noncompliance have been cured, the Department shall cancel any Noncompliance Points accrued prior to such step-in.

12.5 Substituted Entities

12.5.1 Any payment to be made or action to be taken by the Collateral Agent as a prerequisite to keeping this Agreement in effect shall be deemed to have been made or taken by the Collateral Agent if such payment is made or action is taken by a Substituted Entity proposed by the Collateral Agent and reasonably approved by the Department. The Department shall have no obligation to recognize any claim to Developer's Interest by any person or entity that has acquired Developer's Interest by, through, or under any Security Document or whose acquisition shall have been derived immediately from any holder thereof, unless such person or entity is a Substituted Entity reasonably approved by the Department.

12.5.2 The Department shall have no obligation to approve a person or entity as a Substituted Entity unless the Lender demonstrates to the Department's reasonable satisfaction that:

12.5.2.1 The proposed Substituted Entity and its contractors collectively have the financial resources, qualifications and experience to timely perform Developer's obligations under the Contract Documents and Key Contracts;

12.5.2.2 The proposed Substituted Entity and its contractors, each of their respective direct and indirect beneficial owners, any proposed key personnel, each of their respective officers and directors and each of their respective affiliates have a good and sound background and reputation (including (i) the absence of criminal, civil or regulatory claims or actions against any such Person, (ii) the absence of any suspension or debarment from bidding, proposing or contracting with any federal or State department or agency, and (iii) each such Person's adherence to Best Management Practice, contract terms and applicable standards regarding past or present performance on other Department projects); and

12.5.2.3 The proposed Substituted Entity and its contractors are in compliance with the Department's rules, regulations and adopted written policies regarding organizational conflicts of interest.

12.5.3 The Department will approve or disapprove a proposed Substituted Entity within 30 days after it receives from the Lender a request for approval together with: (a) such information, evidence and supporting documentation concerning the identity, financial resources, qualifications, experience and potential conflicts of interest of the proposed Substituted Entity and its contractors as the Department may reasonably request; and (b) such evidence of organization, authority, incumbency certificates, certificates regarding debarment or suspension, and other certificates, representations and warranties as the Department may

reasonably request. The Department will evaluate the financial resources, qualifications, experience and potential conflicts of interest of the proposed Substituted Entity and its contractors using the same standards and criteria that it is then currently applying, or if there is no current application, then the same standards and criteria it most recently applied, to the evaluation of Persons responding to Department requests for qualifications for concession or similar agreements for comparable projects and facilities. If for any reason the Department does not act within such 30-day period, or any extension thereof by mutual agreement of the Department and the Lender, the Department shall be deemed to approve of the Substituted Entity.

12.5.4 Notwithstanding the foregoing, any entity that is wholly owned by a Lender or group of Lenders shall be deemed a Substituted Entity, without necessity for Department approval, upon delivery to the Department of documentation proving that the entity is duly formed, validly existing and wholly owned by the Lender, including a certificate signed by an executive officer of each Lender in favor of the Department certifying, representing and warranting such ownership.

12.5.5 A Lender may request approval of more than one Substituted Entity. A Lender may request approval at any time or times. Any approval by the Department of a Substituted Entity shall expire (unless otherwise agreed in writing by the Department) one year after the approval is issued if the Substituted Entity has not succeeded to Developer's Interest within that period of time.

12.5.6 The Department may revoke an approval if at any time prior to succeeding to Developer's Interest (a) the Substituted Entity ceases to be in compliance with the Department's rules and regulations regarding organizational conflicts of interest or (b) there occurs any suspension or debarment of the Substituted Entity, any of its contractors, any of their respective direct and indirect beneficial owners, any proposed key personnel, any of their respective officers and directors or any of their respective affiliates from bidding, proposing or contracting with any federal or State department or agency.

12.5.7 If the Substituted Entity succeeds to Developer's Interest, then the Department shall not be entitled to terminate due to Noncompliance Points accumulated by Developer prior to its replacement by the Substituted Entity, provided the Noncompliance that resulted in such Noncompliance Points are being cured by the Substituted Entity as quickly as practicable using commercially reasonable efforts. Once all instances of Noncompliance have been cured, the Department shall cancel any Noncompliance Points accrued prior to succession.

12.6 Receivers

12.6.1 The appointment of a receiver at the behest of Developer shall be subject to the Department's prior written approval in its sole discretion. The appointment of a receiver at the behest of any Lender shall be subject to the following terms and conditions:

12.6.1.1 The Department's prior approval shall not be required for the appointment of the receiver or the selection of the Person to serve as receiver;

12.6.1.2 Whenever any Lender commences any proceeding for the appointment of a receiver, it shall serve on the Department not less than five days' prior written notice of the hearing for appointment and of the Lender's pleadings and briefs in the proceeding;

12.6.1.3 The Department may appear in any such proceeding to challenge the selection of the Person to serve as receiver, but waives any other right to oppose the appointment of the receiver; and

12.6.1.4 The Department may at any time seek an order for replacement of the receiver by a different receiver.

12.6.2 No receiver appointed at the behest of Developer or any Lender shall have any power or authority to replace the Lead Contractor or the Lead Operations and Maintenance Contractor except by reason of default or unless the replacement is a Substituted Entity reasonably approved or deemed approved by the Department.

12.7 Other Lender Rights

Provided that the conditions and limitations of Section 12.1 are fully satisfied, the following provisions shall apply.

12.7.1 In addition to all other rights herein granted, the Lender shall have the same rights as Developer under this Agreement with respect to curing any Developer Default. The Department shall permit the Collateral Agent and its Substituted Entity the same access to the Project and Project Right of Way as is permitted to Developer hereunder. The Department hereby consents to Developer constituting and appointing any Collateral Agent as Developer's authorized agent and attorney-in-fact with full power, in Developer's name, place and stead, and at Developer's sole cost and expense, to enter upon the Project and Project Right of Way and to perform all acts required to be performed herein and in any Key Contracts, but only in the event of a Developer Default or a default under the Lender's Funding Agreement or Security Document. The Department shall accept any such performance by or on behalf of the Collateral Agent as though the same had been done or performed by Developer.

12.7.2 The creating or granting of a Security Document shall not be deemed to constitute an assignment or transfer of this Agreement or Developer's Interest, nor shall any Lender, as such, be deemed to be an assignee or transferee of this Agreement or Developer's Interest so as to require such Lender, as such, to assume the performance of any of the terms, covenants or conditions on the part of Developer to be performed hereunder or thereunder. No Lender, nor any owner of Developer's Interest whose ownership shall have been acquired by, through, or under any Security Document or whose ownership shall have been derived immediately from any holder thereof, shall become liable under the provisions of this Agreement unless and until such time as the Lender or such owner becomes the owner of Developer's Interest. Upon any permitted assignment of this Agreement and Developer's Interest by a Lender or any owner of Developer's Interest whose ownership shall have been acquired by, through, or under any Security Document or whose ownership shall have been derived immediately from any holder thereof, the assignor shall be relieved of any further liability which may accrue hereunder or thereunder from and after the date of such assignment, provided that the assignee is a Substituted Entity and executes and delivers to the Department an assumption agreement as required under Section 23.1.1.2.

12.7.3 The Department consents to the exercise by Lender of its rights with respect to Developer's Interest under its Security Documents, this Article 12, the Direct Agreement or otherwise, whether by judicial proceedings or by virtue of any power contained in the Security Documents, or by any conveyance from Developer to Lender in lieu of foreclosure thereunder, or any subsequent transfer from Lender to a Substituted Entity. The foregoing does not affect

the obligation to obtain approval of Persons as Substituted Entities pursuant to Section 12.5.

12.7.4 Whenever the Department or Developer obtains knowledge of any condemnation proceedings affecting the Project or Project Right of Way, it shall promptly give notice thereof to the Collateral Agent. Each Lender shall have the right to intervene and be made a party to any such condemnation proceedings, and the Department and Developer do hereby consent that each Lender may be made such a party or an intervener.

12.7.5 No mutual agreement to cancel or surrender this Agreement or the Lease shall be effective unless consented to in writing by the Collateral Agent, which consent Developer shall be solely responsible to obtain.

12.8 Estoppel Certificates

12.8.1 At any time and from time to time, within 15 days after written request of any Lender or proposed Lender, the Department, without charge and based upon its knowledge, shall certify by written instrument duly executed and acknowledged, to any Lender or proposed Lender as follows:

12.8.1.1 As to whether this Agreement has been supplemented or amended, and if so, the substance and manner of such supplement or amendment, attaching a copy thereof to such certificate;

12.8.1.2 As to the validity and force and effect of this Agreement, in accordance with its terms;

12.8.1.3 As to the existence of any Developer Default of which it has knowledge;

12.8.1.4 As to the existence of events which, by the passage of time or notice or both, would constitute a Developer Default of which it has knowledge;

12.8.1.5 As to the then accumulated amount of Noncompliance Points;

12.8.1.6 As to the existence of any Claims by the Department regarding this Agreement;

12.8.1.7 As to the Effective Date and the commencement and expiration dates of the Term;

12.8.1.8 As to whether a specified acceptance, approval or consent of the Department called for under this Agreement has been granted;

12.8.1.9 Whether the Lender and its Security Documents, or the proposed Lender and its proposed Security Documents, meet the conditions and limitations set forth in Section 12.1; and

12.8.1.10 As to any other matters of fact relating to this Agreement as may be reasonably requested.

12.8.2 The Department shall deliver the same certified, written instrument to a

Substituted Entity or proposed Substituted Entity within 15 days after receiving its written request, provided that the request is delivered to the Department either before the Substituted Entity or proposed Substituted Entity succeeds to Developer's Interest or within 60 days after the Substituted Entity has succeeded to Developer's Interest.

12.8.3 Any such certificate may be relied upon by, and only by, the Lender, proposed Lender, Substituted Entity or proposed Substituted Entity to whom the same may be delivered, and the contents of such certificate shall be binding on the Department.

12.9 Lenders as Third-Party Beneficiaries of the Provisions of Article 12

The Lenders are expressly recognized as being intended, direct third-party beneficiaries under the provisions of this Article 12 and may enforce any rights, remedies or claims conferred, given or granted thereunder.

ARTICLE 13. EQUITY TRANSFERS AND CHANGE OF CONTROL; COMMITTED INVESTMENT REQUIREMENT

13.1 Restrictions on Equity Transfers and Changes of Control of Developer

13.1.1 No Equity Transfers by or among Equity Members shall be allowed during the Term of this Agreement, except as provided in this Section 13.1.1 and Section 13.1.4.

13.1.1.1 No Equity Transfers by or among Equity Members are allowed from the Effective Date to the second anniversary of the Final Acceptance Date.

13.1.1.2 Two years following the Final Acceptance Date, Equity Transfers by or among Equity Members are allowed until four years from the Final Acceptance Date, provided that one or more of the initial Equity Members identified in Appendix 2-H collectively maintain more than 50% of the equity interest in Developer.

13.1.1.3 After four years from the Final Acceptance Date, Equity Transfers by or among Equity Members are allowed.

13.1.1.4 If any Equity Transfer pursuant to Sections 13.1.1.2 or 13.1.1.3 would result in a Change of Control, such Equity Transfer shall be subject to the Department's prior reasonable approval in writing; and, if such Equity Transfer occurs prior to or without the Department's prior reasonable approval in writing, the Equity Transfer shall be deemed to be denied. The Department shall have the right to request information from Developer related to the potential Change of Control, including information to determine the impact on the technical capabilities and financial standing of Developer and Equity Members that may result from the Change of Control.

13.1.1.5 Notwithstanding the provisions in this Section 13.1.1, Equity Transfers by an Equity Member to its Affiliates are allowed after the Effective Date. For purposes of this Section 13.1 only, an Equity Member whose role (and role of its Affiliates involved in the Project, if any) is restricted solely to financial matters and who have no role in the performance of the Work, shall be deemed Affiliated to infrastructure funds managed by such Equity Member (or by one of its Affiliates).

13.1.2 No less than 90 days prior to the expected date of an Equity Transfer pursuant to Section 13.1, Developer shall provide the Department information regarding the proposed Equity Transfer to enable the Department to evaluate whether the Equity Transfer is permitted, including: (a) the names of the transferor and transferee; (b) the three most recent audited financial statements of the transferee (if applicable); (c) the percentage of equity interest to be transferred; (d) the expected date of the Equity Transfer; (e) details of the Affiliate relationship between the transferor and the transferee (if applicable); (f) information demonstrating whether the Equity Transfer will result in a Change of Control; and (g) experience of the proposed equity transferee on similar projects as an investor, contractor or operator.

13.1.3 Provided that Developer furnished the Department the information required under Section 13.1.2, the Department shall provide written notice to Developer no later than 30 days before the expected date of the Equity Transfer if the Department concurs that such Equity Transfer is permitted under Section 13.1.1. If the proposed Equity Transfer would result in a Change of Control, the Department shall also provide written notice to Developer within such period if the Department approves of such Equity Transfer. If the Department fails to provide its concurrence or approval, as applicable, such Equity Transfer shall not be permitted, subject to Developer's right to submit a Dispute for resolution according to the Dispute Resolution Procedures.

13.1.4 Notwithstanding the foregoing, and provided that the conditions and limitations of Section 12.1 are fully satisfied, the exercise of a Lender's rights under the Security Documents to foreclose on the pledge of a shareholder, general partner or member's interest in Developer or otherwise acquire such interest by or through the exercise of a Lender's rights under the Security Documents that would otherwise result in a Change of Control shall not in and of itself constitute a Change of Control. However, any Person acquiring such interest shall be subject to the Department's prior reasonable approval in writing. Notwithstanding the foregoing, the acquisition of such interest by any entity that is wholly owned by a Lender or group of Lenders shall not require Department approval, provided that (a) the Department is furnished documentation proving that the entity is duly formed, validly existing and wholly owned by the Lender (including a certificate signed by an executive officer of each Lender in favor of the Department certifying, representing and warranting such ownership) and (b) the remaining Lenders have not exercised any rights to step in or to cure a Developer Default.

13.1.5 Any Equity Transfer or Change of Control in violation of this Section 13.1 shall be null and void *ab initio* and the Department, at its option, may declare any such attempted action to be a material Developer Default. The foregoing shall not prejudice Developer's right to cure a Developer Default under Section 18.1.2.1.

ARTICLE 14. FINANCIAL MODEL FOR THE PROJECT

14.1 Financial Model

14.1.1 Until the first Financial Model Update, the Original Financial Model shall serve as the Financial Model.

14.1.2 The Original Financial Model and Financial Model are to be held in escrow pursuant to Section 21.6. The Department is entitled to hold a copy thereof, and of Financial Modeling Data, in its files, but such copies are unofficial and the material held in escrow shall constitute the originals for all purposes under this Agreement.

14.1.3 In the event the Department is requested to disclose the Original Financial Model, Financial Model or Financial Modeling Data and Developer has identified the Original Financial Model, Financial Model or Financial Modeling Data as confidential material, the Department will promptly notify Developer so that Developer may seek a protective order or other appropriate remedy. If it wishes to protect the materials from disclosure, Developer shall seek court protection immediately on an emergency basis. In the event that such protective order or other remedy is not timely sought or obtained by Developer, the Parties agree that the Department may and will release the Original Financial Model, Financial Model or Financial Modeling Data if the Department concludes that such disclosure is required by the Public Records Act.

14.2 Financial Model Updates

14.2.1 The Original Financial Model shall be updated and superseded at Financial Close by the Financial Model in order to take into account and reflect the financing terms of the Initial Financing Documents and the effect of Sections 15.2.8 and 15.2.9. **[To be used only if preferred proposer is selected on the basis of an Alternative Financial Proposal]** The Original Financial Model shall be updated and superseded at Financial Close by the Financial Model in order to take into account and reflect the financing terms of the Initial Financing Documents and the effect of Sections 15.2.8 and 15.2.9, without change to the Original Equity IRR except pursuant to Sections 15.2.8 and 15.2.9. **[To be used only if preferred proposer is selected on the basis of a Primary Financial Proposal]** The Financial Model (as so updated) shall be subject to the approval of both Parties. In addition, by mutual agreement of the Parties, the Financial Model may be updated from time to time to reflect amendments to this Agreement or other matters.

14.2.2 Developer shall prepare the Financial Model Updates and shall provide the Department with each Financial Model Update and a complete set of the updated and revised assumptions, and other data that form a part of the Financial Model as updated, including updated and revised projections and calculations with respect to revenues, expenses, the payment of Project Debt and Distributions to Equity Members. The Department may require that the Financial Model Updates be audited by an independent audit firm satisfactory to the Department prior to Financial Model Update becoming effective under this Agreement. The Parties shall bear equally in the cost of the audit. The audit of the Financial Model Update may be the same one required by the Lenders.

14.2.3 The Department shall have the right to challenge the validity, accuracy or reasonableness of any Financial Model Update or the related updated and revised assumptions and data. In the event of a challenge, the immediately preceding Financial Model Update that has not been challenged (or, if there has been no unchallenged Financial Model Update, the Financial Model) shall remain in effect pending the outcome of the challenge or until a new Financial Model Update is issued and not challenged.

14.2.4 In no event shall the Financial Model Formulas be changed except with the prior written agreement of both Parties.

ARTICLE 15. PROJECT FINANCING AND REFINANCING

15.1 Developer Right and Responsibility to Finance Project

15.1.1 Developer is solely responsible for obtaining and paying for all financing, at its own cost and risk and without recourse to the Department, necessary for the acquisition, design, permitting, development, construction, equipping, operation, maintenance, modification, reconstruction, rehabilitation, restoration, renewal and replacement of the Project. Developer will diligently pursue its obligations to obtain the necessary financing as described in Appendix 2-B to this Agreement (Financial Plan).

15.1.2 Developer may grant security interests in or assign the entire Developer's Interest (but not less than the entire Developer's Interest) to Lenders for purposes of securing the Project Debt, subject to the terms and conditions contained in this Agreement and the Lease. Developer is strictly prohibited from pledging or encumbering the Developer's Interest, or any portion thereof, to secure any indebtedness of any Person other than (a) Developer, (b) any special purpose entity that owns Developer but no other assets and has powers limited to Developer, the Project and Work, (c) a special purpose entity subsidiary owned by Developer or an entity described in clause (b) above, or (d) the PABs Issuer.

15.1.3 The Department will reasonably assist Developer in implementing those portions of its financial plan requiring issuance of debt by other Governmental Entities and in securing approvals from such Governmental Entities. Developer, however, is responsible for obtaining the necessary approval and implementation processes and for achieving Financial Close. The Department does not bear any risk for the failure of Developer to obtain funding from these potential sources, and such failure, if any, shall not diminish Developer's obligations under this Agreement except as specifically provided otherwise in Section 15.2.7. Section 3.2.3 does not apply to the approvals described in this Section 15.1.3.

15.1.4 If Developer seeks to utilize PABs or TIFIA Loans, then Developer bears all risks relating to a delay in receiving the necessary approvals and for compliance with all Federal Requirements **[add only if preferred proposer is selected on the basis of a Primary Financial Proposal -** except as specifically provided otherwise in Section 15.2.7**]**. At Developer's written request, the Department will cooperate in good faith in order to assist Developer's efforts to obtain necessary federal approvals for PABs or TIFIA Loans. Section 3.2.3 does not apply to the approvals described in this Section 15.1.4.

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

15.2 Financial Close [This section is for use only if preferred proposer is selected on the basis of an Alternative Financial Proposal]

15.2.1 Concurrently with execution of this Agreement, Developer shall deliver, or has delivered, to the Department the Financial Close Security.

15.2.2 Unless Developer or the Department elects to terminate this Agreement pursuant to Section 19.2.1, Developer shall be unconditionally obligated to enter into the Initial

Funding Agreements and Initial Security Documents and complete closing for all the Initial Project Debt (including any sub-debt), in a total amount which, when combined with all unconditional equity commitments acceptable to the Collateral Agent, is sufficient to fund all capital requirements set forth in the Original Financial Model, by not later than the Financial Close Deadline.

15.2.3 If any Lender for the Initial Project Debt requests an estoppel certificate or Direct Agreement from the Department, Developer shall deliver to the Department the Lender's proposed Initial Funding Agreements and Initial Security Documents that will contain the material commercial terms relating to the Initial Project Debt not later than 30 days prior to the proposed date for Financial Close.

15.2.4 [Not used]

15.2.5 Except to the extent expressly permitted in writing by the Department, Developer shall not be deemed to have achieved Financial Close until all of the following conditions have been satisfied:

15.2.5.1 The Department has received for the Financial Model an update of the audit and opinion obtained from the independent model auditor that provided to the Department an opinion on suitability of the Original Financial Model, which update shall (a) be co-addressed to the Department, (b) expressly identify the Department as an entity entitled to rely thereon, and (c) take into account only the differences between the financial terms assumed in the Original Financial Model and the financial terms obtained at Financial Close, as provided for in Sections 15.2.8 and 15.2.9, and (d) be delivered within two Business Days after the date of Financial Close;

15.2.5.2 Developer has delivered to the Department a true and complete executed copy of each Direct Agreement requested by the Lenders, if any; and

15.2.5.3 All applicable parties have entered into and delivered the Initial Funding Agreements and Initial Security Documents (except to the extent that such documents are not required to be executed on such date) meeting the requirements of Section 15.4, and Developer has delivered to the Department true and complete copies of the executed Initial Funding Agreements and Initial Security Documents (other than minor ancillary documents normally delivered after Financial Close and containing no new material commercial terms).

15.2.6 Developer shall provide the Department with written notice of Developer's satisfaction of the conditions set forth in Section 15.2.5 within one Business Day after all such conditions are satisfied.

15.2.7 Developer's obligation to achieve Financial Close by the Financial Close Deadline is excused only if such failure is directly attributable to one of the following (and in such event this Agreement may be terminated pursuant to Section 19.2.1):

15.2.7.1 As a result of the adjustment pursuant to Section 15.2.8, the First Year Maximum Availability Payment exceeds the Affordability Limit, provided that the Department in its sole discretion may waive this contingency and accept such MAP; or

15.2.7.2 A court with jurisdiction issues a temporary restraining order or other form of injunction that prohibits prosecution of any material portion of the Work, where

the order or injunction remains pending on the Financial Close Deadline.

15.2.8 Subject to the Department's right to terminate under Section 19.2.1, the Department will bear the risk and have the benefit of changes (either positive or negative) in the base interest rates set forth in Appendix 2-C (the "base interest rates") for the period beginning at 10:00 a.m. EPT on September 13, 2010 and ending on the earliest of (a) 10:00 a.m. EPT on the date of Financial Close, (b) 10:00 a.m. EPT on February 24, 2011, or (c) the date of execution of any interest rate hedging instrument by Developer (the "last date of the base interest rate protection period"). The interest rate adjustment will be based on the movement, if any, in the base interest rates. Developer and the Department shall both adjust the Original Financial Model as of the last date of the base interest rate protection period to reflect the changes (if any) in the base interest rates and any revisions approved by the Parties but not any potential errors identified as part of the updated audit opinion provided pursuant to Section 14.2.2. The Department and Developer will use the Original Financial Model, as so adjusted, to calculate the change, positive or negative, in the Base Maximum Availability Payment, without any increase or decrease in the Original Equity IRR.

15.2.9 Except for the adjustment of the Base Maximum Availability Payment for interest rate movement pursuant to Section 15.2.8, any differences between the terms of the Initial Project Debt and Initial Financing Documents and those assumed in the Original Financial Model and Developer's financial plan set forth in Appendix 2-B shall be treated as a Refinancing subject to sharing of Refinancing Gain (if any) in accordance with Section 15.5.3.

15.2.10 The Original Financial Model as adjusted at Financial Close pursuant to Section 14.2.1 shall become the Financial Model.

15.2.11 The Parties shall prepare and execute an amendment to this Agreement adding Appendix 8 at Financial Close.

15.2.12 Within two Business Days after the date of Financial Close, the Department shall return to Developer the original of the Financial Close Security.

15.2.13 Developer shall deliver copies of any ancillary supporting documents (e.g., UCC filing statements) to the Department within 30 days after the date of Financial Close.

15.2 Financing Competition and Financial Close [This section is for use only if preferred proposer is selected on the basis of a Primary Financial Proposal]

15.2.1 Concurrently with execution of this Agreement, Developer shall deliver, or has delivered, to the Department the Financial Close Security.

15.2.2 If prior to the Effective Date Developer did not deliver to the Department the notice described below, then Developer may issue to the Department, at any time between the Effective Date and 150 days before the date the Department estimates it will achieve Phase 1 Substantial Completion, a written notice that Developer is commencing the second phase of a competition among eligible Lenders for providing the Initial Project Debt (the "**IPDC Commencement Notice**"). Department shall cooperate with Developer to keep Developer informed of Department's estimate of such date. If for any reason Developer has not issued the IPDC Commencement Notice by 150 days before the date the Department estimates it will achieve Phase 1 Substantial Completion, then the Department thereafter shall have the right to issue the IPDC Commencement Notice to Developer, authorizing and directing Developer to

commence a competition among eligible Lenders for providing the Initial Project Debt.

15.2.3 Commencing upon issuance of the IPDC Commencement Notice (whether before or after the Effective Date), Developer shall conduct a competition among eligible Lenders to provide the Initial Project Debt. Developer shall conduct such competition in compliance with the provisions of Appendix 13. Appendix 13 sets forth several phases of such competition. If TIFIA financing is indicated in Developer's financial plan as set forth in Appendix 2-B, then Developer also shall diligently pursue all necessary steps to obtain and close the TIFIA financing in accordance with Appendix 13.

15.2.4 Unless Developer or the Department elects to terminate this Agreement pursuant to Section 19.2.1, Developer shall be unconditionally obligated to enter into the Initial Funding Agreements and Initial Security Documents and complete closing for all the Initial Project Debt (including any sub-debt), in a total amount which, when combined with all unconditional equity commitments acceptable to the Collateral Agent, is sufficient to fund all capital requirements set forth in the Original Financial Model, by not later than the Financial Close Deadline.

15.2.5 Except to the extent expressly permitted in writing by the Department, Developer shall not be deemed to have achieved Financial Close until all of the following conditions have been satisfied:

15.2.5.1 Developer has completed the IPDC in accordance with the terms and conditions therefor set forth in Appendix 13 and completed all necessary steps to obtain and close any TIFIA financing indicated in Appendix 2-B;

15.2.5.2 Developer has delivered to the Department for review and comment drafts of those proposed Initial Funding Agreements and Initial Security Documents that will contain the material commercial terms relating to the Initial Project Debt not later than 20 days prior to the proposed date for Financial Close, and such Initial Funding Agreements and Initial Security Documents are consistent with, or no less favorable to Developer than, the terms and conditions offered by the Lenders selected pursuant to the IPDC;

15.2.5.3 The Department has received for the Financial Model an update of the audit and opinion obtained from the independent model auditor that provided to the Department an opinion on suitability of the Original Financial Model, which update shall (a) be co-addressed to the Department, (b) expressly identify the Department as an entity entitled to rely thereon, and (c) take into account only the differences between the financial terms assumed in the Original Financial Model and the financial terms obtained through the IPDC and negotiations for any TIFIA financing, as provided for in Sections 15.2.8 and 15.2.9, and (d) be delivered within two Business Days after the date of Financial Close;

15.2.5.4 Developer has delivered to the Department a true and complete executed copy of each Direct Agreement requested by the Lenders, if any; and

15.2.5.5 All applicable parties have entered into and delivered the Initial Funding Agreements and Initial Security Documents (except to the extent that such documents are not required to be executed on such date) meeting the requirements of Section 15.4, and Developer has delivered to the Department true and complete copies of the executed Initial Funding Agreements and Initial Security Documents (other than minor ancillary documents normally delivered after Financial Close and containing no new material commercial terms).

15.2.6 Developer shall provide the Department with written notice of Developer's satisfaction of the conditions set forth in Section 15.2.5 within one Business Day after all such conditions are satisfied.

15.2.7 Developer's obligation to achieve Financial Close by the Financial Close Deadline is excused only if such failure is directly attributable to one of the following (and in such event this Agreement may be terminated pursuant to Section 19.2.1):

15.2.7.1 Developer has diligently and timely conducted the IPDC in accordance with Appendix 13 and diligently and timely completed all necessary steps to obtain and close any TIFIA financing indicated in Appendix 2-B, but the IPDC and such TIFIA negotiations result in a First Year Maximum Availability Payment that exceeds the Affordability Limit, provided that the Department in its sole discretion may waive this contingency and accept such MAP;

15.2.7.2 A court with jurisdiction issues a temporary restraining order or other form of injunction that prohibits prosecution of any material portion of the Work, where the order or injunction remains pending on the Financial Close Deadline;

15.2.7.3 A decision of the TIFIA Joint Program Office not to provide credit assistance to Developer, or to provide credit assistance in an amount which the Parties mutually determine is likely to be insufficient to achieve the Affordability Limit, taking into account increases in TIFIA contract and budget authority for the Project that are available through payment of subsidies to the U.S. Department of Transportation and the cost to Developer of such subsidies; or

15.2.7.4 The failure of the TIFIA Joint Program Office to close financing on or prior to the Financial Close Deadline despite commercially reasonable efforts by Developer to do so (including making reasonable financial and commercial concessions as necessary and appropriate under the circumstances); provided, however, that the failure of Developer, prior to the expiration of any TIFIA credit commitment, to satisfy any of the conditions precedent for the TIFIA financing set forth in the term sheet and/or credit agreement shall be deemed not to be a failure by TIFIA to close financing by the Financial Close Deadline.

15.2.8 Provided that Developer completes the IPDC in accordance with Appendix 13 and diligently completes all necessary steps to obtain and close any TIFIA financing indicated in Appendix 2-B, and subject to Section 15.2.9 and the Department's right to terminate under Section 19.2.1, the Department will bear the risk and have the benefit of the following:

15.2.8.1 100% of the impact (either positive or negative) on the Base Maximum Availability Payment of changes in the base interest rates set forth in Appendix 2-C (the "base interest rates") for the period beginning at 10:00 a.m. EPT on September 13, 2010 and ending on the earliest of (a) 10:00 a.m. EPT on the date of Financial Close, (b) 10:00 a.m. EPT on the Financial Close Deadline, or (c) the date of execution of any interest rate hedging instrument by Developer (the "last date of the base interest rate protection period"). The interest rate adjustment will be based on the movement, if any, in the base interest rates. Developer and the Department shall both adjust the Original Financial Model as of the last date of the base interest rate protection period to reflect the changes (if any) in the base interest rates and any revisions approved by the Parties but not any potential errors identified as part of the updated audit opinion provided pursuant to Section 14.2.2.

15.2.8.2 85% of the impact (either positive or negative) on the Base Maximum Availability Payment of the differences between all other financial terms assumed and indicated in the Original Financial Model and in Developer's financial plan as set forth in Appendix 2-B and such financial terms of the Initial Project Debt and initial Financing Documents as obtained at Financial Close.

15.2.9 The Department's risk and benefit under Section 15.2.8 are subject to the following limitations.

15.2.9.1 The cost of the Committed Investment shall remain at the Original Equity IRR except as provided in Section 15.2.9.2.

15.2.9.2 In no event shall the ratio of Initial Project Debt to Committed Investment at Financial Close be less than 85 **:** 15, unless Developer agrees that the decrease shall be assigned an amended Equity IRR for the purpose of determining adjustments to the Base Maximum Availability Payment equal to the blended average cost of the Initial Project Debt as determined from the IPDC final submissions, evaluation and selection.

15.2.10 The Parties will use the Original Financial Model to calculate the change under Sections 15.2.8 and 15.2.9, positive or negative, in the Base Maximum Availability Payment. The Parties shall prepare and execute an amendment to this Agreement adding Appendix 8 at Financial Close.

15.2.11 Within two Business Days after the date of Financial Close, the Department shall return to Developer the original of the Financial Close Security.

15.2.12 Developer shall deliver copies of any ancillary supporting documents (e.g., UCC filing statements) to the Department within 30 days after the date of Financial Close.

15.3 No Department Liability for Project Debt

15.3.1 All Project Debt or other obligations issued or incurred by Developer, a Developer-Related Entity or the PABs Issuer in connection with this Agreement or the Project shall be issued or incurred only in the name of Developer, a Developer-Related Entity or the PABs Issuer. The Department shall have no obligation to pay debt service on any debt issued or incurred by Developer, a Developer-Related Entity or the PABs Issuer. The Department shall have no obligation to join in, execute or guarantee any note or other evidence of indebtedness of Developer, a Developer-Related Entity or the PABs Issuer, any other Funding Agreement or any Security Document.

15.3.2 None of the State, the Department, or any other agency, instrumentality or political subdivision of the State, and no board member, director, officer, employee, agent or representative of any of them, has any liability whatsoever for payment of the principal sum of any Project Debt, any other obligations issued or incurred by Developer, a Developer-Related Entity or the PABs Issuer in connection with this Agreement or the Project, or any interest accrued thereon or any other sum secured by or accruing under any Funding Agreement or Security Document. Except for a violation by the Department of its express obligations to Lenders set forth in Article 12 and the Direct Agreement, no Lender is entitled to seek any damages or other amounts from the Department, whether for Project Debt or any other amount. The Department's review of any Financing Documents or other Project financing documents is not a guarantee or endorsement of the Project Debt, any other obligations issued or incurred by

Developer, a Developer-Related Entity or the PABs Issuer in connection with this Agreement, the Lease or the Project, or any traffic and revenue study, and is not a representation, warranty or other assurance as to the ability of Developer, a Developer-Related Entity or the PABs Issuer to perform its obligations with respect to the Project Debt or any other obligations issued or incurred by Developer, a Developer-Related Entity or the PABs Issuer in connection with this Agreement or the Project, or as to the adequacy of the Milestone Payment or Availability Payments to provide for payment of the Project Debt or any other obligations issued or incurred by Developer in connection with this Agreement or the Project. The foregoing does not affect the Department's liability to Developer or a Developer-Related Entity under Article 19 for Termination Compensation that is measured in whole or in part by outstanding Project Debt.

15.4 Mandatory Terms of Project Debt, Funding Agreements and Security Documents

Project Debt and Financing Documents, including the Initial Project Debt and Initial Financing Documents (as listed in Appendix 8 to this Agreement) and any amendments or supplements thereto, shall comply with the following terms and conditions:

15.4.1 The Security Document may only secure Project Debt the proceeds of which are used exclusively for the purpose of (a) either acquiring, designing, permitting, building, constructing, improving, equipping, modifying, operating, maintaining, reconstructing, restoring, rehabilitating, renewing or replacing the Project, (b) making Distributions, but only from the proceeds of refinancings permitted under this Agreement, (c) Rescue Refinancing, including making protective advances intended to prevent or remedy a default under this Agreement or a Funding Agreement or both, (d) refinancing any Project Debt under subsections (a), (b), or (c) above, including paying the reasonable costs of closing the Refinancing (including Lender fees, advisor fees and the fees of legal counsel), (e) to fund reserves relating to the Project, and (f) paying closing costs with respect to Project Debt, financing costs and fees, and interest costs;

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

15.4.3 The Security Documents as a whole securing each separate issuance of debt shall encumber the entire Developer's Interest, provided that the foregoing does not preclude subordinate Security Documents or equipment lease financing;

15.4.4 No Security Document or other instrument purporting to mortgage, pledge, encumber, or create a lien, charge or security interest on or against Developer's Interest shall extend to or affect the fee simple interest of the Department in the Project or the right, title and interest of the Department or any other Governmental Entity in the Project Right of Way or the Department's rights or interests under the Contract Documents;

15.4.5 Any number of permitted Financing Documents may be outstanding at any one time, and any Security Document permitted hereunder may secure two or more separate loans from two or more separate Lenders, provided that each such loan and the Security Documents securing the same comply with the provisions of this Article 15;

15.4.6 Each note, bond or other negotiable or non-negotiable instrument evidencing Project Debt, or evidencing any other obligations issued or incurred by any Person described in

Section 15.4.2 in connection with this Agreement, the Lease or the Project must include or refer to a document controlling or relating to the foregoing that includes a conspicuous recital to the effect that payment of the principal thereof and interest thereon is a valid claim only as against the obligor and the security pledged by Developer or the obligor therefor, is not an obligation, moral or otherwise, of the State, the Department, any other agency, instrumentality or political subdivision of the State, or any elected official, board member, director, officer, employee, agent or representative of any of them, and neither the full faith and credit nor the taxing power of the State, the Department, or any other agency, instrumentality or political subdivision of the State is pledged to the payment of the principal thereof and interest thereon;

15.4.7 Each Funding Agreement and Security Document shall expressly state, or incorporate a statement by reference to another Funding Agreement or Security Document that expressly states, that the Lender shall not name or join the State, the Department, any other agency, instrumentality or political subdivision of the State, or any elected official, board member, director, officer, employee, agent or representative of any of them in any legal proceeding seeking collection of the Project Debt or other obligations secured thereby or the foreclosure or other enforcement of the Funding Agreement or Security Document;

15.4.8 Each Funding Agreement and Security Document shall expressly state, or incorporate a statement by reference to another Funding Agreement or Security Document that expressly states, that the Lender shall not seek any damages or other amounts from the State, the Department, any other agency, instrumentality or political subdivision of the State, or any elected official, board member, director, officer, employee, agent or representative of any of them, whether for Project Debt or any other amount, except (a) damages from the Department for a violation by the Department of its express obligations to Lenders set forth in Article 12 or in the Direct Agreement and (b) amounts due from the Department under this Agreement where the Lender has succeeded to the Developer's Interest, whether by way of foreclosure, transfer in lieu of foreclosure or subrogation;

15.4.9 Each Funding Agreement and Security Document shall require that the Collateral Agent deliver to the Department, concurrently with delivery to Developer or any other Person, every notice of default, election to sell, notice of sale or other notice required by Law or by the Funding Agreement or Security Document in connection with the exercise of remedies under the Funding Agreement or Security Document;

15.4.10 No Financing Documents shall grant to the Lender any right to apply funds in the Renewal Work Reserve, Handback Requirements Reserve Account, or to apply proceeds from any Renewal Work Letter of Credit or Handback Requirements Letter of Credit, to the repayment of Project Debt, to any other obligation owing the Lender or to any other use except the respective uses set forth in Sections 5.7.3 and 5.10.3, and any provision purporting to grant such right shall be null and void; provided, however, that the foregoing shall not preclude any Lender or Substituted Entity from, following foreclosure or transfer in lieu of foreclosure, automatically succeeding to all rights, claims and interests of Developer in and to the Renewal Work Reserve and Handback Requirements Reserve Account. No Financing Document shall purport to grant to the Lender a lien or security interest in the Handback Requirements Reserve Account superior in priority to the Department's lien and security interest described in Section 5.10.1.1;

15.4.11 Each relevant Funding Agreement and Security Document that may be in effect during any part of the period that the Renewal Work Reserve or Handback Requirements Reserve Account applies shall expressly permit, without condition or qualification, or incorporate

permission by reference to another Funding Agreement or Security Document that expressly permits, without condition or qualification, Developer to (a) use and apply funds in the Renewal Work Reserve and Handback Requirements Reserve Account in the manner contemplated by the Contract Documents and (b) otherwise comply with its obligations in the Contract Documents regarding Renewal Work, the Renewal Work Plan, Renewal Work Reserve, Handback Requirements and the Handback Requirements Reserve Account. Subject to the foregoing, any protocols, procedures, limitations and conditions concerning draws from the Renewal Work Reserve or Handback Requirements Reserve Account set forth in any Funding Agreement or Security Document shall be consistent with the permitted uses of the Renewal Work Reserve and Handback Requirements Reserve Account, and shall not constrain Developer's or the Department's access thereto for such permitted uses, even during the pendency of a default under the Funding Agreement or Security Document;

15.4.12 Each Funding Agreement and Security Document shall expressly state, or incorporate a statement by reference to another Funding Agreement or Security Document that expressly states, that the Lender and the Collateral Agent shall respond to any request from the Department or Developer for consent to a modification or amendment of this Agreement within a reasonable period of time; and

15.4.13 No Financing Document shall contain terms that are inconsistent with the terms of the Contract Documents.

15.5 Refinancing

15.5.1 Right of Refinancing

With the prior consent of the Department in writing by the Department's Authorized Representative, which consent shall not be unreasonably delayed or withheld, Developer from time to time may consummate Refinancings under the Funding Agreements on terms and conditions acceptable to Developer and in compliance with Sections 15.5.2 and 15.5.3; provided that the Department's consent shall not be required for an Exempt Refinancing or a Rescue Refinancing so long as Developer shall: (a) notify the Department at least 21 days in advance of such Exempt Refinancing or Rescue Refinancing and (b) include in such notice facts to support the basis on which Developer believes the Refinancing constitutes an Exempt Refinancing or a Rescue Refinancing. The Department's approval of a Refinancing shall be based on confirming compliance with Sections 15.5.2 and 15.5.3 and agreement on the amount, if any, of Refinancing Gain payable to the Department upon the closing of the Refinancing. The Department shall have no obligations or liabilities in connection with any Refinancing except to deliver estoppel certificates pursuant to Section 12.8 and to allow for the new Lender to be added to the Direct Agreement.

15.5.2 Notice, Consent and Documentation of Refinancing

15.5.2.1 In connection with any proposed Refinancing, except a Refinancing that is exempt from approval as provided in Section 15.5.1, Developer shall as soon as practicable submit to the Department a summary outline of the proposed Refinancing, together with a schedule setting forth the various activities, each with schedule durations, to be accomplished from the commencement through the close of the proposed Refinancing. At least 30 days prior to the proposed date for closing the Refinancing, Developer shall submit to the Department draft proposed Financing Documents, and all other relevant background information regarding the proposed Refinancing, including the proposed term sheet and the

financial model showing how Developer has calculated the Refinancing Gain, if any, following the procedures set forth in Appendix 12 (Calculation and Payment of Refinancing Gain), and any other matters required by Appendix 12.

15.5.2.2 The Department shall have up to 15 days to review and determine whether the proposed Refinancing (a) will result in a Refinancing Gain and (b) is an Exempt Refinancing, and, if applicable, select the means for payment of its portion of the Refinancing Gain. If the Department approves the draft proposed Financing Documents for further processing, Developer shall submit final drafts of these documents, including updated versions of the background information previously submitted to the Department, for final review and approval not later than seven days prior to the proposed date for closing the Refinancing.

15.5.2.3 Developer shall only proceed with the Refinancing upon receipt of prior written consent from the Department, which will be provided no later than five days after receiving the final documents. If Developer proceeds with the Refinancing, it shall deliver to the Department copies of all signed Financing Documents in connection with the Refinancing as well as a final calculation of the Refinancing Gain not later than ten days after close of the Refinancing, together with a revised Financial Model reflecting the final terms of the Refinancing and showing Developer's final calculation of the Refinancing Gain. No later than 15 days after close of the Refinancing, the Department and Developer shall meet and confer to agree upon the final calculation of the Refinancing Gain, at which time Developer shall pay the Department its portion of the Refinancing Gain if the selected means of payment is a lump sum payment.

15.5.2.4 With respect to a Rescue Refinancing, at least 21 days prior to the proposed date for closing the Refinancing, Developer shall submit to the Department the proposed term sheet, the financial model and the other documents required by Appendix 12 (Calculation and Payment of Refinancing Gain) showing how Developer has calculated the Refinancing Gain following the procedures set forth in Appendix 12 or demonstrating that the Rescue Refinancing will not produce Refinancing Gain. The Department will have up to ten days to review and dispute Developer's calculation of Refinancing Gain, provide comments and determine whether such calculations have been made in accordance with the requirements of Appendix 12.

15.5.3 Refinancing Gain

15.5.3.1 The Department shall be entitled to receive a payment equal to 60% of any Refinancing Gain attributable to any Refinancing other than an Exempt Refinancing. The Department shall receive its portion of the Refinancing Gain in the manner provided in Appendix 12.

15.5.3.2 The Refinancing Gain shall be calculated in accordance with Appendix 12. The Parties shall negotiate in good faith to determine the Refinancing Gain; and if the Parties fail to agree, the Dispute shall be resolved according to the Dispute Resolution Procedures.

15.5.4 Refinancing Limitations, Requirements and Conditions

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

15.5.4.1 Other than an Exempt Refinancing and a Rescue Refinancing, no Refinancing is permitted prior to the Substantial Completion Date, except to the extent Developer demonstrates to the Department's reasonable satisfaction that (a) the Committed Investment will not decrease as a result of the Refinancing, and (b) the Refinancing will produce Refinancing Gain in which the Department will be entitled to a portion in accordance with Section 15.5.3.

15.5.4.2 If the Department renders any assistance or performs any requested activity in connection with a Refinancing apart from delivering an estoppel certificate, then concurrently with, and as a condition precedent to Developer's right to close a Refinancing, Developer shall reimburse the Department all Department's Recoverable Costs that the Department incurs in connection therewith. The Department shall deliver to Developer a written invoice and demand therefor prior to the scheduled date of closing. If for any reason the Refinancing does not close, Developer shall reimburse such Department's Recoverable Costs and such other fees, costs and expenses within ten days after the Department delivers to Developer a written invoice and demand therefor.

15.5.4.3 Developer shall bear all risks for any Refinancing that negatively affects its Equity IRR, debt coverage ratios or financial performance.

ARTICLE 16. INSURANCE, PAYMENT AND PERFORMANCE SECURITY, AND INDEMNITY

16.1 Insurance

16.1.1 Insurance Policies and Coverage

Developer shall procure and maintain, or cause to be procured or maintained, the Insurance Policies identified in this Section 16.1 and in Appendix 9 strictly in accordance with the minimum coverage requirements and terms of coverage as set forth in Appendix 9 and in this Section 16.1. Such Insurance Policies shall cover (a) the described exposures not covered by the OCIP, (b) the described exposures with respect to OCIP-excluded Contractors performing Work during the period up to Final Acceptance, (c) the described exposures with respect to Work performed off the OCIP Site during the period up to Final Acceptance, (d) the described exposures with respect to O&M Work performed during the period up to Final Acceptance, and (e) the described exposures with respect to all Work performed after Final Acceptance.

16.1.2 General Insurance Requirements

16.1.2.1 Insurers

All Insurance Policies shall be procured from insurers that at the time coverage commences are licensed to do business in the State and have a current policyholder's management and financial size category rating of not less than "A-: VIII" according to A.M. Best's Financial Strength Rating and Financial Size Category, except as otherwise provided in Appendix 9 or approved in writing by the Department in its good faith discretion.

16.1.2.2 Deductibles and Self-Insured Retentions

1. If the OCIP provides coverage with respect to an occurrence or event, then

Section 16.1.6.12 shall govern Developer's and its covered Contractors' responsibility for paying deductibles.

2. If an Insurance Policy provides coverage with respect to a Relief Event, Developer's deductible liability shall be governed by whichever of the Non-Discriminatory O&M Change Deductible, Pre-existing Hazardous Materials Deductible, Tiered Pre-existing Hazardous Materials Deductible, Seismic Event Deductible or Claim Deductible is applicable (if any), subject to Section 9.1.4.

3. If an Insurance Policy provides coverage with respect to an occurrence or event other than a Relief Event, then Developer or its Contractor, as the case may be, shall be responsible for paying all insurance deductibles, and the Department shall have no liability for deductibles and claim amounts in excess of the required coverage.

4. No self-insured retentions are permitted with respect to any risk or occurrence required by this Agreement to be covered by an Insurance Policy.

5. The Department will have the right to recover deductibles and claim amounts in excess of the required coverage through deductions from the Milestone Payment (subject to the Milestone Payment Adjustment Cap set forth in Appendix 4) or Availability Payments, direct billing, or any other method deemed appropriate by the Department.

16.1.2.3 Primary Coverage

Each policy shall provide that the coverage thereof is primary and noncontributory with respect to all named and additional insureds. For each property policy, such policy shall provide that the coverage thereof is primary and noncontributory with respect to all insureds, as their interest may appear. Any insurance or self-insurance beyond that specified in this Agreement that is maintained by an insured or any such additional insured shall be excess of such insurance and shall not contribute with it.

16.1.2.4 Verification of Coverage

1. At each time Developer is required to initially obtain or cause to be obtained each Insurance Policy, and thereafter not less than five Business Days prior to the expiration date of each Insurance Policy, Developer shall deliver to the Department a written binder of insurance, provided that if common commercial practice in the insurance industry calls for a shorter period prior to renewal for issuance of the insurance binder documenting such renewal, then such shorter period shall apply. The binder of insurance shall be on a standard form reasonable acceptable to the Department. Each required binder must be personally and manually signed by a representative or agent of the insurance company shown on the binder with a statement that he/she is an authorized representative or agent of such insurance company and is authorized to bind it to the coverage, limits and termination provisions shown on the binder. Each binder must be accompanied with proof that the person signing the binder is an authorized representative or agent of such insurance company. Each binder must be original, state the signer's company

affiliation, title and phone number, state the identity of all Insurers, named insureds and additional insureds, state the type and limits of coverage, deductibles, subrogation waiver, termination provisions of the policy and other essential policy terms, list and describe all endorsements, include as attachments all additional insured endorsements, and include a statement, if commercially available, that coverage may not be cancelled by the insurer for any reason except for non-payment of premium, fraud, or repeated failure of the named insured to implement reasonable loss control measures.

2. In addition, as soon as they become available, Developer shall deliver to the Department (a) a true and complete copy of each such Insurance Policy or modification, or renewal or replacement Insurance Policy and all endorsements thereto and (b) satisfactory evidence of payment of the premium therefor.

3. If Developer has not provided the Department with the foregoing proof of coverage and payment within three Business Days after receipt of written request therefor, the Department may, upon two Business Days written notice to Developer, in addition to any other available remedy, without obligation and without further inquiry as to whether such insurance is actually in force, obtain such an Insurance Policy; and Developer shall reimburse the Department for the cost thereof upon demand.

16.1.2.5 Contractor Insurance Requirements

1. Developer shall cause each Contractor to provide Insurance Policies that comply with the terms and limits described in Appendix 9 and this Section 16.1 in circumstances where the Contractor is not covered by the OCIP or Developer-provided insurance. Developer shall cause each such Contractor to include the additional insureds specified in the applicable Insurance Policies as required under Appendix 9. Developer shall cause each such Contractor to require that its insurer agree to waive any subrogation rights the insurers may have against such additional insureds or consent to each insured's waiver of recovery in advance of loss. If requested by the Department, Developer shall promptly provide certificates of insurance evidencing coverage for each Contractor.

2. A consolidated, Developer-managed, insurance program is acceptable to satisfy all insurance requirements outside the OCIP, provided that it otherwise meets the requirements described in Appendix 9 and this Section 16.1.

16.1.2.6 Project-Specific Insurance

Except for professional liability Insurance Policies, all Insurance Policies shall be purchased specifically and exclusively for the Project and extend to all aspects of the Work, with coverage limits devoted solely to the Project. Insurance coverages with dedicated Project-specific limits and identified premiums are acceptable, provided that they otherwise meet all requirements described in Appendix 9 and this Section 16.1.

16.1.2.7 Endorsements and Waivers

All Insurance Policies shall contain or be endorsed to comply with all requirements specified in the Contract Documents, as well as the following provisions, provided that, for the workers' compensation policy only subsections (3) and (7) below shall be applicable and for the professional liability policy only subsection (3) below shall be applicable:

1. Any failure on the part of a named insured to comply with reporting provisions or other conditions of the policies, any breach of warranty, any action or inaction of a named insured or others, or any change in ownership of all or any portion of the Project or Developer's Interest shall not vitiate coverage provided to the other named insureds or additional insureds (and their respective members, directors, officers, employees, agents and Project consultants);

2. The insurance shall apply separately to each named insured and additional insured against whom a claim is made or suit is brought, except with respect to the limits of the insurer's liability;

3. Each policy shall be endorsed to state that coverage cannot be canceled, voided, suspended, lapsed, modified or reduced in coverage or in limits except after 60 days' (or for non-payment of premium, fraud, or repeated failure of the named insured to implement reasonable loss control measures, ten days') prior written notice by registered or certified mail, return receipt requested, has been given to the Department. Such endorsement shall not include any limitation of liability of the insurer for failure to provide such notice;

4. Endorsements adding additional insureds to required Insurance Policies shall contain no limitations, conditions, restrictions or exceptions to coverage beyond those that apply under the policy generally, and shall state that the interests and protections of each additional insured shall not be affected by any misrepresentation, act or omission of a named insured or any breach by a named insured of any provision in the policy which would otherwise result in forfeiture or reduction of coverage. The commercial general liability policy shall contain an endorsement providing additional insureds with coverage for "completed operations;"

5. The commercial general liability Insurance Policy shall cover liability arising out of the acts or omissions of Developer's employees engaged in the Work and employees of Contractors to the extent Contractors are provided coverage under such liability policy;

6. The automobile liability Insurance Policy shall be endorsed as required to include Motor Carrier Act Endorsement-Hazardous Materials Clean up (MCS-90) for those Contractors who will at any time transport Hazardous Materials; and

7. Unless specified otherwise in Appendix 9, each Insurance Policy shall provide coverage on an "occurrence" basis and not a "claims made" basis.

16.1.2.8 Waivers of Subrogation

The Department and Developer waive all rights against each other, against each of their agents, employees and Project consultants, against Contractors and their respective members, directors, officers, employees, subcontractors and agents, and against the OCIP Administrator, for any claims to the extent covered and paid by insurance obtained pursuant to this Section 16.1, except such rights as they may have to the proceeds of such insurance. If Developer is deemed to self-insure a claim or loss under Section 16.1.4.4, then Developer's waiver shall apply as if it carried the required insurance. Developer shall require all Contractors to provide similar waivers in writing each in favor of all other parties specified above. Each policy which Developer is required to provide or cause a Contractor to provide hereunder shall include a waiver of any right of subrogation against the Department and its agents and Project consultants (and their respective members, directors, officers and employees) and against the OCIP Administrator or a consent to each insured's waiver of recovery in advance of loss.

16.1.2.9 No Recourse

Except as may be inclusive within the MAP or as expressly provided otherwise in this Section 16.1, there shall be no recourse against the Department for payment of premiums or other amounts with respect to the Insurance Policies.

16.1.2.10 Indemnifications Not Limited

Developer's indemnification and defense obligations under the Contract Documents are not limited to the type or amount of insurance coverage that Developer is required to provide hereunder.

16.1.2.11 Adjustments in Coverage Amounts

1. At least once every two years during the Term (commencing initially on the Substantial Completion Date), the Department and Developer shall review and increase, as appropriate, the per occurrence and aggregate limits for the Insurance Policies (other than the OCIP) that have stated dollar amounts set forth in Appendix 9. At the same frequency the Department and Developer shall review and adjust, as appropriate, the deductibles for such Insurance Policies.

2. In determining increases and adjustments, Developer and the Department shall take into account (a) claims and loss experience for the Project, provided that premium increases due to adverse claims experience shall not be a basis for justifying increased deductibles, (b) the condition of the Project, (c) the Safety Compliance and Noncompliance Points record for the Project, and (d) then prevailing Best Management Practice for insuring comparable transportation projects.

3. Any Dispute regarding increases in insurance limits or adjustments to deductibles shall be resolved according to the Dispute Resolution Procedures.

16.1.2.12 Inadequacy of Required Coverages

The Department makes no representation that the scope of coverage and limits of liability specified in the OCIP or for any Insurance Policy to be carried pursuant to this Agreement or approved variances therefrom are adequate to protect Developer against its undertakings under this Agreement to the Department, or its liabilities to any third party. The coverage, as with all insurance, is limited in scope and amount and may not include every form of insurance protection Developer or its Contractor may deem necessary. It is the responsibility of Developer and each Contractor to discuss the OCIP and other Insurance Policies with their insurance agents, brokers or consultants, and verify if any changes or additional coverages are required. No such limits of scope or liability or approved variances therefrom shall preclude the Department from taking any actions as are available to it under the Contract Documents, or otherwise at Law.

16.1.2.13 Unavailability of Required Coverages

1. If Developer demonstrates to the Department's reasonable satisfaction that it has used diligent efforts in the global insurance and reinsurance markets to procure the required Insurance Policy coverages, and if despite such diligent efforts and through no fault of Developer any of such coverages (or any of the required terms of such coverages, including policy limits) has become completely unavailable, or provision of all such coverages has become unavailable at commercially reasonable rates, from insurers meeting the financial requirements set forth in Section 16.1.2.1 (in either case "insurance unavailability"), the Department will consider in good faith alternative insurance packages and programs that provide coverage as comparable to that contemplated in this Section 16.1 as is possible under then-existing insurance market conditions. For purposes of this Section 16.1.2.13, commercially reasonable rates are rates up to but not exceeding 200% of the applicable Insurance Premium Benchmark Amount for all required Insurance Policies as described in Section 2 of Appendix 9; provided that for the period before any Insurance Premium Benchmark Amount commences, commercially reasonable rates are the greater of (a) rates that a reasonable and prudent risk manager for a Person seeking to insure comparable risks would conclude are justified by the risk protection afforded, and (b) the rates indicated for the period in question in the Financial Model as revised at Financial Close and related Financial Modeling Data.

2. If the Department approves modification or elimination of insurance requirements because of insurance unavailability, then:

   (a) the Department will act as the insurer of last resort to cover the unavailable Insurance Policy or portion thereof; and

   (b) The Department will be entitled to a reduction in the Maximum Availability Payment equal to 100% of the insurance premiums that Developer avoids as a result of the modification or elimination of the insurance requirements. In determining Developer's avoided insurance premiums, the Parties shall calculate the amount of insurance premiums Developer would have been obligated to pay under Section 2 of Appendix 9 (up to the commercially reasonable rates as described in

clause 1 above) had there been no modification or elimination of insurance requirements; provided that (i) if no benchmarks are then applicable it shall be assumed that Developer would have been obligated to pay 100% of the total avoided insurance premiums up to the greater of (A) the commercially reasonable rates as described in clause 1 above or (B) the premiums assumed in the Financial Model, and (ii) if the coverage is completely unavailable, the Parties shall reasonably estimate the premiums that would have been paid by Developer in the most recent market conditions under which the coverage was available.

3. If the required Insurance Policies are available from insurers meeting the financial requirements set forth in Section 16.1.2.1 but not at commercially reasonable rates as described in clause 1 above, then the Department may elect, at its sole option, exercisable by delivering written notice to Developer, to not approve modification or elimination of insurance requirements and to pay 100% of the premiums that exceed such commercially reasonable rates.

4. In the alternative and at the Department's sole option exercisable by delivering to Developer a written notice of termination, in the event of insurance unavailability the Department may terminate this Agreement.. In the event the Department exercises such termination right, the Department shall owe to Developer Termination Compensation calculated pursuant to Section 19.3.6.

5. If the required insurance coverage is available in the market, the Department's decision to approve or disapprove a variance from the requirements of this Section 16.1 shall be final and not subject to the Dispute Resolution Procedures.

6. If the required insurance coverage is completely unavailable or unavailable at commercially reasonable rates, then Developer shall review the global insurance and reinsurance markets quarterly to track changes in market conditions and adjust insurance coverages as soon as the coverages become available at commercially reasonable rates. Developer shall keep the Department currently informed of insurance market conditions and deliver to the Department the information obtained from such quarterly reviews.

16.1.2.14 Insurance Premium Benchmarking

Except as otherwise provided in Section 9.2 or 16.1.2.13, Developer shall bear the full risk of any insurance premium increases from the Effective Date until the end of the first three full annual insurance renewal periods after Final Acceptance, and shall not be entitled to any claim for relief for such increases. Thereafter, the Department and Developer shall allocate the risk of significant increases in insurance premiums through an insurance benchmarking process as set forth in Appendix 9.

16.1.2.15 Defense Costs

Unless otherwise approved in writing by the Department in its good faith discretion, no defense costs shall be included within or erode the limits of coverage of any of the Insurance Policies, except that defense costs may be included within the limits of coverage of professional

liability and pollution liability policies.

16.1.2.16 Contesting Denial of Coverage

If any Insurer under an Insurance Policy described in Sections 16.1.1 and 16.1.3 denies coverage with respect to any claims reported to such Insurer, Developer and the Department shall cooperate in good faith to establish whether and to what extent to contest, and how to fund the cost of contesting, the denial of coverage; provided that if the reported claim is a matter covered by an indemnity in favor of the Department or the denial is the result of Developer's failure to comply with an insurance requirement, then Developer shall bear all costs of contesting the denial of coverage.

16.1.3 Lender Insurance Requirements; Additional Insurance Policies

1. If under the terms of any Funding Agreement or Security Document Developer is obligated to, and does, carry insurance coverage with higher limits, lower deductibles, or broader coverage than required under this Agreement, Developer's provision of such insurance shall satisfy the applicable requirements of this Agreement provided such policy meets all the other applicable requirements of this Section 16.1.

2. If Developer carries insurance coverage respecting the Project or Work in addition to that required under this Agreement, then Developer shall include the Department and its respective members, directors, officers, employees, agents and Project consultants as additional insureds thereunder, under additional insured endorsements as described in Section 16.1.2.7.4, and shall provide to the Department the proofs of coverage and copy of the policy described in Section 16.1.2.4. If, however, Developer demonstrates to the Department that inclusion of such Persons as additional insureds will increase the premium, the Department shall elect either to pay the increase in premium or forego additional insured status. The provisions of Sections 16.1.2.4, 16.1.2.7, 16.1.2.8, 16.1.2.9, 16.1.2.15 and 16.1.4 shall apply to all such policies of insurance coverage, as if they were within the definition of Insurance Policies.

16.1.4 Notice and Prosecution of Claims

16.1.4.1 The Department shall have the right, but not the obligation, to report directly to insurers and process the Department's claims against applicable Insurance Policies. Unless otherwise directed by the Department in writing with respect to the Department's insurance claims, Developer shall be responsible for reporting and processing all potential claims by the Department or Developer against the Insurance Policies. Developer agrees to report timely to the insurer(s) under such policies any and all matters which may give rise to an insurance claim by Developer or the Department and to promptly and diligently pursue such insurance claims in accordance with the claims procedures specified in such policies, whether for defense or indemnity or both. Developer shall enforce all legal rights against the insurer under the applicable Insurance Policies and applicable Laws in order to collect thereon, including pursuing necessary litigation and enforcement of judgments, provided that Developer shall be deemed to have satisfied this obligation if a judgment is not collectible through the exercise of lawful and diligent means.

16.1.4.2 Developer shall immediately notify the Department, and thereafter keep the Department fully informed, of any incident, potential claim, claim or other matter of which Developer becomes aware that involves or could conceivably involve an Indemnified party as a defendant.

16.1.4.3 The Department agrees to promptly notify Developer of the Department's incidents, potential claims against the Department, and matters of which the Department is aware which may give rise to a Department insurance claim or to a right of defense and indemnification under Section 16.4. Delivery of any such notice will constitute a tender of the Department's defense of the claim to Developer and the insurer under any applicable Insurance Policies, subject to the Department's rights to control its own defense to the extent provided in Section 16.5 or by applicable Law. The Department shall cooperate with Developer as necessary for Developer to fulfill its duties hereunder, including providing Developer a copy of all written materials the Department receives asserting a claim against the Department that is subject to defense by an insurer under an Insurance Policy or by Developer under Section 16.5.

16.1.4.4 If in any instance Developer has not performed its obligations respecting insurance coverage set forth in this Agreement or is unable to enforce and collect any such insurance for failure to assert claims in accordance with the terms of the Insurance Policies or to prosecute claims diligently, then for purposes of determining Developer's liability and the limits thereon or determining reductions in compensation due from the Department to Developer on account of available insurance, Developer shall be treated as if it has elected to self-insure up to the full amount of insurance coverage which would have been available had Developer performed such obligations or not committed such failure. Nothing in this Section 16.1.4 or elsewhere in this Section 16.1 shall be construed to treat Developer as electing to self-insure where Developer is unable to collect due to the bankruptcy or insolvency of any insurer which at the time the Insurance Policy is written meets the rating qualifications set forth in this Section 16.1.

16.1.4.5 In the event that an Insurer providing any of the Insurance Policies becomes the subject of bankruptcy proceedings, becomes insolvent, or is the subject of an order or directive limiting its business activities given by any Governmental Entity, including the State Department of Insurance, Developer shall exercise best efforts to promptly and at its own cost and expense secure alternative coverage in compliance with the insurance requirements contained in this Section 16.1 so as to avoid any lapse in insurance coverage.

16.1.5 Application of Insurance Proceeds

All insurance proceeds received for physical property damage to the Project under any Insurance Policies, other than any business interruption insurance maintained as part of such Insurance Policies, shall be first applied to repair, reconstruct, rehabilitate, restore, renew, reinstate and replace each part or parts of the Project in respect of which such proceeds were received.

16.1.6 Owner-Controlled Insurance Program

16.1.6.1 The Department has elected to implement an owner-controlled insurance program (OCIP) for the Project. The Department will administer the OCIP with the assistance of an OCIP Administrator. The Department assumes no obligation to provide insurance coverages other than those set forth in the actual OCIP policies.

16.1.6.2 The OCIP is a series of insurance polices issued by one or more insurance companies to provide certain types of coverages for Construction Work performed by Developer and eligible Contractors of all tiers. These coverages consist of (a) workers' compensation, (b) general liability, including excess liability and ten years of completed operations coverage, and (c) contractor's pollution liability. The coverages under the OCIP are more particularly described in Section 16.1.6.8. The OCIP does not provide builder's risk, professional liability, surety insurance any other type of insurance or suretyship not specifically described in Section 16.1.6.8. The OCIP does not prohibit participants from purchasing any additional liability insurance. Costs for any other insurance coverage maintained by the enrolled parties and not required by this Agreement, including such costs in connection with Relief Events, will not be reimbursable.

16.1.6.3 Coverage under the OCIP applies only to construction activities under the Contract Documents and, as to workers compensation coverage, only construction activities performed at the OCIP Site. Areas adjacent to or near the OCIP Site where incidental operations are performed may be covered, but only if they are solely dedicated to Construction Work and reported to the OCIP Administrator and the OCIP Administrator has confirmed that they are covered. Unless approved by the Department and accepted and endorsed on the policy by the OCIP insurer, locations outside the OCIP Site are not covered under the OCIP even if the outside location is utilized as a batch plant dedicated to the Project or operations are for fabrication of materials to be used at the Site or training of apprentices. Locations outside the OCIP Site include the regularly established workplace, plant, factory, office, shop, warehouse, yard or other property of Developer or any Contractor. Operations of Developer or an enrolled Contractor outside the OCIP Site, including product manufacturing or product assembling, may be covered if Developer or the Contractor requests coverage for specified operations and the operations are:

1. Solely dedicated to the performance of the Construction Work;

2. Approved in writing by the Department;

3. Approved by the OCIP insurer and endorsed onto the general liability and workers' compensation OCIP insurance policies; and

4. Acknowledged in writing by the OCIP Administrator.

16.1.6.4 The insurance provided under the OCIP does not extend coverage for product liability to other parties such as vendors and Suppliers, for any product manufactured, assembled, or worked on away from the OCIP Site.

16.1.6.5 Eligibility and enrollment in the OCIP are governed by the following terms.

1. Developer shall participate in the OCIP's CGL policy coverage as an additional insured, and in the OCIP's pollution liability coverage as a named insured. Developer is not eligible for participation in the OCIP's worker's compensation coverage.

2. Participation in the OCIP by eligible Contractors is mandatory but not automatic. The OCIP will apply to eligible Contractors only if and when they are enrolled. Developer shall cause each eligible Contractor to enroll in the

OCIP before starting work on the Site by submitting CT OCIP Form 1, "OCIP Enrollment Form."

3. Eligible Contractors are Contractors who provide direct labor for construction activities at the OCIP Site. Temporary labor services and employee leasing companies are to be treated as eligible Contractors if the services provided are construction activities at the OCIP Site.

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

5. Excluded Contractors are:

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

   (b) Hazardous waste transport companies;

   (c) Suppliers, vendors, and material dealers that do not perform construction activities at the Site or subcontract installation;

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

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

6. If an excluded Contractor performs direct labor at the OCIP Site, it shall participate in the project safety program and comply with the safety requirements in the Technical Requirements.

7. OCIP insurance policies and OCIP coverages will not apply to excluded Contractors, even if such Contractors are erroneously enrolled in the OCIP. Developer is obligated to provide or cause to be provided insurance coverage for excluded Contractors as provided in Section 16.1.2.5, without the right to additional compensation for the premiums of such coverages.

8. The OCIP insurer reserves the right to reject late OCIP enrollments. If there have been losses in a period during which Developer or a Contractor delayed its enrollment, the OCIP will not furnish coverage to Developer or the Contractor for such losses and Developer will be deemed to have self-insured such losses under Section 16.1.4.4.

16.1.6.6 The Department shall have the right to disqualify any eligible Contractor that fails or refuses to enroll in the OCIP before starting Work at the Site, unless it becomes properly enrolled within three Business Days after the Department or OCIP Administrator delivers to Developer notice demanding enrollment. Developer shall immediately remove from the Site any Contractor so disqualified.

16.1.6.7 If not previously included in the Reference Documents, the Department will provide Developer an "Owner Controlled Insurance Program (OCIP) Manual," (the "**OCIP Manual**") which describes the program and provides guidelines for participation in the OCIP. The OCIP Manual includes a summary of the insurance coverage, loss control procedures and claim procedures as well as enrollment forms and reporting requirements for the OCIP. Developer shall, and shall cause all enrolled Contractors to, use and comply with the requirements contained in the OCIP Manual, including the enrollment procedures. Neither Developer nor any Contractor has the authority to change or waive any such requirements or procedures. Each enrolled Contractor will receive from the OCIP Administrator a separate workers' compensation policy. A copy of the primary general liability, excess liability and contractor's pollution liability policies will be available from the OCIP Administrator.

16.1.6.8 The insurance coverage under the OCIP is summarized as follows:

1. Workers compensation insurance is provided on a statutory basis. If there is an exposure of injury to Developer's or an eligible Contractor's employees under the U.S. Longshore and Harbor Workers' Compensation Act, the Jones Act, or under laws, regulations or statutes applicable to maritime employees, coverage is included for such injuries or claims. Employer's liability insurance is provided in amounts not less than:

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

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

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

2. General liability insurance: The general annual aggregate limit is annually reinstated each policy year. Defense coverage is in addition to the policy limits. Completed-operations coverage will be extended for ten years beyond the earlier of the Final Acceptance Date or expiration of the final OCIP policies. A single limit applies for the ten-year period. Limits for bodily injury, including death arising from the bodily injury, and property damage are:

   (a) $2,000,000 for each occurrence;

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

   (c) $4,000,000 general annual aggregate.

3. Umbrella or Excess Liability Insurance limits are not less than $200,000,000 per occurrence and in the aggregate. Coverage is excess and following form to the commercial general liability and employer's liability policies. General aggregate limits are annually reinstated.

4. Contractor Pollution Liability with a limit of $25,000,000 per occurrence and in the aggregate. Coverage extends to hazardous materials transport and treatment / disposal facilities.

16.1.6.9 The descriptions of the OCIP coverages set forth in this Section 16.1.6 are not intended to be complete or meant to alter or amend any provision of the actual OCIP policies. The OCIP policy limits, coverage terms, coverage exclusions and limitations, and other policy terms and conditions are set forth in full in their respective policy forms. In the event of a conflict or omission between the policy limits, coverage terms, coverage exclusions and limitations, and other policy terms and conditions described in the OCIP policies and the summary or description thereof in this Section 16.1.6, the OCIP Manual, or elsewhere in the Contract Documents, the policy limits, coverage terms, coverage exclusions and limitations, and other policy terms and conditions set forth in the actual OCIP policies issued by the OCIP insurers shall control. In the event of a conflict between the provisions of this Section 16.1.6 and the OCIP Manual that does not involve any conflict with the provisions of the actual OCIP policies issued by the OCIP insurers, then the provisions of this Section 16.1.6 shall govern.

16.1.6.10 The Department will pay all OCIP premiums and other amounts owing to the OCIP insurer; provided that deductibles are governed by Section 16.1.6.12. The Department will be the sole beneficiary of any dividends or return premiums generated by the OCIP. In consideration of the Department providing an OCIP, Developer, on behalf of itself and all its Contractors, waives any right to and shall irrevocably assign to and for the benefit of the Department, all return premiums, premium refunds, premium discounts, dividends, retentions, credits, and any other moneys due the Department in connection with the OCIP. Upon the Department's request, Developer shall promptly execute and deliver, and cause all enrolled Contractors at all tiers to execute and deliver, an assignment thereof, in form prepared by the Department.

16.1.6.11 Developer shall cooperate, and cause its enrolled Contractors to cooperate, with the Department in the administration and operation of the OCIP. Such cooperation shall include the following measures:

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

2. Provide to the Department, its insurance representative and the insurance company, on a monthly basis for the prior month (including months with no payroll), on-Site payroll reports on the form required and described in the OCIP Manual, and such other payroll records relating to the Construction Work as may be necessary for the proper computation of the insurance premiums. The Department shall have the right to withhold the Milestone Payment and other compensation until the Department or its designee receives such payroll reports and records;

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

4. Promptly comply with the requirements, obligations and recommendations of the Department, its insurance representative or insurance company so that

the OCIP may be properly administered and so that the insurance companies will continue to provide the OCIP coverage as described in this Section 16.1.6. If the enrolled parties should fail to comply with any requirement, obligation or recommendation, the Department may, in addition to any other remedy, withhold the Milestone Payment and other compensation until the enrolled parties comply with such requirements, obligations and recommendations;

5. Include OCIP provisions in all Contracts of eligible Contractors and notify the Department and its insurance representative of all Contracts awarded to eligible Contractors; and

6. Comply with applicable loss control (safety) and claims reporting procedures,

7. Maintain and have available the records identified above for a period of up to three years after the Final Acceptance Date or completion of any warranty work covered by the OCIP, whichever is later.

16.1.6.12 Developer or the enrolled Contractor primarily responsible for causing any bodily injury or property damage liability loss shall be responsible for payment of a deductible assessment in accordance with the following terms and conditions.

1. The assessment will equal, in the case of Developer, $25,000, or in the case of a Contractor, its regular (non-OCIP) commercial general liability policy deductible or self-insured retention up to a maximum assessment of $25,000. The minimum assessment shall be the actual loss or $5,000, whichever is less. The assessment shall be applied on the same basis as applied under the Contractor's regular (non-OCIP) general liability insurance policy. Developer shall cause the enrolled Contractor to submit to the Department a copy of the Contractor’s commercial general liability insurance certificate for the purpose of determining the deductible assessment.

2. If the loss exceeds $5,000 and information necessary to determine the Contractor's deductible as stated on its commercial general insurance certificate is not available to the Department, the Department will charge the Contractor the actual loss up to a $25,000 maximum per occurrence until receipt of documentation from the Contractor's commercial general insurance policy evidencing the contractor's actual deductible. If the loss is less than $5,000, the Department will charge the actual loss. The Department will charge the Contractor deductible assessment by processing administrative deductions on the Contractor's progress payments. At the option of the Department, the contractor deductible assessment may also be processed by direct billing, construction change orders, or any other method deemed appropriate by the Department.

3. The deductible assessment will apply to contractor pollution liability losses using the same terms and conditions described above except that in the case of a Contractor the assessment for such losses shall be determined by the deductible on the Contractor’s pollution liability policy subject to the minimum assessment of $5,000 or actual loss, whichever is less. In the event that the Contractor does not have a contractor’s pollution liability policy, the

Contractor's general liability policy deductible will be used to determine the assessment subject to the minimums described above.

4. The deductible assessment does not apply to workers' compensation claims for Developer's or a Contractor's own employee.

16.1.6.13 The Department reserves the right to terminate or modify all or part of the OCIP with 30 days prior written notice. In the event of termination or modification, Developer and its enrolled Contractors of all tiers shall procure and maintain insurance required by the Department to replace the OCIP coverage. The Department will reimburse to Developer the cost of insurance replacement, including associated Project costs that may arise due to such insurance replacement. The form, coverage, limits, cost, and insurer rating for the replacement insurance shall be subject to the Department approval.

16.1.6.14 Except for completed operations coverage, OCIP insurance coverage for Developer will terminate upon Final Acceptance and OCIP insurance coverage for an enrolled Contractor will terminate upon that Contractor's completion of Construction Work at the Site. Developer shall complete the OCIP notice of work completion form as part of the punch-list and Final Acceptance. If a Contractor returns to the job site to perform warranty work, it must perform warranty work under its own worker's compensation insurance coverage; warranty work is covered only under the OCIP general liability insurance policy provided such work is performed within one year after acceptance of the subject Contractor's work.

16.1.6.15 Developer shall be responsible for compliance with the requirements of this Section 16.1.6 including compliance by its enrolled Contractors and by its excluded Contractors of all tiers.

16.1.6.16 Developer agrees that the Department and the OCIP Administrator are not agents, partners, or guarantors of the OCIP insurer and that the Department is not responsible for any claims or disputes between or among Developer, the Contractors, and any OCIP insurer.

16.2 Performance and Payment Security

16.2.1 Performance Security

16.2.1.1 Developer shall, as a condition to the Department's issuance of NTP 2 and the commencement of O&M During Construction and Construction Work, obtain Performance Security in an amount equal to 15% of the contract price under the Contract with the Lead Contractor and separate Performance Security in an amount equal to 15% of the contract price under the Contract with each other Prime Contractor (if any) for the performance of any D&C Work or O&M During Construction, securing the respective Contractor's performance of: (a) the D&C Work; and (b) the O&M During Construction.

16.2.1.2 Developer may elect to procure the Performance Security directly so that it secures Developer's performance of the D&C Work and the O&M During Construction, rather than rely upon its Lead Contractor (or other Prime Contractors, if any) to do so.

16.2.1.3 If the Performance Security required by this Section 16.2.1 is in the form of a surety bond, it must be in the form set forth in Appendix 16-A, and must be

issued by a surety or an insurance company authorized to issue bonds in the State that is rated in the top two categories by two of the three nationally recognized rating agencies or at least A-: VIII or better according to A.M. Best's Financial Strength Rating and Financial Size Category except as otherwise approved in writing by the Department in its reasonable discretion. The surety bond must include a multiple obligee rider in the form of Appendix 16-C. If, however, Developer makes the election under Section 16.2.1.2 and the Performance Security is in the form of a surety bond, then a multiple obligee rider is not necessary, and the language of the bond form set forth in Appendix 16-A shall be adjusted to reflect the election, but only as necessary to identify this Agreement as the bonded contract, to eliminate references to the Lead Contractor (or other Prime Contractor),to change the obligee to the Department, and to clarify that references to "Work" are limited to the Work to be performed until Final Acceptance, including the D&C Work and O&M During Construction. Subject to the Lender's rights under the Direct Agreement, proceeds from a call on the surety bonds by Developer shall be placed in a trust account and used solely for purposes of remedying the underlying performance default and the payment of any other moneys due.

16.2.1.4 If the Performance Security is in the form of a letter of credit and Developer makes the election under Section 16.2.1.2, the letter of credit must be in the form of Appendix 15, and comply with the requirements of Sections 16.2.3_ and 16.3. If the Performance Security is in the form of a letter of credit and Developer does not make the election under Section 16.2.1.2, then the letter of credit form set forth in Appendix 15 shall be adjusted to reflect this fact, but only as necessary to identify each applicable Contractor as the applicant in place of Developer, to identify the Contract between Developer and the Contractor rather than this Agreement, to identify the Collateral Agent as the beneficiary (notwithstanding Section 16.3.2.7), and to satisfy the requirements of Section 16.2.3.

16.2.1.5 In satisfying its obligations under this Section 16.2.1, Developer may switch from a compliant surety bond to a compliant letter of credit (or vice versa) provided that Developer gives the Department 30 days prior written notice of its intention to switch and provided that at all times there remains in place a compliant surety bond or a compliant letter of credit.

16.2.1.6 Prior to commencing any Design Work or Construction Work after Final Acceptance, Developer shall obtain the Department's written approval of the form and amount of Performance Security for such Design Work or Construction Work.

16.2.2 Payment Bond

16.2.2.1 Developer shall, as a condition to the Department's issuance of NTP 2 and the commencement of O&M During Construction and Construction Work, obtain a Payment Bond in an amount equal to 15% of the contract price under the Contract with the Lead Contractor and a separate Payment Bond in an amount equal to 15% of the contract price under the Contract with each other Prime Contractor (if any) for the performance of any D&C Work or O&M During Construction, securing the respective Contractor's obligation to pay for labor and materials in connection with: (a) the D&C Work; and (b) the O&M During Construction.

16.2.2.2 The Payment Bond required by this Section 16.2.2 must be issued in the form set forth in Appendix 16-B, and must be issued by a surety or an insurance company authorized to issue bonds in the State that is rated in the top two categories by two of the three nationally recognized rating agencies or at least A-: VIII or better according to A.M.

Best's Financial Strength Rating and Financial Size Category except as otherwise approved in writing by the Department in its reasonable discretion. The Payment Bond must include a multiple obligee rider in the form of Appendix 16-D.

16.2.2.3 Developer may elect to procure the Payment Bond directly so that it secures Developer's payment obligations for the D&C Work and the O&M During Construction, rather than rely upon its Lead Contractor (or other Prime Contractors, if any) to do so as contemplated by the forms contained in Appendices 16-B and 16-D. If Developer makes this election, a multiple obligee rider is not necessary, and the language of the bond form shall be adjusted to reflect the election, but only as necessary to identify this Agreement as the bonded contract, to eliminate references to the Lead Contractor (or other Prime Contractor), to change the obligee to the Department, and to clarify that references to operations and maintenance work are limited to O&M During Construction.

16.2.2.4 Prior to commencing any Design Work or Construction Work after Final Acceptance, Developer shall obtain the Department's written approval of the form and amount of Payment Bond for such Design Work or Construction Work.

16.2.3 Collateral Agent as Letter of Credit Beneficiary

Notwithstanding Section 16.3.2.7, the Collateral Agent may be named as the beneficiary of any letter of credit provided as Performance Security, but only if the following terms and conditions are satisfied.

16.2.3.1 The letter of credit shall expressly authorize assignment and transfer of the beneficiary rights thereunder from the Collateral Agent to the Department without condition or limitation and shall expressly permit the Department, as beneficiary, to draw without presentation of the original letter of credit.

16.2.3.2 The letter of credit for Performance Security also shall name the Department as automatic and exclusive transferee beneficiary upon Final Acceptance, and upon final acceptance of any subsequent Construction Work during the Term (or, if applicable, Developer's final acceptance of the work under the Contract with the Lead Contractor or other Prime Contractor for the original or subsequent Construction Work).

16.2.3.3 The Collateral Agent may draw on the letter of credit solely for the following purposes:

1. Paying or reimbursing its costs of curing Developer's failure to perform its obligations under the Contract Documents respecting the secured Work (or, if applicable, paying or reimbursing Developer or itself for costs of curing the Lead Contractor's or other Prime Contractor's failure to perform its performance obligations under its respective Contract), or

2. Depositing the proceeds as cash security in a cash collateral account for the benefit of the Collateral Agent and the Department, useable only for the purposes specified in clause (1) above, where the letter of credit will expire within 50 days and has not been replaced or extended pursuant to Section 16.3.3, provided that the terms of the cash collateral account shall unconditionally entitle the Department to draw thereon whenever, and to the extent that, the Department would have the right to draw on the letter of credit

under this Section 16.2 had it not expired.

16.2.3.4 The Collateral Agent first commits in writing to the Department to provide written notice to the Department within two Business Days after making a draw on the letter of credit, indicating the date, amount and purpose of the draw in reasonable detail.

16.2.3.5 Developer has delivered to the Department, concurrently with the issuance of such letter of credit, a certified copy of the letter of credit and a present, executed transfer and assignment of the beneficiary rights from the Collateral Agent to the Department and documents reasonably satisfactory to the Department that permit the Department to exercise its rights as the transferee beneficiary under such letter of credit and to make drawings thereunder as and when set forth in Section 16.3.3.

16.2.3.6 Developer (or, if applicable, the Lead Contractor and other Prime Contractors) shall bear any fees charged by the issuer of the letter of credit for transferring the beneficiary rights thereunder.

16.2.4 Forbearance

The Department shall forebear from exercising remedies as an additional obligee under any surety bond provided as Performance Security or any Payment Bond so long as Developer or the Collateral Agent (a) commences the good faith, diligent exercise of remedies thereunder within 30 days after the Department delivers written notice to Developer and the Collateral Agent of its intent to make a claim thereunder, and (b) thereafter continues such good faith, diligent exercise of remedies until the default is cured.

16.3 Letters of Credit

16.3.1 Any terms and conditions applicable to a particular letter of credit which Developer is required to or may provide under this Agreement are set forth in the provisions of this Agreement describing such letter of credit. Wherever in the Contract Documents Developer has the option or obligation to deliver to the Department a letter of credit, the provisions of this Section 16.3 shall apply:

16.3.2 The letter of credit shall:

16.3.2.1 Be a direct pay, standby letter of credit;

16.3.2.2 Be issued by a financial institution in the form of Appendix 15 and acceptable to the Department's Chief Financial Officer. If the bank issuing the letter of credit fails to maintain an unsecured long-term debt rating of at least "A" from one of the major national rating agencies, Developer shall provide a substitute letter of credit issued by a qualified financial institution within 30 days of the date that the prior financial institution failed to maintain compliance with the requirements of this Section 16.3 or otherwise furnish additional security acceptable to the Department's Chief Financial Officer as may be required from time to time to protect the interests of the Department;

16.3.2.3 Be consistent with the requirements of this Section 16.3;

16.3.2.4 Be payable immediately, conditioned only on written presentment from the Department to the issuer of a sight draft drawn on the letter of credit and a certificate

stating that the Department has the right to draw under the letter of credit in the amount of the sight draft, up to the amount due to the Department, without requirement to present the original letter of credit;

16.3.2.5 Be in place for the entire period of time for which the letter of credit is providing security. Letters of credit with an expiration date shall provide for automatic renewal no later than 30 days prior to the expiration date;

16.3.2.6 Allow for multiple draws; and

16.3.2.7 Name the Department as payee. The letter of credit shall not provide for dual or multiple beneficiaries except as provided in Section 16.2.3.

16.3.3 The Department shall have the right to draw on the letter of credit, without prior notice unless otherwise expressly provided in the Contract Documents with respect to the letter of credit, and use and apply the proceeds as provided in the Contract Documents for such letter of credit, if (a) Developer fails to pay or perform when due the duty, obligation or liability under the Contract Documents for which the letter of credit is held, (b) Developer for any reason fails to deliver to the Department a new or replacement letter of credit, on the same terms, by not later than 14 days before the expiration date of the outstanding letter of credit, unless the applicable terms of the Contract Documents expressly require no further letter of credit with respect to the duty, obligation or liability in question, or (c) the financial institution issuing the Renewal Work Letter of Credit fails to meet the requirements set forth in Section 16.3.2.2 and Developer fails to provide a substitute letter of credit issued by a qualified financial institution within 30 days. For all draws conditioned on prior written notice from the Department to Developer, no such notice shall be required if it would preclude draw before the expiration date of the letter of credit. Draw on the letter of credit shall not be conditioned on prior resort to any other security of Developer.

16.3.4 Developer's sole remedy in connection with the improper presentment or payment of sight drafts drawn under letters of credit shall be to obtain from the Department a refund of the proceeds which are misapplied and the reasonable costs Developer incurs as a result of such misapplication; provided that at the time of such refund Developer increases the amount of the letter of credit to the amount (if any) then required under applicable provisions of this Agreement. Developer acknowledges that the presentment of sight drafts drawn upon a letter of credit could not under any circumstances cause Developer injury that could not be remedied by an award of money damages, and that the recovery of money damages would be an adequate remedy. Accordingly, Developer covenants (a) not to request or instruct the issuer of any letter of credit to refrain from paying any sight draft drawn under the letter of credit and (b) not to commence or pursue any legal proceeding seeking, and Developer irrevocably waives and relinquishes any right, to enjoin, restrain, prevent, stop or delay any draw on any letter of credit.

16.3.5 Developer shall obtain and furnish all letters of credit and replacements thereof at its sole cost and expense, and shall pay all charges imposed in connection with the Department's presentment of sight drafts and drawing against letters of credit or replacements thereof.

16.3.6 In the event the Department's rights and interests under this Agreement are assigned, Developer shall cooperate so that concurrently with the effectiveness of such assignment, either replacement letters of credit for, or appropriate amendments to, the

outstanding letters of credit shall be delivered to the assignee naming the assignee as beneficiary, at no cost to Developer.

16.4 Indemnity by Developer

16.4.1 Subject to Section 16.4.2, Developer shall release, defend, protect, indemnify and hold harmless the Indemnified Parties from and against any and all liabilities, damages, claims, fines, 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, to the extent caused by or arising out of:

16.4.1.1 The breach or alleged breach of the Contract Documents or any Contract by any Developer-Related Entity;

16.4.1.2 The failure or alleged failure by any Developer-Related Entity to comply with the Governmental Approvals, any applicable Environmental Laws or other Laws (including Laws regarding Hazardous Materials management);

16.4.1.3 Any alleged patent, trademark, or copyright infringement or other allegedly improper appropriation or use by any Developer-Related Entity of trade secrets, patents, proprietary information, know-how, copyright rights, inventions or other third-party proprietary rights 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 the Department or another Indemnified Party pursuant to the Contract Documents; provided that this indemnity shall not apply to any infringement resulting from the Department's failure to comply with specific written instructions regarding use provided to the Department by Developer;

16.4.1.4 The actual or alleged negligence, willful misconduct, breach of applicable Law or contract, or other culpable act, culpable omission or misconduct of any Developer-Related Entity in or associated with performance of the Work;

16.4.1.5 Any and all claims by any governmental or taxing authority claiming Taxes based on gross receipts, purchases or sales, the use of any property or income of any Developer-Related Entity with respect to any payment for the Work made to or earned by any Developer-Related Entity;

16.4.1.6 Any and all stop notices and/or liens filed in connection with the Work, including all expenses and attorneys', accountants' and expert witness fees and costs incurred in discharging any stop notice or lien, and any other liability to Contractors, laborers and Suppliers for failure to pay sums due for their work, services, materials, goods, equipment or supplies, provided that the Department is not in default in payments owing to Developer with respect to such Work;

16.4.1.7 Any actual or threatened Release of Hazardous Materials by any Developer-Related Entity;

16.4.1.8 The claim or assertion by any other developer or contractor of inconvenience, disruption, delay or loss caused by interference by any Developer-Related Entity with or hindering the progress or completion of work being performed by the other

developer or contractor, or failure of any Developer-Related Entity to cooperate reasonably with other developers or contractors in accordance therewith;

16.4.1.9 Any dispute between Developer and a Utility Owner, or any Developer-Related Entity's performance of, or failure to perform, the obligations under any Utility Agreement;

16.4.1.10 (a) Any Developer-Related Entity's breach of or failure to perform an obligation that the Department owes to a third Person, including Governmental Entities, under Law or under any agreement between the Department and a third Person, where the Department has delegated performance of the obligation to Developer under the Contract Documents, or (b) the acts or omissions, including negligence, willful misconduct or breach of applicable Law or contract, of any Developer-Related Entity which render the Department unable to perform or abide by an obligation that the Department owes to a third Person, including Governmental Entities, under any agreement between the Department and a third Person, where the agreement is previously disclosed or known to Developer;

16.4.1.11 The fraud, bad faith, arbitrary or capricious acts, willful misconduct, negligence or violation of Law or contract by any Developer-Related Entity in connection with Developer's performance of real property acquisition services under the Contract Documents;

16.4.1.12 Inverse condemnation, trespass, nuisance or similar taking of or harm to real property by reason of (a) the failure of any Developer-Related Entity to comply with Best Management Practice, requirements of the Contract Documents, Project Management Plan or Governmental Approvals respecting control and mitigation of construction activities and construction impacts, (b) the intentional misconduct or negligence of any Developer-Related Entity, or (c) the actual physical entry onto or encroachment upon another's property outside the Project Right of Way by any Developer-Related Entity;

16.4.1.13 If applicable, any violation of any federal or state securities or similar law by any Developer-Related Entity, or Developer's failure to comply with any requirement necessary to preserve the tax exempt status of interest paid on the PABs; or

16.4.1.14 Errors, inconsistencies or other defects in the design or construction of the Project.

16.4.2 Subject to Section 16.4.4 and the releases and disclaimers herein, including all the provisions set forth in Section 3.3.7, Developer's indemnity obligation shall not extend to any Loss to the extent caused by:

16.4.2.1 The negligence, reckless or willful misconduct, bad faith or fraud of such Indemnified Party; or

16.4.2.2 A material breach by the Department of any of its obligations under the Contract Documents;

16.4.2.3 A Relief Event, subject to Developer's obligations as provided for in this Agreement; or

16.4.2.4 A Structural Latent Defect, except to the extent that the Loss would have been avoided had Developer undertaken rehabilitation in accordance with Section 4.16.4 after discovery of the Structural Latent Defect.

16.4.3 In claims by an employee of Developer, a Contractor, anyone directly or indirectly employed by them or anyone for whose acts they may be liable, the indemnification obligation under this Section 16.4 shall not be limited by a limitation on the amount or type of damages, compensation or benefits payable by or for Developer or a Contractor under workers' compensation, disability benefit or other employee benefits laws.

16.4.4 For purposes of this Section 16.4, a third party claim includes a claim, dispute, disagreement, cause of action, demand, suit, action, judgment, investigation, or legal or administrative proceeding which (a) is asserted, initiated or brought by any Indemnified Party's employee, agent or contractor against an Indemnified Party, (b) is within the scope of the indemnities and (c) is not covered by the Indemnified Party's worker's compensation program or worker's compensation coverage required by Law. For purposes of this Section 16.4, a third party Loss includes any actual or alleged Loss sustained or incurred by such employee, agent or contractor.

16.5 Defense and Indemnification Procedures

16.5.1 If the Department receives notice of a claim or otherwise has actual knowledge of a claim that it believes is within the scope of the indemnities under Section 16.4, and if the Department gives notice thereof pursuant to Section 16.1.4.3, then the Department shall have the right to conduct its own defense unless either an insurer accepts defense of the claim within the time required by Law or Developer accepts the tender of the claim in accordance with Section 16.5.3.

16.5.2 If the insurer under any applicable Insurance Policy accepts the tender of defense, the Department and Developer shall cooperate in the defense as required by the Insurance Policy. If no insurer under potentially applicable Insurance Policies provides defense, then Section 16.5.3 shall apply.

16.5.3 If the defense is tendered to Developer, then within 30 days after receipt of the tender it shall notify the Department whether it has tendered the matter to an insurer and (if not tendered to an insurer or if the insurer has rejected the tender) shall deliver a written notice stating that Developer:

16.5.3.1 Accepts the tender of defense and confirms that the claim is subject to full indemnification hereunder without any "reservation of rights" to deny or disclaim full indemnification thereafter;

16.5.3.2 Accepts the tender of defense but with a "reservation of rights" in whole or in part; or

16.5.3.3 Rejects the tender of defense based on a determination that it is not required to indemnify against the claim under the terms of this Agreement.

16.5.4 If Developer accepts the tender of defense under Section 16.5.3.1, Developer shall have the right to select legal counsel for the Indemnified Parties, subject to reasonable approval by the Department, and Developer shall otherwise control the defense of such claim,

including settlement, and bear the fees and costs of defending and settling such claim. During such defense:

16.5.4.1 Developer shall fully and regularly inform the Indemnified Parties of the progress of the defense and of any settlement discussions; and

16.5.4.2 The Department shall fully cooperate in said defense, provide to Developer all materials and access to personnel it requests as necessary for defense, preparation and trial and which or who are under the control of or reasonably available to the Department, and maintain the confidentiality of all communications between it and Developer concerning such defense.

16.5.5 If Developer responds to the tender of defense as specified in Section 16.5.3.2 or 16.5.3.3, the Indemnified Parties shall be entitled to select their own legal counsel and otherwise control the defense of such claim, including settlement.

16.5.6 Indemnified Parties may assume their own defense by delivering to Developer written notice of such election and the reasons therefor, if the Department, at the time it gives notice of the claim or at any time thereafter, reasonably determines that:

16.5.6.1 A conflict exists between the Indemnified Parties and Developer which prevents or potentially prevents Developer from presenting a full and effective defense;

16.5.6.2 Developer is otherwise not providing an effective defense in connection with the claim; or

16.5.6.3 Developer lacks the financial capacity to satisfy potential liability or to provide an effective defense.

16.5.7 If the Indemnified Parties are entitled and elects to conduct their own defense pursuant hereto of a claim for which they are entitled to indemnification, Developer shall reimburse on a current basis all reasonable costs and expenses the Indemnified Parties incur in investigating and defending. In the event the Indemnified Parties are entitled to and elect to conduct their own defense, then:

16.5.7.1 In the case of a defense conducted under Section 16.5.3.1, the Indemnified Parties shall have the right to settle or compromise the claim with Developer's prior written consent, which shall not be unreasonably withheld or delayed;

16.5.7.2 In the case of a defense conducted under Section 16.5.3.2, the Indemnified Parties shall have the right to settle or compromise the claim with Developer's prior written consent, which shall not be unreasonably withheld or delayed, or with approval of the court or arbitrator following reasonable notice to Developer and opportunity to be heard and without prejudice to their rights to be indemnified by Developer; and

16.5.7.3 In the case of a defense conducted under Section 16.5.3.3, the Indemnified Parties shall have the right to settle or compromise the claim without Developer's prior written consent and without prejudice to their rights to be indemnified by Developer.

16.5.8 A refusal of, or failure to accept, a tender of defense, as well as any Dispute over whether an Indemnified Party which has assumed control of defense is entitled to do so under

Section 16.5.6, shall be resolved according to the Dispute Resolution Procedures. Developer shall be entitled to contest an indemnification claim and pursue, through the Dispute Resolution Procedures, recovery of defense and indemnity payments it has made to or on behalf of the Indemnified Parties.

16.5.9 The Parties acknowledge that while Section 16.4 contemplates that Developer will have responsibility for certain claims and liabilities arising out of its obligations to indemnify, circumstances may arise in which there may be shared liability of the Parties with respect to such claims and liabilities. In such case, where either Party believes a claim or liability may entail shared responsibility and that principles of comparative negligence and indemnity are applicable, it shall confer with the other Party on management of the claim or liability in question. If the Parties cannot agree on an approach to representation in the matter in question, each shall arrange to represent itself and to bear its own costs in connection therewith pending the outcome of such matter. Within 30 days subsequent to the final, non-appealable resolution of the matter in question, whether by arbitration or by judicial proceedings, the Parties shall adjust the costs of defense, including reimbursement of reasonable attorneys' fees and other litigation and defense costs, in accordance with the indemnification arrangements of Section 16.4, and consistent with the outcome of such proceedings concerning the respective liabilities of the Parties on the third party claim.

16.5.10 In determining responsibilities and obligations for defending suits pursuant to this Section 16.5, specific consideration shall be given to the following factors: (a) the party performing the activity in question; (b) the location of the activity and incident; (c) contractual arrangements then governing the performance of the activity; and (d) allegations of respective fault contained in the claim.

16.6 Disclaimer

Nothing in this Article 16 or elsewhere in the Contract Documents is intended to establish a standard of care owed to any member of the public or to extend to the public the status of a third-party beneficiary for any of the insurance or indemnifications described in this Article 16.

ARTICLE 17. REPRESENTATIONS AND WARRANTIES

17.1 Developer Representations and Warranties

Developer hereby represents and warrants to the Department as follows:

17.1.1 The Financial Model Formulas (a) were prepared by or on Developer's behalf in good faith, (b) are the same financial formulas that Developer utilized and is utilizing in the Financial Model, in making its decision to enter into this Agreement and in making disclosures to potential equity investors and Lenders under the Initial Funding Agreements, and (c) as of the Effective Date are suitable for making reasonable projections.

17.1.2 The Original Financial Model and Financial Model (a) were prepared by or on Developer's behalf in good faith, (b) were audited and verified by an independent recognized model auditor prior to the Effective Date, (c) fully disclose all cost, revenue and other financial assumptions and projections that Developer has used or is using in making its decision to enter into this Agreement and in making disclosures to Lenders under the Initial Funding Agreements

and (d) as of the Effective Date represent the projections that Developer believes in good faith are the most realistic and reasonable for the Project; provided, however, that such projections (i) are based upon a number of estimates and assumptions, (ii) are subject to significant business, economic and competitive uncertainties and contingencies, and (iii) accordingly are not a representation or warranty that any of the assumptions are correct, that such projections will be achieved or that the forward-looking statements expressed in such projections will correspond to actual results.

17.1.3 Developer has reviewed all applicable Laws relating to Taxes, has taken into account all requirements imposed by such Laws in preparing the Original Financial Model and Financial Model, and agrees to pay, prior to delinquency, all applicable Taxes. Further, Developer accepts sole responsibility and agrees that it shall have no right to compensation or other claim due to its misinterpretation of such Laws or incorrect assumptions regarding the applicability of Taxes.

17.1.4 Developer and its Contractor(s) have maintained, and throughout the term of this Agreement shall maintain, all required authority, license status, professional ability, skills and capacity to perform the Work.

17.1.5 Without limiting its rights and remedies expressly granted hereunder, Developer has evaluated the constraints affecting design and construction of the Project, including the Project Right of Way as defined in the Right of Way Plans as well as the terms and conditions of the NEPA/CEQA Approval and third party agreements listed in Appendix 23, and has reasonable grounds for believing and does believe that the Project can be designed and built within such constraints.

17.1.6 Without limiting its rights and remedies expressly granted hereunder, Developer has, in accordance with Best Management Practice, examined the Site and surrounding locations, performed appropriate field studies and investigations of the Site, investigated and reviewed the subsurface data attached, the Hazardous Materials information, the Utility information and other available public and private records, and undertaken other activities sufficient to familiarize itself with surface conditions and subsurface conditions, including the presence of Utilities, Hazardous Materials, contaminated groundwater, archaeological, paleontological and cultural resources, and endangered and threatened species, affecting the Site or surrounding locations; and as a result of such review, inspection, examination and other activities Developer is familiar with and, subject to the provisions of this Agreement, accepts the physical requirements of the Work.

17.1.7 Developer has familiarized itself with the requirements of any and all applicable Laws, including those Laws applicable to the use of federal-aid funds, and the conditions of any required Governmental Approvals prior to entering into this Agreement. Without limiting the foregoing, Developer is aware of the provisions of Section 3700 of the California Labor Code which require every employer to be insured against liability for workers' compensation or to undertake self-insurance in accordance with the provisions of that Code. Developer will comply with such provisions before commencing performance of the Work under the Contract Documents and at all times during the Term. The foregoing representation shall constitute the certificate concerning such compliance required by Section 1861 of the California Labor Code.

17.1.8 Except as specifically provided otherwise in this Agreement, Developer shall be responsible for complying with the foregoing at its sole cost and without any increase in compensation or extension of the Financial Close Deadline or any Completion Deadline on

account of such compliance, regardless of whether such compliance would require additional time for performance or additional labor, equipment and/or materials not expressly provided for in the Contract Documents. Developer has no reason to believe that any Governmental Approval required to be obtained by Developer will not be granted in due course and, thereafter, remain in effect so as to enable the Work to proceed in accordance with the Contract Documents.

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

17.1.10 Developer is a **[XXXXXXXXXXXXXXXX]** duly organized and validly existing under the laws of **[XXXXXXXXXXXXXXXX]**, has the requisite power and all required licenses to carry on its present and proposed activities, and has full power, right and authority to execute and deliver the Contract Documents and the Key Contracts to which Developer is a party and to perform each and all of the obligations of Developer provided for herein and therein. Developer is duly qualified to do business, and is in good standing, in the State, and will remain in good standing throughout the Term and for as long thereafter as any obligations remain outstanding under the Contract Documents.

17.1.11 The execution, delivery and performance of the Contract Documents and the Key Contracts to which Developer is (or will be) a party have been (or will be) duly authorized by all necessary corporate action of Developer; each person executing the Contract Documents and such Key Contracts on Developer's behalf has been (or at the time of execution will be) duly authorized to execute and deliver each such document on Developer's behalf; and the Contract Documents and such Key Contracts have been (or will be) duly executed and delivered by Developer.

17.1.12 Neither the execution and delivery by Developer of the Contract Documents and the Key Contracts to which Developer is (or will be) a party, nor the consummation of the transactions contemplated hereby or thereby, is (or at the time of execution will be) in conflict with or has resulted or will result in a default under or a violation of the governing instruments of Developer or any other agreements or instruments to which it is a party or by which it is bound.

17.1.13 The execution and delivery by Developer of the Contract Documents and Key Contract to which Developer is (or will be) a party, and the performance by Developer of its obligations thereunder, will not conflict with any Laws applicable to Developer that are valid and in effect on the date of execution and delivery.

17.1.14 Each of the Contract Documents and the Key Contracts to which Developer is (or will be) a party constitutes (or at the time of execution and delivery will constitute) the legal, valid and binding obligation of Developer, enforceable against Developer and, if applicable, each member of Developer, in accordance with its terms, subject only to applicable bankruptcy, insolvency and similar laws affecting the enforceability of the rights of creditors generally and the general principles of equity.

17.1.15 There is no action, suit, proceeding, investigation or litigation pending and

served on Developer which challenges Developer's authority to execute, deliver or perform, or the validity or enforceability of, the Contract Documents and the Key Contracts to which Developer is a party, or which challenges the authority of Developer's representative executing the Contract Documents or such Key Contracts; and Developer has disclosed to the Department any pending and un-served or threatened action, suit, proceeding, investigation or litigation with respect to such matters of which Developer is aware.

17.1.16 As of the Proposal Submission Date Developer disclosed to the Department in writing all organizational conflicts of interest of Developer and its Contractors of which Developer was actually aware; and between the Proposal Submission Date and the Effective Date Developer has not obtained knowledge of any additional organizational conflict of interest, and there have been no organizational changes to Developer or its Contractors identified in its Proposal, which have not been approved in writing by the Department. For this purpose, organizational conflict of interest has the meaning set forth in the Instructions to Proposers.

17.1.17 To the extent the Lead Contractor, the Lead Engineering Firm and/or the Lead Operations and Maintenance Contractor is not Developer, Developer represents and warrants, as of the effective date of the relevant Key Contract, as follows: (a) each of the Lead Contractor, the Lead Engineering Firm and the Lead Operations and Maintenance Contractor is duly organized, validly existing and in good standing under the laws of the state of its organization; and is duly qualified to do business, and is in good standing, in the State, (b) the capital stock of each of them (including options, warrants and other rights to acquire capital stock) is owned by the Persons who Developer has set forth in a written certification delivered to the Department prior to the Effective Date; (c) each of them has the power and authority to do all acts and things and execute and deliver all other documents as are required to be done, observed or performed by it in connection with its engagement by Developer; (d) each of them has all necessary licenses from the State, expertise, qualifications, experience, competence, skills and know-how to perform the Design Work, Construction Work and the O&M Work, as applicable, of the Project in accordance with the Contract Documents; and (e) each of them is not in breach of any applicable Law that would have a material adverse effect on the Design Work, Construction Work and O&M Work, as applicable, of the Project.

17.1.18 Except as provided in Section 11.7, Developer has no authority or right to impose any fee, toll, charge or other amount for the use of the Project.

17.1.19 Prior to the Effective Date Developer made or caused to be made to the Department, in writing, all the disclosures required under Section 143(h)(5)(A) through (G), and as of the Effective Date all such disclosures remain true, complete and accurate.

17.2 Department Representations and Warranties

The Department hereby represents and warrants to Developer as follows:

17.2.1 The Department is a public agency, duly formed and validly existing under the laws of the State, and has full status, power, right and authority to execute, deliver and perform the Contract Documents to which the Department is (or will be) a party and to perform each and all of the obligations of the Department provided for herein and therein.

17.2.2 The Contract Documents to which the Department is (or will be) a party have each been duly authorized by the Department, and each constitutes (or at the time of execution

and delivery will constitute) a legal, valid and binding obligation of the Department enforceable against the Department in accordance with its terms.

17.2.3 Each person executing the Contract Documents to which the Department is (or will be) a party has been (or at the time of execution will be) duly authorized to execute and deliver each such document on behalf of the Department; and the Contract Documents to which the Department is (or will be) a party have been (or will be) duly executed and delivered by the Department.

17.2.4 Neither the execution and delivery by the Department of the Contract Documents to which the Department is (or will be) a party nor the consummation of the transactions contemplated hereby or thereby, is (or at the time of execution will be) in conflict with or has resulted or will result in a default under or violation of the Department's organizational documents or any other agreements or instruments to which it is a party or by which it is bound.

17.2.5 The execution and delivery by the Department of the Contract Documents to which the Department is (or will be) a party, and the performance by the Department of its obligations thereunder, will not conflict with any Laws applicable to the Department that are valid and in effect on the date of execution and delivery.

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

17.2.7 As of the Effective Date, the Department has received no notice of default or violation by the Department of any third party agreement set forth in Appendix 23, and is in compliance in all material respects with such third party agreements.

17.2.8 In executing this Agreement, the Department is in full compliance, and shall remain in compliance, with Section 143, as Section 143 may be amended and with any successor thereto. As of the Effective Date, the Project is included in the Department's long-range transportation plan for the applicable metropolitan planning organization, and the Milestone Payment and Availability Payments, subject to appropriation, payable under this Agreement will be included in the proposed STIP Fund Estimate submitted to the California Transportation Commission for adoption in accordance with Section 11.5.1.

17.2.9 Without limiting its rights and remedies expressly granted hereunder, the Department has evaluated the constraints affecting design and construction of the Project, including the Project Right of Way as defined in the Right of Way Plans as well as the terms and conditions of the NEPA/CEQA Approval and third party agreements listed in Appendix 23, and has reasonable grounds for believing and does believe that the Project can be designed and built within such constraints.

17.3 Updating and Survival of Representations and Warranties

17.3.1 If required by any Lender in connection with Financial Close, both the Department and Developer shall reaffirm in writing their respective representations and

warranties set forth in Sections 17.1 and 17.2 as of Financial Close.

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

17.4 Special Remedies for Mutual Breach of Warranties

Notwithstanding any other provision of this Agreement, if there exists or occurs any circumstance or event that constitutes or results in a concurrent breach of any of the warranties set forth in this Article 17 by both Developer and the Department but does not also constitute or result in any other breach or default by either Party, then such breaches shall not form the basis for a Relief Event or damage claim by the Department against Developer. Instead, the only remedies shall be for the Parties to take action to rectify or mitigate the effects of such circumstance or event, to pursue severance and reformation of the Contract Documents as set forth in Section 25.11, or Termination by Court Ruling as set forth in Section 19.5.3.

ARTICLE 18 DEFAULT; REMEDIES; SUSPENSION OF WORK

18.1 Default by Developer; Cure Periods

18.1.1 Developer Default

Developer shall be in breach of this Agreement upon the occurrence of any one or more of the following events or conditions (each a "**Developer Default**"):

18.1.1.1 Developer fails to satisfy the applicable conditions to commencement of the Design Work as set forth in Sections 4.6 within 90 days of the Effective Date;

18.1.1.2 Developer fails to begin the applicable portion of the Design Work within 60 days following the Department's issuance of NTP 1;

18.1.1.3 Developer abandons all or a material part of the Project, which abandonment shall have occurred if (a) Developer clearly demonstrates through statements or acts an intent not to continue, for any reason other than a Relief Event that materially interferes with ability to continue, to construct, maintain or operate all or a material part of the Project or (b) no significant Work (taking into account the Project Schedule, if applicable, and any Relief Event) on the Project or a material part thereof is performed for a consecutive period of 60 days unless due to Developer's compliance with a Department suspension order;

18.1.1.4 Developer fails to perform the Work or any portion thereof in accordance with the Contract Documents, including conforming to applicable requirements of the Technical Requirements; provided that a failure by Developer to perform any obligation for which Noncompliance Points are assigned under the then Section 4 of Division II will not constitute a Developer Default under this Section 18.1.1.4;

18.1.1.5 Developer fails to comply with applicable Governmental Approvals and Laws, including the Federal Requirements;

18.1.1.6 Developer fails to make an undisputed payment to the Department under this Agreement when due, or fails to deposit funds to any reserve or account in the amount and within the time period required by this Agreement;

18.1.1.7 There occurs any use of the Project or any portion thereof in violation of or not permitted by this Agreement, the Technical Requirements, Governmental Approvals or Laws (except violations of Law by Users);

18.1.1.8 Developer fails to obtain, provide and maintain any insurance, bonds, guarantees, letters of credit or other performance or payment 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, qualifications, terms or coverage of the same;

18.1.1.9 Developer makes or attempts to make an assignment or transfer of all or any portion of this Agreement, the Lease, the Project or Developer's equity or economic interest therein in violation of Article 23 or there occurs an Equity Transfer or Change of Control in violation of Section 13.1;

18.1.1.10 Subject to Section 17.4, any representation or warranty made by Developer or any Guarantor in the Contract Documents, any guaranty or any certificate, schedule, report, instrument or other document delivered to the Department pursuant to the Contract Documents is false, misleading or inaccurate in any material respect when made or omits material information when made;

18.1.1.11 Developer fails to timely observe or perform or cause to be observed or performed any other material covenant, agreement, obligation, term or condition required to be observed or performed by Developer under the Contract Documents; provided that (a) such actions shall not be considered a Developer Default if they are the direct result of the Department's breach of its obligation to make payments to Developer and (b) a failure by Developer to perform any obligation for which Noncompliance Points are assigned under the then current Section 4 of Division II will not constitute a Developer Default under this Section 18.1.1.11;

18.1.1.12 Developer commences a voluntary case seeking liquidation, reorganization or other relief with respect to itself or its debts under any U.S. or foreign bankruptcy, insolvency or other similar Law now or hereafter in effect, seeks the appointment of a trustee, receiver, liquidator, custodian or other similar official of it or any substantial part of its assets; becomes insolvent, or generally does not pay its debts as they become due or admits in writing its inability to pay its debts (other than: (i) debts otherwise paid by an Equity Member; or (ii) Project Debt that is otherwise paid by a financial guarantor that is a Lender to the holders thereof under its financial guaranty); makes an assignment for the benefit of creditors; or takes any action to authorize any of the foregoing; or any of the foregoing acts or events shall occur with respect to (a) any Equity Member with a material financial obligation owing to Developer for Committed Investment, or (b) any Guarantor of material Developer obligations owed to the Department under the Contract Documents, provided such actions shall not be considered a Developer Default if they are the sole and direct result of the Department's breach of its obligation to make payments to Developer;

18.1.1.13 An involuntary case is commenced against Developer seeking liquidation, reorganization, dissolution, winding up, a composition or arrangement with

creditors, a readjustment of debts or other relief with respect to Developer or Developer's debts under any U.S. or foreign bankruptcy, insolvency or other similar Law now or hereafter in effect; seeking the appointment of a trustee, receiver, liquidator, custodian or other similar official of Developer or any substantial part of Developer's assets; seeking the issuance of a writ of attachment, execution, or similar process; or seeking like relief, and such involuntary case shall not be contested by Developer in good faith or shall remain undismissed and unstayed for a period of 60 days; or any such involuntary case, or any of the foregoing acts or events, shall occur with respect to (a) any Equity Member with a material financial obligation owing to Developer for Committed Investment, or (b) any Guarantor of material Developer obligations owed to the Department under the Contract Documents; provided such actions shall not be considered a Developer Default if they are the sole and direct result of the Department's breach of its obligation to make payments to Developer;

18.1.1.14 Developer fails to comply with the Department's written suspension of Work order issued in accordance with Section 18.2.7 within the time reasonably allowed in such order;

18.1.1.15 Developer fails to: (a) achieve Financial Close by the Financial Close Deadline, unless such failure is excused pursuant to Section 15.2.7, (b) achieve Substantial Completion by the Long Stop Date, or (c) achieve Final Acceptance by the Final Acceptance Deadline;

18.1.1.16 A Persistent Developer Noncompliance exists;

18.1.1.17 There occurs any Closure that is not a Permitted Construction Closure or a Permitted Closure; or

18.1.1.18 After exhaustion of all rights of appeal, there occurs any suspension, debarment, disqualification or removal (distinguished from ineligibility due to lack of financial qualifications), or there goes into effect an agreement for voluntary exclusion, from bidding, proposing or contracting with any federal, State or local department or agency of (a) Developer, (b) any Equity Member, (c) any Affiliate for whom transfer of ownership would constitute a Change of Control, or (d) any Key Contractor whose work is not completed.

18.1.2 Initial Notice and Cure Periods

For Developer breaches or failures listed as Noncompliance in Section 4 of Division II, as it may be amended from time to time, the cure periods set forth therein shall exclusively govern for the sole purpose of assessing Noncompliance Points. Subject to remedies that this Article 18 expressly states may be exercised before lapse of a cure period, Developer shall have the following cure periods with respect to the following Developer Defaults:

18.1.2.1 For a Developer Default under Sections 18.1.1.1 through 18.1.1.3, Sections 18.1.1.5 through 18.1.1.9, Section 18.1.1.15(c), and Section 18.1.1.17 a period of 30 days after Developer receives written notice from the Department of Developer Default; provided that (a) as to a Developer Default under Section 18.1.1.7 or 18.1.1.17, such cure period shall not preclude or delay the Department's immediate exercise, without notice or demand, of its remedy set forth in Section 18.2.2, and (b) as to a Developer Default under Section 18.1.1.8 the Department shall have the right, but not the obligation, to effect cure, at Developer's expense, if the Developer Default continues beyond 15 days after such notice is delivered.

18.1.2.2 For a Developer Default under Sections 18.1.1.4, 18.1.1.10, 18.1.1.11 and 18.1.1.18, a period of 30 days after Developer receives written notice from the Department of Developer Default; provided that (a) if the Developer Default is of such a nature that the cure cannot with diligence be completed within such time period and Developer has commenced meaningful steps to cure immediately after receiving the default notice, Developer shall have such additional period of time, up to a maximum cure period of 120 days, as is reasonably necessary to diligently effect cure, and (b) as to a Developer Default under Section 18.1.1.18, if the debarred or suspended Person is an Equity Member or Affiliate, cure will be regarded as complete when Developer proves it has removed such Person from any position or ability to manage, direct or control the decisions of Developer or to perform Work, and if the debarred or suspended Person is a Key Contractor cure will be regarded as complete when Developer replaces the Key Contractor with the Department's prior written approval as provided in Section 7.3.1.

18.1.2.3 For a Developer Default under Section 18.1.1.12 and 18.1.1.13, no right to notice or cure period, except that if the Developer Default relates to an Equity Member or a Guarantor, Developer shall have a period of 60 days to effect cure of such default by providing a substitute Equity Member or Guarantor reasonably acceptable to the Department or by providing a letter of credit or other form of security reasonably acceptable to the Department in the amount of, as the case may be, (a) the Equity Member's financial obligation for Committed Investment to or for the benefit of Developer, or (b) the Guarantor's specified sum or specified maximum liability under its guaranty, or if none is specified, the reasonably estimated maximum liability of the Guarantor. Notwithstanding the foregoing, if such default relates to an Equity Member who holds a Controlling Interest in Developer, Developer shall cure such default only by providing a letter of credit or other form of security reasonably acceptable to the Department in the amount of such Equity Member's financial obligation for Committed Investment to or for the benefit of Developer.

18.1.2.4 For a Developer Default under Sections 18.1.1.14, 18.1.1.15(a) and (b), and 18.1.1.16, there is no cure period.

18.2 Department Remedies for Developer Default

18.2.1 Termination

In the event of a Developer Default under Section 18.1.1.1.15(a), the Department may terminate this Agreement as provided in Section 19.2.2. In the event of any Developer Default that is or becomes a Default Termination Event set forth in Section 19.4.1, the Department may terminate this Agreement as provided in Section 19.4.

18.2.2 Immediate Department Entry to Cure Wrongful Use or Closure

Without notice and without awaiting lapse of the period to cure, in the event of any Developer Default under Section 18.1.1.7 (use of the Project in violation of the Contract Documents) or Section 18.1.1.17 (Closure that is not a Permitted Closure or Permitted Construction Closure), the Department may enter and take control of the relevant portion of the Project to restore the permitted uses and reopen and continue operations for the benefit of Developer and the public, until such time as Developer or the Lenders cure such breach, or the Department terminates this Agreement. Developer shall pay to the Department on demand the Department's Recoverable Costs in connection with such action. So long as the Department undertakes such action in good faith, even if under a mistaken belief in the

occurrence of such a Developer Default, such action shall not be deemed unlawful or a breach of this Agreement, shall not expose the Department to any liability to Developer and shall not entitle Developer to any other remedy, except for the Department's gross negligence, recklessness, willful misconduct or bad faith, it being acknowledged that the Department has a high priority, paramount public interest in providing and maintaining the authorized uses of the Project and continuous public access to the Project. Immediately following cure of such Developer Default, as determined by the Department, acting reasonably, the Department shall relinquish control and possession of the relevant portion of the Project back to Developer.

18.2.3 Remedies for Failure to Meet Safety Standards or Perform Safety Compliance

18.2.3.1 If at any time Developer, or its Surety under payment and performance bonds, fails to meet any Safety Standard or timely perform Safety Compliance or the Department and Developer cannot reach an agreement regarding the interpretation or application of a Safety Standard or the valid issuance of a Safety Compliance Order within a period of time acceptable to the Department, acting reasonably, the Department shall have the absolute right and entitlement to undertake or direct Developer to undertake any work required to ensure implementation of and compliance with Safety Standards as interpreted or applied by the Department, acting reasonably, or with the Safety Compliance Order. If at any time a condition or deficiency of the Project violates any Law respecting health, safety or right of use and access, including the Americans With Disabilities Act and regulations of the Occupational Safety and Health Administration (OSHA) or Cal/OSHA, the Department may take any immediate corrective actions required.

18.2.3.2 To the extent that any work done pursuant to Section 18.2.3.1 is undertaken by the Department and is reasonably necessary to comply with Safety Standards, perform validly issued Safety Compliance Orders or correct a violation of Law respecting health, safety or right of use and access, Developer shall pay to the Department on demand the Department's Recoverable Costs in connection with such work, and the Department (whether it undertakes the work or has directed Developer to undertake the work) shall have no obligation or liability to compensate Developer for any Losses it suffers or incurs as a result thereof, except as a result of the Department's gross negligence, recklessness, willful misconduct or bad faith.

18.2.3.3 To the extent that any work done pursuant to Section 18.2.3.1 is undertaken by the Department and is not reasonably necessary to comply with Safety Standards, perform validly issued Safety Compliance Orders or correct a violation of Law respecting health, safety or right of use and access, the Department shall compensate Developer only for Losses it suffers or incurs as a direct result thereof.

18.2.3.4 Notwithstanding anything to the contrary contained in this Agreement, if, in the good faith judgment of the Department, Developer has failed to meet any Safety Standards or perform Safety Compliance and the failure results in an Emergency or danger to persons or property, and if Developer is not then diligently taking all necessary steps to cure or deal with such Emergency or danger, the Department may (but is not obligated to), without notice and without awaiting lapse of the period to cure any breach, and in addition and without prejudice to its other remedies, (a) immediately take such action as may be reasonably necessary to rectify the Emergency or danger, in which event Developer shall pay to the Department on demand the cost of such action, including the Department's

Recoverable Costs, or (b) suspend the Work and/or close or cause to be closed any and all portions of the Project affected by the Emergency or danger. So long as the Department undertakes such action in good faith, even if under a mistaken belief in the occurrence of such failure or existence of an Emergency or danger as a result thereof, such action shall not be deemed unlawful or a breach, shall not expose the Department to any liability to Developer, except if the Department's action constitutes gross negligence, recklessness, willful misconduct or bad faith, and shall not entitle Developer to any other remedy, it being acknowledged that the Department has a high priority, paramount public interest in protecting public and worker safety at the Project and adjacent and connecting areas. The Department's good faith determination of the existence of such a failure, Emergency or danger shall be deemed conclusive in the absence of clear and convincing evidence to the contrary. Immediately following rectification of such Emergency or danger, as determined by the Department, acting reasonably, the Department shall allow the Work to continue or such portions of the Project to reopen, as the case may be.

18.2.4 Department Step-in Rights

Upon the occurrence of a Developer Default and expiration, without full and complete cure, of the cure period, if any, available to Developer, without necessity for a Warning Notice and without waiving or releasing Developer from any obligations, but subject to the prior rights of the Lenders under this Agreement and the Direct Agreement, the Department shall have the right, but not the obligation, to pay and perform all or any portion of Developer's obligations and the Work that relates to Developer Default, as well as any other then-existing breaches or failures to perform for which Developer received prior written notice from the Department but has not commenced diligent efforts to cure, on and subject to the following terms and conditions.

18.2.4.1 The Department may, to the extent necessary to cure the Developer Default:

1. Perform or attempt to perform, or caused to be performed, such Work;

2. Employ security guards and other safeguards to protect the Project;

3. Spend such sums as the Department deems necessary and reasonable to employ and pay such architects, engineers, consultants and contractors and obtain materials and equipment as may be required for the purpose of completing the Work without obligation or liability to Developer or any Contractors for loss of opportunity to perform the same Work or supply the same materials and equipment;

4. Draw on and use proceeds from the Payment Bond and Performance Security and any other available security to the extent such instruments provide recourse to pay such sums;

5. Execute all applications, certificates and other documents as may be required for completing the Work;

6. Make decisions respecting, assume control over and continue Work as the Department determines appropriate;

7. Modify or terminate any contractual arrangements in the Department's good faith discretion, without liability for termination fees, costs or other charges;

8. Meet with, coordinate with, direct and instruct Contractors, process invoices and applications for payment from Contractors, pay Contractors, and resolve claims of Contractors, and for this purpose Developer irrevocably appoints the Department as its attorney-in-fact with full power and authority to act for and bind Developer in its place and stead;

9. Take any and all other actions which it may in its sole discretion consider necessary to complete the Work; and

10. Prosecute and defend any action or proceeding incident to the Work.

18.2.4.2 Developer shall reimburse the Department, on written demand, the Department's Recoverable Costs in connection with the performance of any act or Work authorized by this Section 18.2.4.

18.2.4.3 For the purpose of carrying out the Department's step-in rights under this Section 18.2.4, the Department shall have the right to take exclusive possession of the Project and the Project ROW and to suspend or revoke Developer's right to enter the same, and the Department is also hereby granted a perpetual, non-rescindable right of entry for the Department and its authorized representatives, contractors, subcontractors, vendors and employees to enter onto any other construction, lay down, staging, borrow and similar areas, exercisable at any time or times without notice. Neither the Department nor any of its authorized representatives, contractors, subcontractors, vendor and employees shall be liable to Developer in any manner for any inconvenience or disturbance arising out of any such exclusion of Developer from the Project or the Project Right of Way or its entry onto any construction lay down, staging, borrow and similar areas in order to perform under this Section 18.2.4, unless caused by the gross negligence, recklessness, willful misconduct or bad faith of such Person. If any Person exercises any right to pay or perform under this Section 18.2.4, it nevertheless shall have no liability to Developer for the sufficiency or adequacy of any such payment or performance, or for the manner or quality of design, construction, operation or maintenance, unless caused by the gross negligence, recklessness, willful misconduct or bad faith of such Person.

18.2.4.4 The Department's rights under this Section 18.2.4 are subject to the right of any Surety under payment and performance bonds to assume performance and completion of all bonded Work.

18.2.4.5 The Department's rights under this Section 18.2.4 are subject to the exercise of the cure rights by the Collateral Agent under the senior Security Documents, provided that (a) the Collateral Agent complies with its obligations under the Direct Agreement and (b) the Department may continue exercising its step-in rights until the Collateral Agent obtains possession and notifies the Department that the Collateral Agent stands ready to immediately commence good faith, diligent curative action.

18.2.4.6 Without waiving any of its rights and remedies under this Agreement, once the Department has exercised its rights under this Section 18.2.4, the Department will comply with the applicable provisions of the Direct Agreement after the

Department has completed performance of the obligations or the work that was the responsibility of Developer to perform.

18.2.4.7 In the event the Department takes action described in this Section 18.2.4 and it is later finally determined that the Department lacked the right to do so because there did not occur a Developer Default and expiration, without full and complete cure, of the cure period, if any, available to Developer, then the Department's action shall be treated as a Department Change.

18.2.5 Damages; Offset

18.2.5.1 Subject to Section 18.2.13, the Department shall be entitled to recover any and all damages available under Law on account of the occurrence of the Developer Default, together with interest thereon from and after the date any amount becomes due to the Department until paid at the applicable Late Payment Rate. Such damages may include (a) loss of any compensation due the Department under this Agreement proximately caused by the Developer Default, (b) actual and projected costs to remedy any defective part of the Work, (c) actual and projected costs to rectify any breach or failure to perform by Developer and/or bring the condition of the Project to the standard it would have been in if Developer had complied with its obligations to carry out and complete the Work in accordance with the Contract Documents, (d) actual and projected costs to the Department to terminate, take over the Project, re-procure and replace Developer, (e) actual and projected delay costs and (f) actual and projected increases in costs to the Department to complete the Project if not completed. Without limiting the foregoing, if the Developer Default is failure to achieve Final Acceptance by the Final Acceptance Deadline, the damages owing the Department shall include its premiums and loss allocations under the OCIP and other costs of administering the OCIP attributable to the period the Department elects to extend the OCIP beyond the Final Acceptance Deadline up to the Final Acceptance Date. Developer shall be liable for any damages that accrue after the occurrence of the Developer Default, regardless of whether the Developer Default is subsequently cured, which shall be due and owing after the expiration of all cure periods available to Developer and Lenders under the Contract Documents.

18.2.5.2 The Department may deduct and offset any damages owing to it under the Contract Documents from and against any amounts the Department may owe to Developer. Without limiting the foregoing, except for damages liquidated by the adjustments to the Milestone Payment under Appendix 4, and subject to the Milestone Payment Adjustment Cap set forth in Appendix 4, the Milestone Payment is subject to deduction and offset for the amount of any damages attributable to any Developer Default that concerns the D&C Work and is the subject of a notice delivered to Developer prior to the date for payment of the Milestone Payment. If the amount of damages owing the Department is not liquidated or known with certainty at the time a payment is due from the Department to Developer, the Department may deduct and offset 105% of the amount it reasonably estimates will be due, subject to the Department's obligation to adjust such deduction or offset when the amount of damages owing the Department is liquidated or becomes known with certainty.

18.2.6 Persistent Developer Noncompliance

18.2.6.1 Developer recognizes and acknowledges that a pattern or practice of continuing, repeated or numerous instances of Noncompliance, whether such instances of Noncompliance are cured or not, will undermine the confidence and trust essential to the success of the public-private arrangement under this Agreement and will have a

material, cumulative adverse impact on the value of this Agreement to the Department. Developer acknowledges and agrees that measures for determining the existence of such a pattern or practice described in the definition of Persistent Developer Noncompliance and this Section 18.2.6 are a fair and appropriate objective basis to conclude that such a pattern or practice will continue.

18.2.6.2 Subject to Section 6.5, a Persistent Developer Noncompliance under clause (a) of the definition thereof, regarding accumulated Noncompliance Points, shall be deemed to exist if:

1. The cumulative number of Noncompliance Points assessed during any consecutive 365-day period (including any period prior to the Substantial Completion Date) equals or exceeds 230; or

2. The cumulative number of Noncompliance Points assessed during any consecutive 1095-day period (including any period prior to the Substantial Completion Date) equals or exceeds 575.

18.2.6.3 Subject to Section 6.5, a Persistent Developer Noncompliance under clause (b) of the definition thereof shall be deemed to exist if the cumulative number of instances of Long Cure Priority Noncompliance, cured or uncured, during any consecutive 1095-day period equals or exceeds 45:

18.2.7 Suspension of Work

18.2.7.1 The Department shall have the right and authority, without obligation or liability, to suspend, in whole or in part, the Work by written order to Developer for Developer's failure to cure and correct, within the applicable cure period available to Developer (except as provided otherwise in clause 5 below) (if any), the following:

1. Failure to perform the Work in compliance with, or other breach of, the Contract Documents, except Noncompliances where no Persistent Developer Noncompliance exists;

2. Failure to comply with any Law or Governmental Approval (including failure to handle, preserve and protect archaeological, paleontological or historic resources, or failure to handle Hazardous Materials, in accordance with applicable Laws and Governmental Approvals);

3. Performance of Design Work or Construction Work without first satisfying all the conditions to commencement of Design Work or Construction Work, as applicable, set forth in Sections 4.6 and 4.7;

4. The existence of conditions unsafe for workers, other Project personnel or the general public, including failures to comply with Safety Standards or perform Safety Compliance as set forth in Section 18.2.3 (and in any such case the order of suspension may be issued without awaiting any cure period);

5. Failure to (a) provide proof of required insurance coverage as set forth in, and within the time required under clause 1 of Section 16.1.2.4, without obligation to await lapse of the cure period set forth in Section 18.1.2.1, (b) provide

proof of OCIP enrollment of Developer or any eligible Contractor before starting Work on the Site as required under Section 16.1.6.5, if such proof is not received within three Business Days after the Department or OCIP Administrator delivers to Developer written notice demanding enrollment, or (c) renew or replace any letter of credit serving as Performance Security or provide a substitute letter of credit as Performance Security within the time set forth in Section 16.3.3; and

6. Failure to carry out and comply with written orders given by the Department.

The Department shall have no liability to Developer, and Developer shall have no right to Extra Work Costs, Delay Costs, time, Financial Close Deadline or Completion Deadline extensions, compensation for losses due to delays in commencement of Availability Payments or for additional interest costs due to delayed receipt of the Milestone Payment, or other relief for the duration of any suspension under this Section 18.2.7.1.

18.2.7.2 The Department shall have the right and authority to suspend, in whole or in part, the Work for reasons other than those set forth in Section 18.2.7.1. If the Department purports to order suspension of Work under Section 18.2.7.1 but there exists no grounds under Section 18.2.7.1 for such suspension, then it shall be deemed a suspension under this Section 18.2.7.2. If the Department orders (or is deemed to order) suspension of Work under this Section 18.2.7.2 and such suspension is a Department-Caused Delay, then Developer shall be entitled to submit a Claim for Extra Work Costs, Delay Costs, other compensation, Financial Close Deadline or Completion Deadline extensions and performance relief as permitted under Article 9.

18.2.7.3 For any suspension order issued under this Section 18.2.7, the Department will provide Developer the reason for such suspension, and Developer shall comply with such suspension order.

18.2.8 Warning Notices

18.2.8.1 Without prejudice to any other right or remedy available to the Department, the Department may deliver a written notice (a "**Warning Notice**") to Developer, with a copy to the Collateral Agent, stating explicitly that it is a "Warning Notice" of a material Developer Default and stating in reasonable detail the matter or matters giving rise to the notice and, if applicable, amounts due from Developer, and reminding Developer of the implications of such notice, whenever there occurs a Developer Default.

18.2.8.2 The issuance of a Warning Notice may trigger a Default Termination Event as provided in Section 19.4.1.3.

18.2.8.3 The Department may issue a Warning Notice at the same time it delivers a notice of Developer Default, and a notice of Developer Default may be issued as a Warning Notice. In either such case, the cure period available to Developer, if any, shall be as set forth in Section 18.1.2. If the Department issues a Warning Notice for any Developer Default after it issues a notice of such Developer Default, then the remaining cure period available to Developer, if any, for such Developer Default before the Department may terminate this Agreement on account of such Developer Default shall be extended by the time period between the date the notice of such Developer Default was issued and the date the Warning Notice is issued. However, this shall not affect the time when the Department may

exercise any other remedy respecting such Developer Default.

18.2.8.4 Along with the Warning Notice and without prejudice to any other right or remedy available to the Department, the Department may, but is not obligated to, request that Developer prepare and submit within the applicable cure period a remedial plan that shall set forth a schedule and specific actions to be taken by Developer to cure the Developer Default and reduce the likelihood of such defaults occurring in the future. Such actions may include improvements to Developer's quality management practices, plans and procedures, revising and restating management plans, changes in organizational and management structure, increased monitoring and inspections, changes in Key Personnel and other important personnel, and replacement of Contractors.

18.2.9 Payment and Performance Security

Upon the occurrence of a Developer Default and expiration, without full and complete cure, of the applicable cure period, if any, without necessity for a Warning Notice, and without waiving or releasing Developer from any obligations, and subject to Section 16.2.4 if applicable, the Department shall be entitled to make demand upon, draw on, enforce and collect any Payment Bond or Performance Security available to the Department under this Agreement with respect to the Developer Default in question, in any order in the Department's sole discretion. Where access to the Payment Bond or Performance Security is to satisfy damages owing, the Department shall be entitled to make demand, draw, enforce and collect regardless of whether the Developer Default is subsequently cured. The Department will apply the proceeds of any such action to the satisfaction of Developer's obligations under this Agreement, including payment of amounts due the Department. For the avoidance of doubt, Payment and Performance Security provided by or on behalf of the Lead Contractor securing its obligations will not be available with respect to a Developer Default (although it will be available for a corresponding breach, if any, by the Lead Contractor).

18.2.10 Delay Liquidated Damages

18.2.10.1 Developer shall be liable for liquidated damages with respect to any failure to achieve Final Acceptance by the Final Acceptance Deadline. The amount of such liquidated damages shall be $1,000 per day for each day of delay in achieving Final Acceptance beyond the Final Acceptance Deadline. Such liability shall apply even though a cure period remains available to Developer or any Lender or cure occurs.

18.2.10.2 Such liquidated damages shall constitute the Department's sole right to damages for such delay but do not liquidate other damages, including OCIP damages described in Section 18.2.5.1 and those encompassed by adjustments to Maximum Availability Payments.

18.2.10.3 Developer and the Department acknowledge that such liquidated damages are reasonable in order to compensate the Department for damages it will incur as a result of late Final Acceptance. Such damages include injury to the relationship with the Presidio Trust, injury to the credibility and reputation of the Department's transportation improvement program with policy makers and with the general public and additional costs of administering this Agreement (including engineering, legal, accounting, overhead and other administrative costs). Developer further acknowledges that these damages are incapable of accurate measurement because of, among other things, the unique nature of the Project and the unavailability of a substitute for it.

18.2.11 Other Rights and Remedies

18.2.11.1 Developer shall be subject to suspension or revocation of its Certificate of Qualification for failure to timely perform and complete the Work by a Completion Deadline.

18.2.11.2 In the instance of a Developer Default, the Department expressly reserves any and all existing rights to pursue administrative or other remedies as to any entity's or Person's respective continuing or future fitness, eligibility, qualification, certification or responsibility status for participation in future Department contracts.

18.2.12 Cumulative, Non-Exclusive Remedies

Subject to Section 18.2.13, and except as specifically provided otherwise in this Agreement, each right and remedy of the Department hereunder shall be cumulative and shall be in addition to every other right or remedy provided herein or now or hereafter existing under Law, and the exercise or beginning of the exercise by the Department of any one or more of any of such rights or remedies shall not preclude the simultaneous or later exercise by the Department of any or all other such rights or remedies.

18.2.13 Limitation on Developer's Liability for Certain Damages

18.2.13.1 Notwithstanding any other provision of the Contract Documents and except as set forth in Section 18.2.13.2, in no event shall Developer be liable to the Department for punitive damages or special, indirect or incidental consequential damages, whether arising out of breach of this Agreement, the Lease or any other Contract Document by Developer, tort (including negligence) or any other theory of liability, and the Department releases Developer from any such liability.

18.2.13.2 The foregoing limitation on Developer's liability shall not apply to or limit the Department's right of recovery respecting the following:

1. Losses (including defense costs) to the extent (a) covered by the proceeds of insurance required to be carried pursuant to Section 16.1, (b) covered by the proceeds of insurance actually carried by or insuring Developer under policies solely with respect to the Project and the Work, regardless of whether required to be carried pursuant to Section 16.1, or (c) Developer is deemed to have self-insured the Loss pursuant to Section 16.1.4.4;

2. Losses arising out of fraud, criminal conduct, intentional misconduct, recklessness, gross negligence or bad faith on the part of any Developer-Related Entity;

3. Losses arising out of Releases of Hazardous Materials by any Developer-Related Entity;

4. Amounts Developer may owe or be obligated to reimburse the Department under the express provisions of the Contract Documents, including Developer's liabilities for liquidated damages, Developer's indemnity and defense liabilities, and Developer's obligations for the Department's Recoverable Costs; and

5. Interest, late charges, fees, transaction fees and charges, penalties and similar charges that the Contract Documents expressly state are due from Developer to the Department.

18.3 Default by the Department; Cure Periods

18.3.1 Department Default

The Department shall be in breach of this Agreement upon the occurrence of any one or more of the following events or conditions (each a "**Department Default**"):

18.3.1.1 The Department fails to make any payment due Developer under this Agreement when due; provided that such payment is not subject to a Dispute;

18.3.1.2 Subject to Section 17.4, any representation or warranty made by the Department under Section 17.2 of this Agreement is false, misleading or inaccurate in any material respect when made or omits material information when made;

18.3.1.3 The Department or any other Governmental Entity confiscates, sequesters, condemns or appropriates the Project or any material part thereof, or Developer's Interest or any material part thereof, excluding a Termination for Convenience or any other exercise of a right of termination set forth in this Agreement; or

18.3.1.4 The Department fails to prioritize any payments under this Agreement in accordance with Section 11.5.

18.3.2 Cure Periods

The Department shall have the following cure periods with respect to the following Department Defaults:

18.3.2.1 For a Department Default under Sections 18.3.1.1, a period of 60 days after Developer delivers to the Department written notice of the Department Default.

18.3.2.2 For a Department Default under Sections 18.3.1.2 or 18.3.1.3, a period of 30 days after Developer delivers to the Department written notice of the Department Default; provided that if the Department Default is of such a nature that the cure cannot with diligence be completed within such time period and the Department has commenced meaningful steps to cure immediately after receiving the default notice, the Department shall have such additional period of time, up to a maximum cure period of 180 days, as is reasonably necessary to diligently effect cure.

18.4 Developer Remedies for Department Default

18.4.1 Termination

Subject to Section 18.4.3, Developer will have the right to terminate this Agreement and recover termination damages as more particularly set forth in, and subject to the terms and conditions of, Section 19.5.

18.4.2 Damages and Other Remedies

18.4.2.1 Developer shall have and may exercise the following remedies upon the occurrence of a Department Default and expiration, without cure, of the applicable cure period:

1. If Developer does not terminate this Agreement, then subject to Sections 9.1.1, 9.2.1 and 18.4.3, Developer may submit a Claim for compensation, Financial Close Deadline or Completion Deadline extensions, performance relief and other relief permitted under Article 9; and

2. Subject to Sections 9.1.1, 9.2.1 and 18.4.3 and 19.10, Developer may exercise any other rights and remedies available under this Agreement or available at Law.

18.4.2.2 Subject to Section 18.4.3 and except as specifically provided otherwise in this Agreement (including Sections 9.2.1 and 19.10), each right and remedy of Developer shall be cumulative and shall be in addition to every other right or remedy provided by this Agreement or now or hereafter existing under Law, and the exercise or beginning of the exercise by Developer of any one or more of any of such rights or remedies shall not preclude the simultaneous or later exercise by Developer of any or all other such rights or remedies.

18.4.3 Limitations on Remedies

18.4.3.1 Notwithstanding any other provision of the Contract Documents and except as provided in Section 18.4.3.2, in no event shall the Department be liable to Developer for punitive damages or special, indirect or incidental consequential damages, whether arising out of a breach of this Agreement, the Lease or any other Contract Document by the Department, tort (including negligence) or any other theory of liability, and Developer releases the Department from any such liability.

18.4.3.2 The foregoing limitation on the Department's liability for damages shall not apply to or limit Developer's right of recovery respecting the following:

1. Losses (including defense costs) to the extent covered or which would have been covered by insurance required to be carried by Department pursuant to Section 16.1.6 or for which the Department has self-insured;

2. Losses arising out of fraud, criminal conduct, intentional misconduct, recklessness or bad faith on the part of the Department;

3. Losses arising out of Department Releases of Hazardous Materials;

4. Amounts the Department may owe or be obligated to reimburse to Developer under the express provisions of the Contract Documents; or

5. Interest, late charges, fees, transaction fees and charges, penalties and similar charges that the Contract Documents expressly state are due from the Department to Developer.

18.4.3.3 The measure of compensation available to Developer as set forth in this Agreement for an event of termination shall constitute the sole and exclusive monetary relief and damages available to Developer arising out of or relating to such event; and Developer irrevocably waives and releases any right to any other or additional damages or compensation. No award of compensation or damages shall be duplicative.

ARTICLE 19. TERMINATION

19.1 Termination for Convenience

19.1.1 The Department may terminate this Agreement and the Lease in whole if the Department determines, in its sole discretion, that a termination is in the Department's best interest (a "**Termination for Convenience**"). The Department will deliver to Developer a written Notice of Termination for Convenience specifying the election to terminate and its effective date. Termination of this Agreement and the Lease shall not relieve Developer or any Guarantor or Surety of its obligation for any claims arising from the Work performed prior to such termination.

19.1.2 In the event of a Termination for Convenience, the Department shall pay compensation to Developer (or to the Collateral Agent as provided in the Direct Agreement) in an amount equal to either (i) the Backward Looking Termination for Convenience Amount, or (ii) the Forward Looking Termination for Convenience Amount, as selected by Developer in Appendix 2-J. Any Dispute arising out of the determination of such compensation shall be resolved according to the Dispute Resolution Procedures.

19.1.3 The Backward Looking Termination for Convenience Amount shall be calculated as follows (calculated at the Early Termination Date and without duplicative-counting):

1. The Project Debt Termination Amount; plus

2. An amount which, upon the date of payment by the Department, is added to all Distributions described in clause (a) of the definition thereof actually paid to Equity Members or their Affiliates on or before the date of payment by the Department, gives an internal rate of return up to the date of payment on Committed Investment described in clause (a) of the definition thereof (taking into account the timing of such Distributions and Committed Investment), equal to the Equity IRR; plus

3. Redundancy Payments for employees of Developer that have been or will be reasonably incurred by Developer as a direct result of termination of this Agreement; plus

4. Subject to Section 18.4.3, any Losses that have been incurred and will be incurred by Developer as a direct result of termination of this Agreement arising out of the termination of contracts with Contractors, including reasonable and documented out-of-pocket costs to demobilize, but only to the extent that (a) such Losses are incurred in connection with the Project and in respect of the provision of services or the completion of work required to be provided by Developer, (b) such Losses are incurred under arrangements and/or agreements that are consistent with terms that have been entered into in the ordinary course of business and on reasonable

commercial terms, and (c) Developer and the relevant Contractors have each used reasonable efforts to mitigate the Losses;

Minus the sum of subsections (5) and (6) below

5. All amounts standing to the credit of any bank account held by or on behalf of Developer as of the Early Termination Date, except in the Handback Requirements Reserve Account (governed by Section 5.10.3.3); and

6. The portion of any previous payments to Developer that compensated Developer for Extra Work Costs and Delay Costs accruing after the Early Termination Date and attributable to Relief Events that occurred prior to termination.

19.1.4 The Forward Looking Termination for Convenience Amount shall be calculated as follows (calculated at the Early Termination Date and without duplicative-counting):

1. The Project Debt Termination Amount; plus

2. The amount of all Distributions described in clause (a) of the definition thereof to Equity Members or their Affiliates anticipated in the Financial Model to be paid between the Early Termination Date until the date of expiration of the Term, each amount discounted back at the Equity IRR from the date on which it is shown to be payable in the Financial Model to the Early Termination Date; plus

3. Redundancy Payments for employees of Developer that have been or will be reasonably incurred by Developer as a direct result of termination of this Agreement; plus

4. Subject to Section 18.4.3, any Losses that have been incurred and will be incurred by Developer as a direct result of termination of this Agreement arising out of the termination of contracts with Contractors, including reasonable and documented out-of-pocket costs to demobilize, but only to the extent that (a) such Losses are incurred in connection with the Project and in respect of the provision of services or the completion of work required to be provided by Developer, (b) such Losses are incurred under arrangements and/or agreements that are consistent with terms that have been entered into in the ordinary course of business and on reasonable commercial terms, and (c) Developer and the relevant Contractors have each used its reasonable efforts to mitigate the Losses;

Minus the sum of subsections (5) and (6) below

5. All amounts standing to the credit of any bank account held by or on behalf of Developer as of the Early Termination Date, except in the Handback Requirements Reserve Account (governed by Section 5.10.3.3); and

6. The portion of any previous payments to Developer that compensated Developer for Extra Work Costs and Delay Costs accruing after the Early Termination Date and attributable to Relief Events that occurred prior to

termination.

19.2 Termination for Failure of Financial Close

19.2.1 The Department may terminate this Agreement without fault or penalty if Financial Close does not occur by the Financial Close Deadline and such failure is directly attributable to the contingency set forth in Section 15.2.7.1. The Department shall notify Developer within ten days after the Financial Close Deadline whether it elects to waive such contingency or elects to terminate. In the absence of such notice, it shall be assumed that the Department has elected to terminate. Developer or the Department may terminate this Agreement without fault or penalty if Financial Close does not occur by the Financial Close Deadline and such failure is directly attributable to **[if preferred proposer is selected on the basis of an Alternative Financial Proposal –** the contingency set forth in Sections 15.2.7.2**] [if preferred proposer is selected on the basis of a Primary Financial Proposal –** any of the contingencies set forth in Sections 15.2.7.2, 15.2.7.3 and 15.2.7.4**]**. In either case, however, notice of termination shall obligate the Department and Developer to engage in good faith negotiations for a minimum period of 30 days before such termination is effective. Termination shall take effect at the end of such 30-day period unless the Parties otherwise agree in writing. In the event of such a termination:

19.2.1.1 All the Contract Documents shall be deemed rescinded;

19.2.1.2 The Department and Developer shall take all actions specified to occur on or about the Termination Date set forth in Section 19.6; and

19.2.1.3 Developer will be entitled to compensation calculated as follows:

1. The lesser of (a) Developer's documented, actual, reasonable external costs incurred, without mark-up by Developer for overhead or profit, for the satisfaction of conditions precedent to issuance of NTP 1 specifically related to Design Work and for the preparation of Design Documents between the Effective Date and the date of delivery of the notice of termination, or (b) $18,000,000; plus

2. The amount of the stipend set forth in the RFP; plus

3. The lesser of (a) Developer's documented, actual, reasonable external costs incurred for (i) the work necessary to achieve Financial Close and to satisfy the conditions precedent to issuance of NTP 1 not specifically related to Design Work and (ii) the O&M Work performed after issuance of NTP 2, or (b) $3,000,000.

19.2.1.4 For purposes of Section 19.2.1.3, "external costs" means only those costs that are payable for work or services performed between the Effective Date and the Termination Date by Contractors that are not Equity Members or Affiliates. "External costs" expressly excludes costs of work and services performed by, and the overhead costs of, Developer, Equity Members and Affiliates.

19.2.1.5 If the failure to achieve Financial Close is directly attributable to the contingency set forth in Section 15.2.7.2, then the Department and Developer hereby agree and acknowledge that (a) such compensation shall be in consideration for those

services performed by Developer until the Termination Date, and (b) the Department is authorized, independently of the authority under Streets and Highways Code Section 143, to contract and pay for such services pursuant to Government Code Section 14131.

19.2.2 If Developer fails to achieve Financial Close by the Financial Close Deadline and such failure is not directly attributable to any of the contingencies set forth in Section 15.2.7, then the following terms and conditions shall apply.

19.2.2.1 The Department shall have the right to terminate this Agreement upon five days' prior written notice to Developer, without need for Warning Notice or any other notice and without any additional cure period, unless Developer achieves Financial Close in accordance with the conditions set forth in Section 15.2.5 within such five-day period.

19.2.2.2 In the event of such termination, Developer shall be liable for and pay to the Department liquidated damages for such failure in the amount of the Financial Close Security. Such liquidated damages shall constitute the Department's sole right to damages on account of such failure.

19.2.2.3 Upon or after the effective date of termination, the Department shall be entitled to collect the liquidated damages owing under Section 19.2.2 through a draw on or forfeiture of the Financial Close Security, as applicable, without prior notice to or demand upon Developer for such liquidated damages.

19.2.2.4 Developer acknowledges that the time period the Department has provided to Developer to achieve Financial Close is ample and reasonable, and that such liquidated damages are reasonable in order to compensate the Department for damages it will incur as a result of the lost opportunity to the Department represented by the Contract Documents. Such damages include the harm from the difficulty, and substantial additional expense, to the Department, to procure and deliver, operate and maintain the Project through other means, loss of or substantial delay in use, enjoyment and benefit of the Project by the general public, and injury to the credibility and reputation of the Department's transportation improvement program, with policy makers, other Governmental Entities and the general public who depend on and expect availability of service. Developer further acknowledges that these damages are incapable of accurate measurement because of, among other things, the unique nature of the Project and the unavailability of a substitute for it.

19.3 Termination for Extended Relief Events

19.3.1 Notice of Conditional Election to Terminate

Either Party may deliver to the other Party written notice of its conditional election to terminate this Agreement and the Lease based on Relief Events (other than a Department Default, which is governed by Section 19.5.1) if:

19.3.1.1 One or more of the following have occurred:

1. One or more Relief Events occur before the end of the Construction Period and the resulting Relief Event Delays exceed 270 days in the aggregate, except that in the case of a Relief Event under clause (o) of the definition thereof (court order prohibits prosecution of any portion of the Work), the Department may elect to deliver written notice of its conditional election to

terminate if the resulting Relief Event Delay exceeds 180 days, even if such date arrives before 270 days of aggregate Relief Event Delays;

2. A Permitted Construction Closure affecting all or substantially all of the Traffic Lanes during the Construction Period persists for a consecutive period of 270 days or more; or

3. (a) A Permitted Closure affecting all or substantially all of the Traffic Lanes persists for a consecutive period of 270 days or more;

and

19.3.1.2 Developer could not have mitigated or cured such result through the exercise of diligent efforts; and

19.3.1.3 The written notice is delivered after such result has occurred, and such result is continuing at the time of delivery of the written notice; and

19.3.1.4 The written notice sets forth in reasonable detail the Relief Event, Permitted Construction Closure or Permitted Closure, as applicable, a description of the direct result and its duration, and the notifying Party's intent to terminate this Agreement.

19.3.1.5 Notwithstanding the foregoing, if following the occurrence of any Relief Event that results in damage or partial destruction of the Project:

1. The conditions listed in Sections 19.3.1.1 through 19.3.1.4 are satisfied;

2. Insurance proceeds are available to fund work required to remedy the effects of the Relief Event; and

3. The Parties agree to a restoration plan in respect of such work required to remedy the effect of the Relief Event;

then the Parties agree that neither of them shall have the right to elect to terminate this Agreement or the Lease pursuant to this Section 19.3.1.

19.3.2 Developer Options Upon Department Notice

If the Department gives written notice of conditional election to terminate pursuant to Section 19.3.1, Developer shall have the option either (a) to accept such notice or (b) to continue this Agreement and the Lease in effect by delivering to the Department written notice of Developer's choice not later than 30 days after the Department delivers its notice. If Developer does not deliver such written notice within such 30-day period, then it shall be conclusively deemed to have accepted the Department's election to terminate this Agreement and the Lease, whereupon termination shall take effect. If Developer delivers timely written notice choosing to continue this Agreement and the Lease in effect, then:

19.3.2.1 Except as provided in Article 9 and Article 10, the Department shall have no obligation to compensate Developer for any other costs of restoration and repair, for any loss of Availability Payments or for any other Extra Work Costs or Delay Costs arising out of the Relief Event, Permitted Construction Closure or Permitted Closure, as applicable;

19.3.2.2 If the Relief Event occurs prior to the Final Acceptance Date and results in a Relief Event Delay, Developer shall be entitled to an extension of the applicable Completion Deadlines in accordance with the Contract Documents; and

19.3.2.3 This Agreement and the Lease shall continue in full force and effect and the Department's election to terminate shall be deemed withdrawn.

19.3.3 Department Options Upon Developer Notice

If Developer gives written notice of conditional election to terminate pursuant to Section 19.3.1, including an estimate (with supporting documentation) of the compensation that would be paid or reimbursed to Developer under Section 19.3.3.1, the Department shall have the option either: (a) to accept such notice, or (b) to continue this Agreement and the Lease in effect, provided that the Department in its reasonable discretion determines that the Project can be completed or re-opened, as applicable, on a commercially reasonable basis, in each case by delivering to Developer written notice of the Department's choice not later than 30 days after Developer delivers its notice. If the Department does not deliver such written notice within such 30-day period, then it shall be conclusively deemed to have accepted Developer's election to terminate this Agreement and the Lease, whereupon termination shall take effect. If the Department delivers timely written notice choosing to continue this Agreement and the Lease in effect, then the following provisions shall apply.

19.3.3.1 The Department shall be obligated to pay or reimburse Developer an amount equal to (without duplicative counting):

1. Only as to Relief Events under clause 1 of Section 19.3.1.1, the Extra Work Costs to repair and restore any physical damage or destruction to the Project and Delay Costs, if any, directly caused by the Relief Event which are incurred after the date Developer delivers its written notice of conditional election to terminate; plus

2. Compensation calculated and paid in accordance with Section 9.2, modified as follows:

   (a) If Developer delivers its written notice of conditional election to terminate prior to Substantial Completion, then: the 270 day limitation in Section 9.2.2.4 shall not apply; or

   (b) If Developer delivers its written notice of conditional election to terminate after Substantial Completion due to a Permitted Closure affecting all or substantially all of the Traffic Lanes caused by a Relief Event under clause (a) or (n) of the definition thereof, then beginning on the 271st day and continuing for as long as such Permitted Closure persists, the adjustment to the Maximum Availability Payment under Section 9.2.4.3 shall in no event cause the prorated Availability Payments to fall below the lesser of: (i) the prorated amounts of debt service (except the repayment of principal scheduled to be funded by the Milestone Payment which has been delayed by a Relief Event Delay) and operations and maintenance expenses scheduled to be paid as shown in the Financial Model for the time periods during which such Closure persists after the initial 270 days; or (ii) the actual prorated amounts of debt service (except

the repayment of principal scheduled to be funded by the Milestone Payment which has been delayed by a Relief Event Delay) and operations and maintenance expenses actually incurred (provided that Developer uses reasonable commercial efforts to mitigate such costs) during the time period during which such Permitted Closure persists after the initial 270 days. Notwithstanding the foregoing, in no event shall the calculations in this clause (b) of Section 19.3.3.1.2 exceed the prorated Availability Payment which would have been earned if such Permitted Closure had not persisted for more than 270 days;

minus

3. The sum of (a) the greater of (i) the proceeds of insurance (including casualty insurance and business interruption insurance) that is required to be carried pursuant to Section 16.1 and provides coverage to pay, reimburse or provide for any of the foregoing costs and losses or (ii) the proceeds of insurance (including casualty insurance and business interruption insurance) that is actually carried by or insuring Developer under policies solely with respect to the Project and the Work, regardless of whether required to be carried pursuant to Section 16.1, and that provides coverage to pay, reimburse or provide for any of the foregoing costs and losses, and (b) the foregoing costs and losses that Developer is deemed to have self-insured pursuant to Section 16.1.4.4.

19.3.3.2 Developer's remedies and other relief from performance obligations under Section 9.2 shall continue to apply to the Relief Event until the damages produced by such Relief Event are compensated as provided in this Agreement and the restoration works are completed.

19.3.3.3 This Agreement and the Lease shall continue in full force and effect and Developer's election to terminate shall not take effect.

19.3.4 No Waiver

No election by Developer under Section 19.3.2 or by the Department under Section 19.3.3 to keep this Agreement and the Lease in effect shall prejudice or waive the Department's right to thereafter give a written notice of conditional election to terminate with respect to the same or any other Relief Event.

19.3.5 Concurrent Notices

If the Department and Developer deliver concurrent written notices of conditional election to terminate, Developer's notice shall prevail. Notices shall be deemed to be concurrent if each Party sends its written notice before actually receiving the written notice from the other Party. Knowledge of the other Party's written notice obtained prior to actual receipt of the notice shall have no effect on determining whether concurrent notice has occurred.

19.3.6 Termination Compensation for Extended Relief Events and Closures

19.3.6.1 If either Party accepts the other Party's conditional election to terminate, then this Agreement and the Lease shall be deemed terminated on an Early

Termination Date that is 60 days after the date of acceptance of the conditional election to terminate; and Developer will be entitled to compensation calculated as follows (calculated at the Early Termination Date and without double-counting):

1. The Project Debt Termination Amount; plus

2. Amounts paid by the Equity Members or their Affiliates in the form of Committed Investment described in clause (a) of the definition thereof up until the Early Termination Date, plus a rate of return on such payments from the date paid until the Early Termination Date equal to 5% per annum, less any amounts actually received by the Equity Members or their Affiliates from Developer as Distributions described in clause (a) of the definition thereof, provided if the amounts calculated pursuant to this subsection (2) are less than zero, then, for purposes of the calculation of the termination amount, they shall be deemed to be zero; plus

3. Redundancy Payments for employees of Developer that have been or will be reasonably incurred by Developer as a direct result of termination of this Agreement; plus

4. Subject to Section 18.4.3, any Losses that have been or will be incurred by Developer as a direct result of termination of this Agreement arising out of the termination of contracts with Contractors, including reasonable and documented out-of-pocket costs to demobilize, but only to the extent that (a) such Losses are incurred in connection with the Project and in respect of the provision of services or the completion of work required to be provided, (b) such Losses are incurred under arrangements and/or agreements that are consistent with terms that have been entered into in the ordinary course of business and on reasonable commercial terms and (c) Developer and the relevant Contractor have each used its reasonable efforts to mitigate the Losses;

Minus the sum of subsections (5) and (6) below

5. All amounts standing to the credit of any bank account held by or on behalf of Developer as of the Early Termination Date, except in the Handback Requirements Reserve Account (governed by Section 5.10.3.3); and

6. The portion of any previous payments to Developer that compensated Developer for Extra Work Costs and Delay Costs accruing after the Early Termination Date and attributable to Relief Events that occurred prior to termination.

19.3.6.2 Any Dispute arising out of the determination of such compensation shall be resolved according to the Dispute Resolution Procedures.

19.3.6.3 If the termination is directly attributable to the contingency set forth in clause (o) of the definition of Relief Event (court order), then the Department and Developer hereby agree and acknowledge that (a) such compensation shall be in consideration for those services performed by Developer until the Termination Date, and (b) the Department is authorized, independently of the authority under Streets and Highways

Code Section 143, to contract and pay for such services pursuant to Government Code Section 14131.

19.4 Termination for Developer Default

19.4.1 Developer Defaults Triggering Department Termination Rights

Developer agrees, acknowledges and stipulates that any of the Developer Defaults listed in this Section 19.4.1 would result in material and substantial harm to the Department's rights and interests under this Agreement and therefore constitute a material Developer Default justifying termination if not cured within the applicable cure period, if any. After expiration of the applicable cure period (if any) provided to Developer under this Agreement, the following Developer Defaults (each a "**Default Termination Event**") shall, subject to the provisions of the Direct Agreement, entitle the Department, at its sole election, to terminate this Agreement and the Lease, effective immediately upon delivery of written notice of termination to Developer and the Collateral Agent under the Security Documents as required by the Direct Agreement:

19.4.1.1 There occurs a Developer Default under Section 18.1.1.12 or 18.1.1.13;

19.4.1.2 There occurs a Developer Default under Section 18.1.1.9, 18.1.1.14, 18.1.1.15, or 18.1.1.16(a) or (b); or

19.4.1.3 There occurs any other Developer Default for which the Department issues a Warning Notice under Section 18.2.8 and such Developer Default is material and is not fully and completely cured within the applicable cure period, if any, set forth in Section 18.1.2 or available to Lenders under the Direct Agreement.

19.4.2 Compensation to Developer

If the Department issues a notice of termination of this Agreement and the Lease due to a Default Termination Event, the Department or Developer, as applicable, will be entitled to compensation in the applicable amount set forth below.

19.4.2.1 If this Agreement is terminated by the Department pursuant to Section 19.4.1 before Financial Close, Developer shall be liable for and pay to the Department liquidated damages for such Default Termination Event in the amount of the Financial Close Security. Such liquidated damages shall constitute the Department's sole right to damages on account of such Default Termination Event.

19.4.2.2 If this Agreement and the Lease are terminated by the Department pursuant to Section 19.4.1 (but excluding a termination due to a Default Termination Event under Section 19.4.1.1) after Financial Close and before the Substantial Completion Date, and if and only if no Lender has duly exercised an option to obtain New Agreements from the Department pursuant to a Direct Agreement, then the Department shall pay compensation to Developer in an amount calculated as follows (calculated at the Early Termination Date and without duplicative-counting):

1. The lesser of (a) Project Adjusted Costs, or (b) the costs as shown in the Schedule of Values (as such Schedule of Values may be adjusted for Relief Events) multiplied by the percentage of the D&C Work completed as of the

Early Termination Date, less the Milestone Payment Amount actually paid by the Department (if any), less all adjustments to and deductions from such Milestone Payment (if any) made pursuant to Sections 4.9.4.3 and 4.9.4.5, and excluding (i) interest and other financing costs, (ii) professional and advisory fees, (iii) Developer overhead and administrative expenses and (iv) Redundancy Payments and other demobilization costs; plus

2. The lesser of (a) the actual costs incurred in performing the O&M During Construction, or (b) the costs of O&M During Construction shown in Tables A and B of Appendix 2-G(3) (as such O&M Work costs may be adjusted for Relief Events) multiplied by the percentage of the O&M During Construction completed as of the Early Termination Date, excluding from both items (a) and (b) (i) interest and other financing costs, (ii) professional and advisory fees, (iii) Developer overhead and administrative expenses, and (iv) Redundancy Payments and other demobilization costs; plus

3. The amount of any compensation accrued under Section 9.2.3 but not yet paid;

minus the sum of subsections (4) and (5) below:

4. Subject to Section 18.2.13, the amount of any Losses recoverable by the Department under the Contract Documents resulting from the Developer Default, including the damages described in Section 18.2.5.1; and

5. Any amounts previously paid (excluding the Milestone Payment and Availability Payments) by the Department to Developer under the Agreement.

However, if the foregoing amount is more than 80% of the Project Debt Termination Amount, Developer will be entitled to compensation of 80% of the Project Debt Termination Amount minus the amount under subsections (5) above, except there shall not be subtracted the portion of previous payments by the Department to Developer that Developer applied to reduce the principal amount of the Project Debt.

19.4.2.3 If this Agreement and the Lease are terminated by the Department pursuant to Section 19.4.1 (but excluding a termination due to a Default Termination Event under Section 19.4.1.1) on or after the Substantial Completion Date, and if and only if no Lender has duly exercised an option to obtain New Agreements from the Department pursuant to a Direct Agreement, then the Department shall pay compensation to Developer (calculated at the Early Termination Date and without duplicative-counting) equal to the lower of:

1. The amount calculated as follows:

   (a) The amount of the Project Adjusted Costs; plus

   (b) The actual costs incurred in performing the O&M During Construction, excluding (i) interest and other financing costs, (ii) professional and advisory fees, and (iii) Developer overhead and administrative expenses; minus

(c) The value of the accrued amortization of the Project Adjusted Costs and actual costs incurred in performing the O&M During Construction, provided that (i) accrued amortization will be determined by calculating, using a straight line amortization schedule over 30 years, the total amount accrued through the Early Termination Date, and (ii) in no event shall such amount be greater than the amount of Project Adjusted Costs and costs of O&M During Construction less accrued amortization on the Early Termination Date as shown in the Financial Model; minus

(d) Subject to Section 18.2.13, the amount of any Losses recoverable by the Department under the Contract Documents resulting from the Developer Default, including the damages described in Section 18.2.5.1; minus

(e) Any amounts previously paid (excluding the Milestone Payment and Availability Payments) by the Department to Developer under the Agreement.; and

2. The amount calculated as follows:

(a) 80% of the Project Debt Termination Amount; minus

(b) Any amounts previously paid (excluding the Milestone Payment and Availability Payments) by the Department to Developer under the Agreement, except there shall not be subtracted the portion of previous payments by the Department to Developer that Developer applied to reduce the principal amount of the Project Debt.

19.4.2.4 If this Agreement and the Lease are terminated due to a Default Termination Event under Section 19.4.1.1 where the debtor is Developer, or if this Agreement and the Lease are terminated due to a Default Termination Event and any Lender duly exercises an option to obtain New Agreements from the Department pursuant to a Direct Agreement, then no compensation shall be due to Developer.

19.4.3 Any Dispute arising out of the determination of such compensation shall be resolved according to the Dispute Resolution Procedures.

19.4.4 If this Agreement and the Lease are terminated for grounds which are later determined not to justify a termination by the Department pursuant to Section 19.4.1, such termination shall be deemed to constitute a termination for convenience pursuant to Section 19.1.1, and Developer's remedy shall be as set forth in Section 19.1.2.

19.5 Termination for Department Default or Suspension of Work; Termination by Court Ruling

19.5.1 Termination for Department Default

19.5.1.1 In the event of a material Department Default under Section 18.3.1.1 or 18.3.1.3 that remains uncured following notice and expiration of the applicable cure

period under Section 18.3.2, Developer shall have the right to terminate this Agreement and the Lease, effective immediately upon delivery of written notice of termination to the Department.

19.5.1.2 In the event of such termination, the Department shall pay compensation to Developer in an amount equal to the amount described in Section 19.1.2. Any Dispute arising out of the determination of such compensation shall be resolved according to the Dispute Resolution Procedures. If, however, it is determined after Developer terminates this Agreement that Developer lacked the right to terminate due to material Department Default, then such termination shall be treated as a termination due to material Developer Default and Section 19.4.2 shall govern the measure of the Termination Compensation.

19.5.2 Termination for Suspension of Work

If the Department issues a suspension order under Section 18.2.7.2 that is a Department-Caused Delay and that suspends all or any material portion of the Work on all or any material portion of the Project for a consecutive period of 270 days or more, Developer shall have the right to terminate this Agreement and the Lease, effective immediately upon delivery of written notice of termination to the Department, provided that such suspension is not the result of the negligence, willful misconduct, or breach of applicable Law, Governmental Approval or contract by any Developer-Related Entity. In the event of such termination, Developer will be entitled to compensation equal to the amount described in Section 19.1.2. Any Dispute arising out of the determination of such compensation shall be resolved according to the Dispute Resolution Procedures.

19.5.3 Termination by Court Ruling

19.5.3.1 Termination by Court Ruling means, and becomes effective upon, (a) issuance of a final order by a court of competent jurisdiction to the effect that this Agreement is void, voidable, and/or unenforceable or impossible to perform in its entirety for reasons beyond the reasonable control of Developer, or (b) issuance of a final order by a court of competent jurisdiction upholding the binding effect on Developer of a Change in Law that causes impossibility of performance of a fundamental obligation by Developer or the Department under the Contract Documents or impossibility of exercising a fundamental right of Developer or the Department under the Contract Documents.

19.5.3.2 For the purpose of this Section 19.5.3, a final order by a court of competent jurisdiction means (a) a trial court judgment or order is entered and no appeal is filed within the appeal period available at Law or (b) an appellate court judgment or order is entered that does not remand the case to the lower court for further proceedings, regardless of whether such judgment or order is appealed.

19.5.3.3 The final court order shall be treated as the notice of termination of this Agreement and the Lease. In the event of such termination, Developer will be entitled to compensation in an amount equal to (a) the amount described in Section 19.2.1.3 if termination occurs before Financial Close, or (b) the amount described in Section 19.3.6 if termination occurs after Financial Close. Any Dispute arising out of the determination of such compensation shall be resolved according to the Dispute Resolution Procedures.

19.5.3.4 The Department and Developer hereby agree and acknowledge that such compensation shall be in consideration for those services performed by Developer

until the Termination Date, and that the Department is authorized, independently of the authority under Streets and Highways Code Section 143, to contract and pay for such services pursuant to Government Code Section 14131.

19.6 Termination Procedures and Duties

Upon expiration of the Term or any earlier termination of this Agreement for any reason, the provisions of this Section 19.6 shall apply. Except as expressly provided otherwise in this Section 19.6, Developer shall timely comply with such provisions independently of, and without regard to, the timing for determining, adjusting, settling and paying any amounts due Developer or the Department on account of termination. If Developer fails to timely comply with the provisions of this Section 19.6, Department shall have the right thereupon to enter and take possession and control of the Project and Project Right of Way by summary proceeding available to landlords under applicable Law.

19.6.1 Transition Plan

19.6.1.1 Not later than 90 days prior to expiration of the Term, or, if applicable, within three days after receipt of a notice of termination, Developer shall meet and confer with the Department for the purpose of reviewing and updating the transition plan required under Section 4, 1 of Division II for the orderly transition of Work, demobilization and transfer of control of the Project and Project Right of Way to the Department. The Parties shall use diligent efforts to complete the updating of such transition plan within 15 days after the date Developer receives the notice of termination.

19.6.1.2 The transition plan shall be in form and substance reasonably acceptable to the Department and shall include and be consistent with the other provisions and procedures set forth in this Section 19.6 and the Technical Requirements, all of which procedures Developer shall immediately follow, regardless of any delay in preparation or acceptance of the interim or final transition plan. The transition plan shall include an estimate of costs and expenses to be incurred by both Parties in connection with implementation of the transition plan.

19.6.2 Relinquishment and Possession of the Project

19.6.2.1 On the Termination Date, Developer shall: (a) execute, acknowledge and deliver to the Department a quitclaim deed, in form and substance acceptable to the Department, acting reasonably, quitclaiming all of Developer's right, title, interest and estate in and to the Project and Project Right of Way, and (b) execute and deliver a written termination of the Lease.

19.6.2.2 On the Termination Date, or as soon thereafter as is possible as provided in the transition plan, Developer shall relinquish and surrender full control and possession of the Project and Project Right of Way to the Department or the Department's Authorized Representative, and shall cause all Persons claiming under or through Developer to do likewise, in at least the condition required by the Handback Requirements.

19.6.2.3 On the later of the Termination Date or the date Developer relinquishes full control and possession as provided in the transition plan, the Department shall assume responsibility, at its expense (subject to the right to recover damages under this Agreement), for the Project and the Project Right of Way.

19.6.3 Continuance or Termination of Key Contracts Prior to Work Completion

19.6.3.1 If as of the Termination Date Developer has not completed the Work, in whole or in part, the Department shall elect, by written notice to Developer, to continue in effect the relevant Key Contracts or to require their termination. The Department may elect to keep certain Key Contracts in effect and require termination of other Key Contracts. If the Department elects to continue any Key Contracts, then Developer shall execute and deliver to the Department a written assignment, in form and substance acceptable to the Department, acting reasonably, of all Developer's right, title and interest in and to such Key Contracts, and the Department shall assume in writing Developer's obligations thereunder that arise from and after the Termination Date.

19.6.3.2 If the Department elects to require termination of any Key Contracts, then Developer shall:

1. Unless the Department has entered into a New Agreement with a Lender or its Substituted Entity, take such steps as are necessary to terminate the relevant Key Contracts, including notifying each Key Contractor that its Key Contract is being terminated and that each of them is to immediately stop work and stop and cancel orders for materials, services or facilities unless otherwise authorized in writing by the Department;

2. Immediately demobilize and secure in a safe manner Staging Areas and any other staging, lay down and storage areas used by such Key Contractors for the Project to the reasonable satisfaction of the Department, and remove all debris and waste materials (including Hazardous Materials and Undesirable Materials that are in the process of removal) except as otherwise approved by the Department in writing;

3. Take such other actions as are necessary or appropriate to mitigate further cost;

4. Subject to the Department's reasonable prior written approval, settle all outstanding liabilities and all claims arising out of such Key Contracts;

5. As a condition to Developer receiving all payments required to be paid by the Department under Article 19 and pursuant to the requirements of the transition plan, cause each of the Key Contractors to execute and deliver to the Department a written assignment, in form and substance acceptable to the Department, acting reasonably, of all of their right, title and interest in and to all warranties, to the extent assignable, claims and causes of action held by each of them against subcontractors and other third parties in connection with the Project or the Work, to the extent the Project or the Work is adversely affected by any subcontractor or other third-party breach of warranty, contract or other legal obligation; and

6. As a condition to Developer receiving all payments required to be paid by the Department under Article 19 and pursuant to the requirements of the transition plan, carry out such other directions as the Department may give for termination of the Work in accordance with the transition plan.

19.6.4 Other Close-Out Activities

19.6.4.1 Within 30 days after notice of termination is delivered or no later than 30 days prior to the natural expiration of the Term (as applicable), Developer shall provide the Department with a true and complete list of all materials, goods, machinery, equipment, parts, supplies and other property in inventory or storage (whether held by Developer or any Person on behalf of or for the account of Developer) for use in or respecting the Work or the Project, or on order or previously completed but not yet delivered from Suppliers for use in or respecting the Work or the Project. On or about the Termination Date, Developer shall transfer to the Department title to, all such materials, goods, machinery, equipment, parts, supplies and other property through bills of sale or other documents of title as directed by the Department, and deliver possession of all such items to the Department or the Department's Authorized Representative.

19.6.4.2 Developer shall take all action that may be necessary, or that the Department may direct, for the protection and preservation of the Project, the Work and such materials, goods, machinery, equipment, parts, supplies and other property.

19.6.4.3 On the Termination Date, Developer shall transfer to the Department the amount in the Handback Requirements Reserve Account due the Department in accordance with Section 5.10.3.3.

19.6.4.4 Within 15 days after notice of termination is delivered or no later than 30 days prior to the natural expiration of the Term (as applicable), Developer shall deliver to the Department a draft inventory of the data and documents identified in Section 19.6.4.5 and a draft plan to transfer such data and documents to the Department.

19.6.4.5 On or about the Termination Date, Developer shall execute and deliver to the Department the following, together with an executed bill of sale or other written instrument, in form and substance acceptable to the Department, acting reasonably, assigning and transferring to the Department the following:

1. All completed or partially completed drawings (including plans, elevations, sections, details and diagrams), specifications, designs, Design Documents, As-Built Record Plans, surveys, and other documents and information pertaining to the Work;

2. All samples, borings, boring logs, subsurface data and similar data and information relating to the Project or Project Right of Way;

3. All books, records, reports, test reports, studies and other documents of a similar nature relating to the Work, the Project or the Project Right of Way;

4. All data and information relating to the use of the Project by the traveling public, including all studies, reports, projections, estimates and other market research or analysis relating to use of the Project by the traveling public; and

5. All other work product and Intellectual Property used or as specifically developed by Developer or any Affiliate relating to the Work, the Project or the Project Right of Way, except for Proprietary Intellectual Property of Developer or an Affiliate held in an Intellectual Property Escrow.

19.6.4.6 Within 90 days after the Termination Date, the Parties shall adjust and prorate costs of operation and maintenance of the Project, including utility service costs and deposits, as of the Termination Date. If the Parties do not have complete or accurate information by such date, they shall make the adjustment and proration using a good faith estimate, and thereafter promptly readjust when the complete and accurate information is obtained. The Parties acknowledge that certain adjustments or readjustments may depend on receipt of bills, invoices or other information from a third party, and that the third party may delay in providing such information. Any readjustment necessary only because of error in calculation and not due to lack of complete and accurate information shall be irrevocably waived, unless the Party seeking readjustment delivers written request for such readjustment to the other Party not later than 180 days following the Termination Date.

19.6.4.7 On or about the Termination Date, Developer shall execute and deliver to the Department a written assignment, in form and substance acceptable to the Department, acting reasonably, of all Developer's right, title and interest in and to any escrows or similar arrangements for the protection of Intellectual Property, source code or source code documentation of others (to the extent permitted by such third parties) used for or relating to the Project or the Work.

19.6.4.8 On or about the Termination Date, Developer shall execute and deliver to the Department a written assignment, in form and substance acceptable to the Department, acting reasonably, of all Developer's right, title and interest in and to all warranties, to the extent assignable, claims and causes of action held by Developer against third parties in connection with the Project or the Work which are not to be pursued by Developer as provided in the final transition plan, including claims under casualty and business interruption insurance.

19.6.4.9 If termination occurs prior to Financial Close, then promptly after Developer takes all the actions required of it on or about the Termination Date under this Section 19.6, the Department shall return to Developer the original of the Financial Close Security, unless termination is pursuant to Section 19.2.2 or 19.4.

19.6.4.10 Developer shall otherwise assist the Department in such manner as the Department may require prior to and for a reasonable period following the Termination Date to ensure the orderly transition of the Project, and shall, if appropriate and if requested by the Department, take all steps as may be necessary to enforce the provisions of the Key Contracts pertaining to the surrender of the Project.

19.6.4.11 For a period of four years following the Termination Date, Developer shall maintain a secure archive copy of all electronic data transferred to the Department.

19.7 No Separate Terminations of Agreement and Lease

If for any reason this Agreement is terminated before the Lease is delivered from escrow, then all right to obtain the Lease shall concurrently cease and terminate. Department and Developer further agree and expressly intend that after the Lease is granted neither this Agreement nor the Lease shall continue in full force and effect without the other. Accordingly, (a) any termination of this Agreement according to its terms shall also automatically constitute a termination of the Lease, even if the notice of termination fails to declare a termination of the Lease, and (b) any termination of the Lease shall also automatically constitute a termination of this Agreement, even if the notice of termination fails to declare a termination of this Agreement.

19.8 Effect of Expiration or Earlier Termination

19.8.1 Cessation of Developer's Property Interest

19.8.1.1 Expiration of the Term shall automatically cause, as of the expiration date, the complete reversion to the Department, and cessation, of the Developer's Interest, at no charge to the Department, but subject to Sections 5.10.3.3 and 19.6.4.5 and without prejudice to any Claim of liability pursuant to Section 19.8.3.

19.8.1.2 Early termination of this Agreement and the Lease shall automatically cause, as of the Termination Date, the complete reversion to the Department, and cessation, of the Developer's Interest, except for its rights under Section 5.10.3.3 and its right to Termination Compensation.

19.8.1.3 Automatically upon either such reversion and cessation of Developer' Interest, the Project and the Project Right of Way shall be and remain free and clear of any lien, encumbrance or other claim of record created, permitted or suffered by Developer or anyone claiming by, through or under Developer, including the liens, pledges, assignments, collateral assignments, security interests and encumbrances of any and all Financing Documents. In order to confirm the foregoing, at the Department's request, Developer shall promptly obtain and deliver to the Department reconveyances, releases and discharges of all Security Documents, executed by the Lenders in proper form for recording or filing (as appropriate), but no such reconveyances, releases and discharges shall be necessary to the effectiveness of the foregoing.

19.8.2 Contracts and Agreements

Regardless of the Department's prior actual or constructive knowledge thereof, no contract or agreement to which Developer is a party as of the Termination Date shall bind the Department, unless the Department elects to assume such contract or agreement in writing. Except in the case of the Department's express written assumption, no such contract or agreement shall entitle the contracting party to continue performance of work or services respecting the Project following Developer's relinquishment to the Department of possession and control of the Project, or to any claim, legal or equitable, against the Department.

19.8.3 Liability After Expiration or Termination

No expiration or earlier termination of this Agreement or the Lease shall excuse either Party from any liability arising out of any default as provided in this Agreement or the Lease that occurred prior to termination. Notwithstanding the foregoing, any termination of this Agreement shall automatically extinguish any Claim of Developer to compensation for Extra Work Costs and Delay Costs accruing after the Early Termination Date attributable to Relief Events that occurred prior to termination.

19.8.4 Final Release

19.8.5 Subject to Sections 19.6.4.5 and 19.8.3, upon expiration of the Term, the Department shall be forever released and discharged from any and all Claims, causes of action, suits, demands and Losses, known or unknown, suspected or unsuspected, that Developer may have against the Department arising out of or relating to this Agreement or the Lease or expiration thereof, the other Contract Documents, or the Project. Developer shall execute and

deliver to the Department all such releases and discharges as the Department may reasonably require to confirm the foregoing, but no such written release and discharge shall be necessary to give effect to the foregoing release.

19.8.6 Subject to Sections 19.6.4.5 and 19.8.3, if this Agreement is earlier terminated for any reason, then the Department's payment to Developer of the amounts required under this Agreement (if any) shall constitute full and final satisfaction of, and upon payment the Department shall be forever released and discharged from, any and all claims, causes of action, suits, demands and Losses, known or unknown, suspected or unsuspected, that Developer may have against the Department arising out of or relating to this Agreement or the Lease or termination thereof, the other Contract Documents, or the Project. Upon such payment, Developer shall execute and deliver to the Department all such releases and discharges as the Department may reasonably require to confirm the foregoing, but no such written release and discharge shall be necessary to give effect to the foregoing satisfaction and release.

19.9 Payment of Termination Compensation

19.9.1 Termination Compensation for termination pursuant to Section 16.1.2.13 shall be due and payable by the Department in immediately available funds within 90 days after (a) the Department gives its written notice of its election to terminate; (b) the Collateral Agent provides the Department with a written statement as to the Project Debt Termination Amount, with documentation reasonably required by the Department to support such statement; and (c) Developer provides the Department with a written statement as to the amounts payable and deductible pursuant to subsections (2) through (6) of Section 19.3.6, with documentation reasonably required by the Department to support such statement and a certification that such amounts are true and correct.

19.9.2 Termination Compensation for termination pursuant to Section 19.1, 19.5.1 or 19.5.2 shall be due and payable by the Department in immediately available funds within 90 days after (a) the Department or Developer, as the case may be, gives its written notice of its election to terminate; (b) the Collateral Agent provides the Department with a written statement as to the Project Debt Termination Amount (if applicable), with documentation reasonably required by the Department to support such statement; and (c) Developer provides the Department with a written statement as to the amounts payable and deductible pursuant to subsections (2) through (6) of Sections 19.1.3 or 19.1.4, as applicable, with documentation reasonably required by the Department to support such statement and a certification that such amounts are true and correct.

19.9.3 Termination Compensation for termination pursuant to Section 19.2.1 shall be due and payable by the Department in immediately available funds within 90 days after (a) the Department and Developer cease good faith negotiations under Section 19.2.1, and (b) Developer provides the Department with a written invoice, in form required by the Department, for the amounts described in subsections (1) and (3) of Section 19.2.1.3 together with documentation required by the Department to support such invoice and a certification that such invoice is true and correct.

19.9.4 Termination Compensation for termination pursuant to Section 19.3 shall be due and payable by the Department in immediately available funds within 90 days after (a) either Party has accepted the other Party's election to terminate this Agreement, (b) the time period for the other Party to elect not to terminate this Agreement has expired and the party has not made the election; (c) the Collateral Agent provides the Department with a written statement as to the

Project Debt Termination Amount, with documentation reasonably required by the Department to support such statement; and (d) Developer provides the Department with a written statement as to the amounts payable and deductible pursuant to subsections (2) through (6) of Section 19.3.6, with documentation reasonably required by the Department sufficient to support such statement and a certification that such amounts are true and correct.

19.9.5 Termination Compensation for termination pursuant to Section 19.4 shall be due and payable by the Department in immediately available funds within 90 days after (a) the Department has given written notice of its election to terminate this Agreement, (b) Developer provides the Department with a written statement as to the amounts described in subsections (1) through (3) of Section 19.4.2.2 or subsection (1) of Section 19.4.2.3, as the case may be, with written documentation sufficient to support such statement and a certification that such amounts are true and correct. If, however, at such time any Lender continues to have the option to obtain New Agreements from the Department pursuant to Section 13 of the Direct Agreement, then the termination compensation shall not be due and payable until 30 days after the earlier of (i) the date the Department receives written waivers of all such options from all applicable Lenders or (ii) all such options expire without exercise.

19.9.6 Termination Compensation for termination pursuant to Section 19.5.3 shall be due and payable by the Department in immediately available funds within 90 days after (a) the Termination by Court Ruling becomes effective, (b) the Collateral Agent provides the Department with a written statement as to the Project Debt Termination Amount, with documentation reasonably required by the Department to support such statement; and (c) Developer provides the Department with a written statement as to the amounts payable and deductible pursuant to subsections (2) through (6) of Section 19.3.6, with documentation reasonably required by the Department sufficient to support such statement and a certification that such amounts are true and correct; provided that if Section 19.5.3(a) applies then clauses (b) and (c) above are replaced with clause (b) of Section 19.9.3.

19.9.7 If as of the date the Department tenders payment the Parties have not agreed upon the amount of Termination Compensation due, then:

19.9.7.1 The Department shall proceed to make payment to Developer of the undisputed portion of the Termination Compensation;

19.9.7.2 Within 30 days after receiving such payment Developer shall deliver to the Department written notice of the additional amount of Termination Compensation that Developer in good faith determines is still owing (the “disputed portion”); and

19.9.7.3 The Department shall pay the disputed portion of the Termination Compensation to Developer in immediately available funds within 30 days after the disputed portion is agreed to by the Parties or otherwise determined pursuant to Article 24, as the case may be, and shall pay interest thereon commencing 45 Days after the Early Termination Date until paid at the applicable Late Payment Rate.

19.9.8 If the Department does not pay the undisputed portion, or the finally determined amount of the disputed portion, of the Termination Compensation on the date due, whether due to lack of appropriations, lack of available funds or other reason, then it shall thereafter continue to pay to Developer 85% of the Quarterly Payments that would have been due absent termination until such portion of the Termination Compensation, together with interest thereon at the applicable Late Payment Rate, is paid in full. Such Quarterly Payments shall be credited

toward the Termination Compensation.

19.10 Exclusive Termination Rights

This Article 19 together with Sections 16.1.2.13, 18.2.1 and 18.4.1 and the express provisions on termination set forth in the Lease contain the entire and exclusive provisions and rights of the Department and Developer regarding termination of this Agreement and the Lease, and any and all other rights to terminate under Law are hereby waived to the maximum extent permitted by Law.

ARTICLE 20. RESERVED RIGHTS

20.1 General

Without prejudice to Developer's rights to additional compensation, Financial Close Deadline or Completion Deadline extensions, performance relief and other relief permitted under Article 9, Developer's rights and interests in the Project and Project Right of Way are and shall remain specifically limited only to such real and personal property rights and interests that are necessary and required for developing, permitting, designing, financing, constructing, installing, equipping, operating, maintaining, repairing, reconstructing, rehabilitating, restoring, renewing or replacing the Project. Developer's rights and interests specifically exclude any and all Airspace and any and all improvements and personal property above, on or below the surface of the Project Right of Way which are not necessary and required for such purposes.

20.2 Reserved Business Opportunities

20.2.1 The Department reserves to itself, and Developer hereby relinquishes, all right and opportunity to develop and pursue anywhere in the world entrepreneurial, commercial and business activities that are ancillary or collateral to the use, enjoyment and operation of the Project and Project Right of Way as provided in this Agreement and the Lease ("**Business Opportunities**"). Unless expressly authorized by the Department in its sole discretion, Developer will not grant permission for any Person to use or occupy the Project for any ancillary or collateral purpose, whether through a sublease or otherwise. The foregoing reservation in no way precludes Developer or its Affiliates and Contractors from (a) carrying out its financial plan reflected in its Financial Model, (b) arranging and consummating Refinancings, (c) creating and using brochures and other marketing material that include descriptions, presentations and images of the Project or the Work for the purpose of promoting Developer's business of developing, financing and operating transportation projects, or (d) competing on any request or solicitation for proposals or bids issued by the Department in connection with Business Opportunities.

20.2.2 The Business Opportunities reserved to the Department include all the following:

20.2.2.1 All rights to finance, design, construct, operate and maintain any transit, passenger or freight rail facility or other mode of transportation in the Airspace or Project Right of Way, and to grant to others such rights;

20.2.2.2 All rights to finance, design, construct, operate and maintain Project Enhancements in the Airspace or Project Right of Way, and to grant others such rights;

20.2.2.3 Unless Developer has exercised its right under Section 11.6 to collect tolls and user fees for the right to use the Project and satisfied all conditions precedent under Section 11.6, all rights to toll, collect tolls and perform other tolling activities in the Airspace or Project Right of Way, and to grant to others such rights;

20.2.2.4 All rights to install, use, lease, grant indefeasible rights of use, sell and derive revenues from electrical and fiber optic conduit, cable, capacity and associated equipment or other telecommunications equipment and capacity, existing over, on, under or adjacent to any portion of the Project Right of Way, except for the capacity of any such improvement installed by Developer that is necessary for and devoted exclusively to the operation of the Project;

20.2.2.5 All rights to use, sell and derive revenues from traffic data and other data generated from the operation of the Project;

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

20.2.2.7 All ownership, possession and control of, and all rights to develop, use, lease, sell and derive revenues from, carbon credits or other environmental benefits generated by or arising out of the development, use, operation or maintenance of the Project;

20.2.2.8 All rights to install, use and derive information, services, capabilities and revenues from intelligent transportation systems and applications, except installation and use of any such systems and applications by Developer as required solely for operation of the Project. For avoidance of doubt, if Developer installs any such systems or applications, all use and capacity thereof not necessary for operation of the Project is reserved to, and shall be the sole property of, the Department;

20.2.2.9 All rights to market, distribute, sell and derive revenues from any goods, products or merchandise depicting, utilizing or exploiting any name, image, logo, caricature or other representation, in any form or medium, of the Department or the Project;

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

20.2.2.11 Any other commercial or noncommercial development or use of the Airspace or Project Right of Way for other than operation of the Project.

20.2.3 If the development, use or operation of the Airspace or Project Right of Way by the Department or anyone claiming under or through the Department, or if the development or operation of a Business Opportunity in the Airspace or Project Right of Way, materially prevents Developer from performing its fundamental obligations under this Agreement or materially adversely affects its costs, Developer shall be entitled to submit a Claim for compensation, Completion Deadline extensions, performance relief or other relief as permitted under Article 9.

Prior to deciding whether to pursue or implement a Business Opportunity, the Department may require Developer to provide analysis of the impacts thereof on Developer's costs and schedule.

20.2.4 Developer may propose Business Opportunities, including expected financial and other terms, for Department consideration. In the event Developer desires to utilize, develop or take advantage of any Business Opportunity, it may submit to the Department its ideas and proposals for development thereof. If and only if the Department, in its sole discretion, is interested in the proposed Business Opportunity, the Department and Developer shall thereafter negotiate cooperatively and in good faith to formulate a structure, terms and conditions and written agreement(s) for such Business Opportunity and its use and development, which may include a development agreement, concession or franchise agreement, license agreement, royalty agreement, joint venture, or other form of lawful joint enterprise or lawful joint participation concerning the Business Opportunity. Nothing herein, however, creates any legally binding obligation on the part of the Department or Developer to continue such negotiations or to enter into any structure or agreement for development or use of a Business Opportunity. Neither the submission to the Department of a proposed Business Opportunity or related ideas, concepts, financial models or other information, nor the Department's election not to engage in the proposed Business Opportunity with Developer, shall preclude the Department from thereafter pursuing such Business Opportunity or using, adapting and disclosing the ideas, concepts, financial models or other information presented, provided the Department pursues it through a competitive procurement process in which Developer is afforded a fair and non-discriminatory opportunity to compete.

20.2.5 In the event a Developer Default concerns a breach of the provisions of this Section 20.2, in addition to any other remedies, the Department shall be entitled to Developer's disgorgement of all profits from the prohibited activity, together with interest thereon at the maximum rate permitted by Law, and to sole title to and ownership of the prohibited assets and improvements and revenues derived therefrom.

20.2.6 For the avoidance of doubt, Developer is prohibited by Law and this Article 20 from placing or permitting any outdoor advertising within the boundaries of the Project Right of Way. Also for the avoidance of doubt, Developer shall not state or infer in any marketing or advertising materials or broadcast that the Department recommends the products or services of Developer.

ARTICLE 21. RECORDS; INTELLECTUAL PROPERTY

21.1 Maintenance and Inspection of Records

21.1.1 Developer shall keep and maintain in the jurisdiction of District 4 of the Department or other location approved by the Department in writing in its sole discretion all books, records and documents relating to the Project, Project Right of Way, or Work, including copies of all original documents delivered to the Department. Developer shall keep and maintain such books, records and documents in accordance with applicable provisions of the Contract Documents and in accordance with Best Management Practice. Developer shall notify the Department where such records and documents are kept.

21.1.2 Developer shall make all its books, records and documents available for inspection by the Department and the Department's Authorized Representatives and legal counsel at Developer's offices in the jurisdiction of District 4 of the Department or other location

approved by the Department in writing in its sole discretion, or pursuant to each Intellectual Property Escrow, at all times during normal business hours, without charge. Developer shall provide, or make available for review pursuant to each Intellectual Property Escrow, to the Department copies thereof as and when reasonably requested by the Department, without charge. The Department may conduct any such inspection upon 48 hours' prior written notice, or unannounced and without prior notice where there is good faith suspicion of fraud or criminal activity. The right of inspection includes the right to make extracts and take notes.

21.1.3 Developer shall retain records and documents for a minimum of five years after the date the record or document is generated; provided that if the Contract Documents specify any different time period for retention of particular records, such time period shall control. Notwithstanding the foregoing, all records which relate to Claims and Disputes being processed or actions brought under the Dispute Resolution Procedures shall be retained and made available until any later date that such Claims, Disputes and actions are finally resolved.

21.2 Audits

21.2.1 The Department and its designated representatives shall have such rights to review and audit Developer and its Contractors, and to review, copy and audit on an Open Book Basis their respective books and records and supporting documentation pertaining to the Project, Work or Contract Documents, as the Department deems necessary for purposes of verifying compliance with the Contract Documents and applicable Law. Without limiting the foregoing, the Department shall have the right to audit Developer's Project Management Plan and compliance therewith, including the right to inspect Work and/or activities and to verify the accuracy and adequacy of the Project Management Plan and its component parts, plans and other documentation. Developer agrees to maintain such books and records pertaining to the period up to Final Acceptance for a minimum of four years after the Final Acceptance Date, and for all other books and records for a minimum of four years after the end of the Fiscal Year in which they were created, unless a longer period of records retention is stipulated or necessary resolve a Claim or Dispute. Developer shall allow auditor(s) access to such books and records during normal business hours and to allow interviews of any employer who might reasonably have information related to such books and records. Further, Developer agrees to include a similar right of the State to audit records and interview staff in any subcontract related to performance of the Contract Documents. (GC 8546.7, PCC 10115 et seq., CCR Title 2, Section 1896). Developer shall comply with the above and be aware of the penalties for fraud and for obstruction of investigation set forth in PCC § 10115-10.

21.2.2 All Claims filed against the Department shall be subject to audit at any time following the filing of the notice of potential Claim. The audit may be performed by employees of the Department or by an auditor under contract with the Department. No notice is required before commencing any audit before 60 days after the expiration of the term of this Agreement. Thereafter, the Department shall provide 20 days notice to Developer, any Contractors or their respective agents before commencing an audit. Developer, Contractors or their agents shall provide adequate facilities, acceptable to the Department, for the audit during normal business hours. Developer, Contractors and their agents shall cooperate with the auditors. Failure of Developer, Contractors or their agents to maintain and retain sufficient books and records to allow the auditors to verify all or a portion of the Claim or to permit the auditor access to such books and records on an Open Book Basis shall constitute a waiver of the Claim and shall bar any recovery thereunder. At a minimum, the auditors shall have available to them the following documents relating to the Claim:

21.2.2.1 Daily time sheets and supervisor's daily reports;

21.2.2.2 Union agreements;

21.2.2.3 Insurance, welfare, and benefits records;

21.2.2.4 Payroll registers;

21.2.2.5 Earnings records;

21.2.2.6 Payroll tax forms;

21.2.2.7 Material invoices and requisitions;

21.2.2.8 Material cost distribution work sheet;

21.2.2.9 Equipment records (list of company equipment, rates, etc.);

21.2.2.10 Contractors' (including Suppliers') invoices;

21.2.2.11 Contractors' and agents' payment certificates;

21.2.2.12 Canceled checks (payroll and Suppliers);

21.2.2.13 Job cost report;

21.2.2.14 Job payroll ledger;

21.2.2.15 General ledger;

21.2.2.16 Cash disbursements journal;

21.2.2.17 All documents that relate to each and every Claim together with all documents that support the amount of damages as to each Claim; and

21.2.2.18 Work sheets used to prepare the Claim establishing (a) the cost components of the Claim, including labor, benefits and insurance, materials, equipment, Contractors, all documents that establish the time periods, individuals involved, the hours for the individuals, and the rates for the individuals, and (b) the lost revenue components of the Claim.

21.2.3 Full compliance by Developer with the provisions of this Section 21.2 is a contractual condition precedent to Developer's right to seek relief on a Claim under this Agreement.

21.2.4 Any rights of the federal government and any agency thereof, including FHWA, to review and audit Developer, its Contractors and their respective books and records are set forth in the Federal Requirements and applicable Law. Without limiting the foregoing, the U.S. Comptroller General and his/her representatives shall have the authority: to (a) examine any records of Developer or any of its Contractors, or any State or local government agency administering this Agreement, that directly pertain to and involve transactions relating to this Agreement or any Contract; and (b) interview any officer or employee of Developer or any of its

Contractors, or of any State or local government agency administering this Agreement, regarding such transactions.

21.2.5 The Department's audit rights include the right to observe the business operations of Developer and its Contractors to confirm the accuracy of books and records and compliance with the Project Management Plan.

21.2.6 Developer shall include in the Project Management Plan internal procedures to facilitate review and audit by the Department and, if applicable, FHWA.

21.2.7 Developer represents and warrants the completeness and accuracy of all information it or its agents provides in connection with Department audits, and shall cause all Contractors to warrant the completeness and accuracy of all information such Contractors provide in connection with Department audits.

21.2.8 Developer's internal and third-party quality and compliance auditing responsibilities shall be set forth in the Project Management Plan.

21.2.9 Nothing in the Contract Documents shall in any way limit the constitutional and statutory powers, duties and rights of any elected or appointed State official, including the independent rights of the State Auditor, in carrying out his or her legal authority.

21.3 Public Records Act

21.3.1 Developer shall comply with the Public Record Act and the Department's guidelines established pursuant to California Government Code Section 6253.4 dealing with access to public records. Further, Developer acknowledges and agrees that, except as provided by applicable Law, all Submittals, records, documents, drawings, plans, specifications and other materials in the Department's possession, including materials submitted by Developer, are subject to the provisions of the Public Records Act. If Developer believes information or materials submitted to the Department constitute trade secrets, proprietary information or other information exempt from disclosure, Developer shall be solely responsible for specifically and conspicuously designating that information by placing "CONFIDENTIAL" in the center header of each such page affected, as it determines to be appropriate and placing the materials in a folder or binder clearly labeled with the citation to the specific Law that exempts the material from disclosure under the Public Records Act. Any specific proprietary information, trade secrets or confidential commercial and financial information shall be clearly identified as such, and shall be accompanied by a concise statement of reasons supporting the claim including the specific Law that authorizes the confidentiality and the specific Law that exempts the material from disclosure under the Public Records Act. Nothing contained in this provision shall modify or amend requirements and obligations imposed on the Department by the Public Records Act or other applicable Law, and the provisions of the Public Records Act or other Laws shall control in the event of a conflict between the procedures described above and the applicable Law. Developer is advised to contact legal counsel concerning such Law and its application to Developer.

21.3.2 If the Department receives a request for public disclosure of materials marked "CONFIDENTIAL," the Department will use reasonable efforts to notify Developer of the request and give Developer an opportunity to assert, in writing and at its sole expense, a claimed exception under the Public Records Act or other applicable Law within the time period specified in the notice issued by the Department and allowed under the Public Records Act. Under no

circumstances, however, will the Department be responsible or liable to Developer or any other Person for the disclosure of any such labeled materials, whether the disclosure is required by Law, or court order, or occurs through inadvertence, mistake or negligence on the part of the Department or its officers, employees, contractors or consultants.

21.3.3 If any legal action is filed against the Department to enforce the provisions of the Public Records Act in relation to confidential information, the Department agrees to promptly notify Developer of such action, and the Department's sole involvement in such proceedings or litigation will be as the custodian retaining the material until otherwise ordered by a court or such other authority having jurisdiction with respect thereto, and Developer shall be fully responsible for otherwise prosecuting or defending any action concerning the materials at its sole cost and risk; provided, however, that the Department reserves the right, in its sole discretion, to intervene or participate in the litigation in such manner as it deems necessary or desirable. Developer shall pay and reimburse the Department within 30 days after receipt of written demand and reasonable supporting documentation for all costs and fees, including attorneys' fees and costs, the Department incurs in connection with any litigation, proceeding or request for disclosure.

21.4 Intellectual Property

21.4.1 Subject to Section 21.5, Developer shall deliver copies of all Proprietary Intellectual Property owned by Developer which it uses in providing the Work to the Department. All Intellectual Property contained in the Work, including Proprietary Intellectual Property and Technology Enhancements, owned by Developer or its Affiliates or Contractors on the Effective Date or developed by Developer or its Affiliates or Contractors during the Term shall remain exclusively the property of Developer or its Affiliates or Contractors that supply the same, notwithstanding any delivery of copies thereof to the Department or any other provision contained in this Agreement.

21.4.2 The Department shall have and is hereby granted a nonexclusive, transferable, irrevocable, fully paid up right and license to use, reproduce, modify, adapt and disclose, and sublicense others to use, reproduce, modify, adapt and disclose, the Proprietary Intellectual Property owned by Developer or its Affiliates or Contractors, including with respect to Technology Enhancements, source code and source code documentation, solely in connection with the Project; provided that the Department shall have the right to exercise such license only at the following times:

21.4.2.1 From and after the expiration or earlier termination of the Term for any reason whatsoever;

21.4.2.2 During any time that the Department is exercising its step-in rights pursuant to Section 18.2.4; and

21.4.2.3 During any time that Developer has been replaced.

21.4.3 The Department shall have no right to sell any Proprietary Intellectual Property of Developer or to use, reproduce, modify, adapt and disclose, or allow any party to use, reproduce, modify, adapt and disclose, any such Proprietary Intellectual Property for any other purpose other than as set forth in Section 21.4.2.

21.4.4 The right to transfer the license is limited to any Governmental Entity that

succeeds to the power and authority of the Department generally or with respect to the Project.

21.4.5 The right to sublicense is limited to State or regional Governmental Entities that are or become involved in the Project and to the concessionaires, contractors, subcontractors, employees, attorneys, consultants and agents that are retained by or on behalf of the Department or any such State or regional Governmental Entity in connection with the Project. All such sublicenses shall be subject to Section 21.4.6.

21.4.6 Subject to Section 21.3, the Department shall:

21.4.6.1 Not disclose any Proprietary Intellectual Property of Developer to any Person other than authorized transferees and sublicensees who agree to be bound by any confidentiality obligations of the Department relating thereto;

21.4.6.2 Enter into a commercially reasonable confidentiality agreement if requested by Developer with respect to the licensed Proprietary Intellectual Property; and

21.4.6.3 Include, or where applicable require such other State or regional Governmental Entity to include, in the contract with the sublicensee its covenant to employ sound business practices no less diligent than those used for its own confidential information, and no less diligent than required by commercially reasonable standards of confidentiality, to protect all Proprietary Intellectual Property of Developer and other materials provided under the sublicense against disclosure to third parties not in receipt of a sublicense, and to use the sublicense only for the permitted purposes.

21.4.7 Notwithstanding any contrary provision of this Agreement, in no event shall the Department or any of its directors, officers, employees, consultants or agents be liable to Developer, any Affiliate or any Contractor for any damages, including loss of profit, arising out of breach of the duty of confidentiality set forth in Section 21.4.6 if such breach is not the result of gross negligence or intentional misconduct. Developer hereby irrevocably waives all claims to any such damages.

21.4.8 Developer shall continue to have a full and complete right to use any and all duplicates or other originals of its Proprietary Intellectual Property in any manner it chooses.

21.4.9 With respect to any Proprietary Intellectual Property, including with respect to Technology Enhancements, source code and source code documentation owned by a Person other than Developer, including any Affiliate, Developer shall obtain from such owner, concurrently with execution of any contract, subcontract or purchase order with such owner or with the first use or adaptation of the Proprietary Intellectual Property in connection with the Project, both for Developer and the Department, nonexclusive, transferable, irrevocable, royalty-free licenses to use, reproduce, modify, adapt and disclose such Proprietary Intellectual Property solely in connection with the Project, of at least identical scope, purpose, duration and applicability as the license granted under Section 21.4.2. The limitations on sale, transfer, sublicensing and disclosure by the Department set forth in Section 21.4.3 through Section 21.4.6 shall also apply to the Department's licenses in relation to such Proprietary Intellectual Property. Developer shall also either cause to be delivered to the Department copies of such Proprietary Intellectual Property or obtain from such owner consent to have the relevant Proprietary Intellectual Property deposited into an Intellectual Property Escrow pursuant to the provisions of Section 21.5. The foregoing requirements shall not apply, however, to mass-marketed software products (sometimes referred to as "shrink wrap software") owned by such a

Person where such a license and copies cannot be extended to the Department using commercially reasonable efforts.

21.4.10 All Background Intellectual Property shall be owned by Developer or its Affiliates or Contractors, as applicable. The Department shall have and is hereby granted a non-exclusive license to use the Background Intellectual Property owned by Developer or its Affiliates or Contractors, but only in connection with the Project and such license shall only be provided during the Term.

21.5 Intellectual Property Escrows

21.5.1 The Department and Developer acknowledge that Developer and/or Contractors that supply software, software source code or source code documentation, including related modifications, updates, revisions, replacements and upgrades, may not wish to deliver this Proprietary Intellectual Property as specifically required by Section 21.4.1 directly to the Department, as public disclosure could deprive Developer and/or Contractors of commercial value. Developer further acknowledges that the Department nevertheless must be ensured access to such Proprietary Intellectual Property at any time, and must be assured that such Proprietary Intellectual Property to be delivered to the Department pursuant to Section 21.4.1 is released and delivered to the Department in either of the following circumstances:

21.5.1.1 In the case of such Proprietary Intellectual Property owned by Developer or any Affiliate, (a) this Agreement is terminated for Developer Default, (b) a business failure (including voluntary or involuntary bankruptcy or insolvency) of Developer occurs, (c) Developer is dissolved or liquidated, or (d) Developer fails or ceases to provide services as necessary to permit continued use of such Proprietary Intellectual Property to be delivered to the Department pursuant to Section 21.4.1 pursuant to the license or any sublicense thereof.

21.5.1.2 In the case of such Proprietary Intellectual Property owned by a Contractor (other than a Contractor that is an Affiliate), this Agreement is terminated for any reason (including Department Default) and either (a) a business failure (including voluntary or involuntary bankruptcy) of the Contractor occurs or (b) the Contractor is dissolved or liquidated or otherwise ceases to engage in the ordinary course of the business of manufacturing, supplying, maintaining and servicing such Proprietary Intellectual Property to be delivered to the Department pursuant to Section 21.4.1 that is the subject of a license under Section 21.4.

21.5.2 In lieu of delivering such Proprietary Intellectual Property directly to the Department as required in Section 21.4.1, Developer may, from time to time, elect to deposit it with a neutral depository. In such event, the Department and Developer shall: (a) mutually select one or more escrow companies or other neutral depositories (each an "**Escrow Agent**") engaged in the business of receiving and maintaining escrows of software source code and situated in a convenient location; (b) establish one or more escrows (each an "**Intellectual Property Escrow**") with the Escrow Agent on terms and conditions reasonably acceptable to the Department and Developer for the deposit, retention, upkeep and release of such Proprietary Intellectual Property; (c) determine a date for Developer's deposit of such Proprietary Intellectual Property into the Intellectual Property Escrow; and (d) determine a process for releasing from escrow such Proprietary Intellectual Property. Provisions for access and release to the Department shall be consistent with Section 21.5.1. Related documentation shall include all relevant commentary, explanations and instructions to compile source code, and all modifications, additions or substitutions made to such source code and related

documentation. Intellectual Property Escrows also may include Affiliates and Contractors as parties and may include deposit of their own software, software source code and source code documentation, and their related modifications, updates, revisions, replacements and upgrades. The Department shall not be responsible for the fees and costs of the Escrow Agent.

21.5.3 If the Department elects, in its sole discretion, not to be a signatory party to the escrow agreement establishing an Intellectual Property Escrow, then the Department shall be a named, intended third party beneficiary of the escrow agreement and the subject Intellectual Property Escrow with direct rights of enforcement against Developer and the Escrow Agent. Each escrow agreement shall provide that neither Developer nor the Escrow Agent shall have any right to amend or supplement it, or waive any provision thereof, without the Department's prior written approval in its sole discretion.

21.5.4 Intellectual Property Escrows shall provide rights of access and inspection to the Department and its designees at any time, subject to terms and conditions reasonably necessary to protect the confidentiality and proprietary nature of the contents of the Intellectual Property Escrows.

21.5.5 The Intellectual Property Escrows shall survive expiration or earlier termination of this Agreement regardless of the reason.

21.6 Escrow of Financial Model and Financial Modeling Data

21.6.1 The Department and Developer shall, within ten Days after the Effective Date, diligently examine and inventory all the Financial Modeling Data to verify that the Financial Modeling Data is authentic, legible, and in accordance with the terms of this Section 21.6. The examination (whether done before or after the Effective Date) does not include review, nor does it constitute approval, of proposed construction methods, estimating assumptions, or interpretation of or compliance with the Contract. Documents. The examination does not alter any conditions or terms of the Contract Documents.

21.6.2 Promptly after the Parties complete the examination, the Department and Developer shall seal and jointly deposit the Original Financial Model and initial Financial Modeling Data in an escrow at a commercial business located in San Francisco, California mutually acceptable to the Parties.

21.6.3 The Parties shall follow comparable procedures for examining, verifying and depositing into escrow the Financial Model, Financial Model Updates and all Financial Modeling Data developed after the Effective Date. The Parties shall complete the examination and make the deposit within ten Days after the Financial Model, Financial Model Update or such Financial Modeling Data are developed.

21.6.4 If the Department elects, in its sole discretion, not to be a signatory party to the escrow agreement establishing such escrow, then the Department shall be a named, intended third party beneficiary of the escrow agreement and the subject escrow with direct rights of enforcement against Developer and the escrow agent. The escrow agreement shall provide that neither Developer nor the escrow agent shall have any right to amend or supplement it, or waive any provision thereof, without the Department's prior written approval in its sole discretion. Provisions in the escrow agreement for access to the escrowed materials shall be consistent with this Section 21.6.

21.6.5 Developer shall submit the Original Financial Model, Financial Model, Financial Model Updates and Financial Modeling Data into escrow as a paper copy and on electronic storage media in a sealed container, clearly marked with Developer's name, date of submittal, project contract number and the words, "Financial Model and Financial Modeling Data for Escrow." Developer certifies that the material initially submitted to the escrow constitutes the Original Financial Model and all the Financial Modeling Data included in or used in preparation of the Proposal, that Developer has personally examined the contents of the container, and that they are complete. Whenever Developer makes an additional deposit of the Financial Model, a Financial Model Update or Financial Modeling Data to escrow, Developer shall certify to the Department in writing at the time of deposit that (a) the material deposited into the escrow constitutes the true Financial Model or Financial Model Update, and constitutes all the Financial Model Data used in preparation of the Financial Model or Financial Model Update, Claim, Change Proposal or other matter, as the case may be, (b) Developer has personally examined the contents of the container, and (c) they are complete.

21.6.6 The deposit and examination of Contractors' documentation that forms part of the Financial Modeling Data shall be accomplished in the same manner as for Developer's documentation.

21.6.7 Each of the Department and Developer shall have the right to examine, through one or more designated representatives, any and all components of the escrowed material at any time during the escrow agent's normal business hours. The Party scheduling an examination need not have or state a specific reason to examine. Without limiting the foregoing, the Parties recognize that examination of the escrowed material may assist in the negotiation or determination of MAP adjustments, compensation, damages, extension of Completion Deadlines, Developer Change Proposals and Department Changes, or may assist in the potential resolution or settlement of Claims or Disputes. Except as provided below, examinations shall be performed jointly within five days of receipt of a written request to do so by either Party. If either Party fails or refuses to participate in a joint examination at the scheduled time, the Party requesting the examination may proceed with the examination on condition that it is accompanied at all times by an employee of the escrow agent and signs a written certification before departing certifying that the examining Party did not alter the escrowed material, add any materials thereto, or remove any materials therefrom. In addition, if Developer fails or refuses to participate in a joint examination at a scheduled time, such failure or refusal shall be deemed to be a failure by Developer to exhaust administrative claim remedies with respect to the particular Claim or Dispute and a bar to its bringing future legal proceedings upon the Claim or Dispute.

21.6.8 The escrowed material is, and shall remain, the property of Developer or its Contractors.

21.6.9 Either Party may introduce the escrowed material into evidence before the Disputes Review Board and in court proceedings. The Parties shall promptly abide by any request from the Disputes Review Board to receive, review and utilize escrowed material to assist the Disputes Review Board in its recommendations.

21.6.10 The escrow for the Original Financial Model, Financial Model, Financial Model Updates and Financial Modeling Data shall remain in effect throughout the Term, subject to any mutual agreement of the Parties to discard materials therein from time to time.

21.6.11 The Department shall not be responsible for the fees and costs of the

escrow agent for the Original Financial Model, Financial Model, Financial Model Updates and Financial Modeling Data.

21.7 Information Disclosure

Developer shall promptly provide to the California Transportation Commission or the State Legislative Analyst any information or data either of them may request that is in the possession of or reasonably available to any Developer-Related Entity concerning the Project or the Work. The California Transportation Commission and State Legislative Analyst are intended third party beneficiaries of this Section 21.7 with direct rights of enforcement.

ARTICLE 22. FEDERAL REQUIREMENTS

22.1 Compliance with Federal Requirements

Developer shall comply and require its Contractors to comply with all Federal Requirements, including those set forth in Appendix 20 to this Agreement and including compliance with federal Law pertaining to the use of federal-aid funds.

22.2 Cooperation with FHWA

Developer shall cooperate with FHWA in the reasonable exercise of FHWA's duties and responsibilities in connection with the Project.

ARTICLE 23. ASSIGNMENT AND TRANSFER

23.1 Restrictions on Assignment, Subletting and Other Transfers

23.1.1 Developer shall not voluntarily or involuntarily sell, assign, convey, transfer, pledge, mortgage or otherwise encumber Developer's Interest or any portion thereof without the Department's prior written approval, except:

23.1.1.1 To Lenders for security as permitted by this Agreement, provided Developer retains responsibility for the performance of Developer's obligations under the Contract Documents;

23.1.1.2 To any Lender affiliate that is a Substituted Entity in accordance with Section 12.5.4 or to any other Substituted Entity approved by the Department; provided that such Substituted Entity assumes in writing full responsibility for performance of the obligations of Developer under this Agreement, the Lease, the other Contract Documents and the Key Contracts to which Developer is then a party arising from and after the date of assignment; or

23.1.1.3 To any entity in which the organizations signing this Agreement for Developer, or the shareholder(s), general partner(s) or member(s) that exercise management control over such organizations, hold and exercise effective management control and hold at least the applicable percent of equity interest set forth in Section 13.1.

23.1.2 Developer shall not sublease or grant any other special occupancy or use of the Project to any other Person without the Department's prior written approval in its sole discretion.

23.1.3 Any sale, assignment, conveyance, transfer, pledge, mortgage, encumbrance, sublease or grant of other special occupancy or use in violation of this provision shall be null and void *ab initio* and the Department, at its option, may declare any such attempted action to be a material Developer Default. The foregoing shall not prejudice Developer's right to cure a Developer Default under Section 18.1.2.1.

23.2 Standards and Procedures for Department Approval

23.2.1 Where the Department's prior approval is required for a proposed sale, assignment, conveyance, transfer, pledge, mortgage, encumbrance, sublease or grant of other special occupancy or use (collectively an "assignment"), and such assignment is proposed at any time during the period ending six years after the Final Acceptance Date, the Department may withhold or condition its approval in its sole discretion. Any such decision of the Department to withhold approval shall be final, binding and not subject to the Dispute Resolution Procedures.

23.2.2 Thereafter, the Department shall not unreasonably withhold its approval. Among other reasonable factors and considerations, it shall be reasonable for the Department to withhold its approval if:

23.2.2.1 Developer fails to demonstrate to the Department's reasonable satisfaction that the proposed assignee, sublessee, grantee or transferee (collectively the "transferee"), and its proposed contractors (a) have the financial resources, qualifications and experience to timely perform Developer's obligations under the Contract Documents and Key Contracts and (b) are in compliance with the Department's rules, regulations and adopted written policies regarding organizational conflicts of interest;

23.2.2.2 Less than all of Developer's Interest is proposed to be assigned, conveyed, transferred, pledged, mortgaged, encumbered, sublet or granted; or

23.2.2.3 At the time of the proposed assignment, there exists any uncured Developer Default or any event or circumstance that with the lapse of time, the giving of notice or both would constitute a Developer Default, unless the Department receives from the proposed transferee assurances of cure and performance acceptable to the Department in its good faith discretion.

23.2.3 In order to request the Department's approval of a proposed assignment, Developer shall deliver to the Department a Submittal consisting of a request for approval together with (a) a reasonably detailed description of the proposed assignment, (b) such information, evidence and supporting documentation as the Department may request concerning the identity, financial resources, qualifications, experience and potential conflicts of interest of the proposed transferee and its proposed contractors and (c) such evidence of organization and authority, and such incumbency certificates, certificates regarding debarment or suspension, and other certificates, representations and warranties as the Department may request. For proposed assignments governed by Section 23.2.2, the Department will evaluate the identity, financial resources, qualifications, experience and potential conflicts of interest using the same standards and criteria that it is then currently applying, or if there is no current application, then the same standards and criteria it most recently applied, to the evaluation of Persons responding to the Department requests for qualifications for concession or similar agreements for comparable projects and facilities.

23.2.4 If for any reason the Department does not act within 30 days after receiving all required information, or any extension thereof by mutual agreement of the Parties, the proposed assignment shall not be permitted, subject to Developer's right, in the case of a proposed assignment governed by Section 23.2.2, to submit a Dispute for resolution according to the Dispute Resolution Procedures.

23.3 Assignment by the Department

The Department may assign all or any portion of its rights, title and interests in and to the Contract Documents, Payment Bond and Performance Security, guarantees, letters of credit and other security for payment or performance: (a) without Developer's consent, to any other Person that succeeds to the governmental powers and authority of the Department, and (b) to others with the prior written consent of Developer, Developer shall provide such consent if either (i) the sources of funding of the Department's assignee for the Milestone Payment and Availability Payments are at least as adequate and secure as the Department's at the time of the assignment or (ii) the Department's assignee shall have a credit rating equal to or better than the Department's rating at the time of the assignment as measured by a nationally recognized rating agency. Any sale, assignment, conveyance, transfer, pledge, mortgage, encumbrance or grant of other special occupancy or use in violation of this provision shall be null and void *ab initio*.

23.4 Notice and Assumption

23.4.1 Assignments and transfers of Developer's Interest or the Department's interest permitted under this Article 23 or otherwise approved in writing by the Department or Developer, as applicable, shall be effective only upon receipt by the non-assigning Party of written notice of the assignment or transfer and a written instrument executed by the transferee, in form and substance reasonably acceptable to the non-assigning Party, in which the transferee, without condition or reservation, assumes all of Developer's or the Department's (as the case may be) obligations, duties and liabilities under this Agreement, the Lease and the other Contract Documents then in effect and agrees to perform and observe all provisions thereof applicable to Developer or the Department.

23.4.2 Each transferee of Developer's Interests, including any Person who acquires Developer's Interest pursuant to foreclosure, transfer in lieu of foreclosure or similar proceeding, shall take Developer's Interest subject to, and shall be bound by, the Project Management Plan, the Quality Plan, the Key Contracts, the Utility Agreements, the Governmental Approvals, and all agreements between the transferor and Governmental Entities with jurisdiction over the Project or the Work, except to the extent otherwise approved by the Department in writing in its good faith discretion. Except with respect to assignments and transfers in lieu of foreclosure or similar proceeding, the transferor and transferee respecting an assignment of Developer's Interest shall give the Department written notice of the assignment not less than 30 days prior to the effective date thereof.

23.5 Change of Organization or Name

23.5.1 Developer shall not change the legal form of its organization without the prior written approval of the Department, which consent may be granted or withheld in the Department's sole discretion.

23.5.2 If either Party changes its name, such Party agrees to promptly furnish the other Party with written notice of change of name and appropriate supporting documentation.

ARTICLE 24. DISPUTE RESOLUTION PROCEDURES

24.1 General Provisions

24.1.1 The Parties shall use reasonable efforts to resolve any Disputes under this Article 24 in a timely manner.

24.1.2 The following Disputes shall be submitted to the informal dispute resolution process in accordance with Section 24.2: (a) Disputes arising from Construction Claims up to and before Final Acceptance; (b) Disputes arising from non-Construction Claims up to and before Final Acceptance; (c) Disputes arising from Construction Claims after Final Acceptance; and (d) Disputes arising from non-Construction Claims after Final Acceptance.

24.1.3 The following Disputes shall be submitted to the Disputes Review Board ("DRB") in accordance with Section 24.3: (a) Disputes arising from Construction Claims up to and before Final Acceptance; and (b) Disputes arising from Construction Claims after Final Acceptance.

24.1.4 If the Parties are unable to resolve Disputes regarding Construction Claims or non-Construction Claims arising before Final Acceptance in accordance with Article 24, the claiming Party may initiate a single legal action to resolve such Claims after Final Acceptance by filing a civil action in the State Superior Court for the City and County of San Francisco. Neither Party shall have the right to litigate its Construction Claims or non-Construction Claims arising before Final Acceptance in multiple civil actions. Neither Party shall have the right to assert, and each Party hereby waives the right to assert, the statute of limitations as a defense to any such Claims provided such Claims are stated in a complaint in a single civil action filed within 30 days after the Final Acceptance Date and conclusion of all DRB proceedings respecting such Claims.

24.2 Informal Dispute Resolution Process

24.2.1 Prior to the DRB proceeding, in successive order, the Parties must engage in informal dispute resolution to resolve the Dispute by and between the Department's Resident Engineer and the Developer's equivalent manager, the Department's Senior Resident Engineer and the Developer's equivalent manager, and finally the Department's District Director and the Developer's equivalent manager.

24.2.2 The Department's Resident Engineer or the Developer's equivalent manager may initiate the process of informal dispute resolution by providing the other Party with written notice of a Dispute. The written notice shall provide a clear statement of the Dispute, and shall refer to the specific contract provisions that pertain to the Dispute. The notice shall also include a detailed description of the facts and circumstances relating to the Dispute (including the relevant dates, locations, and items of work). Within five days of the receipt of the written notice, the Department's Resident Engineer and the Developer's equivalent manager shall meet and review the Dispute. The Department's Resident Engineer and the Developer's equivalent manager shall attempt to resolve the Dispute within ten days of the initial meeting. If the Dispute is resolved, the Parties shall create and sign a short description of the facts and the resolution that was agreed upon by the Parties.

24.2.3 If the Dispute is not resolved by the tenth day, the Dispute shall be escalated to the Department's Senior Resident Engineer and the Developer's equivalent manager who shall meet and review the Dispute within five days. The Department's Senior Resident Engineer and the Developer's equivalent manager shall attempt to resolve the Dispute within

ten days of their initial meeting. If the Dispute is resolved, the Parties shall create and sign a short description of the facts and the resolution that was agreed upon by the Parties.

24.2.4 If the Dispute is not resolved by the tenth day, the Department's District Director and the Developer's equivalent manager shall meet and review the Dispute within five days. The Department's District Director and the Developer's equivalent manager shall attempt to resolve the Dispute within ten days of the initial meeting. If the Dispute is resolved, the Parties shall create and sign a short description of the facts and the resolution that was agreed upon by the Parties.

24.2.5 If the Dispute is not resolved by the tenth day by the Department's District Director and the Developer's equivalent manager, the Parties shall proceed as otherwise provided herein.

24.3 Dispute Review Board

24.3.1 Prior to any DRB proceeding, the Parties must engage in informal dispute resolution, as provided in Section 24.2, to resolve the Dispute.

24.3.2 The DRB is a three member board established by the Department and Developer to assist in the resolution of Disputes described in Section 24.1.3. The DRB shall remain in effect as a standing board from the date first formed until it concludes all proceedings respecting Disputes arising from Construction Claims up to and before Final Acceptance. The process to convene the DRB shall be initiated by the Department or Developer within ten days after the expiration of the time set forth in Section 24.2.5. The Party initiating the process shall notice the other Party of its intent to convene the DRB.

24.3.3 DRB members shall be knowledgeable in the type of construction and contract documents anticipated by the Agreement and shall have completed training through the Dispute Review Board Foundation.

24.3.4 No DRB member shall have prior direct involvement in the Agreement. No DRB member shall have a financial interest in this Agreement, the Parties, Developer-Related Entities, Affiliates, or legal and business service providers to either Party, at any time within 24 months prior to Financial Close or during the Term.

24.3.5 DRB members shall fully disclose, and continue to make future disclosures relating to, any and all direct or indirect professional or personal relationships with any and all key members and personnel of the Parties.

24.3.6 While both the Department and Developer should consider the DRB's recommendation, it is not binding on either Party.

24.3.7 Developer shall not use or permit use of the DRB for disputes between the Developer and its Contractors or between its Contractors and the Department.

24.3.8 The Parties agree that each DRB member shall act in the capacity of an independent agent and not as an employee of either Party.

24.3.9 No Party shall bear a greater responsibility for damages or personal injury than is normally provided by Federal or State of California Law.

24.3.10 Notwithstanding the provisions of this Agreement that require the Developer to indemnify and hold harmless the Department, the Parties shall jointly indemnify and hold harmless the DRB members from and against all claims, damages, losses, and expenses, including attorney's fees, arising out of and resulting from the findings and recommendations of the DRB.

24.4 Appointment of the DRB

24.4.1 The DRB shall consist of one member selected by the Department and approved by Developer, one member selected by Developer and approved by the Department, and a third member selected by the first two members and approved by both the Department and Developer. The approval of the third DRB nominee is subject to compliance with Sections 24.3.3, 24.3.4 and 24.3.5.

24.4.2 Each of the Department and Developer shall provide the other written notification requesting approval of the name of its DRB nominee along with the DRB nominee's disclosure statement. Disclosure statements shall include a résumé of the DRB nominee's experience and a declaration statement describing past, present, anticipated, and planned relationships with all Parties involved in this Agreement. Objections to DRB nominees shall be based on a specific breach or violation of DRB nominee responsibilities or DRB nominee qualifications. The Department or Developer may object to the other's DRB nominee in the event there is a failure on the part of the DRB nominee in making the required disclosure provided in Sections 24.3.4 and 24.3.5. Objection to such nomination must be made within five days of the written notification of the DRB nominee. If a Party objects to the other's DRB nominee, the nominating Party shall nominate another DRB nominee within five days of such objection.

24.4.3 The two DRB members selected and subsequently approved by the Department and Developer, respectively, shall proceed with the selection of the third DRB member immediately after receiving written notification from both Parties confirming approval of the first two DRB nominees. The two DRB members shall provide their recommendation simultaneously to the Parties within 15 days of their confirmation to the DRB. The third DRB nominee shall provide a disclosure statement to the first two DRB members, the Department, and Developer. The professional experience of the third DRB member shall complement that of the first two DRB members. The third DRB member shall be subject to the mutual approval of the Department and Developer.

24.4.4 If the two DRB members do not agree on the third DRB nominee or if the Department or Developer cannot mutually approve the third DRB nominee, the two DRB members shall submit a list of nominees, comprised of three names from each DRB member, to the Department and Developer for approval.

24.4.5 If the Department and Developer cannot agree on the third DRB member nomination selected from the listed provided under Section 24.4.4, the Department and Developer shall each select three names from the current list of arbitrators certified by the Public Works Contract Arbitration Committee created by Article 7.2 of the State Contract Act. The two DRB members shall then select one of the six names by a blind draw. The selected DRB member shall submit a disclosure in compliance with Sections 24.3.4 and 24.3.5. The selected DRB member shall be appointed as a third DRB member unless Developer or the Department object to the nomination based on a failure to disclose as provided in Sections 24.3.4 and 24.3.5, or failure to comply with Sections 24.3.3, 24.3.4 and 24.4.5, no later than

five days following written notice of such appointment. If there is an objection against the selection of the third DRB member the Parties must repeat the blind draw until a third DRB member is selected and approved by both Parties.

24.4.6 If there is no objection from either Party based on Section 24.3.3, 24.3.4 or 24.3.5, the third DRB member shall become the DRB Chairperson.

24.5 Termination, Replacement of DRB Member

24.5.1 A DRB member may be terminated immediately, by either party, for failing to comply at all times with all required employment or financial disclosure conditions of DRB membership in conformance with the terms of the Agreement, and for violation of Sections 24.3.4 and 24.3.5.

24.5.2 Service of a DRB member may be terminated at any time upon not less than 15 days prior written notice to the other Party, as follows: (a) the Department may unilaterally terminate service of the Department-appointed member; (b) Developer may unilaterally terminate service of the Developer-appointed member; and (c) upon the written recommendation of the Department and Developer appointed members and the mutual written approval of the Parties, the appointed DRB members may remove the third member. Each Party shall document the need for the replacement and substantiate the replacement request in writing to the other Party and DRB members prior to the removal of a DRB member.

24.5.3 A DRB member may resign upon not less than 15 days written notice of resignation to the Department and Developer.

24.5.4 When a member of the DRB is replaced, the replacement member shall be appointed in the same manner as the replaced member was appointed. The appointment of a replacement DRB member will begin promptly upon determination of the need for replacement and shall be completed in a timely manner.

24.6 DRB Scope of Work

24.6.1 The DRB shall fairly and impartially consider Disputes placed before it and provide recommendations to the Parties for resolution of these Disputes. The DRB shall provide recommendations based on the facts related to the Dispute, the Contract Documents, and applicable Laws.

24.6.2 Except for those persons who provide technical services and are directly involved in the Project or who have direct knowledge of the Dispute, only the Department's Resident Engineer, Senior Resident Engineer, and District Director, and the Developer's equivalent managers, may present information at the DRB meeting.

24.6.3 The DRB shall govern the conduct of its business and reporting procedures in accordance with the terms and conditions of this Agreement. The DRB may establish further procedures that conform to the requirements of this Agreement.

24.6.4 The Department will provide conference facilities for DRB meetings at no cost to Developer.

24.6.5 The DRB Chairperson shall schedule DRB meetings and any other DRB

activities.

24.6.6 DRB members shall have no claim against the Department or Developer from any alleged harm arising out of the Parties' discussions and evaluations of the DRB's opinions and recommendations.

24.6.7 DRB members shall refrain, at all times, from expressing opinions on the merits of evidence and statements on matters under Dispute, except in the private sessions of the DRB members. Opinions of DRB members expressed in private sessions shall be kept strictly confidential. Individual DRB members shall not meet with, or discuss Disputes or other issues under the Contract Documents with the individual Parties. Discussions regarding the Project and Disputes among the DRB members and the Parties shall be in the presence of all three members and both Parties. Individual DRB members shall not undertake independent investigations of any kind pertaining to Disputes, except with the knowledge of both Parties and as expressly directed by the DRB Chairperson. No DRB member shall have any *ex parte* communication with any Party or their managers or agents regarding material issues in Dispute. Any such *ex parte* communications with either Party or their managers or agents will result in the immediate removal of the DRB member.

24.7 DRB Meeting Procedures and Recommendations

24.7.1 If the Parties are unable to reach resolution of their Dispute as provided in Section 24.2 and the Dispute is governed by Section 24.1.3, either Party may submit its Dispute to the DRB. Once the DRB has convened, the Party shall submit, in writing, its request for the DRB to consider such Dispute. The Party initiating the request for the DRB shall make a written request to the DRB Chairperson and the other Party. The written Dispute referral shall describe the disputed matter in individual discrete segments, so that it will be clear to both Parties and the DRB what discrete elements of the Dispute have been resolved, and which remain unresolved, and shall include an estimate of the impacts on cost of the affected Work and impacts, if any, on Controlling Work Items, Critical Path and Completion Deadlines.

24.7.2 The Parties shall each be afforded an opportunity to be present and to be heard by the DRB, and to offer evidence. Either Party furnishing written evidence or documentation to the DRB must furnish copies of such information to the other Party a minimum of 15 days prior to the date the DRB is scheduled to convene the meeting for the Dispute. Either Party shall produce such additional evidence as the DRB may deem necessary to reach an understanding and a recommendation regarding the Dispute. The Party furnishing additional evidence shall furnish copies of such additional evidence to the other Party at the same time the evidence is provided to the DRB. The DRB shall not consider evidence that is not furnished in conformance with the terms specified herein.

24.7.3 Upon receipt by the DRB of a written referral of a Dispute, the DRB shall convene to review and consider the Dispute. The DRB meeting shall be held no earlier than 30 days and no later than 60 days after receipt of the written request unless otherwise agreed to by all Parties.

24.7.4 The DRB may request clarifying information from either Party within ten days after the DRB meeting. Requested information shall be submitted to the DRB within ten days of the DRB request, unless extended with the written approval of the DRB or the other Party.

24.7.5 The DRB shall furnish a written report to the Parties with its finding(s), conclusion(s) and recommendation(s). The DRB shall complete its report ("**DRB Report**") (including any minority opinion) and submit it to the Parties within 30 days after the DRB meeting, except that time extensions may be granted at the request of the DRB with the written concurrence of the Parties. The DRB Report shall summarize the facts considered, the contract language, Laws reviewed by the DRB as pertinent to the Dispute, and the DRB's interpretation and reasoning in arriving at its conclusion(s) and recommendation(s). If appropriate, the DRB Report also may recommend guidelines for determining compensation. The DRB Report shall stand on its own, without attachments or appendices. The DRB Chairperson shall furnish a copy of the DRB Report to the DRB Coordinator, Division of Construction (address as of the Effective Date: MS 44, P.O. Box 942874, Sacramento, CA 94274).

24.7.6 Within 30 days after receiving the DRB Report, the Parties shall respond to the DRB in writing stating their respective position as to whether the Dispute is resolved or remains unresolved. Failure to provide the written statement within the time specified, a written rejection of the DRB's recommendation, or a written statement requesting that the DRB reconsider their recommendation, shall conclusively indicate that the Party(s) failing to respond accepts the DRB recommendation. Immediately after responses have been received from both Parties, the DRB shall provide copies of both responses to the Parties simultaneously.

24.7.7 Either Party may request clarification of elements of the DRB Report from the DRB prior to responding to the DRB Report. The DRB shall consider any clarification request only if submitted within ten days after receipt of the DRB Report, and if submitted simultaneously in writing to both the DRB and the other Party. Each Party may submit only one request for clarification for any individual DRB Report. The DRB shall respond, in writing, to requests for clarification within ten days of receipt of such requests.

24.7.8 Either Party may seek a reconsideration of the DRB's recommendation. The DRB shall only grant reconsideration if the Party seeking the re-consideration submits new evidence and if the request is submitted within the 30 day time limit specified for response to the DRB Report. Each Party may submit only one request for reconsideration regarding an individual DRB Report.

24.7.9 If the Parties are able to settle their Dispute with the aid of the DRB Report, they shall promptly accept and implement the terms and conditions of the settlement. If the Parties cannot agree on compensation within 60 days of the acceptance by both Parties of the settlement, either Party may request that the DRB provide a written recommendation regarding compensation.

24.8 Payment of DRB Members and DRB Costs

24.8.1 Each DRB member shall be compensated at an agreed rate of $1,500 per day for each in-person, official DRB meeting (and shall not include meetings attended via telephone or other remote communication method). A member serving on more than one Department DRB (regardless of the number of meetings per day) shall not be paid more than the agreed rate per day. The agreed rate shall be considered full compensation for on-site time, travel expenses, transportation, lodging, time for travel, and incidentals for each day or portion thereof that the DRB member attends (in person) an authorized DRB meeting. From time to time the Parties may reconsider and mutually revise the agreed rate, in which case

they shall document the revised agreed rate in writing.

24.8.2 No additional compensation will be made for time spent by DRB members in regard to review and research activities outside the official DRB meetings unless that time (such as time spent evaluating evidence and preparing recommendations and a DRB Report on Disputes presented to the DRB) has been specifically agreed upon in writing by the Department and Developer in advance. Time away from the project, which has been specifically agreed upon by the Department and Developer in advance, will be compensated at an agreed rate of $150 per hour. The agreed amount of $150 per hour shall include all incidentals including but not limited to expenses for telephone, fax, and computer services. From time to time the Parties may reconsider and mutually revise the agreed rate, in which case they shall document the revised agreed rate in writing.

24.8.3 If the DRB needs outside technical services, these technical services shall be pre-approved by both the Department and Developer. The cost of technical services requested by the DRB will be borne equally by the Department and Developer.

24.8.4 The Department and Developer shall equally bear the costs and expenses of the DRB. There will be no markups applied to expenses connected with the DRB.

24.8.5 Regardless of the DRB recommendation, neither Party shall be entitled to reimbursement of DRB costs from the other Party.

24.8.6 DRB members may submit invoices to the Department and Developer for payment for work performed and services rendered for their participation in authorized meetings not more often than once per month. The invoices shall be in a format approved by the Parties and accompanied by a general description of activities performed during that billing period. Payment for hourly fees, at the agreed rate, shall not be paid to a DRB member until the amount and extent of those fees are mutually approved by the Department and Developer.

24.9 Confidentiality

24.9.1 The Parties agree that all documents and records provided by the Parties in reference to documents brought before the DRB that are marked "Confidential - for use by the DRB only" related to the Dispute shall be kept in confidence and used only for the purpose of resolution of the Dispute, and for assisting in development of DRB findings and recommendations; and that such documents and records will not be utilized or revealed to others, except to officials of the Parties who are authorized to act on the subject Disputes, for any purposes, during the life of this Agreement. The foregoing shall not apply, however, to documents and records that prior to submission to the DRB were already subject to the Public Records Act. Upon termination of this Agreement, such confidential documents and records, and all copies thereof, shall be returned to the respective Parties who furnished them to the DRB. However, the Parties understand that such documents may be subsequently discoverable and admissible in legal proceedings unless a protective order has been obtained by the Party seeking further confidentiality.

24.9.2 Notwithstanding the foregoing, the FHWA shall have the right to review the work of the DRB in progress (except for private meetings or deliberations of the DRB that do not become part of the project records.

24.10 Right to Litigate Dispute

The Department and Developer agree that the submission of any unresolved Dispute to the informal dispute resolution process and the DRB (as applicable) under this Article 24 is a condition precedent to the Department or Developer having the right to proceed to litigation of such unresolved Dispute.

24.11 Continuance of Work and Payments During Dispute

24.11.1 During the course of any and all Dispute Resolution Procedures, Developer shall proceed with the performance of the Work, including disputed Construction Work and any other disputed Work, unless otherwise specified or directed by the Department in accordance with the Contract Documents. Throughout the disputed Work, Developer shall maintain records that provide a clear distinction between the incurred direct costs of disputed Work and that of undisputed Work. The Developer shall allow the Department access to Developer's project records on an Open Book Basis as the Department desires to evaluate the Dispute.

24.11.2 During the course of any and all Dispute Resolution Procedures, the Department shall continue to pay to Developer when due all undisputed amounts owing under this Agreement.

24.12 Jurisdiction and Venue

The Parties agree to exclusive jurisdiction and venue in the State Superior Court for the City and County of San Francisco in any action by or against the Department or its successors and assigns arising out of the Contract Documents, the Project or the Work.

ARTICLE 25. MISCELLANEOUS

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 this Agreement or the other 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 this Agreement or the other 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 this Agreement or the other Contract Documents shall be deemed to be a waiver of any other or subsequent right or remedy under this Agreement or the other 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 this Agreement or the other Contract Documents.

25.2.4 Either Party's waiver of any breach or 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 in writing signed by both Parties, such interpretation and implementation thereof will not be binding in the event of any future 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 the Department other than that of Project developer and independent contractor, and that of landlord and tenant under the Lease.

25.3.2 Nothing in the Contract Documents is intended or shall be construed to create any partnership, joint venture or similar relationship between the Department and Developer; and in no event shall either Party take a position in any tax return or other writing of any kind that a partnership, joint venture or similar relationship exists. While the term "public-private partnership" may be used on occasion to refer to contractual relationships of the type hereby created, the Parties do not thereby express any intention to form or hold themselves out as a *de jure* or *de facto* partnership, joint venture or similar relationship, to share net profits or net losses, or to give the Department control or joint control over Developer's financial decisions or discretionary actions concerning the Project and Work.

25.3.3 In no event shall the relationship between the Department and Developer be construed as creating any relationship whatsoever between the Department and Developer's employees. Neither Developer nor any of its employees is or shall be deemed to be an employee of the Department. Except as otherwise specified in the Contract Documents, Developer has sole authority and responsibility to employ, discharge and otherwise control its employees and has complete and sole responsibility as a principal for its agents, for all Contractors and for all other Persons that Developer or any Contractor hires to perform or assist in performing the Work.

25.4 Successors and Assigns

The Contract Documents shall be binding upon and inure to the benefit of the Department and Developer and their permitted successors, assigns and legal representatives.

25.5 Designation of Representatives; Cooperation with Representatives

25.5.1 The Department and Developer shall each designate an individual or individuals who shall be authorized to make decisions and bind the Parties on matters relating to the Contract Documents ("**Authorized Representative**"). Appendix 11 to this Agreement provides the initial Authorized Representative designations. Such designations may be changed by a

subsequent writing delivered to the other Party in accordance with Section 25.9.

25.6 Survival

Developer's and the Department's representations and warranties, the Dispute Resolution Procedures contained in Article 24 and the Disputes Review Board Agreement, the indemnifications and releases contained in Section 16.4, the rights and obligations regarding compensation contained in Article 19 and any other obligations to pay amounts hereunder, and all other provisions which by their inherent character should survive expiration or earlier termination of this Agreement and/or completion of the Work under this Agreement, shall survive the expiration or earlier termination of this Agreement and/or the completion of the Work under this Agreement. The provisions of Article 24 and the Disputes Review Board Agreement shall continue to apply after expiration or earlier termination of this Agreement to all Claims and Disputes between the Parties arising out of the Contract Documents.

25.7 Limitation on Third-Party Beneficiaries

It is not intended by any of the provisions of the Contract Documents to create any third-party beneficiary hereunder or to authorize anyone not a Party hereto to maintain a suit for personal injury or property damage pursuant to the terms or provisions hereof, except to the extent that specific provisions (such as the warranty and indemnity provisions, and the provisions for the protection of certain Lenders under Article 12 and the Direct Agreement) identify third parties and state that they are entitled to benefits hereunder. Except as otherwise provided in this Section 25.7, the duties, obligations and responsibilities of the Parties to the Contract Documents with respect to third parties shall remain as imposed by Law. The Contract Documents shall not be construed to create a contractual relationship of any kind between the Department and a Contractor or any Person other than Developer.

25.8 Governing Law

The Contract Documents shall be governed by and construed in accordance with the laws of the State of California.

25.9 Notices and Communications

25.9.1 Notices under the Contract Documents shall be in writing and (a) delivered personally, (b) sent by certified mail, return receipt requested, (c) sent by a recognized overnight mail or courier service, with delivery receipt requested, or (d) sent by facsimile or email communication followed by a hard copy and with receipt confirmed by telephone, to the following addresses (or to such other address as may from time to time be specified in writing by such Person):

25.9.1.1 All notices, correspondence and other communications to Developer shall be delivered to the following address or as otherwise directed by Developer's Authorized Representative:

_____

_____

_____

Atttn:

Telephone:

Facsimile

Email:

In addition, copies of all notices to proceed, notices regarding Disputes, and suspension, termination and default notices shall be delivered to the following persons:

[addresses]

25.9.1.2 All notices, correspondence and other communications to the Department shall be marked as regarding the Project and shall be delivered to the following address or as otherwise directed by the Department's Authorized Representative:

_____

_____

_____

Atttn:

Telephone:

Facsimile

Email:

In addition, copies of all notices regarding Disputes, and termination and default notices shall be delivered to the following person:

California Department of Transportation

1120 N Street, MS 57

Sacramento, CA 95814

Atttn: Dan Near, Assistant Chief Counsel

Telephone: (916) 651-3572

Facsimile (916) 654-6128

Email: daniel_a_near@dot.ca.gov

25.9.2 Notices shall be deemed received when actually received in the office of the addressee (or by the addressee if personally delivered) or when delivery is refused, as shown on the receipt of the U. S. Postal Service, private carrier or other Person making the delivery. Notwithstanding the foregoing, notices sent by facsimile after 4:00 p.m., Pacific Standard or Daylight Time (as applicable), and all other notices received after 5:00 p.m., Pacific Standard or Daylight Time (as applicable), shall be deemed received on the first business day following delivery (that is, in order for a fax to be deemed received on the same day, at least the first page of the fax must have been received before 4:00 p.m., Pacific Standard or Daylight Time (as applicable)). Any technical or other communications pertaining to the Work shall be conducted by Developer's Authorized Representative and technical representatives designated by the Department.

25.10 Integration of Contract Documents

The Department and Developer agree and expressly intend that, subject to Sections 1.2.2, 1.2.3 and 25.12, this Agreement and other Contract Documents constitute a single, non-severable, integrated agreement whose terms are interdependent and non-divisible.

25.11 Severability

If any clause, provision, section or part of the Contract Documents is ruled invalid by a court having proper jurisdiction, then the Parties shall (a) promptly meet and negotiate a substitute for such clause, provision, section or part, which shall, to the greatest extent legally permissible, effect the original intent of the Parties, including an equitable adjustment to the Financial Model Update (or, if there has been no update, the Financial Model) and Developer's compensation to account for any change in the Work resulting from such invalidated portion, and (b) if necessary or desirable, apply to the court or other decision maker (as applicable) which declared such invalidity for an interpretation of the invalidated portion to guide the negotiations. The invalidity or unenforceability of any such clause, provision, section or part shall not affect the validity or enforceability of the balance of the Contract Documents, which shall be construed and enforced as if the Contract Documents did not contain such invalid or unenforceable clause, provision, section or part.

25.12 Construction and Interpretation of Agreement

25.12.1 The language in all parts of the Contract Documents shall in all cases be construed simply, as a whole and in accordance with its fair meaning and not strictly for or against any Party. The Parties hereto acknowledge and agree that the Contract Documents have been the subject of a careful, thorough, arm's length exchange of ideas, questions, answers, information and drafts during the Proposal preparation process, that each Party has been given the opportunity to independently review the Contract Documents with legal counsel, and that each Party has the requisite experience and sophistication to understand, interpret and agree to the particular language of the provisions of the Contract Documents. Accordingly, in the event of an ambiguity in or Dispute regarding the interpretation of the Contract Documents, the Contract Documents shall not be interpreted or construed against the Party preparing them, and instead other rules of interpretation and construction shall be utilized. The Department's final answers to the questions posed during the Proposal preparation process for this Agreement shall in no event be deemed part of the Contract Documents and shall not be relevant in interpreting the Contract Documents except as they may clarify provisions otherwise considered ambiguous.

25.12.2 The captions of the articles, sections and subsections of this Agreement are for convenience only and shall not be deemed part of this Agreement or considered in construing this Agreement.

25.12.3 References in this instrument to this "Agreement" mean, refer to and include this instrument as well as the riders, exhibits, addenda, attachments or other documents affixed hereto (which are hereby incorporated herein by reference) or other documents expressly incorporated by reference in this instrument. Any references to any covenant, condition, obligation and/or undertaking "herein," "hereunder" or "pursuant hereto" (or language of like import) mean, refer to and include the covenants, conditions, obligations and undertakings existing pursuant to this instrument and any riders, exhibits, addenda, attachments or other documents affixed to or expressly incorporated by reference in this instrument. All

terms defined in this instrument shall be deemed to have the same meanings in all riders, exhibits, addenda, attachments or other documents affixed to or expressly incorporated by reference in this instrument unless the context thereof clearly requires the contrary. Unless expressly provided otherwise, all references to Attachments, Articles and Sections refer to the Attachments, Articles and Sections set forth in this Agreement or the Technical Requirements. Where a specific Section is referenced, such reference shall include all subsections thereunder. Unless otherwise stated in this Agreement or the other Contract Documents, words which have well-known technical or construction industry meanings are used in this Agreement or the other Contract Documents in accordance with such recognized meaning. All references to a subsection or clause "above" or "below" refer to the denoted subsection or clause within the Section in which the reference appears. Wherever the word "including," "includes" or "include" is used in the Contract Documents, it shall be deemed to be followed by the words "without limitation". Wherever reference is made in the Contract Documents to a particular Governmental Entity, it includes any public agency succeeding to the powers and authority of such Governmental Entity.

25.12.4 As used in this Agreement and as the context may require, the singular includes the plural and vice versa, and the masculine gender includes the feminine and vice versa.

25.12.5 All monetary amounts and obligations set forth in the Contract Documents are expressed and payable in U.S. dollars.

25.13 Approvals under Contract Documents

25.13.1 Refer to Section 3.3 regarding the standards for Department approval or consent.

25.13.2 In all cases where approvals or consents are required to be provided under the Contract Documents by Developer and no particular standard for such approvals or consents is expressly provided, such approvals or consents shall not be unreasonably withheld or delayed. In cases where sole discretion is specified, Developer's decision shall be final, binding and not subject to the Dispute Resolution Procedures.

25.14 Entire Agreement

The Contract Documents contain the entire understanding of the Parties with respect to the subject matter thereof and supersede all prior agreements, understandings, statements, representations and negotiations between the Parties with respect to their subject matter.

25.15 Counterparts

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

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

[XXXXXXXXXXXXXXXXXXXXXX]	**CALIFORNIA DEPARTMENT OF TRANSPORTATION**

By: _____ By: _____

Name: _____ Name: _____

Title: _____ Title: _____

FOR DEPARTMENT USE ONLY

APPROVED AS TO FORM:

_____

[XXXXXXXXXXXXXXXXXX]